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Property in Crisis

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Property in Crisis

Cover Page Footnote

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ARTICLES

PROPERTY IN CRISIS

*Nestor M. Davidson**

*Rashmi Dyal-Chand***

Property law generally develops gradually, with doctrine slowly accreting in the interstices of daily conflict and the larger culture of property likewise emerging at a glacial pace. In times of crisis, however, fundamental questions about the nature of ownership and the balance between the individual and the state instantiated in the structure of property rise rapidly to the surface. Our current economic crisis—the deepest since the Great Depression—is no exception.

This economic crisis, more than many in our history, began with property, sparked in no small measure by structural flaws in the residential market and an ownership society that advocated risk taking with insufficient heed for consequences. Property has likewise played a palpable role in the still-emerging policy response, with concerns about creeping socialism and fears of nationalization shaping regulatory design.

As a result, this crisis has unsettled long-stagnant tensions in property theory. It is providing a vivid reminder of the interconnected nature of property while recalibrating the role of property as a repository for risk and reward. These conceptual shifts have brought the state's role in shaping property to the fore, starkly—albeit perhaps temporarily—placing great weight on the public, communitarian, and even punitive aspects of the nature of property. This crisis thus provides a powerful window to assess the current state of our property discourse and begin to glean lessons about the directions in which property may evolve in the aftermath.

Although scholars have begun to grapple with the causes and some of the particular consequences of the current crisis, there has been relatively little theoretical engagement with the role of property norms in the origins of,

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and in the regulatory response to, the crisis. By identifying the intersection of crisis and property theory with greater clarity, this Article lays the groundwork for normative efforts moving forward. It holds broader lessons as well for understanding the contingent nature of legal change and the structure of one of our most foundational social institutions.

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INTRODUCTION

Property law and the larger discourse of property are forged not only in the steady accretion of economic and social development, but also in moments of dramatic change. Repeatedly throughout American history, times of crisis have brought to the fore fundamental questions about the nature of property, the state’s role in this aspect of private ordering, and the balance between the individual and the community. We are now experiencing the deepest economic crisis since the Great Depression and,

not surprisingly, we are witnessing a similar reassessment of deep-seated property norms.

As individual failures of homeownership have cascaded into spirals of distress in communities across the country, “toxic” debt has been injected into some of the nation’s largest financial institutions, freezing credit markets globally. The federal government has responded on a scale rarely seen in American history. In short order, we have witnessed trillions of dollars pumped into financial markets, the nationalization of major enterprises, and the unleashing of a stimulus program touching almost every sector of the economy.

The current economic crisis has already made basic questions about the nature of property a daily aspect of our cultural and political dialogue. As the crisis deepened and the government’s response grew accordingly, there was an increasingly loud chorus of popular outcry asserting that the meaning of property has somehow been cast into flux.¹ Versions of the sentiment that a fundamental shift is afoot can be found throughout the press and blogosphere.² For some, this shift is cause for celebration, but more often it is a source of anxiety.³

This kind of tumult in a time of change is nothing new in the history of American property law. The deepest social and cultural fault lines around property inexorably rise to the surface in moments of crisis and leave their mark on the texture of property law. Just as the development of property law evinces an ebb and flow between crystalline rules and equitable muddying,⁴ in a larger sense the history of American property law represents a long-running battle for primacy between theoretical end points. These competing poles have variably been embodied in dichotomous conceptions of private versus public, the individual versus the state, classic liberalism versus civic republicanism, and similar invocations of a still-enduring primal divide.⁵ Struggles over oppositional visions of property—and, however phrased, these theoretical constructs are as much ideal types as actual underlying norms—tend to reach critical turning points in moments of political and economic crisis. No crisis ever really generates a final synthesis that resolves underlying tensions, and the cycle continues.

1. *Newsweek* captured this moment tellingly with a cover declaring, “We Are All Socialists Now.” Jon Meacham & Evan Thomas, *We Are All Socialists Now*, NEWSWEEK, Feb. 16, 2009, at 23.

2. Sources on this cascade daily, and it takes only a few select headlines to get a sense of the tenor of much of the popular commentary on what the crisis and response might mean. See, e.g., Posting of Reenita Malhotra to The Inspired Economist Blog, Does the Bank Bailout Spell Socialism? Why Won’t Geithner Let “Zombie Banks” Fail?, <http://inspiredeconomist.com/2009/02/13/does-the-bank-bailout-spell-socialism-why-wont-geithner-let-zombie-banks-fail/> (Feb. 13, 2009); *O’Reilly Factor: Is America Sliding Towards Socialism?* (Fox News television broadcast Feb. 20, 2009).

3. See *supra* note 2.

4. See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

5. See *infra* Part I.A.

Because the current economic crisis started in the housing market and because the response has sparked primal concerns about how the government is reshaping the nature of ownership, it is a crisis even more deeply grounded in and evocative of property. Indeed, the veneration of homeownership opportunities and particular visions of risk and reward contributed materially to the conditions that led to global economic meltdown.⁶ This has underscored the fact that property is an interconnected institution, providing a vivid reminder of the power of ecological and social-relations conceptions of property and an equally stark reminder that unfettered risk carries the potential for contagion that our system of property cannot long tolerate.

Regulatory responses to the crisis have likewise demonstrated that contested norms of ownership have served as a palpable constraint on regulatory design.⁷ As various bailouts, stimulus plans, housing-market rescue efforts, and other interventions have emerged, questions such as whether it is appropriate to take equity stakes in financial firms in return for assistance have become significant flashpoints.⁸ The federal government has at times been reluctant to move too quickly in this direction, while at times appearing coercive and even retributive in its stance toward ownership.⁹ This is not to argue that any particular mix of regulations, loans, investments, equity stakes, or broader stimulus plans would necessarily be normatively preferable or practically more effective than what we have witnessed to date. Instead, these observations serve primarily to underscore the discernable power that property norms have had in guiding regulatory design, for better or worse, towards some approaches and away from others.

Examining property in times of crisis thus provides a powerful way to unearth both the current landscape of tensions underlying property theory and the pragmatics of property in operation. It is too early to draw definitive conclusions about the residue that this crisis will leave on property doctrine. As with many previous crises, there are already important legal changes emerging in the regulatory response that may prove lasting in areas such as mortgage law, bankruptcy, access to credit, and others.¹⁰ On the deeper structure of property law and the culture of property that this structure embodies, however, the crisis has already left its mark.

We leave to others the task of debating the precise predicates of the current crisis and the details of the still-emerging response, as scholars have

6. See *infra* Part III.A.

7. See *infra* Part III.B.

8. See, e.g., RAYMOND J. AHEARN, CONG. RESEARCH SERV., THE GLOBAL ECONOMIC DOWNTURN AND PROTECTIONISM 9 (2009); JAMES R. BARTH ET AL., THE RISE AND FALL OF THE U.S. MORTGAGE AND CREDIT MARKETS: A COMPREHENSIVE ANALYSIS OF THE MARKET MELTDOWN 269–74 (2009); BAIRD WEBEL, CONG. RESEARCH SERV., ONGOING GOVERNMENT ASSISTANCE FOR AMERICAN INTERNATIONAL GROUP (AIG) 1–2 (2009).

9. See *infra* Parts II.A, III.A.

10. See *infra* Part III.C.

already begun to do.¹¹ But that discourse would benefit from a clearer conceptual understanding that situates property norms in this crisis and this crisis in the evolution of property norms. This Article, accordingly, seeks to isolate central theoretical lessons—arguably *the* central lessons—that this crisis holds for legal scholars, and to provide a framework through which emerging scholarship on the crisis can proceed. By identifying patterns of change in property theory with greater clarity and elucidating the consequences of the cyclical nature of moments of dislocation, this Article lays a foundation for normative efforts moving forward.

In the end, our current moment of economic dislocation may pass with relatively minor long-term disruption, and the Herculean efforts underway to respond may take hold. But we have not seen the end of the meltdown. A sentiment that has become a recurring trope of late is that a “crisis is a terrible thing to waste.”¹² The current crisis provides an important opportunity to interrogate basic questions about the nature of property, ownership, and community—an opportunity not to be wasted.

* * *

The Article is organized as follows. Part I lays the groundwork for understanding property in crisis by outlining theories of change in the development of property law. The part illustrates the ways in which steady-state change has alternated in American history with moments of dramatic contestation. Throughout, the discourse of property has balanced norms of individualism and community, localism and uniformity, as well as piecemeal, retrospective development and forward-looking, systemic approaches to change.

Part II then turns to the current economic crisis. The part discusses what is known about the roots of the crisis and how the landscape of policy responses is emerging. It then isolates and explains the role of property law and norms in both the genesis of the crisis and in the government’s reaction.

Finally, Part III shifts from the descriptive to the theoretical, arguing that this particular moment deeply illuminates current conceptions of property and the evolving nature of the institution of property itself. The crisis, Part III contends, reveals a vision of property as interconnected, sensitive to distributional consequences, and as much about collective security and an active state as it is about individual risk and reward. Conversely,

11. Legal scholarship to date on the crisis has focused largely on predicates to the crisis, *see, e.g.*, Symposium, *Subprime Meltdown: The Law and Finance of the American Home Mortgage Foreclosure Crisis*, 2008 UTAH L. REV. 1107; Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1 (2009), or has focused on specific aspects of the response, *see, e.g.*, Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727 (2009); Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565; David Schmudde, *Responding to the Subprime Mess: The New Regulatory Landscape*, 14 FORDHAM J. CORP. & FIN. L. 709 (2009).

12. *See* Thomas L. Friedman, Op-Ed., *Kicking Over the Chessboard*, N.Y. TIMES, Apr. 18, 2004, § 4, at 13 (quoting Stanford economist Paul Romer).

conceptions of property as variably inviolate and flexible have guided the regulatory response to the crisis, with the state reactively seeking to preserve property as a locus of opportunity at all levels of market participation while at the same time prospectively valorizing a less comfortable vision of appropriation on behalf of the public. Part III concludes with broader reflections of where the crisis may leave the discourse of property. In sum, the current crisis provides an unparalleled window through which to observe what the fire this time means for this foundational social institution.

I. MODES OF CHANGE IN THE DEVELOPMENT OF PROPERTY LAW

Like many traditional areas of common law, property law generally develops in the interstices of individual conflict resolution and legislative change, gradually transforming over long periods.¹³ Property has an inherently conservative tendency in this respect, perhaps unsurprising given the deep investment in existing institutional arrangements that property represents at any given time. However, in the American experience, property law—and the larger culture of property—have witnessed moments of deep contestation, times of crisis that call foundational concepts into question. Understanding this dual evolutionary dynamic is critical to any exploration of the current economic crisis, particularly as this crisis informs our normative impulses moving forward.

In this part, we approach this pattern on three levels. First, as a predicate to understanding how crisis unsettles property, we outline some perennial and long-standing tensions in property theory that undergird fault lines in property law. We next turn to a discursive methodology for examining property in crisis, drawing on theoretical frames that contrast steady-state change with punctuated equilibrium and exploring the structural forces that promote relative stasis in property law. Finally, we give historical examples of what we call, borrowing from Bruce Ackerman's exploration of transformational constitutional realignments, "property moments."¹⁴

A. *Primary Axes of Contestation in the Dialectic of Property*

In the American tradition, debates about property have often fallen along two central axes. On the one hand, the association of property with possessive individualism and unfettered alienability have been deep and intertwined property norms since the Founding. Competing with this conception, however, have always been communitarian or civic republican ideals that emphasize the social construction of property and property's role

13. See Quintin Johnstone, *Major Issues in Real Property Law*, 55 MO. L. REV. 1 (1990).

14. Cf. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*] (together theorizing and illuminating significant historical moments of constitutional change).

in social ordering.¹⁵ Neither ideal type has ever existed in pure form in American law, but the larger discourse of property tends to gravitate between them. And these ever-competing norms have been placed in starkest light in times of upheaval, where the necessity, or perhaps bare reality, of the state's role in what is otherwise considered private ordering through property becomes most visible.¹⁶

In the literature on the development of property law, a closely related tension has long persisted between bottom-up versus top-down conceptions of the individual-state relationship vis-à-vis property that essentially recapitulates the debate about the relative merits of pre- versus postpolitical visions of property.¹⁷ One foundational organic vision is the Lockean ideal of property as a bulwark against the state,¹⁸ while civic republican perspectives have generally been more comfortable with the reality of an active state role.¹⁹ In a modern version of this tension, Saul Levmore has framed the development of property law as a conflict between self-organizing norms of efficiency versus rent seeking through the organs of the state.²⁰ In some ways, structuralist explanations that emerge from critical perspectives parallel Levmore's rent-seeking story,²¹ although the power dynamics that dominate this narrative are decidedly different from the assumptions reflected in efficiency paradigms.²²

Another reflection of this perennial dichotomy manifests itself in the divide between the relative significance of various forms of property, whether real versus personal or, increasingly, "old" property versus so-

15. See generally GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997).

16. See *infra* Part I.C.

17. See, e.g., Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, in 4 *THE ECONOMICS OF LEGAL RELATIONSHIPS: THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 209, 210–11 (Nicholas Mercurio & Warren J. Samuels eds., 1999); Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005).

18. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 17 (3d ed. 2008) (discussing the influence of Lockean conceptions of property as a "bulwark of freedom from arbitrary government").

19. See ALEXANDER, *supra* note 15, at 2 (describing a competing vision of property grounded in "a commitment to the basic idea that the core purpose of property is not to satisfy individual preferences or to increase wealth but to fulfill some prior normative vision of how society and the polity that governs it should be structured"); see also Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 470 (1976).

20. See Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 184–86 (2003).

21. Although the reductionist Marxist narrative of an inexorable historical progression from feudalism to capitalism to socialism no longer finds many adherents, deterministic materialist arguments about structural forces that perhaps conspiratorially drive legal change are not hard to find.

22. There is a normative dimension to this developmental debate. For materialists like Saul Levmore, idealizing efficiency maximizing norms—a defensible if reductionist position—tends to relegate all other interactions to the illegitimacy of rent seeking. Conversely, communitarian and civic republican visions of property begin with less normative suspicion of state ordering.

called “new” property.²³ In property theory, traditional forms of property often stand for bottom-up, individualistic paradigms, while complex intangibles and intellectual property tend to reflect more explicit recognition of the top-down, regulatory nature of property.

Conceptually, then, debates about the development and nature of property law can be seen as a dialectic between two competing visions of property. On a basic level, theorists track ownership along a spectrum that starts with “public” or common holding of a given resource, moves towards greater exclusivity and individual control, and arrives at the other end with something like Blackstone’s sole and absolute dominion.²⁴ That these archetypes rarely exist in pure form has not stopped theorists from ceaselessly debating the normative and practical interplay between them and the forces that tend to push entitlements toward one end of the spectrum or the other.

In all, these disparate vocabularies reflect overarching tensions that strongly inform not only disputes over land and property rights but also, at a deeper level, popular reaction to the role of the regulatory state. These tensions have played out primarily in the structure of constitutional property, although that structure in turn enables much underlying doctrine. Thus, in the pre–New Deal *Lochner v. New York*²⁵ era, the Court actively policed a balance between state power and the claimed sanctity of property, giving foundational weight at times to a common-law driven vision of the latter.²⁶ More recently, the same tension has played out in jurisprudential conflicts over regulatory takings.²⁷ Similar balancing certainly informs the many daily disputes that the law of property resolves, if more as a set of background norms.²⁸

23. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

24. See generally David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103 (2009).

25. 198 U.S. 45 (1905).

26. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437–38 (1987).

27. See, e.g., Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826 (2006). See generally DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* (2002) (reviewing contemporary takings jurisprudence).

28. In the American context, this tension plays out as well along lines of localism versus nationalism. Traditionally, property has been seen as a quintessentially localist institution, emanating from state law and grounded in particularized, small-scale norms. See, e.g., Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205 (2004) (“The ‘property’ protected by the Takings Clause is defined not by a single sovereign, but by the legislative enactments and judicial pronouncements of fifty separate states.”). This reflects property’s common-law origins and a deep intuition that the content of property law arises from localized patterns of use and conflict. Indeed, there are many doctrinal echoes of this localized vision of property. Customary rights, for example, give legal effect to local patterns of use that paradigmatically (if fictitiously) have existed since “the memory of man runneth not to the contrary.” See JESSE DUKEMINIER ET AL., *PROPERTY* 700 (6th ed. 2006).

On the other side has always been pressure for national supremacy, whether embodied in federal constitutional protection for property, see Thomas W. Merrill, *The*

The tension between public and private in property reflects larger, and perhaps intractable, ambiguities over the relationship between the state and the individual in private ordering.²⁹ In this sense, the question is not formal ownership—public, private, or any number of hybrid approaches³⁰—but rather the nature of legal property itself. Does property primarily constitute state recognition of a priori private relations, as in certain simplistic versions of the Lockean narrative? Or is the state the essential force that defines the nature of property rights, mediating individual relationships through conscious or default choices to privilege one set of entitlements over another?

The relative valence of these ideological poles remains contested in the historiography,³¹ but the deep resonance of these competing conceptions is clear. As discussed below, these debates manifest in particularized form in disputes about conceiving property as insular and isolated versus property as an interconnected whole, property as a platform for individual opportunity versus property as a locus for egalitarian distribution, and property as reward for individual risk or property as an institutional form of security.³² All of these underlying tensions exist in times of stasis, slowly influencing the development of property law. In times of crisis, however, the fault lines that such tensions expose are revealed much more explicitly. It is to that dynamic that we now turn.

B. *Steady States and Punctuated Equilibria in the Development of Property*

In political science, institutional history, and related fields, scholars have developed a useful vocabulary for understanding the dynamics of institutional evolution, contrasting relatively steady-state, gradual

Landscape of Constitutional Property, 86 VA. L. REV. 885, 886–90 (2000), or in the pragmatic reality that national (and now increasingly global) markets have demanded a measure of uniformity. See Robin Paul Malloy, *The Secondary Mortgage Market—A Catalyst for Change in Real Estate Transactions*, 39 SW. L.J. 991, 991 (1986); Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261, 1261–63 (1991). These two foci of legal ordering have always coexisted in uneasy tension in property, with a rhetoric that tends to extol local diversity and a reality that increasingly (and especially, as we shall see, in moments of crisis) reflects conformity to national exigencies.

29. Cf. Bernard E. Harcourt, *Neoliberal Penalty: The Birth of Natural Order, The Illusion of Free Markets* 3 (John M. Olin Program in Law & Econ. Working Paper Series, Working Paper No. 433, 2008), available at <http://ssrn.com/abstract=1278067> (challenging comparative conceptions of paradigmatically “free” and “regulated” markets).

30. See, e.g., A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMIES (Gregory S. Alexander & Grazyna Skapska eds., 1994).

31. See William W. Fisher III, *Stories About Property*, 94 MICH. L. REV. 1776, 1786–87 (1996) (reviewing CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* (1994)) (discussing historiographic developments in visions of the ideology of property); *id.* at 1788 (noting the increasing scholarly critique of a simple bipolar perspective).

32. See *infra* Part III.A.

development with moments of significant disjuncture.³³ In its application to each new field, the vocabulary adjusts and matures, while still elucidating common themes of the forces that can preserve stasis and then give way to significant change.

This conceptual framework builds on work that originated with the theory of punctuated equilibrium in evolution.³⁴ In brief, classic evolutionary theory posited that changes at the species level occur through a steady accumulation of incremental differentiation. As natural selection reinforces these changes, species gradually evolve. Niles Eldredge and Stephen Jay Gould, however, argued that the fossil record contains too much evidence that contradicts this model of uniform change, with frequent examples of long-term and relatively undisturbed stasis punctuated by massive change in relatively short order.³⁵ Thus, they hypothesized that a relatively steady equilibrium is disrupted, generally by some significant exogenous force, which leads to rapid adaptation and a new equilibrium.³⁶

Scholars have borrowed these two contrasting frames to argue that political ordering, policy choices, law, and even the structure of scientific thought,³⁷ often develop gradually, constrained institutionally and socially, and then—like speciation—morph rapidly. In a variety of areas, steady hydraulic change is occasionally punctuated by some confluence of factors (economic crisis, technological revolution, war) causing social or legal change that parallels Eldredge and Gould's phyletic paradigm shifts. Paleontology provides apt metaphors, then, for understanding how complex systems adapt to rapidly changing conditions and external shocks.

33. See, e.g., FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); Connie J. G. Gersick, *Revolutionary Change Theories: A Multilevel Exploration of the Punctuated Equilibrium Paradigm*, 16 *ACAD. MGMT. REV.* 10 (1991). A closely parallel intellectual development can be found in institutional historical theories of "critical junctures." See Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 *WORLD POL.* 341 (2007); see also Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 *IOWA L. REV.* 601, 641–42 (2001) (discussing this linkage). Critical junctures constrain future institutional arrangements in particularly significant ways and, like punctuated equilibria, are often found during times of significant change. See Capoccia & Kelemen, *supra*, at 341 (describing a "dual model of institutional development characterized by relatively long periods of path-dependent institutional stability and reproduction that are punctuated occasionally by brief phases of institutional flux . . . during which more dramatic change is possible").

34. The modern paleontological literature on punctuated equilibria traces to Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *MODELS IN PALEOBIOLOGY* 82 (Thomas J. M. Schopf ed., 1972). Phyletic gradualism, to which punctuated equilibrium was proposed as an alternative, is predicated on steady accumulated species changes. *Id.* at 83–84. See generally MICHAEL SHERMER, *THE BORDERLANDS OF SCIENCE: WHERE SENSE MEETS NONSENSE* (2001). It is customary in citations to Eldredge and Gould's theory to note that punctuated equilibrium has been challenged in evolutionary studies. See, e.g., RICHARD DAWKINS, *THE BLIND WATCHMAKER: WHY THE EVIDENCE OF EVOLUTION REVEALS A UNIVERSE WITHOUT DESIGN* (1996).

35. Eldredge & Gould, *supra* note 34.

36. *Id.*

37. Cf. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (discussing patterns of paradigm shifts in the history of scientific thought).

The legal literature has proven congenial to invocations of theories of steady-state change versus punctuated equilibrium.³⁸ Perhaps the best known example is Bruce Ackerman's work on moments of constitutional crisis and realignment.³⁹ Ackerman argues that U.S. history has seen several distinctive periods of popular constitutionalism, during which "We the People" have acted in a kind of higher lawmaking capacity to amend the existing constitutional order.⁴⁰ Ackerman focuses on the Revolutionary era, the Civil War realignment, and the New Deal to argue that at each of these junctures, a process of popular upheaval literally changed the meaning of the Federal Constitution.⁴¹

Ackerman's thesis has been as controversial as it has been influential,⁴² but it does highlight the role of crisis in opening up a legal discourse beyond the frames that institutional stasis generally imposes. It may be that in an area such as property, differences between steady-state and punctuated change in law are more questions of degree than kind, as any series of legal changes in long-enough retrospect can seem transformative. But it is possible to see a recurring pattern in U.S. history of repeated disjunctions, what might be described, à la Ackerman, as "property moments."⁴³

To be clear, to invoke Ackerman's paradigm here is not to argue for a strict dualist vision of lawmaking in the arena of property in which popular political forces upend existing institutional arrangements.⁴⁴ Rather, it is

38. See, e.g., Hathaway, *supra* note 33, at 613–17 (discussing evolutionary path dependence and punctuated equilibrium as paradigms for evaluating legal change); cf. Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985) (tracing the influence of Darwinian evolutionary theories on the history of jurisprudence). For a discussion of tensions within historiographical traditions in legal scholarship, see Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 274–75 & n.2 (1991) (contrasting "'evolutionary' and 'transformational' frameworks" and offering a dialectic alternative to "embrace both continuity and discontinuity as historiographical themes").

39. See ACKERMAN, FOUNDATIONS, *supra* note 14; ACKERMAN, TRANSFORMATIONS, *supra* note 14; see also Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We The People*, 108 YALE L.J. 2237 (1999) (discussing the parallels between Ackerman's theory and the political-science literature on critical realignments).

40. See ACKERMAN, FOUNDATIONS, *supra* note 14, at 6–7; ACKERMAN, TRANSFORMATIONS, *supra* note 14, at 20 (arguing for a model of popular constitutional change that begins with constitutional impasse, moves to an electoral mandate, followed by a challenge to dissenting institutions, a judicial validation of the new order (a "switch in time"), and, finally, a consolidating election).

41. See generally ACKERMAN, TRANSFORMATIONS, *supra* note 14 (charting fundamental constitutional realignments at each of these transformative "constitutional moments").

42. See, e.g., Larry Kramer, *What's a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 CASE W. RES. L. REV. 885 (1996); Colin Gordon, *Rethinking the New Deal*, 98 COLUM. L. REV. 2029 (1998) (reviewing ACKERMAN, TRANSFORMATIONS, *supra* note 14).

43. Cf. Capoccia & Kelemen, *supra* note 33, at 350 & n.36 (discussing the terminology of "moments" to describe "critical junctures" of significant institutional change).

44. Nor do we mean to suggest that Ackerman's is the only, or even the most apposite vocabulary for applying evolutionary theory to property law. Cf. James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009).

more prosaically to recognize that moments of economic and social upheaval provide opportunities to loosen the normally fairly tight bounds of debate about the nature of property, both in its constitutional and its more common-law-oriented aspects. The point, then, is to focus less on some form of higher politics and more on a discursive practice that has particularly important consequences in times of crisis.

Applying this vocabulary of institutional evolution to the arena of property, then, it is appropriate first to outline in general terms forces that shape a dynamic of general stasis in legal change. It is, after all, against these forces that crisis operates. In times of steady-state change, underlying structural shifts in society and the economy gradually bring new challenges to the legal system. Long-term structural changes, such as the settling of the American continent, the Industrial Revolution, or the rise of urbanism in the nineteenth century, create new conflicts to which the law must respond.⁴⁵ The legal system, in the context of individual conflict resolution—one neighbor against another, one property holder defending her entitlements—then reacts and tends in the ordinary course to adapt incrementally out of such small-scale concerns.

Cultural influences have been equally important, particularly as a distinctive American legal identity emerged from its British roots. Changed conceptions of gender and racial equality, for example, exerted powerful influence on the development of property law and the rhetoric of property. The nineteenth-century Married Women's Property Acts⁴⁶ and the twentieth-century civil rights movement⁴⁷—both of which left fundamental changes in the fabric of property law—are two of the most prominent examples, but by no means the only ones. We will leave it to historians to argue about the relative weight that materialist and idealist influences played at any given moment in the development of American property law, but it is clear that the dialectic of property involves both influences.

Running counter to influences that generate change over time are constraints that exert strong pressure to limit significant developments in the law. The resources available to the state, for example, to influence private ordering can be an independent variable that can slow incremental changes in property law.⁴⁸ Likewise, the institutional and individual capacity of actors in the legal system to instantiate change, whether in terms of limitations of the judicial enterprise or the scope of the regulatory state,

45. These changes seem dramatic in retrospect, but presented the legal system with relatively long periods during which to adapt.

46. See generally MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* (1986).

47. See generally Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 *UCLA L. REV.* 1553 (2002).

48. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 77 (2d ed. 1985). Friedman argues that during the colonial era, "the desire to rule, and rule broadly, was tempered by the modest means, in taxes and staff, that rulers had at their command. Regulation tended to be local, and as cheap in money and men as possible." *Id.*

limits creativity and reifies a certain degree of conservatism in existing norms.⁴⁹

Finally, built above the interface between these economic and social forces and the hydraulic pressures they exert on law are a variety of other mediating institutions, including lawyers, judges, legislators, and, increasingly, the apparatus of the modern regulatory state.⁵⁰ These institutions tend to be invested in the existing legal order and act as stabilizing forces in the face of pressures for adaptation.

In short, competing dynamic and mediating forces generate relative stasis in ordinary times, with property more than many areas of law reflecting the significant path dependency that derives from the deep investment that property represents at any given moment.⁵¹ In times of crisis, however, this balance can be upended, and ordinary path-dependent incremental change can give way to much more fundamental contestation. This dynamic manifests itself as a divide between piecemeal, reactive approaches to conflicts about property on the one hand, and more proactive and systemic approaches on the other.⁵² Whether at the local level, with the slow accretion of common-law change, or at the national level in response to disjunction, property is often explicitly retrospective, validating the existing order and lending stability in the face of accumulated expectations.⁵³ Indeed, regulatory change that unsettles those expectations raises the most contentious questions in property law, and courts still struggle with how much latitude legislatures and other regulatory bodies should receive to force change outside of traditional property norms.⁵⁴ At times, however,

49. This individual and institutional path dependence makes moments of crisis all the more significant.

50. Cf. William Weston Fisher III, *The Law of the Land: An Intellectual History of American Property Doctrine, 1776–1880*, at 1–4 (Sept. 1991) (unpublished Ph.D. dissertation, Harvard University) (describing the interaction between legal discourse and related discourses in social theory, economics, popular discourse, and others).

51. Cf. Hathaway, *supra* note 33, at 613–17. The path dependency that derives from the long-term nature of much property of any value represents a constraint on the various institutions that shape property law.

52. Cf. Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 210–34 (2008) (contrasting regulatory approaches to system risk).

53. Cf. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 111–12 (C. K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802) (“Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.”). See generally Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005). For an insightful discussion of the tension between norms of stability and the reality of disjunction in property, see John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463, 466 (2007) (noting that property “is typically understood as an institution whose very identity and purpose is intimately associated with the task of promoting stability—not with responding to . . . radical change” and exploring how property actually does respond to such change).

54. This plays out, for example, in the prominence that “background principles” of state property law have taken on in the wake of the Court’s decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). *Lucas* attempted to cabin legal change that could be accomplished without compensation to “traditional” property norms largely instantiated in the common law of nuisance, but courts have continued to validate modern

the regulatory system takes a more forward-looking approach to the structure of private ordering through property and grapples with what expectations *should* be appropriate prospectively.⁵⁵

C. “Property Moments” in Recurring Patterns

As a result of crisis, property law and property norms have undergone moments of significant contestation throughout American history. In briefly cataloging these moments using the vocabulary of institutional evolution, our goal is to illustrate the oft-understated role of crisis in shaping the discourse of property. Each of the “property moments” discussed here could merit—indeed, most have merited—an entire literature of their own.⁵⁶ Moreover, we do not propose any rigid typology of the ages of American property law,⁵⁷ or delve in depth into the contested causes and consequences of each of these critical turning points. Rather, in this discussion we simply note the surprising regularity with which our political and legal culture is confronted with moments of punctuated equilibrium that raise fundamental questions about the nature of property. Repeatedly, crisis resurrects the same long-standing tensions in property theory, often deepening the corresponding fault lines in property law.

To begin, one need not delve far into debates about Charles Beard’s argument that the Federal Constitution, particularly its protections for contract and property, enshrined the economic power of the Founding Fathers⁵⁸ to recognize that fundamental questions about the nature of property were actively contested in the Revolutionary and early Federal

conceptions of the harms that can flow from the use of property. See, e.g., Christie Olsson, *Takings Law in the Aftermath of Lucas v. South Carolina Coastal Council: Does The Background Principles Exception Clarify or Complicate Regulatory Takings Law?*, 45 SANTA CLARA L. REV. 707, 721–24 (2005).

55. Zoning law, for example, seeks to set forward-looking parameters for the resolution of conflicts over land use, in contrast to the generally backward-looking, reactive nature of nuisance.

56. For helpful general empirical and theoretical discussions of cycles of economic crisis in the United States, see, for example, GEORGE COOPER, *THE ORIGIN OF FINANCIAL CRISES: CENTRAL BANKS, CREDIT BUBBLES AND THE EFFICIENT MARKET FALLACY* (2008); CHARLES P. KINDLEBERGER & ROBERT Z. ALIBER, *MANIAS, PANICS AND CRASHES: A HISTORY OF FINANCIAL CRISES* (5th ed. 2005). Perhaps the best-known scholar of economic crisis is the late Hyman Minsky. Minsky, an economist, argued that the credit cycle is inherently unstable, with a model that typically begins with some opportunity that raises investment expectations, leading to an increasingly euphoric boom. The market then tops out and some investors begin to exit, which eventually leads to a panic. See, e.g., HYMAN P. MINSKY, JOHN MAYNARD KEYNES (1975); Hyman P. Minsky, *The Financial Instability Hypothesis* (Jerome Levy Econ. Inst. of Bard Coll., Working Paper No. 74, 1992), available at <http://www.levy.org/pubs/wp74.pdf>.

57. Cf. GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977). Gilmore’s periodization of American law, which he drew from Karl Llewellyn’s *The Common Law Tradition*, *id.* at 11, is relevant here, but in the development of conceptions of property, we are focusing on the disjunctions between eras.

58. See generally CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

periods.⁵⁹ Early American history saw conflicts over the confiscation of Loyalist property, skirmishes over slavery, rebellions and populist arguments about redistribution, and debt crises, among other crucibles at the formation of our property law.⁶⁰

Indeed, the Yazoo Land Scandal in the 1780s and 1790s was perhaps the first crisis that approximates our current meltdown, and it had a notable effect on early American property law.⁶¹ The scandal involved the bribing of the legislature of Georgia to sell tens of millions of acres of contested public land, roughly what would become modern Alabama and Mississippi.⁶² This early crisis led, among other things, to the first invalidation of a state law as unconstitutional by the U.S. Supreme Court in *Fletcher v. Peck*⁶³—upholding the land transfers,⁶⁴ even though secured through bribery—and had important implications for the eventual settlement of the West.

Within a generation after the Founding, an uneasy stasis was to be found that largely lasted until the Civil War. That crisis and its legal aftermath, most notably in the Thirteenth, Fourteenth, and Fifteenth Amendments, represented a moment of significant disjunction and unstable resolution in the structure of property.⁶⁵ The Civil War Amendments not only barred slavery, but also ironically laid the foundation for the eventual constitutionalization of broad protection for property in the Fourteenth Amendment. Again, after crisis, the pendulum swung. Late nineteenth-century formalism can hardly be said to have grown directly in response to state intervention in property rights.⁶⁶ However, the ideological and

59. See, e.g., Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135.

60. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992) (discussing doctrinal developments in property law arising out of the Revolution); see also Fisher, *supra* note 50, at 4 (describing “watershed[.]” moments in the development of American property law, bookended by the Revolution and Reconstruction).

61. See ROBERT V. HINE & JOHN MACK FARAGHER, *THE AMERICAN WEST: A NEW INTERPRETIVE HISTORY* 112–13 (2000).

62. *Id.*

63. 10 U.S. (6 Cranch) 87 (1810).

64. *Id.* at 142–43.

65. See ELY, *supra* note 18, at 83–84 (discussing ways in which the exigencies of the Civil War led to significant reordering of existing property rights, including the abolition of slavery in the Thirteenth Amendment and the Confiscation Acts during the war).

66. Developments in conceptions of property rights in the nineteenth century raise very interesting questions about the public/private divide, and the role of the state in fostering a uniquely American property law. For example, Willard Hurst has argued that a prevailing vision in the early nineteenth century was of property as a dynamic source of productive potential, rather than a static barrier against the state. See generally Willard Hurst, *The Release of Energy*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 109 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988). And Harry Scheiber has ably chronicled the many ways in which an array of sectors were increasingly granted sweeping powers, notably the power of eminent domain, to alter property arrangements as a means of fostering infrastructure and industrial development. See generally Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789–1910*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER*, *supra*, at 132.

rhetorical foundations of pre–New Deal substantive due process protections for property rights were in some sense forged in the crisis of the mid-nineteenth century.

Tensions between classical liberal and civic republican visions of property again came to dominate the discourse during the Great Depression, an economic and social crisis not entirely unlike the one we are now experiencing, although (so far) of much greater magnitude. The New Deal and the revolution it spawned in constitutional jurisprudence—rejecting *Lochnerian* oversight of basic economic regulation—was perhaps predictably attacked as the dawning of collectivization and communism.⁶⁷ And it is no coincidence that the work of the Legal Realists in attacking formalist conceptions of property, although generally predating the New Deal, took hold largely against this backdrop.⁶⁸

This crisis and response revealed deep anxieties about what the Supreme Court was doing to property rights, but nonetheless confirmed the constitutional validity of the modern regulatory state. At the same time that a constitutional revolution was underway, the ground level law of property was changing in response to crisis as well. Exercising power the Court affirmed after initial doubts, the New Deal transformed the housing market through standardizing and insuring thirty-year fixed mortgages.⁶⁹ Regulatory intervention also sowed the first seeds of modern consumer rights law.⁷⁰

American history has witnessed any number of other, perhaps less momentous, crises and financial panics up to (and now beyond) the Savings and Loan Crisis of the 1980s.⁷¹ Similar stories can be told about public outrage, institutional reordering, and reflexive response that raise questions about the nature of property as an institution and legal force.⁷² What this brief overview highlights is that a series of critical junctures throughout our history provoked fundamental questions about the nature of property and intensified preexisting tensions in property law. It is possible to trace

67. See generally ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998).

68. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1928).

69. See Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSP. 93, 94–96 (2005) (discussing New Deal era structural interventions in the mortgage market).

70. For an illuminating history of these developments, see LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 18–61 (2003) (discussing the Depression and the rise of the “citizen consumer”).

71. See KINDLEBERGER & ALIBER, *supra* note 56, at 2–3.

72. Lawrence Friedman outlines, for example, a perennial cycle of debtor-creditor struggles in the terms of mortgage law that has flared repeatedly in times of crisis. See FRIEDMAN, *supra* note 48, at 245–48. As early as the Panic of 1819, which led the state of New York to legislate a one-year grace period for “hard-pressed land debtors,” doctrinal shifts have followed economic upheaval. *Id.* at 247.

doctrinal changes to some of these crises,⁷³ but we are less interested in probing any specific innovation than in illustrating a common pattern.

This discussion does raise a question about what makes a crisis a “crisis,” a question that is difficult to answer definitively. Intuitively, it is possible to point to a historically felt sense at any given moment. Accounts of the Revolution, the Civil War, the Great Depression, and other less significant moments are replete with contemporaneous expressions that make it clear people understood they were living through a time of critical change. Our current moment has produced a similar sense of historic importance, although it is still too early to see how significant a turning point we are witnessing. Beyond that kind of visceral invocation of crisis, it is possible to point to the depth of dislocation, the widespread nature of the resulting social and economic change, and the duration of the realignment that follows, as guideposts.⁷⁴ Again, it is not necessary to resolve this here, but it is important to acknowledge that it may be more a question of degree than kind to identify particularly significant examples of crisis.

Indeed, in important respects, these moments of crisis seem less to represent fundamental realignments in the way that Ackerman describes his examples of popular constitutional amendment (however contested), and Grant Gilmore his ages of American law, although they do at times take place in the context of larger legal change that filters through to property doctrine.⁷⁵ What they represent more immediately are times when seemingly settled questions about the balance of individual autonomy and state authority, the role of the state in regulating property, and the role of property in social ordering rise to the cultural and legal surface. These times of uncertainty provoke anxiety and ferment in general, but particularly about the nature of ownership itself. Although time and again the pendulum seems to swing back toward more privatized visions of property, the residue of crisis remains.⁷⁶

73. Cf. Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385 (2006) (examining colonial American legal developments transforming real property’s use as security for debts).

74. Cf. Lovett, *supra* note 53, at 471–74 (discussing the nature of “radically changed circumstances”). For a quite different perspective on regulation in a perceived permanent state of crisis, see generally Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1 (2006) (offering a number of insights about the costs and benefits of perceiving regulation as forced by crisis, and thus limited, for example in the exploration of alternatives and the possibilities of resistance).

75. Thus, for example, the New Deal Court’s ratification of an expanded scope of federal regulatory power has had profound effects on the operation of property law in practice, even if that ratification operated at one step removed from most of the doctrinal questions that frame common-law aspects of property law.

76. To the extent that moments of punctuated equilibrium in property law reflect modes of species evolution by in fact contributing to property law’s *evolution*—a question that we cannot answer here—such evolution arguably occurs more in the form of new institutional approaches to core tensions in property theory than in any particular doctrinal developments. Several observations follow from this claim that will be explored in greater depth below. See *infra* Part III. First, because of the oppositional nature of these basic property tensions, such evolution appears to be more cyclical in nature than linear, a process in which competing

II. THE GREAT RECESSION: HOUSING CRISIS, ECONOMIC SHOCK, AND EMERGING RESPONSE

Government owning a stake in any private U.S. company is objectionable to most Americans—me included.

- Former Treasury Secretary Henry Paulson⁷⁷

Like many prior dislocations, the current economic crisis seems foreseeable in retrospect. As of yet, however, it is not clear what combination of regulatory interventions and market corrections will be required to return to something resembling normality. The centrality of property in the current crisis, both in its origins and in the emerging response, assures that this crisis is a significant property moment. Overarching the many intricate modes of property's entanglement with the crisis are three core assumptions about property: that widespread homeownership is a paramount objective; that credit should be widely accessible at all societal levels, partly as a means to accomplish that objective; and that ownership opportunities in the secondary market for mortgage-backed securities are also imperative, partly as a means to ensure the availability of credit.

In this part, we describe the events that contributed to and comprised the current crisis, which began with a housing bubble in the early part of this decade, imploded in the meltdown of the subprime mortgage markets, and then extended to financial markets throughout the world. We then describe the still-evolving regulatory response, including recent initiatives by both the executive and legislative branches to contain the crisis. Finally, we recount briefly property's multiscalar involvement in the current property moment.

A. *The Crisis: Subprime Mortgages, Credit Lockups, and the Global Slowdown*

The current economic crisis—dubbed by many as the “Great Recession”—took shape throughout much of the decade, a period in which innovations in the credit market for housing fueled a major housing bubble. The causes of the crisis will likely be disputed for some time as commentators use different analytical and normative perspectives to diagnose its predicates. Some have focused on one or a few determinants,

norms revolve around and incrementally shape the most basic assumptions about property rights and ownership. Second, the consistency in these basic assumptions, from crisis to crisis, likely reveals as much about property's evolution as the different institutional arrangements resulting from temporary resolutions of the core tensions. Finally, each crisis leaves its own unique residue, often in redefining the ways in which we preserve our most basic assumptions about property law, rather than in redefining those assumptions.

77. Press Release, U.S. Dep't of the Treasury, Statement by Secretary Henry M. Paulson, Jr. on Actions To Protect the U.S. Economy (Oct. 14, 2008), <http://www.treas.gov/press/releases/hp1205.htm>.

such as the startling decline in home values in 2007,⁷⁸ systemic failures to assess risk,⁷⁹ or the illusion of liquidity.⁸⁰ Others have described the crisis as a “perfect storm.”⁸¹ In this Article, we adopt a descriptive perspective, disassociated from direct questions of prescription and prevention. Our purpose in this section is to use a wide-angle lens in chronicling the events leading up to the crisis as necessary groundwork for understanding the role of property in this crisis.⁸²

Although the origins of the crisis run deep, it is useful to begin with the Federal Reserve’s interest rate responses after the dot-com crash in the early part of this millennium. As mortgage interest rates fell, credit began to flow to housing consumers. The Bush Administration’s policy focus on what it described as an “ownership society,” favorable economic conditions, and innovations within the housing and mortgage industry produced an environment in which underwriting standards dropped and borrowers with lower incomes and riskier profiles received financing.⁸³

“Subprime” lending—a category that defies easy definition, but generally involves higher risk loans and less creditworthy borrowers⁸⁴—increased significantly, peaking in 2006 at over \$600 billion in originations.⁸⁵ In marked contrast with loans in the “prime” mortgage market, subprime and “Alt-A” loan instruments included “exotic” terms such as higher loan-to-

78. Christopher L. Foote et al., *Subprime Facts: What (We Think) We Know About the Subprime Crisis and What We Don't* 3 (Fed. Reserve Bank of Boston Pub. Policy Discussion Papers, Paper No. 08-2, 2008), available at <http://ssrn.com/abstract=1153411>.

79. Schwarcz, *supra* note 52; see also John B. Taylor, *The Financial Crisis and the Policy Responses: An Empirical Analysis of What Went Wrong* 27 (Rock Ctr. for Corporate Governance Working Paper Series, Working Paper No. 30, 2009), available at <http://ssrn.com/abstract=1341170> (arguing that “government actions and interventions” prolonged the crisis by “misdiagnosing the problems in the bank credit markets and thereby responding inappropriately by focusing on liquidity rather than risk”).

80. Anastasia Nesvetailova, *The End of a Great Illusion: Credit Crunch and Liquidity Meltdown* (Danish Inst. for Int’l Studies, Working Paper No. 2008/23, 2008), available at http://www.diiis.dk/graphics/Publications/WP2008/WP2008-23_Credit_Crunch_and_Liquidity_Meltdown.pdf.

81. See, e.g., Karl S. Okamoto, *After the Bailout: Regulating Systemic Moral Hazard*, 57 UCLA L. REV. 183, 204–05 (2009).

82. In doing so, we do not claim, nor even seek, to be comprehensive. Rather, we touch on only the most salient forces and events that shaped the crisis.

83. See Gary B. Gorton, *The Panic of 2007*, at 5–7 (Yale Sch. of Mgmt. and Nat’l Bureau of Econ. Research, Working Paper No. 08-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1255362. For one of many attempts to catalog the factors that led to the creation and expansion of the subprime market, see, for example, BARTH ET AL., *supra* note 8, at 46–56.

84. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1261 (2002). Subprime and “Alt-A” loans are marked in the industry by some general characteristics, including lower borrower FICO scores, borrower credit problems, and failure to conform to Fannie Mae and Freddie Mac underwriting standards. See Gorton, *supra* note 83, at 8.

85. L. Randall Wray, *Lessons from the Subprime Meltdown* 30 (The Levy Econ. Inst. of Bard Coll., Working Paper No. 522, 2007), available at <http://ssrn.com/abstract=1070833>; see also Gorton, *supra* note 83, at 3 (“Subprime mortgage origination in 2005 and 2006 was about \$1.2 trillion of which 80 percent was securitized.” (citing MAJORITY STAFF OF THE J. ECON. COMM., 110TH CONG., THE SUBPRIME LENDING CRISIS 18 fig.8 (2007))).

value ratios, teaser interest rates for the first two or three years, and interest-only and payment-option adjustable-rate mortgages.⁸⁶ Concomitantly with the loosening of underwriting standards, underwriting processes in the subprime market also changed. This resulted most paradigmatically in the advent of “no-doc” and “low-doc” loans, which contributed materially to the mind-boggling level of fraudulent practices among real estate and mortgage brokers in the subprime market.⁸⁷ These alterations in underwriting standards and practices diverged sharply from the standardized lending norms established during the New Deal, many of which had contributed to the development of a stable secondary market.⁸⁸

As housing prices rose in markets across the country and homebuilders turned deserts into cities seemingly overnight, the cycle of borrowing was fueled by increasingly sophisticated securitizations.⁸⁹ A robust market in residential mortgage-backed securities had existed for at least two decades.⁹⁰ In the early part of this millennium, subprime-mortgage-backed securities joined the secondary market.⁹¹ In contrast to its long experience with the traditional loan terms that still largely characterize prime lending, the industry had no experience in valuing the risks associated with the exotic loan terms underlying subprime-mortgage-backed securities.⁹² Moreover, the market participants best positioned to value risk had little incentive to do so, thanks to an incentive structure in which mortgage originators received higher fees for imposing more onerous terms on borrowers, but then sold the loans and often also the servicing function to third parties.⁹³ Nonetheless, it appears that the most exotic were also the

86. For examples and descriptions, see NAT'L CONSUMER LAW CTR., *FORECLOSURES: DEFENSES, WORKOUTS, AND MORTGAGE SERVICING* 11–13 (2d ed. 2007); Allan N. Krinsman, *Subprime Mortgage Meltdown: How Did It Happen and How Will It End?*, J. STRUCTURED FIN., Summer 2007, at 13, 14–15; Gorton, *supra* note 83, at 12–19; Wray, *supra* note 85, at 30–31. As recent studies have documented, a number of these innovations were associated with predatory behavior, such as equity stripping. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF TREASURY, *CURBING PREDATORY HOME MORTGAGE LENDING* 31 (2000), available at <http://www.huduser.org/publications/pdf/treasrpt.pdf>.

87. See *Subprime Mortgage Lending Problems in Context: Hearing on Subprime and Predatory Lending Before the H. Subcomm. on Financial Institutions and Consumer Credit Comm. on Financial Services*, 110th Cong. 4–5 (2007) (statement of Alex J. Pollock, Resident Fellow, American Enterprise Institute); Danielle DiMartino & John V. Duca, *The Rise and Fall of Subprime Mortgages*, ECON. LETTER (Fed. Reserve Bank of Dallas, Dallas, Tex.), Nov. 2007, at 1, 2–5; Krinsman, *supra* note 86, at 14–15; Wray, *supra* note 85, at 21. For a discussion of the racial impact of subprime lending practices, see Carol Necole Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. (forthcoming 2010).

88. L. Randall Wray, *Lessons from the Subprime Meltdown*, CHALLENGE, Mar.–Apr. 2008, at 40, 63–64 (2008); see also Michael H. Schill, *The Impact of the Capital Markets on Real Estate Law and Practice*, 32 J. MARSHALL L. REV. 269, 270–76 (1999).

89. See generally Levitin, *supra* note 11.

90. See Malloy, *supra* note 28, at 992–99; Schill, *supra* note 28, at 1271–72.

91. Wray, *supra* note 88, at 43–48.

92. DiMartino & Duca, *supra* note 87, at 4; Wray, *supra* note 85, at 22–23; see also Gorton, *supra* note 83, at 49–61.

93. See Wray, *supra* note 88, at 46–47; see also Charles D. Anderson et al., *Deconstructing a Mortgage Meltdown: A Methodology for Decomposing Underwriting Quality* (May 29, 2009) (unpublished article), available at <http://ssrn.com/abstract=1411782>.

most securitized.⁹⁴ Another unique feature of subprime securitizations was the reliance on housing market appreciation for their underlying value.⁹⁵

In late 2006, two events interrupted the uninhibited and seemingly limitless expansion of the primary and secondary mortgage markets: the rise in interest rates and the flattening (and in some areas of the country, decline) of home values.⁹⁶ The consequence was what would turn out to be only the first wave of interest rate resets, mortgage defaults, and foreclosures.⁹⁷

Responses from lenders appeared to cover the spectrum and many of the details remain unclear. Some tightened underwriting requirements;⁹⁸ others appeared to loosen them even further.⁹⁹ What is clear is that by mid-2007, secondary-market investors had begun to lose confidence.¹⁰⁰ Faced with the inability to sell loans in short order in the secondary market, subprime lenders originated fewer loans.¹⁰¹ The slowdown in the primary market was exacerbated by increasing demands among secondary-market investors that subprime lenders buy back some of the riskiest securities.¹⁰² By late 2007, credit markets began to tighten, some home lenders, including Countrywide Financial, began to experience significant losses, and more than twenty subprime lenders had already filed for bankruptcy or gone out of business.¹⁰³ Meanwhile, another wave of interest rate resets and defaults hit.¹⁰⁴ As foreclosures reached historic highs, a record that would be

94. According to Randall Wray,

So-called liar loans increased from a quarter of subprimes in 2001 to 40% in 2006. . . . The percent of [subprime] loans with adjustable rates rose from about 74% in 2001 to more than 93% in 2005; interest-only loans rose from zero to nearly 38% over the same period; and the low or no doc share rose from 29% to more than half. Data provided by the JEC shows that over the same period, hybrid adjustable rate mortgages (those with teaser rates for 2 or 3 years, after which loans would be reset at higher rates) rose from just under 60% of securitized subprimes in 2001 to nearly three-quarters by 2004. In other words, the riskiest types of subprimes—ARMS and hybrid ARMS—were favorites with securitizers.

Wray, *supra* note 85, at 30–31 (citations omitted).

95. See DiMartino & Duca, *supra* note 87, at 4; Gorton, *supra* note 83, at 12, 19.

96. BARTH ET AL., *supra* note 8, at 73–74.

97. *Id.* at 74–99.

98. DiMartino & Duca, *supra* note 87, at 5; Gorton, *supra* note 83, at 51.

99. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve, Speech at the Federal Reserve Bank of Chicago's 43rd Annual Conference on Bank Structure and Competition (May 17, 2007), <http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm>.

100. DiMartino & Duca, *supra* note 87, at 5–6.

101. Krinsman, *supra* note 86, at 16–17.

102. *See id.* at 16.

103. See Leslie Earnest, *Pink Slips Litter Loan Industry: The Turmoil in the Sub-prime Mortgage Sector Hits Some Workers As Hard As Borrowers*, L.A. TIMES, Apr. 6, 2007, at C1; Knowledge@Wharton, *The Subprime Crisis: A Timeline*, http://knowledge.wharton.upenn.edu/special_sections/subprime/timeline.cfm# (last visited Feb. 5, 2010); *see also* Krinsman, *supra* note 86, at 16.

104. BARTH ET AL., *supra* note 8, at 135–41.

broken in early 2008,¹⁰⁵ some lenders faced the once-surreal possibility of owning homes that could not be liquidated.¹⁰⁶

The stock market started to drop in early 2008, with the year beginning with the kind of volatility that has since come to seem normal. In March, the Federal Reserve underwrote the takeover of Bear Stearns by JPMorgan Chase, and throughout the spring and summer some of Wall Street's largest financial institutions were forced to write off billions of dollars in assets related to what had become essentially worthless subprime securities.¹⁰⁷

In one watershed month, September 2008, the federal government placed Fannie Mae and Freddie Mac in conservatorships, committing up to \$100 billion to each entity in the event of capital shortfalls.¹⁰⁸ A week later, Bank of America bought Merrill Lynch in a fire sale, and the storied firm Lehman Brothers filed for bankruptcy.¹⁰⁹ The next day, the Dow dropped over 500 points, the worst loss since the aftermath of September 11, 2001.¹¹⁰ On September 16, the Federal Reserve agreed to loan the then-staggering sum of \$85 billion to insurance giant American International Group (AIG),¹¹¹ a portion of which was repaid in November in the form of the Treasury's purchase of \$40 billion of preferred stock in AIG.¹¹² On September 25, the largest bank failure in American history occurred with the emergency sale of Washington Mutual to JPMorgan Chase.¹¹³

Over the next few months, the magnitude of the lockup of credit markets around the world—and the resulting fallout—became clear.¹¹⁴ Globally, investors shifted investments to Treasury bills and other relatively safe havens, thereby raising the cost of borrowing.¹¹⁵ Money market funds, traditionally the most conservative means of investment, were threatened, with some falling below previously inviolable thresholds.¹¹⁶ In late October, currencies around the globe plummeted.¹¹⁷ That same month,

105. *Id.* at 91, 374–86.

106. *Id.* at 231–48.

107. *Id.* at 4–5, 106, 235.

108. *Id.* at 253–55.

109. See Andrew Ross Sorkin, *Merrill Is Sold: Failing To Find Buyer, Lehman Set To File for Bankruptcy*, N.Y. TIMES, Sept. 15, 2008, at A1. A week after that, Goldman Sachs and Morgan Stanley, the two remaining major independent investment banks on Wall Street, transformed themselves into bank holding companies. BARTH ET AL., *supra* note 8, at 237.

110. NYTimes.com, 10 Weeks of Financial Turmoil, http://www.nytimes.com/interactive/2008/09/27/business/economy/20080927_WEEKS_TIMELINE.html (last visited Feb. 5, 2010).

111. BARTH ET AL., *supra* note 8, at 64, 235–37.

112. *Id.* at 235–37. This loan has been supplemented several times.

113. *Id.* at 269; 10 Weeks of Financial Turmoil, *supra* note 110.

114. See Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 967–68 (2009).

115. See BARTH ET AL., *supra* note 8, at 78, 352; see also Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 71–76 (2009).

116. BARTH ET AL., *supra* note 8, at 117.

117. Mark Landler & Vikas Bajaj, *Some Currencies Plunge As Stocks Sink Worldwide*, N.Y. TIMES, Oct. 25, 2008, at A1.

unemployment in the United States reached a fourteen-year high.¹¹⁸ In late January 2009, the International Labour Organization predicted that as many as 51 million people could be unemployed in 2009 around the world.¹¹⁹

This crisis compares in scale, if not (yet) in depth, to the Great Depression. Then, as now, the stock market plummeted, banks failed, and unemployment skyrocketed after a bubble of unprecedented prosperity.¹²⁰ Then, as now, the financial crisis was international in scope.¹²¹

B. *The Emerging Response*

Thus far, the federal government has responded to the meltdown with a series of still-evolving interventions. Aimed primarily at reestablishing liquidity and reducing panic, these regulatory moves have ranged from purging toxic debt, to recapitalizing reluctant lending institutions, to broadly stimulating the economy in an effort to restore some semblance of normality. As discussed below, during late 2007 and throughout 2008, regulators appeared to adopt an ad hoc approach of prescribing one treatment, waiting with baited breath as the Dow reacted, and then trying another. Since President Obama has taken office, regulatory responses have taken on a greater level of coordination, though significant challenges remain.

One early response to the mortgage aspects of the current crisis was the Mortgage Forgiveness Debt Relief Act of 2007, which sought to promote loan modifications as an alternative to foreclosure by reducing the negative tax consequences associated with such modifications.¹²² Another response, after the market dropped in early 2008, was a modest stimulus package.¹²³

118. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS1400000 (last visited Feb. 5, 2010). The November 2008 unemployment rate was 6.9%, the highest since October 1993. Since November, unemployment rates have steadily increased from 6.9% to 9.5% in June 2009. The highest unemployment rate since August 1983 is 10.1%.

119. INT'L LABOUR ORG., GLOBAL EMPLOYMENT TRENDS 19 (2009), available at http://www.ilo.org/public/english/region/ampro/cinterfor/news/get_2009.pdf.

120. See BARTH ET AL., *supra* note 8, at 144; ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT 101–06 (2008); Jonathan Macey et al., *Helping Law Catch Up to Markets: Applying Broker-Dealer Law to Subprime Mortgages*, 34 J. CORP. L. 789, 806 (2009); Moran, *supra* note 115, at 76.

121. Moran, *supra* note 115, at 98–99 (discussing the international scope of the current crisis); Maurice Obstfeld & Alan M. Taylor, *The Great Depression as a Watershed: International Capital Mobility over the Long Run* (Nat'l Bureau of Econ. Research, Working Paper No. 5960, 1997), available at <http://www.econ.ucdavis.edu/faculty/amtaylor/papers/w5960.pdf> (discussing the international scope of the Great Depression).

122. Pub. L. No. 110-142, 121 Stat. 1803 (2007). Even prior to this time, indeed since 2006, federal bank regulators had attempted limited preventive measures, such as the Interagency Guidance on Nontraditional Mortgage Product Risks, 71 Fed. Reg. 58,609 (Oct. 4, 2006).

123. Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613.

As evidenced by the spiraling crisis that followed, both proved largely irrelevant.

Over the summer of 2008, Congress passed the Housing and Economic Recovery Act (HERA).¹²⁴ In a multifaceted effort to address weaknesses in the housing market that moved well beyond the enhanced disclosures and tax breaks characteristic of recent legislation targeting homeowners,¹²⁵ HERA authorized the Federal Housing Administration (FHA) to insure \$300 billion worth of mortgages by means of voluntary refinancing, and it also changed certain lending requirements of FHA programs.¹²⁶ The legislation provided new oversight for Fannie Mae and Freddie Mac and gave the Treasury Department authority to purchase an equity interest in both entities.¹²⁷ Indeed, as noted, the new regulator used its powers to nationalize Fannie and Freddie shortly after the bill was passed.¹²⁸ HERA also notably required that all loan originators be licensed and registered under a statewide system or, if employed by a depository institution, a national system.¹²⁹

None of these actions seemed to stem the widening credit crisis, as banks became increasingly reluctant to loan given the uncertainty of their own subprime-infected portfolios. On September 18, 2008, the Bush Administration proposed what eventually became a \$700 billion bailout package.¹³⁰ After much political wrangling—including a rejection by the House that led to a 778-point single-day drop in the Dow—Congress passed the bill on October 3.¹³¹

The bailout plan began with a proposal to buy up hundreds of billions of dollars worth of distressed mortgages. The concept behind this plan was stanching the uncertainty created out of fear of the inability to value assets backed by this so-called “toxic” debt, which in turn was blocking lending.¹³² As the crisis spread across the globe, the Treasury shifted gears in response to early indications that purchasing toxic debt was unlikely to calm the markets.¹³³ In mid-October 2008, the Treasury announced that it would use the almost limitless authority granted under the HERA’s Troubled Asset Relief Program (TARP) to buy up to \$250 billion in bank

124. Pub. L. No. 110-289, 122 Stat. 2654 (2008).

125. For an example of such a statutory effort, see the Home Ownership and Equity Protection Act (HERA) of 1994, 15 U.S.C. § 1601 (2006). HERA did in fact augment disclosure requirements in the Real Estate Settlement Procedures Act, but it certainly did not stop there. 12 U.S.C.A. § 5115 (West Supp. 2009).

126. See 12 U.S.C.A. §§ 1701, 1709, 1715z-23(m).

127. See *id.* §§ 1455, 1719, 4501–4526.

128. See *supra* text accompanying note 108.

129. See 12 U.S.C.A. §§ 5101–5114.

130. BARTH ET AL., *supra* note 8, at 257.

131. *Id.*; see Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

132. Lucian A. Bebchuk, *Buying Troubled Assets*, 26 YALE J. ON REG. 343, 344–45 (2009).

133. See *id.* at 346–47.

stock, thereby taking equity in a mix of large and regional banks.¹³⁴ Meanwhile, the Federal Reserve and central banks around the world cut interest rates.¹³⁵

In November 2008, Treasury Secretary Paulson changed course again, proposing to extend his program of equity injections to include consumer lenders, such as credit card companies, auto finance companies, and the like.¹³⁶ This proposal came to fruition in the form of the Term Asset-Backed Securities Loan Facility (TALF), which among other things authorized the Federal Reserve Bank of New York to lend up to \$200 billion to holders of certain consumer and small-business loans.¹³⁷ Later that month, the Treasury and FDIC provided \$20 billion in addition to guarantees and other supports to Citigroup in return for preferred stock.¹³⁸

One consistent point of contention throughout the early phases of the crisis was the issue of where homeowners in financial distress fit in to the government's response. By means of its Hope for Homeowners initiative, the Bush Administration promoted voluntary workout efforts by lenders and remained reluctant to directly mandate workouts.¹³⁹ Although the program initially aimed to protect several hundred thousand homeowners from foreclosure, thus far it has helped fewer than one hundred.¹⁴⁰ Perhaps in light of the meager response to this program, in November 2008, Fannie Mae and Freddie Mac temporarily suspended foreclosures on all loans owned or securitized by Fannie Mae.¹⁴¹

Meanwhile, in Europe, the Irish and German governments were among those guaranteeing bank deposits,¹⁴² Iceland passed legislation to resuscitate its failing banking industry,¹⁴³ and a number of other European countries began to nationalize their banks.¹⁴⁴ In mid-October 2008, South Korea unveiled a \$130 billion plan that included state guarantees on some

134. BARTH ET AL., *supra* note 8, at 258–59.

135. *Id.* at 244–48; *see also* Federal Reserve Statistical Release, Selected Interest Rates, <http://www.federalreserve.gov/releases/h15/data.htm> (last visited Feb. 5, 2010).

136. BARTH ET AL., *supra* note 8, at 240.

137. *Id.*

138. *Id.* at 261, 306.

139. *Id.* at 252.

140. *Id.*; *see also* Brian Grow et al., *The Home Foreclosure Fiasco: How the Banking Industry Is Undermining Efforts To Keep People in Their Houses*, BUSINESSWEEK, Feb. 23, 2009, at 34, 36 (“Hope for Homeowners—which Bush officials and banks promised last fall would shield 400,000 families from foreclosure—has so far produced only 25 refinanced loans.”).

141. Press Release, Fannie Mae, Fannie Mae To Suspend Foreclosures Until January 2009 While Streamlined Modification Program Is Implemented (Nov. 20, 2008), <http://www.fanniemae.com/newsreleases/2008/4531.jhtml;jsessionid=I4GW4PZTD2WBDJ2FQSHSFGI?p=Media&s=News+Releases>.

142. Sebastian Schich, *Financial Crisis: Deposit Insurance and Related Financial Safety Net Aspects*, FIN. MARKET TRENDS, Dec. 2008, at 1, 15, *available at* <http://www.oecd.org/dataoecd/36/48/41894959.pdf>.

143. *Id.*

144. *See, e.g., Timeline: Credit Crunch to Downturn*, BBC NEWS, <http://news.bbc.co.uk/2/hi/7521250.stm> (last visited Feb. 5, 2010) (explaining that on September 29, 2008, “the mortgage lender Bradford & Bingley is nationalised”).

bank debt and other capital supports,¹⁴⁵ followed by China, which in November announced a \$586 billion two-year economic stimulus package.¹⁴⁶

In mid-January 2009, at President-Elect Obama's request, President Bush submitted a request to Congress for the remaining \$350 billion in TARP funding.¹⁴⁷ In mid-February, the Federal Reserve Board announced that \$100 billion of these funds would be used to expand TALF to as much as \$1 trillion, with a particular focus on stimulating economic growth among households and small businesses.¹⁴⁸ This initiative is part of the current administration's multipronged Financial Stability Plan, which includes a "Financial Stability Trust" and a "Public-Private Investment Fund."¹⁴⁹ Prominently among the supports offered by the Trust is a capital assistance program, which provides preferred stock, convertible to common stock, in return for capital, as well as a mandatory "stress test" for major banking institutions and the promise of greater coordination among the key regulatory agencies.¹⁵⁰ Meanwhile, the public-private investment fund is intended to include private capital alongside public funds for bailing out troubled banks.¹⁵¹

President Obama has thus far departed rather decidedly from his predecessor's position on consumers and homeowners. His administration's Homeowner Affordability and Stability Plan (HASP) envisions helping at least seven million families modify or refinance their mortgages. The plan seeks to accomplish these measures by means of a mix of mandates and incentives, including promised opportunities to

145. *Addressing the Impact of the Global Financial Crisis on Asia-Pacific Economies*, MACROECONOMIC POL'Y BRIEF (Econ. and Soc. Survey Comm'n for Asia and the Pac., Bangkok, Thailand), Dec. 2008, at 1, 3; see also BARTH ET AL., *supra* note 8, at 285.

146. Dawn Holland et al., *The World Economy: Economic Downturn in Asia*, NAT'L INST. ECON. REV., Jan. 2009, at 23, 23; Christopher A. McNally, *China and the Global Financial Crisis*, ASIA PAC. BULL., Dec. 12, 2008, available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/apb026.pdf>; Sherle R. Schwenninger, *How To Save the World*, WORLD POL'Y J., Winter 2008/09, at 3, 10.

147. See Press Release, George W. Bush, U.S. President, Message to the Congress of the United States (Jan. 12, 2009), <http://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090112-7.html>. The most recent planned uses of Troubled Asset Relief Program (TARP) funds are for foreclosure relief, capital for small banks, and increased Term Asset-Backed Securities Loan Facility (TALF) funding. Press Release, U.S. Dep't of Treasury, Treasury Department Releases Text of Letter from Secretary Geithner to Hill Leadership on Administration's Exit Strategy for TARP (Dec. 9, 2009), http://www.financialstability.gov/latest/pr_12092009.html.

148. Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Is Prepared To Expand the Term Asset-Backed Securities Loan Facility (TALF) (Feb. 10, 2009), <http://www.federalreserve.gov/newsevents/press/monetary/20090210b.htm>.

149. In connection with this initiative, the Obama Administration established a publicly accessible website providing information about the new programs as well as opportunities to track public expenses in connection with the program. See U.S. DEP'T OF THE TREASURY, FACT SHEET: FINANCIAL STABILITY PLAN, available at <http://www.financialstability.gov/docs/fact-sheet.pdf>.

150. *Id.* at 2-3.

151. *Id.* at 3.

refinance loans owned or guaranteed by Fannie Mae or Freddie Mac, mandated reductions in interest rates,¹⁵² matching funds for this purpose, and financial incentives to lenders to modify terms and to borrowers to comply with terms.¹⁵³ Notably, the plan also provides \$1.5 billion in relocation funds to renters displaced by foreclosure and \$2 billion in “neighborhood stabilization” funds.¹⁵⁴ In May 2009, Congress supplemented these efforts by passing the Helping Families Save Their Homes Act,¹⁵⁵ which requires successors in interest of foreclosed properties to honor the lease terms of renters and, in the case of month-to-month tenancies, to provide at least a ninety-day pre-eviction notice. Finally, President Obama has proposed a new consumer financial protection agency, which would regulate the sale of consumer credit by testing the safety of consumer loans much as toasters and other consumer products are currently tested.¹⁵⁶

On February 17, President Obama signed into law the American Recovery and Reinvestment Act of 2009,¹⁵⁷ a \$787 billion package, approximately one-third of which took the form of tax cuts, many of them for middle-class taxpayers. The Act also provides financial aid to states, and financial incentives for home purchases as well as basic consumer purchases.¹⁵⁸ In addition, in mid-2009, the administration announced a new plan aimed at giving greater regulatory oversight to the Federal Reserve, particularly for the purpose of monitoring systemic risk, and also proposing to coordinate the oversight of the disparate financial regulators at the federal level.¹⁵⁹ On the international front, the Group of 20 pledged in a September 2009 meeting to devise regulations for global financial reform aimed at greater coordination at an international level.¹⁶⁰

152. Such reductions are to last for a period of five years. See U.S. DEP'T OF THE TREASURY, HOMEOWNER AFFORDABILITY AND STABILITY PLAN: FACT SHEET 4, available at <http://www.treasury.gov/initiatives/eesa/homeowner-affordability-plan/FactSheet.pdf>.

153. *Id.*

154. *Id.* at 7. The plan also seeks to bolster confidence in Fannie Mae and Freddie Mac by means of additional preferred stock purchase agreements.

155. Pub. L. No. 111-22, §§ 702–703, 123 Stat. 1632, 1660–62 (2009) (to be codified at 12 U.S.C. § 5220 note; 42 U.S.C. § 1437f(o)(7)).

156. Zachary A. Goldfarb et al., *U.S. May Add New Financial Watchdog: Consumer Agency Under Consideration*, WASH. POST, May 20, 2009, at A1; see also Adam J. Levitin, *The Consumer Financial Protection Agency* (Georgetown Law Faculty Working Papers, Research Paper No. 1447082, 2009), available at <http://ssrn.com/abstract=1447082>.

157. Pub. L. No. 111-5, 123 Stat. 115.

158. *See id.*

159. Timothy Geithner & Lawrence Summers, *A New Financial Foundation*, WASH. POST, June 15, 2009, at A15. In the same month, the Securities and Exchange Commission proposed new rules to reduce the risk in money market funds. Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Rule Amendments To Strengthen Regulatory Framework for Money Market Funds (June 24, 2009), <http://www.sec.gov/news/press/2009/2009-142.htm>.

160. Edmund L. Andrews, *Leaders of G-20 Vow To Reshape Global Economy*, N.Y. TIMES, Sept. 26, 2009, at A1.

Thus far, President Obama's responses to the crisis have been compared—and contrasted—with New Deal-era regulation.¹⁶¹ The recent legislation includes public works projects, though these efforts are less massive and certainly less iconic than Franklin D. Roosevelt's. It seems possible that President Obama's carrot-and-stick approach to loan modifications could evolve into a New Deal-style overhaul of the mortgage finance market. Apt also are the comparisons between the two sets of regulatory initiatives aimed at the banking system's recovery. In both eras, federal financing is assumed to be the linchpin in restoring liquidity and trust in the banks.¹⁶² As in the comparisons between the originators of the crisis, the most telling comparisons are at the most abstract level. As commentators have recognized time and again, not since the New Deal has the government spent so much money, nor intervened so intrusively, in the private sectors of banking and finance.

C. Isolating Property in This Moment

Every bursting economic bubble—from tulips to dot-coms—implicates property, but the current crisis originates more than most in core aspects of our system of property. The run-up to the crisis grew fairly directly from ownership of that most iconic of possessions, the home. Powerful and, in hindsight, overblown rhetoric combined with a complex business and regulatory infrastructure, all firmly grounded in property, to produce a spike in subprime lending as a means to the imperative of homeownership. The result was a corresponding proliferation of subprime residential mortgage-backed securities and the downstream financial structures that fueled, and were fueled by, a housing bubble. Perhaps most poignantly, the crisis arose in an important sense from the quest for ownership rights by those with lower incomes or who were otherwise on the margins of homeownership and access.

Consider first the rising rhetoric of property rights that grew more prominent in the years preceding the crisis. Notable cultural signposts include the aftermath of *Kelo v. New London*,¹⁶³ and President Bush's championing of the "ownership society."¹⁶⁴ In a sweeping statement about

161. For a general discussion of the similarities between the New Deal and Obama's stimulus strategies, see generally Mitchell H. Rubinstein, *Obama's Big Deal: The 2009 Federal Stimulus; Labor and Employment Law at the Crossroads*, 33 RUTGERS L. REC. 1 (2009).

162. Tim Reid, *Barack Obama Reveals Stimulus Package That Could Exceed \$1 Trillion*, TIMES ONLINE (U.K.), Dec. 9, 2008, http://www.timesonline.co.uk/tol/news/world/us_and_americas/us_elections/article5303652.ece.

163. 545 U.S. 469 (2005). For commentary on *Kelo v. New London*'s aftermath, see D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365 (2007); George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45 (2008).

164. See, e.g., Warren Vieth, *Bush Makes His Pitch for 'Ownership Society'*, L.A. TIMES, Sept. 5, 2004, at A25.

the manifold benefits of property ownership, he proclaimed, “Ownership brings security and dignity and independence [W]e seek to provide not just a government program, but a path—a path to greater opportunity, more freedom and more control over your own life.”¹⁶⁵ The “ownership society” campaign generated a host of federal policies seeking to promote homeownership and access to credit, including down-payment assistance programs,¹⁶⁶ increased investment by the government-sponsored entities in the secondary market,¹⁶⁷ and tax relief for homeowners.¹⁶⁸

Equally important, and more hidden thus far, is the role of property in the intricate business and regulatory infrastructure in which the crisis fermented. Basic assumptions about land and ownership lay at the heart of a significant number of seemingly inconsequential business and legal decisions. One of many examples is the systemwide assumption (again, erroneous in hindsight) that property values would continue indefinitely to appreciate. On this basis, subprime lenders provided exotic new adjustable-rate mortgages, relaxed loan-to-value ratios, and changed other traditional loan terms, reasoning that at worst borrowers could refinance on the basis of the increased equity in their homes.¹⁶⁹ Similarly, intermediaries and investors in the secondary market for subprime mortgages assumed that rising property values would offset the higher risk of defaults associated with such mortgages.¹⁷⁰ Indeed, early analysis already hints at a connection between the illiquidity that the market has recently experienced and the inaccurate predictions about land valuation inherent in credit ratings.¹⁷¹ Meanwhile, federal regulators accepted, or at a minimum failed to question, the risk models circulated by industry players, which implicitly assumed that the unprecedented bubble in housing prices would not burst—at least not suddenly, dramatically, or pervasively.¹⁷²

The recent controversy over the role of the Mortgage Electronic Registration System (MERS) encapsulates another set of foundational property assumptions, this time forced by the crisis into conflict with the

165. *Id.*

166. *Id.*; Press Release, White House, Office of the Press Sec’y, President Hosts Conference on Minority Homeownership (Oct. 15, 2002), http://www.policyalmanac.org/social_welfare/archive/wh_minority_housing.shtml.

167. Vieth, *supra* note 164; Press Release, White House, *supra* note 166.

168. Vieth, *supra* note 164. For a theoretical discussion of the ownership society as a policy undertaking, see Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American “Ownership Society,”* 79 S. CAL. L. REV. 45 (2005) and Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 310–11 (2006).

169. DiMartino & Duca, *supra* note 87, at 3–4; Gorton, *supra* note 83, at 3, 7, 12.

170. Jeffrey Manns, *Rating Risk After the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability*, 87 N.C. L. REV. 1011, 1045 (2009); DiMartino & Duca, *supra* note 87, at 4; Wray, *supra* note 85, at 20–21 (intermediaries had no incentive to look more carefully). Certainly, it appears that one of the core features of predatory lending, asset-based lending, arose from this basic assumption about property values.

171. Nesvetailova, *supra* note 80, at 15–16.

172. See Wray, *supra* note 88, at 57.

increasing abstraction and fragmentation of ownership spawned by securitization. The controversy has been generated primarily by claims of defendants in foreclosure cases that MERS is not the “owner” in any meaningful sense of the mortgages at issue.¹⁷³ In Arizona, for example, a number of lawsuits were filed against MERS and the owners of mortgage loans for whom MERS was acting as a nominee, alleging fraud and conspiracy to hide the true identity of the owners from borrowers.¹⁷⁴ Similarly, a federal district judge in Ohio dismissed fourteen foreclosure cases filed by Deutsche Bank on the ground that the bank, which had acquired the mortgages on the secondary market, failed to prove it owned the notes and mortgages.¹⁷⁵ In a number of these cases, courts have responded to the ethereal and fragmented nature of ownership by reverting to and reasserting older norms of ownership. A typical response, for example, has been to resort to the land registry, which is so deeply connected to the location of physical property, as the most conclusive determinant of ownership.¹⁷⁶ In these cases, the crisis has brought a stark clash between basic property assumptions about how ownership is proven. Equally striking is the ultimate vindication of a traditional, physicalist ownership as finally settling the matter.

Thus far, the response to the crisis has been heavily saturated with property references, some familiar and some new and evolving. From HERA in the summer of 2008 to President Obama’s HASP of early 2009, in the form of taking stock in Fannie Mae, Freddie Mac, and a growing circle of lenders, the federal government has acted on and through property. As the crisis continues, in symbiotic fashion, the regulatory response has left its mark on property and property has left its mark on the regulatory response, marks to which we will now turn.

III. PROPERTY IN CRISIS

No two crises in our history have been exactly alike, although some echoes recur with eerie similarity—the bursting of seemingly irrational economic bubbles, chronicles of financial deaths that in hindsight could have been foretold, and broad regulatory and cultural changes that never completely solve underlying structural problems. The current crisis

173. See, e.g., *Landmark Nat’l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009); see also Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System 16–22* (Oct. 5, 2009) (unpublished article), available at <http://ssrn.com/abstract=1469749>.

174. *JPMDL Centralizes Conspiracy, Fraud Suits Against MERS in Arizona Federal Court*, MEALEY’S LITIG. REP.: MORTGAGE LENDING, Dec. 2009, at 22.

175. *In re Foreclosure Cases*, No. 07-2282, 2007 U.S. Dist. LEXIS 84011 (N.D. Ohio Oct. 31, 2007); see also Gretchen Morgenson, *Foreclosures Hit a Snag for Lenders*, N.Y. TIMES, Nov. 15, 2007, at C1. As is standard in the securitization process, Deutsche Bank likely never received the physical notes, but rather only evidence that these instruments had been sent to a repository for safekeeping. Morgenson, *supra*.

176. Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1354 (1982) (“Land is an obvious candidate for recordation because it is permanent and in one location.”).

recapitulates elements of many earlier crises. But our current moment, perhaps more than many past crises, is deeply evocative of tensions in how we think about property, particularly along the perennial fault lines often reduced to the public/private divide.

This part accordingly examines the relationship between property and the current crisis from three different perspectives. First, it explores the ways in which this crisis has affected our understanding of the design of property law. In doing so, we evoke traditional property norms that have in one way or another gained vitality in the reflected light of the crisis. Each of these norms is a particular manifestation of theoretical tensions outlined above.¹⁷⁷ In crisis, some norms have been destabilized, or have become less obvious. Others have been legitimized or have become more compelling. And some appear to have served unusual goals in the heat of perceived catastrophe. The purpose here, in short, is to begin to understand what the crisis reveals about the contemporary expression of long-standing fault lines in the discourse of property.

Next, this part turns to the relationship between property and this crisis from the opposite direction. Here, the emphasis is on the varied roles that property has played in shaping regulatory responses to the crisis. Particularly, the part lays out the construction of these same property norms into a disjointed and evolving—but also specific and expansive—engagement with fault lines in property law. This reveals a momentary, partial, and unstable resolution of theoretical tensions in the property discourse of this crisis.

Finally, this part tenders reflections in broader terms about what the fire this time reveals. The undertaking here is to sift the emerging residue of crisis to start to discern the lasting impact of this particular property moment on property's pressure points. Ultimately, this examination may help guide those engaged in the ongoing normative effort to understand that the question is not whether the state is destroying private property in order to save it, but rather whether current readjustments to the public/private divide make pragmatic sense and will actually respond to the crisis.

A. *Crisis as an Influence on the Design of Property*

While the current crisis speaks volumes about the general cultural valence of property, it also puts great pressure on several fundamental property norms. Many events, legal and cultural, influence the development of property.¹⁷⁸ Certain decisions, such as the Supreme Court's reaffirmation of long-standing eminent domain doctrine in *Kelo v.*

177. See *supra* Part I.A.

178. Cf. William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1776 (1988) (discussing the importance of understanding "dominant social expectations" about property as an influence on theories of takings).

New London, strike particularly strong popular chords.¹⁷⁹ Economic and social crises tend to generate a more diffuse discourse, with property as just one element of a larger conversation about the nature of the market and the role of the state, but such moments nonetheless can shed significant light about recurring anxieties that uncertainty about property can generate.

Accordingly, this section plumbs how property norms can be understood in the reflected light of the current crisis. In particular, the crisis is actively revealing the interconnected nature of property as against isolationist visions. The crisis is likewise highlighting the ways in which the design of property is sensitive to egalitarian concerns in light of a culture that for too long has associated the institution with unfettered opportunity. And the crisis strongly reinforces the role of the state, both in leavening the risk associated with reward in the discourse of property as well as in setting the terms of ownership, at times coercively. As we shall see, these deep property norms in the flux of crisis correlate with points in the public/private debate, while also invoking new questions about property's localism and incrementalism.

1. Isolation Versus Interconnection

To begin, the crisis has underscored what might be considered the unity of property, a unity emphasized in theoretical terms by both social relations, as well as ecological conceptions of property. "Unity of property" here refers not to Richard Epstein's use of the term "unity of ownership" to describe the coalescence of property rights into a reductive practical bundle,¹⁸⁰ but rather to a notion of property as "context and relativity, . . . accommodation and community."¹⁸¹ Conceptually, this is a central strand of the debate between Lockean-individualist and more communitarian, proprietary visions of property.¹⁸² In this context, the debate plays out between a kind of physicalized Blackstonian isolation as a descriptive and normative baseline,¹⁸³ and conceptions of property that stress holistic interconnection.¹⁸⁴

179. See, e.g., Jeannie Suk, *Taking the Home*, 20 LAW & LITERATURE 291, 294 (2008) (discussing public outcry following the *Kelo* decision).

180. Cf. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 58–62 (1985).

181. Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1530 (1989).

182. See *supra* Part I.A.

183. See, e.g., Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).

184. See, e.g., Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971) ("Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing."). For further discussion of the social-relations aspects of this interconnected conception of property, see Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 771–73 (2009).

On one level, the unity of property revealed by the current crisis is eminently practical. Land is tied to debt; debt is tied to complex financial instruments like mortgage-backed securities and collateralized debt obligations; those instruments are tied to personal holdings for investors. When one thread in this web becomes “toxic”—to use a way of describing debt that has entered the popular consciousness in this crisis¹⁸⁵—the entire interrelated system can be compromised. Retirees in Arizona see the value of their 401(k)s evaporate because of lending practices in Maine and appetite for debt tranches in Bahrain.

At a more local level, the crisis is demonstrating the broad consequences of our neighbors’ debts—a view of property that transcends the externalities-driven focus of the isolationist conception. We have always known that foreclosures, as devastating as they might be for an individual borrower in immediate terms, have an impact on neighbors. This is a “spillover,” in the classic sense, but still fairly localized. As the scale of foreclosures has reached levels not seen since the Great Depression, however, entire communities are being devastated.¹⁸⁶ In the light of crisis, the interdependence of the value of individual property holding becomes inescapable.

From a legal perspective, seemingly minor changes can cascade in terms of the social impact of property. Everything from whether subprime debt can be collateralized, to the spiral engendered by a district court ruling that the holder of mortgage-backed securities could not foreclose because of the structure of the intermediaries, to the incentives that regulators allow for mortgage origination can combine to create and undermine global markets. Yet there is also a tension inherent in the current vibrations caused by property losses: even while the average American cannot ignore the impact of the crisis on her retirement account, commentators voice populist exhortations to homeowners to accept responsibility for their irrational prior acts of indulgence.¹⁸⁷ A populist devotion to the isolationist view of ownership and its consequences still remains, indeed perhaps becomes even more shrill during this and other times of crisis.

2. Opportunity Versus Egalitarianism

A second, normative debate brought to the fore in the current crisis is the image of property in service of opportunity on the one hand, and of egalitarianism and material redistribution on the other hand. American

185. The current crisis has spawned a host of neologisms that seem destined to enter our lexicon in its wake. See William Safire, *On Language: Toxic Bailout*, N.Y. TIMES, Oct. 3, 2008, § 6 (Magazine), at 14. One can add, to cite another example, the “bad bank,” a regulatory device under discussion that would purchase those toxic debts. See Deborah Solomon & Damian Paletta, *Bank Bailout Plan Revamped*, WALL ST. J., Feb. 9, 2009, at A1.

186. See, e.g., David Streitfeld, *Almost Entire Town Is Drowning in Debt As Home Values Plunge*, N.Y. TIMES, Nov. 11, 2008, at A1.

187. See, e.g., C. S. & G. L., *MSNBC Twice Aired Santelli’s Criticism of Administration Foreclosure Plan Without Substantive Response*, MEDIA MATTERS FOR AM., Feb. 20, 2009, <http://mediamatters.org/research/200902200016>.

property law has generally privileged the inchoate promise that property ownership leads to ever greater opportunities—for wealth, income, and other rewards. This orientation elevates certain policy choices. For example, as some observers of American law and policy have noted approvingly,¹⁸⁸ the property-as-opportunity paradigm permeates regulatory support for transactions in credit and other opportunities to leverage assets such as one's home. The connotation is that the "right" to assume debt must be preserved as a means of leveraging opportunity.¹⁸⁹

Indeed, the hyperexpansive layering of securities and credit transactions on the residential real estate market is a reminder that the oldest and most traditional objects of property remain foundational as potential sources of market access at a time when scholars are increasingly announcing the ascendancy of various "modern" forms of property.¹⁹⁰ In this crisis, the humble single-family house—so venerated in our culture in contemporary suburban echo to the Jeffersonian tradition of the yeoman farmer and even older echo of the cultural power of land—turns out to be central to the entire global economy.¹⁹¹

This opportunity-enhancing viewpoint generates a corresponding stake in the infrastructural public/private debate. The role of both market and state in protecting property rights is to protect access to ownership opportunities, in the classically liberal or neoliberal sense of regulating in the event of market failure.¹⁹² As constitutional drafters in other parts of the world make markedly different choices about positive rights in recognition of explicit distributional objectives,¹⁹³ the American standard has remained reactive rather than prospective, incremental rather than all-inclusive.

Yet as the current crisis has deepened, it has exposed the drawbacks of conceptualizing property as the locus for primarily individual opportunity.

188. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

189. Indeed, in the globalizing trend toward increased rights to credit, the founder of the Grameen Bank, who recently won the Nobel Peace Prize, has repeatedly declared that "credit is a fundamental human right." See Randeep Ramesh, 'Credit Is a Basic Human Right,' *GUARDIAN WKLY.* (U.K.), Jan. 5, 2007, at 28.

190. See, e.g., Scott R. Cleere, *Intellectual Property: The Capital of the Information Age*, *ADVOCATE*, June 2005, at 10; Lee G. Meyer, *Intellectual Property in Today's Financing Market*, 19 *AM. BANKR. INST. J.*, Mar. 2000, at 20.

191. Perhaps the most obvious lesson for property scholars that the current crisis evinces is the tenacity of certain reflexive images of property in the private realm. It may be that our supposed service economy was, until the current crisis, increasingly creating wealth out of ever-more-creative financial structures, and it is certainly true that property now extends to even the most abstract and novel of creations. See, e.g., Joshua A. T. Fairfield, *Virtual Property*, 85 *B.U. L. REV.* 1047 (2005). Our point is not that traditional forms of property are on some pragmatic or normative metric more important than intellectual property or other emerging property types. It is instead an observation that, in an era in which intangibles and intellectual property dominate the discourse, this crisis reminds us that the most traditional forms of property—indeed, land—remain important.

192. See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 118–19 (2004).

193. In this regard, compare the South African Constitution with our own. *S. AFR. CONST.* 1996, ch. 2, § 25.

Given the extent to which the crisis has touched so many people's retirement accounts, savings, and investments—not to mention homes, jobs, and schools—the distributional consequences of crisis are difficult to ignore. It has also become clear that spreading opportunity widely can result in widespread pain and loss. The recent scholarly discussions of property as a tool of egalitarianism, “human flourishing,” and “development and dignity” provide a rich basis for elaborating alternatives to the negative-rights-focused orientation of property as opportunity.¹⁹⁴ Some of these conceptions view property law as the appropriate mechanism for elucidating a framework that recognizes “moral and political conceptions of just social relationships, just distribution, and democracy.”¹⁹⁵

Even while almost instinctively adhering to the negative image of “redistributionist,” the public discourse also has begun to contemplate the possibility that the government ought to prevent such losses from being suffered again. Indeed, the current administration's most recent initiatives suggest a serious deliberation over government's role in establishing a distributional baseline.¹⁹⁶

3. Security and Insecurity, Risk and Reward

A third, and closely related, tension in conceptions of property that the current crisis has put into stark relief is the role of property as a repository for investment, in the classic sense of either reward for labor or security of expectation.¹⁹⁷ The classical liberal emphasis on individual labor retains deep cultural relevance in the reflexive preference for market mechanisms that supposedly price risk accurately, and a corresponding conception of property as the locus of residual value.¹⁹⁸ The current crisis—and

194. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2009) [hereinafter Alexander et al., *A Statement of Progressive Property*]; see also Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

195. Alexander et al., *A Statement of Progressive Property*, *supra* note 194, at 743.

196. One undertaking of this Article is to complicate our understanding of the crisis by examining the connections between regulatory and market failures, on the one hand, and overreaching and downright naïveté by home buyers on the other. Thus it is important to look beyond explanations for the crisis that focus on distortions arising from bringing low-income borrowers into the market. See Korngold, *supra* note 11, at 728–29 (arguing against attempts to locate the cause of the current crisis in the Community Reinvestment Act). The problem was not only that low-income borrowers defaulted after interest rate resets, but a larger systemic failure of credit risk that was not isolated to the lower end of the market.

197. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.1 (7th ed. 2007). As Gregory Alexander has noted, the foundational modern economic account of property rights offered by Harold Demsetz “holds that property rights maximize aggregate social wealth by encouraging people to take into account the costs and benefits of how they use their property.” ALEXANDER, *supra* note 15, at 379–80 (discussing Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967)).

198. See, e.g., John Armour & Michael J. Whincop, *The Proprietary Foundations of Corporate Law*, 27 OXFORD J. LEGAL STUD. 429, 437–38 (2007) (discussing conceptions of property rights in which “‘Ownership’ is defined as the entitlement to exercise ‘residual rights of control’”).

particularly the scale and breadth of federal, state, and local interventions to respond to cascading market failures related to property—put real pressure on the idea that property is a neutral vessel to align risk and reward.

At a local level, one of the ironies of the current economic crisis is that the push to promote the *ur*-privatized vision of ownership and a culture that increasingly venerated reward for risk taking were in no small measure responsible for a global collapse. There are at least some documented benefits for ownership as a tenure model that can undergird our cultural preference for homeownership.¹⁹⁹ But there are countervailing costs, not the least of which include the real economic and psychological consequences of the *loss* of homeownership—costs that are becoming acutely understood in light of the current level of foreclosures.²⁰⁰

Moving from the veneration of homeownership to the other heart of the crisis, the financial sector, reveals an eerie parallel. A long arc of regulatory change in the past quarter century reduced monitoring and supervision of financial markets, justified ceaselessly by the argument that risk taking should be encouraged and rewarded. The consequence of this excessive risk taking in an era of privatized regulatory structures is that the nature of the underlying asset base is becoming increasingly seen as a bewildering failure—something of a global Ponzi scheme (or, perhaps now, a global Madoff scheme). Direct intervention thus becomes critical to shore up confidence in a number of arenas, often explicitly to avoid a psychological herd effect of cascading doubt.

One of the many reminders from this crisis of risk's unpredictability is the echo in the crisis-torn financial sector of Frank Michelman's anticommens as made real by Michael Heller's empty Moscow storefronts.²⁰¹ Securitization in the subprime sector entailed an acute level of decomposition of ownership in the classic sense, in which multiple owners were granted rights of exclusion, producing an atmosphere of instability, insecurity, and inability to exercise predictable and productive rights of use.²⁰² As was the case with Heller's anticommens, in this case of too much property, the interdependence of property rights resulted in an opaque decisionmaking structure and a failure to rescue property ownership from a downward spiral of insecurity.²⁰³

199. See, e.g., Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 *FORDHAM L. REV.* 949, 970–73 (2008).

200. See generally Lorna Fox O'Mahony, *Homeownership, Debt, and Default: The Affective Value of Home and the Challenge of Affordability*, in *AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS* 169 (Nestor M. Davidson & Robin Paul Malloy eds., 2009).

201. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621, 622–23 (1998); Frank I. Michelman, *Ethics, Economics and the Law of Property*, 24 *NOMOS* 3 (1982).

202. Heller, *supra* note 201, at 664–67.

203. See *id.* at 673. David A. Dana discusses some of the implications, including the impossibility of loan modifications, in his article, *The Foreclosure Crisis and the Anti-fragmentation Principle in State Property Law*, 77 *U. CHI. L. REV.* (forthcoming 2010), available at <http://ssrn.com/abstract=1415006>.

As a result, in complex global financial markets no less than in single-family housing, conceptions of the balance between risk and reward instantiated in property are being recalibrated to account for the reality of an active (if still unproven) safety net. Property's function as a font of security now more clearly highlights the centrality of the state in bolstering that very security. This is nothing new in our culture,²⁰⁴ but it is a stark aspect of the current crisis nonetheless.

4. Coercion Versus Cooperation

Finally, the current crisis also has brought tensions to the surface of American property law about what, exactly, the prescriptive role of the state should be when it does intervene. A striking example emerges from the government's partial nationalization of banks. While European social democracies have long been accustomed to the notion that government can legitimately serve to coordinate property rights and market relationships among private firms, such a notion is both foreign to most in this country and repugnant to many.²⁰⁵ In our putatively classic liberal market economy, the state's role is theoretically to protect the integrity of market interactions.²⁰⁶ State intervention beyond this point raises deep questions of legitimacy, dilution of competition, and the natural hierarchies that are popularly thought to flow from the rough-and-tumble world of the free market, even if such interventions occur with regularity.²⁰⁷

Fundamental in this conceptualization is the notion that private firms and individuals have the freedom to engage in a broad range of competitive behavior, with property rights serving as a source of freedom. This orientation of private firms vis-à-vis each other, the market, and the state creates an atmosphere in which state intervention in private structures of ownership is not only unwelcome, but a signal of abnormal, troubled times.

Against that conceptual baseline, the acquisition of property rights by the state seems coercive rather than collaborative, aggressive rather than supportive. Nonetheless, partial or complete nationalization sends a message that the state has been required to settle affairs and relationships that private firms can no longer manage.²⁰⁸ Indeed, the primary purpose of state ownership rights may be the signaling effect. After all, the government at first proceeded by taking preferred stock in these private entities, that is, stock with no voting rights and arguably more analogous to debt than to equity.²⁰⁹ And even these moves towards public ownership

204. See *supra* Part I.C.

205. Compare VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 6–66 (Peter A. Hall & David Soskice eds., 2001) with the recent quotations from Henry Paulson and other top officials, see, e.g., text accompanying note 77.

206. See VARIETIES OF CAPITALISM, *supra* note 205, at 49, 251.

207. See *id.* at 8, 251.

208. We thank Lorna Fox O'Mahony for supplying the (for her, from the British context) familiar adage “capitalized profit, socialized loss” to the American crisis.

209. Such a move may also have been influenced by federal regulations governing the adequacy of capital maintained by national banks. See 12 C.F.R. pt. 3, app. A (2009). The

were tentative.²¹⁰ Still, as the crisis deepened, federal officials began considering converting government stock in Citigroup and other banks to common stock, suggesting a more particularized interest—especially when considered in conjunction with the new “stress test”—in coordination.²¹¹

Moreover, against this backdrop of unwelcome coercion, the particular regulations accompanying partial nationalization have generated a novel image of property—that of property as an instrument of punishment. It is no accident that the first major limitation the government imposed after taking preferred stock in certain lenders was to cap executive compensation paid out by those lenders.²¹² Although there may be excellent reasons to limit executive compensation and require other concessions in exchange for state investment, in the context of crisis, they take on an undertone of sanction rather than regulation. Thus, in an economic age dominated by massive, multinational firms, criminal law’s vocabulary of fines and probation appear far less potent than property law’s vocabulary of punishment by means of transferring ownership. And so, in response to the public outcry against corporate misbehavior, the government chose ownership as a means of retribution.

B. *Property as an Influence on Regulatory Design in Times of Crisis*

If this crisis is deeply revealing about property norms in our contemporary culture, norms of property have equally been an active force in regulatory design during this particular time of crisis. Given the origination of the crisis in the housing market, it makes sense that the government’s response to the mortgage meltdown would be property focused. However, as this section argues, the governmental response to the

government’s cap on executive compensation belies the merely rhetorical nature of the government’s ownership interest, however, as does the recent move to convert some preferred stock to common stock.

210. In the face of widespread public distrust, temporary state ownership allowed the Treasury, Federal Reserve, and other bank regulators to announce that the “U.S. government stands firmly behind the banking system during this period of financial strain to ensure it will be able to perform its key function of providing credit to households and businesses.” Press Release, U.S. Dep’t of the Treasury, Joint Statement by the Treasury, FDIC, OCC, OTS and the Federal Reserve (Feb. 23, 2009), <http://www.ustreas.gov/press/releases/tg38.htm>. Emphasizing the temporary nature of this coordinating role, the press release ended with the following statement: “Because our economy functions better when financial institutions are well managed in the private sector, the strong presumption of the Capital Assistance Program is that banks should remain in private hands.” *Id.*

211. David Enrich & Monica Langley, *U.S. Eyes Large Stake in Citi: Taxpayers Could Own up to 40% of Bank’s Common Stock, Diluting Value of Shares*, WALL ST. J., Feb. 23, 2009, at A1.

212. Paula Cruickshank, *Treasury Issues New Restrictions on Executive Compensation Paid by Financial Institutions*, CCH FIN. CRISIS NEWS CENTER, Feb. 4, 2009, <http://www.financialcrisisupdate.com/2009/02/treasury-issues-new-restrictions-on-executive-compensation-paid-by-financial-institutions.html>. The Obama Administration’s stress test for banks has similar connotations of punitive effect. See *supra* notes 149–50 and accompanying text.

broader financial crisis is more surprising in its almost single-minded engagement with property.

This section tracks the construction of property norms into a set of regulatory responses, and, in doing so, it overlays the normative tensions outlined in the previous section onto the regulatory framework that has developed thus far. The central insight gained from this exercise is that decidedly different property norms have guided regulatory design at different levels. On the one hand, regulatory responses to the subprime mortgage meltdown, where we might expect to see the most far-reaching and permanent reforms, reactively preserved a core vision of property as creating ownership opportunities at all levels of market participation in anticipation of incentivizing industry-driven market correction. Regulation at the core thus adopted wholesale the “steady-state” property norms that prevail during times of relatively stable equilibrium, embodying the relatively more isolationist, opportunity-oriented, risk-rewarding view of ownership. In particular, the regulatory adoption of these norms dictated choosing the least radical solutions that protected existing property institutions.

On the other hand, in the response to failures in wider financial markets, property has arguably liberated regulatory intervention. At this level, regulators adopted the property norms that come to the fore in times of crisis, including a more interconnected, distribution-protective, stability-oriented, and coordinated view of property. The regulatory choice of new norms at this level of crisis response resulted in a new role for government as a coercive owner of property that had previously been perceived as inaccessibly private.

Considered as a whole, the property story that emerges from the response to this crisis is a distinctive narrative of simultaneous constraint and liberation. It is a particular version of the age-old debate between public and private, in which large-scale rhetoric and massive public intervention combine to restore and protect private rights of ownership. It is a unique lesson about federalism, emphasizing the federal government’s role in coordinating a response to a global economic crisis as imposing as any military threat. And thus far it is a discourse on the resolute adherence to the market’s integrity, undergirded by certain measures of last resort, in staving off future global crises.

1. Property’s Influence in the Response to the Subprime Mortgage Crisis

Given the enormity, immediacy, and centrality of the subprime meltdown, it would be reasonable to expect a regulatory response targeting the meltdown quite specifically. From the popular discourse surrounding the passage of HERA, to the early and excitable media attention to the subprime meltdown, to Treasury Secretary Paulson’s initial instinct to use bailout funds to buy toxic debt, the nation diagnosed the cause of this

financial crisis as originating in the residential real estate markets.²¹³ Yet early regulation at the core of the crisis was decidedly understated. Perhaps the global economy could not have been calmed by a response within the real estate markets alone.²¹⁴ But in this section, we argue that property-focused ideology also shaped the pursuit and cultivation of solutions.

Consider HERA, the federal government's initial regulatory response to the mortgage meltdown. At the rhetorical level, the title of this statute speaks volumes in its focus on housing as the stabilizer of markets and the originator of economic recovery.²¹⁵ Unquestionably, HERA was much more interventionist than its statutory predecessors, which had been passed when market failure was occurring in more limited segments of the real estate markets. Most conspicuously, both the legislative and executive branches began to question the primacy of contract principles, which had served as the mainstay for the regulatory focus on guidance about predatory behavior, disclosures to consumers, and even incentive-based tax supports.

But neither HERA nor the other early responses to the meltdown sought to renegotiate steady-state property norms supporting the protection of ownership. Thanks in part to the voluntary nature of the refinancing program, which is the remedy most directly targeting homeowners, the statute's primary impact appears to have been rhetorical. Very few refinancings under the statute have actually occurred.²¹⁶ Moreover, of the range of possible choices, HERA's two regulatory targets, lenders and the government-sponsored entities, historically have been the most regulated and, not coincidentally, the least associated with traditional rights of ownership. In all but a few jurisdictions, lenders' interests as mortgagees are technically "security" interests, rather than "ownership" interests.²¹⁷

213. It was not until February 2009 that regulators reverted to the plan to buy up toxic debt and also established a more comprehensive foreclosure prevention program. See Bebuchuk, *supra* note 132, at 344.

214. The consistent prescriptive focus on the real estate markets by Professors Nesvetailova and Wray, both applying Hyman Minsky's scholarship, intriguingly counters this view. Nesvetailova, *supra* note 80, at 21–23; Wray, *supra* note 88, at 61–65.

215. The same is true of the rhetoric surrounding the bill's passage, which portrayed the protection of homeownership as the linchpin to overcoming the crisis. For example, the U.S. Department of Housing and Urban Development's (HUD) website included the following:

“Q: Will this law be a bailout for speculators, homeowners, investors, and lenders?”

A: No. It is narrowly tailored to keep families in their homes.”

Press Release, U.S. Dep't of Hous. & Urban Dev., Housing and Economic Recovery Act of 2008 FAQ (Aug. 5, 2008), <http://www.hud.gov/news/recoveryactfaq.cfm>. And according to the House Committee on Financial Services,

H.R. 3221, the Housing and Economic Recovery Act of 2008, represents the most comprehensive response yet to the American mortgage crisis, and will help families facing foreclosure keep their homes, help other families avoid foreclosures in the future, and help the recovery of communities harmed by empty homes caught in the foreclosure process.

House Committee on Financial Services, Housing and Economic Recovery Act of 2008, <http://financialservices.house.gov/FHA.html> (last visited Feb. 5, 2010).

216. See *supra* notes 139–40 and accompanying text.

217. In title theory jurisdictions, the lender technically retains fee title to the collateral, giving the lender the right of possession, but most title states nonetheless treat the lender's

Until quite recently, when lenders' security interests were up against mortgagors' ownership of their homes, the law protected the latter.²¹⁸ HERA's refinancing program is thus not a new frontier so much as a return to principles established over centuries of mortgagor protection.²¹⁹ Particularly in light of this and other limitations on the FHA refinancing programs, the property story that emerges from HERA's provisions is extravagant steady-state rhetoric about ownership as a cure-all, combined with a restrained regulatory balancing of ownership opportunities.²²⁰

President Obama's HASP seems to attempt to convert HERA's rhetoric to tangible protections for homeowners, most conspicuously by mandating some of the protections that HERA merely incentivized. Viewed as a property story, however, the program is consistent with HERA in protecting ownership, if a bit more emphatically. The image of homeownership as an important means of individual wealth accumulation, as well as economic stimulus, pervades this program. As in HERA, homeownership protections are balanced against attempts to rejuvenate the government-sponsored entities and, thus, the secondary market. Also consistent here is the reliance on credit—refinancing and loan modification—as a stabilizing force. Ubiquitous in this effort, as in HERA, is the explicitly temporary and reactive approach to market correction. The primary if not exclusive goal of both programs is to restore the housing market to a state of normality. Taken as a whole, the regulatory focus on property as ownership may certainly be defensible; but it is hard to imagine that it could have been accidental.

By no means were these the only available regulatory choices, nor was this the only possible property story. For quite some time, consumer advocates and others had been pressing for a range of other regulatory options, some of which had been widely adopted by states prior to the deregulation of the banking industry. For example, usury caps had been the norm²²¹ prior to their preemption by the Depository Institutions

interest simply as a security interest. See Ann M. Burkhart, *Lenders and Land*, 64 MO. L. REV. 249, 267–70 (1999).

218. Rashmi Dyal-Chand, *From Status to Contract: Evolving Paradigms for Regulating Consumer Credit*, 73 TENN. L. REV. 303, 307–16 (2006).

219. And even at that, the refinancing program is voluntary and incentive based. The other prominent regulatory move in HERA was the special oversight of Fannie Mae and Freddie Mac, two entities that were created by the government and have always been regulated heavily. Even the temporary moratorium on foreclosures by Fannie Mae and Freddie Mac was only on debt securitized by Fannie Mae, leaving private owners of mortgage-backed securities in the secondary market still essentially unregulated.

220. The refinancing program, licensing requirements, and monitoring of capitalization levels evince a cautious regulatory interest in protecting homeownership. Also evident, particularly in the reforms aimed at the government-sponsored entities, is a clear interest in protecting the ownership interests in the secondary market for mortgage-backed securities. The limitations in the provisions aimed at protecting homeowners reveal the balancing of lenders' and investors' property interests.

221. Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 526 (2004).

Deregulation and Monetary Control Act of 1980.²²² Both in response to predatory lending and to the subprime meltdown, a number of advocates urged the adoption of suitability requirements similar to those imposed on the sale of securities.²²³ And the widespread fraud in the brokerage industries has led some recently to propose fiduciary duty requirements on real estate and mortgage brokers.²²⁴

But, aside from being more prospective in orientation, each of these reforms would limit access to credit and, ultimately, to homeownership. For example, homeowners currently have almost unlimited opportunities to obtain credit using their home equity as collateral. Suitability requirements would change this expectation by requiring much more careful review of borrowers' ability to repay loans, particularly those with exotic terms, thereby exempting some borrowers from the market both for purchase money and home equity loans.²²⁵ The imposition of fiduciary duties on brokers, if it had the intended effect, would lead brokers to provide information about risk that might convince borrowers not to borrow. Studies on usury caps long ago documented the tightened availability of credit.²²⁶ One consequence would be that fewer low-income and marginalized borrowers could buy homes. Another consequence would be that equity in homes already owned would more likely be protected in its illiquid form.

Similarly, limitations on the holder-in-due-course doctrine would contract the secondary market. Investors would be unwilling to buy securities backed by mortgages with higher risks of default. Lenders would be less likely to make loans with exotic terms if they could not sell such loans on the secondary market. Fewer buyers would enter the secondary market. Ultimately, less capital would flow to the primary market for mortgages.²²⁷

222. Pub. L. No. 96-221, § 501, 94 Stat. 132, 161 (codified as amended at 12 U.S.C. § 1735f-7(a) (2006)).

223. See, e.g., Engel & McCoy, *supra* note 84, at 1317-66; Alvin C. Harrell, *Commentary: The Subprime Lending Crisis—The Perfect Credit Storm?*, 61 CONSUMER FIN. L.Q. REP. 626, 631 (2007).

224. See, e.g., KEITH ERNST ET AL., CTR. FOR RESPONSIBLE LENDING, STEERED WRONG: BROKERS, BORROWERS, AND SUBPRIME LOANS 35-36 (2008), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/steered-wrong-brokers-borrowers-and-subprime-loans.pdf>.

225. See Harrell, *supra* note 223, at 630-31.

226. See, e.g., William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1107-09 (1984); see also Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 476, 573-75 (2000) (advocating against usury deregulation).

227. For a summary of traditional arguments supporting the holder-in-due-course doctrine, see generally Gregory E. Maggs, *The Holder in Due Course Doctrine as a Default Rule*, 32 GA. L. REV. 783 (1998). For an argument that it results in only a minor reduction in credit availability, see William H. Lawrence & John H. Minan, *The Effect of Abrogating the Holder-in-Due-Course Doctrine on the Commercialization of Innovative Consumer Products*, 64 B.U. L. REV. 325, 338-40 (1984).

Like HERA and HASP, most of these alternative frames for regulating both the primary and secondary mortgage markets center on the protection of a fairly conventional vision of ownership rights. But unlike recent regulatory programs, including the February 2009 stimulus bill, which uphold the tradition of expanding the circle of ownership to new homeowners, these alternative property norms would limit access to ownership in order to safeguard ownership by those who have already attained it. In other words, these regulations would focus on preserving the equity in owned homes rather than on increasing liquidity. Some of these moves would also fail to recognize the new owners in the increasingly global circle of ownership, the secondary-market investors.

In short, the government's response thus far to the crisis at the level of primary mortgage markets has been constructed emphatically on the steady-state vision of property. Property manifests as a negative right of access to credit and ownership opportunities. It serves as a powerful tool of wealth accumulation. Even under more recent interventions, refinancing of debt (for the purpose of restoring opportunity) takes primacy over foreclosure relief. The latter would be a more obvious means of establishing a distributional baseline. Importantly in this property story, strident rhetoric about the dignity, primacy, and social worth of ownership underpin regulatory reaction and incrementalism. The Blackstonian traces in this view of property are not limited to notions of privacy, dominion, and access to markets. Implicit in this property story is a discomfort with sudden change and indeed with regulation. In response to failures in disclosure and incentive-based regimes, this conception of property proposes more enticing incentives—refinancing rather than reductions in debt through “cram-downs.” The assumption is thus that incentives will inspire responsible behavior.

At this level of regulatory intervention, property also symbolizes risk taking rather than mere subsistence or even security. Property is a tool of individual choice. At bottom, property signifies access to the free market, and indeed to freedom itself. In this property story, the isolationist vision of property materializes as an obsession with privacy. Thanks to industry innovations, FICO scores now substitute for face-to-face meetings with loan officers.²²⁸ Little or no documentation is required to obtain a loan. Contracts, in lieu of intrusive regulation, govern rights in private relationships.

Finally, this incrementalist vision carries with it the sense that the current crisis is an anomaly rather than a foreseeable event that could happen again. The regulatory response has not been reactive only because of the unpredictability of the crisis. It has also been reactive because regulators have assumed that at the local level, the market does not need a more

228. See Wray, *supra* note 88, at 48.

permanent form of correction or coordination. This is an inherently noninterventionist vision.²²⁹

Thus, at the epicenter of the crisis, in the response to the subprime meltdown, the steady-state vision of property constrained regulators from deconstructing rights of access and ownership that had accumulated at all levels of market participation. The immediacy and enormity of the crisis required a relatively far-reaching regulatory response. Against the background of a restrained core vision of property, regulators defined “far-reaching” as the opportunity to recalculate and assign risk. Aside from the need for far-reaching impact, political expedience also required a firm regulatory response to the pervasive inattention, speculative behavior, and outright fraud manifest in the mortgage market, with its onerous effects on certain categories of consumers. But here again, the regulatory focus was on fraud rather than on more diffuse speculation, on licensing rather than on regulating excessive profit. The former type of regulation was reactive; the latter would require more prospective intervention. This was a vision of property law wearing its nuisance hat: an attempt to remedy a noxious result of a previously (and presumptively imminent) socially beneficial use.

2. Property’s Influence in the Response to Financial-Market Failures

In contrast to the restrained property story emanating from the government’s response to failures in the primary mortgage market, property’s influence in the response to broader financial market failures is a story with much more regulatory heft. At the forefront, in dollars, commentary, and press, was the Treasury Department’s decision to take equity stakes in private firms. Regulation in the face of the understandably pervasive sense of distrust in private decision making by financial firms took the form of a counterbalancing governmental *ownership* interest. It is as though some conceptual barrier remained that made equity different in a foundational way from the combination of regulation, insurance, and indirect subsidies that had preceded it. In its use of TARP funds, the federal government pointedly thrust aside traditional protections buttressing private ownership—at least on a temporary basis. It deliberately chose to disrupt the august vision in liberal economies of corporations as bastions of private ownership, contracts, relationships, and risk taking.²³⁰ Perhaps it

229. As discussed below, the state’s response to financial market failures has carried with it more open consideration of significant change in the regulation of financial and other markets. See *infra* Part III.C.

230. See, e.g., Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); see also *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 690 (5th Cir. 1985) (“Under the doctrine of limited liability, the owner of a corporation is not liable for the corporation’s debts. Creditors of the corporation have recourse only against the corporation itself, not against its parent company or shareholders. It is on this assumption that ‘large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.’” (quoting *Anderson v. Abbott*, 321 U.S. 349, 362 (1944)))

did so because, at that point in the unraveling global economy, no new entrants were available to join the circle of ownership. The only imperative was to increase liquidity by any means possible. Even so, as extensive experience with financial crises in other parts of the world shows, means other than equity ownership were available.²³¹

Even the limited equity ownership taken by the federal government is, in contemporary American terms, a relatively radical move. To those who had come of age in the past quarter century, it can be breathtaking to hear or read commentary on the need to “nationalize,” “own,” or “take control” of private banks.²³² After decades in which the institution of property had served as a principal means of drawing clear definitional lines between liberal and social democracies, liberal and coordinated market economies, neoliberalism and welfarism,²³³ suddenly it seemed that this very same institution was functioning to blur those lines.

If only at the level of rhetoric, this move crossed important property boundaries, not least of all between public and private. It was a move that was grounded explicitly in a set of property norms that punctuated the equilibrium of the preceding decades. It may be inaccurate to say, as some commentators have, that “we’re all Keynesians now.”²³⁴ But the admittedly lurching response of the Treasury, the Federal Reserve, and the Federal Housing Finance Agency seem to be generating increasing comfort with both direct state investment in private entities and with exercising broad powers to nationalize specific companies or entities seen as critical to the underlying structure of financial markets and the economy. It is striking that as Fannie Mae, Freddie Mac, and potentially significant portions of the banking industry come into forms of public ownership, there have been no

(citing *Baker v. Raymond Int’l*, 656 F.2d 173, 179 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982))).

231. For one discussion of various options, see Anna Gelpern, *Systemic Corporate and Bank Restructuring in Financial Crisis*, 34 INT’L LAW. 223 (2000).

232. Edmund L. Andrews & Mark Landler, *White House Overhauling Rescue Plan for Economy: As World Leaders Meet, New Emphasis on Direct Capital Infusions for Banks*, N.Y. TIMES, Oct. 12, 2008, at A1 (“As recently as late September, the idea of letting the government buy part of the banking system had been unthinkable in the Bush administration. To many officials, such intervention seemed like a European-style government intrusion in the markets.”); Matthew Richardson & Nouriel Roubini, *How Swede It Is: To Shore Up the Banks, Nationalize Them*, WASH. POST, Feb. 15, 2009, at B3 (“The U.S. banking system is close to being insolvent, and unless we want to become like Japan in the 1990s—or the United States in the 1930s—the only way to save it is to nationalize it.”); Gerald F. Seib, *Split over Big Government Persists*, WALL ST. J., Feb. 24, 2009, at A2 (“The Treasury Department is confronting a once-unthinkable decision over whether to nationalize big American banks. It’s clear the Obama administration doesn’t want to take that step, even though the British government is heading in precisely that direction, and some analysts think some form of nationalization here is inevitable.”).

233. See, e.g., COMPARING WELFARE CAPITALISM: SOCIAL POLICY AND POLITICAL ECONOMY IN EUROPE, JAPAN AND THE USA (Bernhard Ebbinghaus & Philip Manow eds., 2001); Isabela Mares, *Firms and the Welfare State: When, Why, and How Does Social Policy Matter to Employers?*, in VARIETIES OF CAPITALISM, *supra* note 205, at 184.

234. This was actually a quotation from Richard Nixon, made in 1971. See Editorial, *We’re All Keynesians Now*, WALL ST. J., Jan. 18, 2008, at A12.

modern *Steel Seizure* cases,²³⁵ or even much popular outcry. In the immediate aftermath, companies deemed “too large to fail” seemed to be lining up for similar intervention, beginning with General Motors and Chrysler. The pendulum has already begun to swing back again, with companies starting to reduce their dependence on federal aid, but at an institutional level, this wave of state control is at least putting some pressure on conceptions of property rights feeding opportunity, risk, and reward that vilify the role of the state in creating the conditions under which individual entrepreneurship can take place.²³⁶

The gravity of the crisis notwithstanding, the choice to regulate by taking equity stakes was again just one choice among a number. Nationalization could be more substantively interventionist, as it has been in some European countries.²³⁷ Such a move would certainly cross even more property boundaries. By contrast, much of what partial nationalization accomplished could have been done in the form of “mere” regulation—of corporate behavior, for example. In a similar vein, funds could have been transferred in the form of outright loans rather than equity investments. These options would have resonated in property to a far lesser extent.

It is unclear whether the regulatory reliance on property felt like a choice to those involved, or something like the least radical among only radical options. Undeniably, regulation that overtly used the vocabulary of either socialization or welfare would have received a more negative public response than that of ownership. In the face of public outrage, it may have been imperative to displace the autonomy of private firms with a level of coercion. It was an acknowledgement that aid to these firms was inappropriate without some corresponding amount of control. It was also a signpost of the collective willingness to suspend our traditional norms as the crisis deepened and broadened.

Underpinning the response to the broader economic crisis, then, is an emergent property story grounded in “crisis” norms rather than in the steady-state norms that have so prominently constrained regulation of the subprime meltdown. In this property story, the idea of property as relational is dominant. Regulation of the financial markets in this crisis may for generations be the paradigmatic example of the Legal Realists’ claim that property exists to serve relationships.²³⁸ The globalized ripple effects from the subprime meltdown forced a set of regulatory responses

235. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952) (limiting the power of the President to seize private property during times of emergency).

236. On the other hand, there was something oddly consistent about the post-*Kelo* public outcry and the public’s response to nationalization in the shadow of global crisis. Both responses were grounded in a particular vision of the power, perhaps even sacredness, of property, however contested in crisis.

237. See *supra* notes 142–44 and accompanying text.

238. See generally JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); Cohen, *supra* note 68; Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

that strongly refuted Blackstonian absolutism: property rights had to be limited to protect the property rights of others.

Although property retained its rhetorical connection with power, here the power was public, collective, and even coercive in its effect. It was public both because the government's involvement included the increasingly meaningful right to control and because of the transparency of the Treasury's actions. Press releases accompanied purchases of preferred stock.²³⁹ Rather than serving as a tool of individual opportunity, property ownership in this response became a means of collective action against the broad distributional consequences of unrestrained private behavior.²⁴⁰

In these aspects of the regulatory response, the image of property as a set of duties, not just rights, has come to the fore. In this sense, nationalization recognizes that the assets at stake included pensions, homes, and savings accounts. This was a moment of stabilizing, indeed even subsistence, rather than risk taking. And at this level, even if only briefly, property served as the basis for some kind of a positive right. In an extraordinary inversion of prevailing property norms, property ownership served briefly as a locus for efforts to achieve stability, more in the nature of a safety net than a risk enabler, within the free market.

Finally, implicit in this emergent property story is a reliance (however uncomfortable) on regulation. In contrast to responses targeted at preserving homeownership, this was not an incentive program to promote more accurate assessment of risk. It was a moment of punctuated equilibrium—a large-scale “cram-down” of sorts to mandate responsible behavior. It was the seizure of temporary governmental control for the purpose of managing risk. Governmental involvement conceded both the need for coordinated action at times of economic crisis and the reverberating public consequences of private, corporate decision making. It is in this respect that property's drift toward the coordination among firms in more socialized economies is most apparent.²⁴¹ Moreover, in this vision of property as public, property was used as a tool of coercing appropriate behavior. The nation relied on property's potential to punish and deter deviant behavior by banks, financial firms, the auto industry, and others. It was, in sum, a more radical vision of property.

Perhaps unpredictably, in the outer reaches of the crisis, the imperative to act appears to have driven interpretations of property that challenge an apparent recent hardening of the individualized, classical liberal vision. At

239. See, e.g., Press Release, U.S. Dep't of the Treasury, Treasury Announces TARP Investment in GMAC (Dec. 29, 2008), <http://www.treas.gov/press/releases/hp1335.htm>; Press Release, Bd. of Governors of the Fed. Reserve Sys., FDIC & U.S. Dep't of the Treasury, Joint Statement by Treasury, Federal Reserve, and the FDIC on Citigroup (Nov. 23, 2008), <http://www.federalreserve.gov/newsevents/press/bcreg/20081123a.htm>.

240. See, e.g., Peter S. Goodman, *Chilly Review from Experts*, N.Y. TIMES, Sept. 23, 2008, at A1 (“‘It absolutely has to be punitive,’ Mr. Baker said. ‘If they sell us the junk, then we own the company.’” (quoting Dean Baker, Co-director, Center for Economic and Policy Research)).

241. See *supra* notes 205–07 and accompanying text.

this stage in the crisis, at the level of globalized losses, regulators employed a very different core vision of property by defining “far-reaching” regulation as a top-down intervention in the industry most connected to the problem of escalating illiquidity. It was as if the prospect of a global economic shutdown was equivalent to a military threat or a constitutional crisis.²⁴² Nor could the responsibility for acting be shared with the states. National coordination was required, as was unified and decisive action. The federal government’s authority in the face of such a crisis was incontestable.

3. Normative Tensions in Property’s Influence

The fact that different property norms guided regulation at different levels of crisis response creates stark inconsistencies. Property theorists have long recognized the extensive historical provenance of these tensions, divides that are arguably foundational to the very institution of property. It is a truism that property is not absolute, although this crisis has made that fact more widely accessible. But the coexistence of property as freedom, and property as (not just duty, but also) coercion and even punishment, is more contemporary and discomfiting. Moreover, it seems less obvious, after this crisis, what the tipping point is between property as enabler of risk and property as stabilizing force. And it is reasonable to wonder how glibly a bright line between liberalism and welfarism could be redrawn after witnessing the roles property has recently played.

But in addition to the unswervingly strong ownership rhetoric, there has been another crucial consistency in property’s role in all aspects of the state’s response: underlying the regulatory interventions was the expectation that such interventions were merely reactive and temporary. In seeking to remedy homeownership failures, the chief provisions in both HERA and HASP were explicitly short-term.²⁴³ In attempting to stabilize the financial markets, federal officials have repeatedly described TARP, government-backed guarantees, and, of course, nationalization as “temporary.”²⁴⁴ Even President Obama’s stabilization initiatives and his

242. In this respect, the experiences of governments in other parts of the world facing civil unrest as a result of economic crisis may have seemed too fresh and looming to permit a restrained response.

243. *See supra* notes 124–27, 152–54 and accompanying text.

244. *See, e.g.*, U.S. DEP’T OF THE TREASURY, TREASURY WHITE PAPER: THE CAPITAL ASSISTANCE PROGRAM AND ITS ROLE IN THE FINANCIAL STABILITY PLAN 3, available at http://www.treas.gov/press/releases/reports/tg40_capwhitepaper.pdf (“U.S. government ownership is not an objective of CAP. However, to the extent that significant government stake in a financial institution is an outcome of the program, our goal will be to keep the period of government ownership as temporary as possible and encourage the return of private capital to replace government investment.”); Henry M. Paulson, Jr., U.S. Treasury Sec’y, Remarks on the Role of the GSEs in Supporting the Housing Recovery Before the Economic Club of Washington (Jan. 7, 2009), <http://www.treas.gov/press/releases/hp1345.htm> (“This conservatorship, with the explicit backing of the federal government, is temporary and must be resolved for the long-term.”); Press Release, U.S. Dep’t of the Treasury, Joint Statement by Secretary of the Treasury Timothy F. Geithner,

commitment to new “rules of the road”²⁴⁵ do not evidence the more permanent reallocation of responsibilities and control evident in many European countries. Indeed, the particular focus of the response on financial institutions, liquidity, and stabilization of markets serves precisely the steady-state property story of ownership and access.²⁴⁶ For example, current congressional interest in a systemic risk regulator of last resort reveals a clear reluctance to regulate except reactively, when all else fails.²⁴⁷ This is not to advocate any particular policy response, but rather to note that even in the depth of crisis, a rhetoric of market functioning, even with renewed oversight, has been invoked to preserve a sphere of traditional ownership and reward for risk.

C. *What the Fire This Time Reveals*

At this juncture, it is appropriate to widen our perspective to understand what this crisis reveals—and similar moments of punctuated equilibrium historically have revealed—for the development of property law more broadly. Given that federal, state, and local responses to the crisis continue to unfold, it is too early to get a clear sense of where the current crisis will leave ground-level property law. But some aspects of the crisis and response may well have lasting effect. Certainly, in the short run, it appears clear that access to credit will be more tightly constrained in a consumer-protection mode,²⁴⁸ and market regulation in a number of contexts will be approached with less reflexive hostility.²⁴⁹ It is also possible that the recent seeming ascendancy of the property rights movement may lose some momentum. The movement’s unceasing hostility to communal necessity loses rhetorical force in light of the felt necessity for an active state role.

Chairman of the Board of Governors of the Federal Reserve System Ben S. Bernanke, Chairman of the Federal Deposit Insurance Corporation Sheila Bair, Comptroller of the Currency John C. Dugan, and Director of the Office of Thrift Supervision John M. Reich—Financial Stability Plan (Feb. 10, 2009), <http://www.treas.gov/press/releases/tg21.htm>.

245. See Press Release, U.S. Dep’t of the Treasury, Treasury Outlines Framework for Regulatory Reform: Provides New Rules of the Road, Focuses First on Containing Systemic Risk (Mar. 26, 2009), <http://www.treas.gov/press/releases/tg72.htm>.

246. Curiously enough, these extraordinary measures, which have been invoked to rescue companies that are “too big to fail,” have also functioned to avoid some of the basic consequences—such as bankruptcies—that it is reasonable to expect of property ownership.

247. Sarah Borchersen-Keto, *Frank Says Systemic Risk Regulator Biggest Near-Term Priority*, CCH FIN. CRISIS NEWS CENTER, Feb. 3, 2009, <http://www.financialcrisisupdate.com/2009/02/frank-says-systemic-risk-regulator-biggest-near-term-priority.html>.

248. See *supra* notes 221–25 and accompanying text.

249. See, e.g., Arthur E. Wilmarth, Jr., *Cuomo v. Clearing House: The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection*, in *THE PANIC OF 2008: CAUSES, CONSEQUENCES AND IMPLICATIONS FOR REFORM* (Lawrence E. Mitchell & Arthur E. Wilmarth, Jr., eds., forthcoming 2010) (describing a recent U.S. Supreme Court case in which the Court limited the preemptive reach of the Office of the Comptroller of the Currency, thereby freeing the state attorney general to seek judicial enforcement of state fair lending laws against national banks); Robert C. Hockett, *A Fixer-Upper for Finance* (Mar. 23, 2009) (unpublished article), available at <http://ssrn.com/abstract=1367278>.

Any serious attempt at alleviating this crisis will require the industry and its regulators to reexamine some of their most basic assumptions about property as they seek to rebuild the markets engendered by it. In addition to highlighting the centrality of land valuation, the crisis has made clear that individual loan terms matter a great deal, as do the roles of intermediaries and even real estate brokers in predicting and valuing risk. It also appears that foreclosure laws and processes are no longer in sync with the complex balance of ownership generated by securitization. At some level, adaptation must occur. We are, accordingly, likely to see changes in a number of areas of mortgage law, including pressure to allow the modification of mortgage debts in bankruptcy,²⁵⁰ possible changes to the holder-in-due-course doctrine for negotiable instruments,²⁵¹ reevaluation of the tools of standardization,²⁵² reforms to foreclosure proceedings,²⁵³ and other changes.

These doctrinal developments are important, to be sure. This crisis, however, is likely to be more significant for what it will highlight in terms of contested conceptions of property. As we have argued, our current property moment underscores the unity of property on several dimensions, giving cultural heft to interconnected, ecological visions of property. Property, moreover, retains surprisingly significant cultural force even in the face of potential social and economic dislocation that calls into question any valorized image of individual ownership. And property in crisis has a tendency to remind people that, although rife with its own imperfections, the state is indispensable when the social costs of existing property arrangements spread.

Indeed, the insecurity of property that the current crisis has brought to the foreground has generated reflexive fears as retirement savings evaporate (in an era in which privatization has become the predominant model of retirement security) and trillions of dollars of wealth appear to evaporate.²⁵⁴ This raises an important point about the broader popular resonance of the current crisis: perhaps temporarily, as with so many cultural valences around property, our culture may come to recognize that state action that seems to cut deeply into traditional notions of property can be as stabilizing

250. See Levitin, *supra* note 11.

251. See *supra* note 227 and accompanying text.

252. See Dana, *supra* note 203 (proposing new procedures for modifying mortgage loans); Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securities*, 82 S. CAL. L. REV. 1075 (2009) (discussing strategies for overcoming rigidity in pooling and servicing agreements); Korngold, *supra* note 11, at 741–46 (discussing the Mortgage Electronic Registration System (MERS), which tracks and processes the ownership and transfer of mortgages, a system that is coming into question in the current crisis).

253. Consider Melissa Jacoby's recommendations on mortgage delinquency management. Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2278–95 (2008).

254. Not literally, of course, as market valuation is merely a representation of how a willing seller and willing buyer *might* price an asset at any given time, and a drop in the stock market does not represent a literal loss in any resource value.

as state inaction (or at least less visible action). One of the more influential concerns articulated about the state's role in property rights is Michelman's idea that certain types of state action give rise to what he described as "demoralization costs."²⁵⁵ These costs derive from the uncertainty and disaffection that people feel when faced with interference with their expectations about their entitlements.²⁵⁶ His idea has been invoked to justify minimalism in how the state approaches the terms of ownership²⁵⁷ and has added a powerful undergirding for the long-standing argument that stability of expectation is a paramount virtue for any property system.²⁵⁸

Although the idea that people suffer a species of demoralization when the state alters their property rights continues to resonate, we rarely pause to consider the power of the state to have the opposite effect—in some sense, to buck up our collective "morale" when widespread risk taking with respect to basic assets fails. The current economic crisis, with its multitrillion dollar interventions into financial, housing, and other markets, provides an apt moment to do so.

What the crisis may reveal, then, is that stability may be important for property, less because individual expectation must always be paramount, but rather because it falls at times to the state to backstop and mitigate what would be harshest about a system that venerates individual expectation—and risk taking and reward—above all else. In many ways, a central thrust of the current response is aimed as much at the psychology of the market as it is at the underlying economic fundamentals. In this respect, it sends a strong signal about the unique power of the state to rectify broadscale collapse. If the state is often seen as a threat to individual liberty—with property standing as a bulwark against arbitrary action—then the ability of the state to respond to crisis can act as a perennial reminder of the opposite proposition.

Normatively, this may lead to a greater willingness to embrace an ethic of mutual responsibility around property.²⁵⁹ If property retains its greatest cultural force as a bulwark against the state in the classical liberal vision or a residuum of exclusion in the modern economic/utilitarian version of that conception, then regulation is suspect as a default. Thus, if the prevailing conception of property is one of isolation, where externalities are an aberration to be responded to on a grudging basis, then conceptions of the common good hold little traction. By contrast, if property is understood as deeply interconnected, woven into an inextricable web, then there is nothing more natural than a role for the community in modulating the consequences

255. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214–16 (1967).

256. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 60–64 (1977).

257. See, e.g., DANA & MERRILL, *supra* note 27, at 36 (discussing the role of demoralization costs and settlement costs in the calculus of governmental decision making).

258. See *supra* note 53 (discussing Jeremy Bentham and his modern descendants emphasizing the value of stable expectations in ordering property).

259. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 818–19 (2009).

of what happens in that web. Whether the community will accept a more overtly redistributive impulse once the crisis subsides is another question.

It is also likely that this crisis will hasten the national, uniformity-oriented tendencies in property law, with the federal government taking such an active role in responding to the crisis. From a formal perspective, property will continue nominally to be a creature of state law. As a practical matter, however, the acceleration of national regulatory regimes for traditionally state-oriented aspects of property could shift the balance of power. This harmonizing tendency is driven in times of relative stasis primarily by market demands,²⁶⁰ but in crisis, the institutional capacity of the federal government to act tends to make national-level regulatory response the default.

Likewise, in this crisis, both in terms of real estate and mortgage markets, as well as the larger financial system, there is likely to be at least a period of proactive, systematic efforts to conceptualize the structure of property. This will counterbalance the largely reactive, piecemeal conflict resolution that has defined the relative stasis of recent decades. The extent to which such efforts will reach beyond liquidity provision, correlative protections of last resort in bankruptcy, and disclosure enhancements to a more fundamental restructuring of the real estate and credit markets remains to be seen. It is reasonable to expect that both the national-level regulatory impulse and the extent of proactive intervention will be driven by the industry itself in its push towards globalization. Perhaps globalization too will inform the development of new “rules of the road” reflecting a greater level of coordination.

Ultimately, however, as has occurred regularly in American history, it seems just as possible that the valence of property rights will return to something closer to the possessive individualist vision.²⁶¹ Advocates can and often do react hyperbolically to any change in the structure of property rights that might represent some unalterable turn towards collectivization or laissez-faire absolutism. But in the broad sweep, there seems to be something of a regression to the mean in the eternal dialectic of individual and state.²⁶²

Perhaps more than any other signal, the familiar echo of strident rhetoric surrounding a core veneration of ownership portends a pendulum swing back toward the individualist vision. In this respect, there is a marked

260. See generally Malloy, *supra* note 28; Schill, *supra* note 28.

261. See *supra* notes 17–30 and accompanying text.

262. This pendulum can swing quickly in both directions. In Oregon, for example, the infamous Measure 37—which mandated compensation for the exercise of ordinary land use regulatory powers—seemed to enshrine an absolutist vision of the threat to private property represented by land use regulation. After a few years experiencing what it meant for people’s neighbors to act without restraint or planning in land use, Oregonians reversed course. The public reaction to the *Kelo* decision, moreover, taken as a singular moment of public intrusion on property rights, may end up being another example, although economic crisis has a way of lowering the outrage felt when individual property owners fail to block the redevelopment of distressed communities.

consistency in the evolving regulatory response. Perhaps also one of the more enduring lessons from the discourse of institutional evolution would be to understand whether this consistency is part of the cycle between steady-state change and punctuated equilibrium—a buffering system of sorts that the institution builds in for crises such as this. These possibilities, hinging on the centrality of property norms, are justification enough for a more careful comparison of rhetoric and policy in the Great Depression and other key property moments.

One implication of focusing on property in times of crisis, ultimately, is that the dialectic can at a minimum overcome the path dependency that marks so much of the development of the law.²⁶³ In crisis, there is a stronger collective sense that existing institutional arrangements are far less stable than they appear in times of stasis, and this gives freedom to ask questions that might seem untenable in less fraught times.

The meltdown we are experiencing, like crises past, will not come close to resolving eternal dilemmas deeply woven into the American narrative of property, but it does provide a crucible under which the conceptual foundations and political resonance of private property are being tested. The massive scale of government intervention in financial markets, ongoing calls for even more direct intervention on behalf of borrowers, and the growing recognition that unmediated private ordering around property can have devastating—indeed global—spillovers puts increasing pressure on the idea of property as a private refuge. The current crisis reveals in very strong terms that, while the Blackstonian vision of property as the realm of individual exclusion still has powerful cultural resonance, it does not long stand as a barrier to more civic-minded interventions.

CONCLUSION

Our current economic crisis has already sparked allusion to Yeats's famous cyclical image: "Turning and turning in the widening gyre / The falcon cannot hear the falconer; / Things fall apart; the centre cannot hold."²⁶⁴ Apocalyptic visions come readily to mind during times of upheaval, but cycles do turn, and, in the discourse of property, there has rarely been consensus about what the center is that might or might not hold.

At one level, property can seem an inherently conservative legal institution, reflexively resistant to change, preserving as it does the realm of settled expectation. Change does come, generally incrementally, and perhaps often reluctantly. But times of crisis often accelerate that change and spark unlikely reactions in return. Property in crisis raises the most fundamental questions about the nature of what it means to own, invest, transact, and rely on property. It remains to be seen whether our current

263. Cf. Hathaway, *supra* note 33, at 635–45.

264. WILLIAM BUTLER YEATS, *The Second Coming*, in THE COLLECTED POEMS OF W. B. YEATS 187 (Richard J. Finneran ed., rev. 2d ed. 1996), *quoted in* Paul Krugman, *The Widening Gyre*, N.Y. TIMES, Oct. 27, 2008, at A27.

economic crisis and the government's response will be remembered as a simple adjustment after a bubble or a watershed moment. Either way, this "property moment" has brought core conceptions of property to the forefront of popular discourse, stirring anxiety but hopefully also thoughtful reconsideration.