Fordham Urban Law Journal

Volume 38, *Number* 3 2010 *Article* 4

COOPER-WALSH COLLOQUIUM - SURVEYING THE DAMAGE: AN ASSESSMENT OF LEGAL AND POLICY RESPONSES TO THE SUBPRIME MORTGAGE CRISIS

A Simple Approach to Preventing the Next Housing Crisis-Why We Need ONe, What One Would Look Like, and Why Dodd-Frank Isn't It

David A. Dana*

*

A Simple Approach to Preventing the Next Housing Crisis-Why We Need ONe, What One Would Look Like, and Why Dodd-Frank Isn't It*

David A. Dana

Abstract

This article considers the adequacy of The Dodd-Frank Act in terms of its potential ability to prevent another crisis in the housing market. The author argues that Dodd-Frank, even if implemented broadly, will not address the key problem of excess complexity in the housing and financial markets. The author then suggests additional reform focusing on simplicity, exemplified by the existing regulatory framework in Denmark. Lastly, the author addresses the current political economy, which is blamed for making the passage of effective regulation too difficult.

KEYWORDS: Housing Crisis, Dodd-Frank

*Northwestern University School of Law. Associate Dean of Academic Affairs: Faculty and Research, and Stanford Clinton Sr. & Zylpha Kilbride Clinton Research Professor of Law.

A SIMPLE APPROACH TO PREVENTING THE NEXT HOUSING CRISIS—WHY WE NEED ONE, WHAT ONE WOULD LOOK LIKE, AND WHY DODD-FRANK ISN'T IT

David A. Dana[*]

INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[1] was, ostensibly, a response to the crisis in the U.S. housing market and the inter-related crisis in the market for mortgage-backed securities ("MBS"). One of the goals of the legislation, presumably, was to prevent another crisis in housing and mortgage finance. After what we have seen in recent years, certainly no one could question the importance of that goal. The housing crisis has deprived thousands upon thousands of Americans of not just wealth, but of their homes; it has helped drive municipalities to the brink of fiscal collapse; and it has impeded the recovery of the U.S. job market. The MBS crisis took down major financial institutions in the United States and almost caused a complete collapse of the financial sector. We cannot afford a repeat experience.

But Dodd-Frank, even if it is implemented in the far-reaching way that some hope and think it can be, will not address a problem at the heart of the housing and MBS crisis: excessive complexity. The years running up to

[*] Northwestern University School of Law. Associate Dean of Academic Affairs: Faculty and Research, and Stanford Clinton Sr. & Zylpha Kilbride Clinton Research Professor of Law.

1. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

the implosion of the housing and MBS markets were marked by ever-increasing complexity. This complexity caused confusion and poor judgments on the part of unsophisticated home buyers and owners, as well as supposedly sophisticated securities investors.[2] This complexity also allowed some people and institutions to make an astonishing amount of money originating mortgages that never should have been originated and selling MBS that never should have been sold, at least at the prices at which they were sold.[3] Dodd-Frank does not do the structural simplification work we need to prevent this from recurring once the memories of the current crisis fade.

Instead of Dodd-Frank, we need clear statutory reform that limits residential mortgages to a few sensible products, all girded by strict underwriting standards, and that correspondingly produces a well-ordered, transparent market in bonds or securities based on these mortgages. Other countries, most notably Denmark, have maintained a simplified, and hence much more stable, regime of residential lending and finance with reasonable costs of capital for borrowers. Moreover, it would probably be a good thing if reforms brought about lower rates of household investments in home ownership in the United States. From a basic economics perspective, Americans have long been overinvested in where they live. The approach I advocate—the simplicity approach, if you will—is admittedly politically unfeasible at present, but if what is politically feasible is only Dodd-Frank, then perhaps our attention needs to focus most immediately on changing our politics and thereby expanding the domain of the politically feasible.

I. THE MOVE TO COMPLEXITY AND ITS CONSEQUENCES

At one point in time, residential lending in the United States was fairly simple, involving few parties per transaction and few instruments. Thirty-year fixed rate, fully-amortized mortgages were overwhelmingly the mortgage of choice, a significant down payment deposit was required, and second and third mortgages were relatively uncommon, at least as part of the initial purchase transaction. In the last twenty years or so, we saw the utilization of a dizzying array of nontraditional alternatives in which rates were not fixed or were only fixed for a time, principal was only partially amortized or not amortized at all, and by means of second mortgages or

2. *See* SIEGEL & GALE, SIEGEL & GALE SIMPLICITY SURVEY: A CLARION CALL FOR TRANSPARENCY 1-2 (2009), *available at* http://www.siegelgale.com/pdf/S+G_Simplicity_Survey.pdf.

3. *See* MARTIN NEIL BAILY ET AL., BROOKINGS INST., THE ORIGINS OF THE FINANCIAL CRISIS 22 (2008), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2008/11_origins_crisis_baily_litan/11_origins_crisis_baily_litan.pdf.

simply through relaxed underwriting standards, purchases often meant little or no upfront, unborrowed cash deposit.[4] At the same time, the number of parties involved in a single loan proliferated.[5] Whereas once mortgages were solicited, originated, and held by lenders,[6] now those functions are typically performed by different parties. Mortgage brokers often originate mortgages, and usually sell them as fast as possible to lenders, who in turn often sell them again and again. Lenders very often retain servicing on loans they sold long ago.[7] As the big servicers, such as Bank of America, have recently been forced to admit,[8] the fabric of transactions surrounding a given ordinary residential mortgage can now be so complex that it is no mean feat to determine at a given point in time who exactly "owns" the mortgage.[9]

There has been a corresponding move to complexity in the MBS arena.[10] Mortgages have been securitized for quite a long time in the United States,[11] but until recently, almost all of the securitized mortgages were fixed rate mortgages that were originated using relatively strict Federal

4. *See* ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED'N AM., EXOTIC OR TOXIC? AN EXAMINATION OF NON-TRADITIONAL MORTGAGE MARKET FOR CONSUMERS AND LENDERS 3-4 (2006), *available at* http://www.consumerfed.org/pdfs/Exotic_Toxic_Mortgage_Report0506.pdf.

5. *See* David A. Dana, *A Simple Approach to Preventing the Next Housing Crisis: Why We Need One, What One Would Look Like, and Why Dodd-Frank Isn't It*, HUFFINGTON POST (Dec. 31, 2010, 4:06 PM), http://www.huffingtonpost.com/david-a-dana/a-simple-approach-to-prev_b_803092.html [hereinafter Dana, *A Simple Approach*]; *see also* David A. Dana, *The Foreclosure Crisis and the Anti-Fragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 97, 102-05 (2010) [hereinafter Dana, *Foreclosure Crisis*].

6. *See, e.g.*, MINN. STAT. § 58.02(11) (2006).

7. For an excellent source on the transformation of the housing industry in the United States and its implications for the foreclosure crisis, see CONGRESSIONAL OVERSIGHT PANEL, FORECLOSURE CRISIS: WORKING TOWARD A SOLUTION (2009), *available at* http://cop.senate.gov/documents/cop-030609-report.pdf. *See also* Dana, *Foreclosure Crisis*, *supra* note 5, at 97.

8. *See* William Arden, *Bank of America Stops Foreclosures in All Fifty States*, HUFFINGTON POST (Oct. 8, 2010, 1:37 PM), http://www.huffingtonpost.com/2010/10/08/bank-of-america-halts-foreclosures_n_755737.html.

9. That is at least part of the difficulty of establishing whether foreclosures are proper. *See id*. For an extended discussion of the possible implications of the difficulties of ascertaining legal ownership of mortgages and MBS, see CONGRESSIONAL OVERSIGHT PANEL, EXAMINING THE CONSEQUENCES OF MORTGAGE IRREGULARITIES FOR FINANCIAL STABILITY AND FORECLOSURE MITIGATION (2010), *available at* http://cop.senate.gov/documents/cop-111610-report.pdf.

10. *See* Susan Block-Lieb & Edward J. Janger, *Demand-Side Gatekeepers in the Market for Home Loans*, 82 TEMP. L. REV. 465 (2009).

11. *See* Bank of New York v. Raftogianis, 10 A.3d 236, 243 (N.J. Super. 2010); Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185 (2007); Fred N. Sauer, *Seeds of Financial Catastrophe*, AMERICAN THINKER (Dec. 22, 2010), http://www.americanthinker.com/2010/12/seeds_of_financial_catastrophe.html.

Housing Administration (FHA) or Freddie Mac underwriting requirements and that enjoyed an implicit repayment guarantee of the United States.[12] In the years immediately leading up to the implosion of the housing and mortgage finance market, we witnessed an array of new private label MBS that were much more complex than traditional MBS. The new types of MBS had so many tranches and permutations that you needed flow charts and advanced engineering degrees just to map them out. FHA and Freddie Mac sought to compete with private label MBS by loosening their underwriting standards and producing increasingly varied MBS products.[13] The greater complexity in the market for mortgage instruments and in the MBS market were intertwined and reinforcing. As Adam Levitin and Susan Wachter have recently detailed: "The greater and more complex array of MBS fed demand for more borrowers, which was achieved in part by means of new, more complex loan arrangements that targeted households that could not have afforded traditional mortgages."[14]

That the housing and MBS crises were preceded by a move from simplicity to great complexity does not, by itself, mean that the complexity per se was a cause of the two crises. But complexity can operate to lead to sub-optimal decisions, as the behavioral psychology literature illustrates. Faced with a confusing array of choices, people tend to fall back on heuristic biases that do not necessarily result in decisions that maximize their welfare.[15] In particular, the complexity of mortgage arrangements and instruments likely made it easier for potential home owners and refinancing home owners to fall prey to the "myopia bias" and the "the optimism bias."[16] The myopia bias leads to excessive discounting of future costs compared to near-term or immediate ones.[17] With the optimism bias, it was too

12. *See* Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble* (U. Pa. Inst. for Law & Econ. Res., Research Paper No. 10-15, 2010), *available at* http://ssrn.com/abstract=1669401; *see also* Dana, *Foreclosure Crisis*, *supra* note 5, at 102-03.

13. *See* Steven Malanga, *ACORN: Creature of the CRA—How the Community Reinvestment Act Gave Rise to the Radical Activist Group*, FRONTPAGEMAG (Sept. 17, 2009), http://archive.frontpagemag.com/readArticle.aspx?ARTID=36330.

14. *See* Levitin & Wachter, *supra* note 12, at 44.

15. *See* BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS (2005) (asserting that people nonetheless will gravitate to situations where they are offered more and more choices, which Schwartz refers to as "the paradox of choice").

16. *See* Eric S. Belsky et al., *Consumer and Mortgage Credit at the Crossroads*, *in* BORROWING TO LIVE 5, 30-33 (Nicolas Retsinas & Eric Belsky eds., 2008) (discussing these biases in the mortgage lending context); A. Ross Otto & Bradley C. Love, *You Don't Want to Know What You're Missing: When Information About Foregone Rewards Impeded Dynamic Decision Making*, 5 JUDGMENT & DECISION MAKING 1, 1-10 (2010).

17. *See* HOWARD KUNREUTHER ET AL., HIGH STAKES DECISION MAKING: NORMATIVE, DESCRIPTIVE, AND PRESCRIPTIVE CONSIDERATIONS 6 (2001), *available at* http://marketing.wharton.upenn.edu/ideas/pdf/Kahn/high%20stakes%20decision%20making.pdf.

easy for many borrowers to believe that housing prices always rise (and certainly never fall) and hence that a no-money down, variable-interest rate mortgage is not just immediately tempting but also prudent.[18] So, too, the dizzying array of MBS choices made it easier for investors to heavily invest funds that were supposed to be reserved for prudent investments, without directly tackling the possibility that the always-rising-prices scenario might be nothing more than a historical anomaly.

Swindlers flourished in the complexity and the confusion of the housing and MBS markets. The complexity of consumer choice made it easier for unscrupulous mortgage originators to target and sell products to vulnerable homeowners and home buyers that they did not understand, could not afford, did not need, or were more expensive than available alternatives.[19] The complexity of the MBS markets and its instruments allowed the originators, poolers, and sellers of MBS to take advantage of their superior information by overcharging and overselling their customers.[20] Complexity made it easier for the MBS poolers and marketers to shop offerings among credit agencies for the best ratings. Complexity helped the credit agencies to meet the implicit demands of the MBS poolers and marketers—and hence boost their profits—because it allowed them to tell themselves the story that the offerings, which after all were too complex for them to really understand, somehow might deserve the AAA or AA ratings.[21]

Complexity has also made it harder for the government and private actors to respond sensibly to the housing and MBS crises.[22] One plausible solution to the housing crisis would be the re-working of mortgages to reduce principal and make the mortgages more in keeping with actual market values. There are many reasons we have observed almost no loan modifications with principal reductions, but one contributing factor is the division of individual mortgages into many distinct and often adverse investment interests and the consequent difficulty of gaining approval from mortgage

18. James Kwak, *Housing in Ten Words*, BASELINESCENARIO (Aug. 23, 2010, 10:04 AM), http://baselinescenario.com/2010/08/23/housing-in-ten-words/.

19. As one of the most trenchant commentators on the housing crisis succinctly put it, "[t]he mess was caused by years of poisonous lending, regulatory inaction and outright fraud." Gretchen Morgenson, *Housing Doesn't Need a Crash. It Needs Bold Ideas*, N.Y. TIMES, Sept. 12, 2010, at BU1.

20. *See* Levitin & Wachter, *supra* note 12, at 50.

21. *See* Gretchen Morgenson & Louise Story, *Ratings Agencies Shared Data and Wall Street Seized the Advantage*, N.Y. TIMES, Apr. 24, 2010, at A1 (discussing documents showing that the credit agencies understood that "they couldn't properly analyze all of the banks' products").

22. *See* Levitin & Wachter, *supra* note 12, at 6.

"owners" to significant modifications.[23] The division of the ownership of mortgages from their servicing has also impeded loan modifications.[24]

Finally, complexity helped vested economic interests—including those making money off the poor choices that home buyers and owners and securities investors make in an environment of complexity—avoid effective regulatory oversight. In the lead up to the implosion of the housing and MBS markets, federal regulators were largely passive, but when they did try to act, they received an enormous push-back from the financial industry and they quickly retreated.[25] The financial industry's enormous clout with both political parties in Congress as well as the White House would make it difficult for even the most courageous, well-intentioned regulators to try to get anything done that the industry does not favor. But complexity makes it harder for such regulators to try to get anything done because regulators quite plausibly can be (and are) assaulted with the claim that they do not fully understand the complexities of the relevant markets and hence are not equipped to impose new rules and regulations. Indeed, in the wake of the MBS crisis, regulators had to turn for advice and counsel to the same entities that had helped create and benefited from the bubble in MBS instruments for explanations of those instruments and guidance as to what they might really be worth.

II. THE SIMPLICITY APPROACH (OR WHY NOT FOLLOW DENMARK?)

In a simplified mortgage and MBS market, there would be only one or two kinds of residential mortgages available, with the thirty-year fixed-rate

23. *See* Dana, *Foreclosure Crisis*, *supra* note 5, at 104. For an extended, thoughtful account of increasing fragmentation (without using the word as such) of property in our law in areas other than mortgages, see MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008).

24. *See* Larry Cordell et al., *The Incentives of Mortgage Servicers: Myths and Realities* (Fed. Reserve Bd., Working Paper No. 2008-46, 2008), *available at* http://www.federalreserve.gov/pubs/feds/2008/200846/200846pap.pdf; Joshua D. Coval et al., *The Economics of Structured Finance* 10-15 (Harv. Bus. Sch., Working Paper No. 09-060, 2008), *available at* http://www.hbs.edu/research/pdf/09-060.pdf; *see also Why President Obama's Plan Will Not Work and What Will: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of House Fin. Servs. Comm.*, 111th Cong. 6-7 (2009) (testimony of John D. Geanakoplos, Professor of Economics, Yale University), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/geanakoplos_testimony_-_all.pdf ("Servicers are paid a percentage of principal for each house that is not defaulting. That means reducing interest costs them nothing and gains them much, at least in the short term" and "all servicers are driven by their immediate needs."); Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securities*, 82 S. CAL. L. REV. 1075, 1102-12 (2009).

25. *See* Susan P. Koniak, George M. Cohen, David A. Dana & Thomas Ross, *How Washington Abetted the Bank Job*, N.Y. TIMES, Apr. 4, 2010, at WK10.

as the predominant instrument; putting twenty percent down or paying mortgage insurance requirements would be strict requirements, not easily evaded using second mortgages; and rate disparities among mortgages offered to borrowers would thus be limited. The similarity in instruments and uniformity of underwriting standards would not support a wide range of rates. Because only traditional, reasonable risk mortgages would be made, there would be no possibility of MBS based on nontraditional mortgages. MBS pools would be based on quite transparent instruments, and investors in MBS could thus make reasoned and reasonable investment choices. In such an environment, the bubbles and subsequent implosions we experienced would be less likely.

Moreover, there are models—and not just historical ones—for such a simplified regime of mortgage finance. In Denmark, the form of residential mortgages is tightly regulated—so much so that there is really only a single mortgage rate good for virtually all new mortgages on any given day. Mortgages are financed with bonds, such that banks are able to off-load interest rate risk while retaining creditworthiness risk. The Danish system, which the prominent investor George Soros has suggested as a model for the United States, was adopted in the wake of late nineteenth century housing bubbles and has proved highly effective in preventing bubbles.[26] At the same time, the cost of capital for mortgages in Denmark compares favorably with the rest of Europe and the United States.[27] If a simplified regime can satisfy the needs of home buyers and owners in Denmark while achieving admirable stability, why, at least in theory, can the United States not do the same?

Dodd-Frank does not even come close to offering greater simplicity. It is a massive piece of legislation. The bill does not bar nontraditional mortgage instruments; it does not even require that potential home buyers be given a lucid explanation of how a plain vanilla mortgage would compare to less traditional, higher risk alternatives. Regulations should at least require mortgage brokers to offer traditional mortgages to customers who can afford them, but even that modest reform seems unlikely given the clout of

---

26. *See* George Soros, *Denmark Offers a Model Mortgage Market*, WALL ST. J., Oct. 10, 2008, at A15 (explaining that in Denmark "[m]ortgage originators are required to retain credit risk and to perform the servicing functions, thereby properly aligning the incentives").

27. *See id.*; *see also* Karen Dubas, Summary, *Can Elements of the Danish Mortgage System Fix Mortgage Securitization in the United States?*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES. (Mar. 26, 2009), http://www.aei.org/EMStaticPage/100028?page=Summary ("In Denmark, the credit risk of a loan is required to remain with the brokers or mortgage bankers who originated the debt. Unlike the current U.S. model, Danish mortgage originators are now invested in the credit worthiness of the loan; their interests become 'perpetually aligned' with the borrowers, and they become de facto 'liability advisers.' The interest-rate risk in the loan is sold to bond holders.").

the financial industry. Moreover, it is hard to imagine that courts will uphold regulations that, in effect, re-insert provisions into Dodd-Frank that Congress quite plainly removed from it as part of the process that allowed for its ultimate passage and enactment into law.[28] Congressional intent that Dodd-Frank be limp, lax, and not terribly protective of consumers is in no way admirable, but is quite plain for all to see.

Dodd-Frank also does not restrict what kinds of mortgages can be securitized or how they can be securitized. It is true that Dodd-Frank may make certain mortgages riskier than before for investors by giving borrowers who feel they were sold an unsuitable mortgage some recourse against foreclosure. But if recent history has taught us anything, it is that investors in MBS sometimes can be sold on securities based on mortgages that are in fact quite risky—indeed, that in a search for a higher rate of return, they may gravitate to such investments whether they understand what they are doing or not. We can be assured that the financial industry will seek to tap the ever-present yearning for higher return.

III. THE CHOICE-IS-ALWAYS-GOOD/INNOVATION-IS-ALWAYS-GOOD OBJECTION

One central objection to a simple regime of mortgage finance is that complexity is beneficial when it gives consumers (home buyers, owners, and investors) greater choice and thus allows them to maximize their preferences. After all, if choice is good, isn't more choice better? And if innovation is good, why isn't financial innovation in mortgages and MBS good, too? Even after the recent crises, it is still commonplace for politicians, business leaders, and elite commentators to opine that financial innovation is a key American comparative advantage that we must not undermine in the interest of reform.[29]

As noted above, however, more choice does not always translate into better informed, better-reasoned choice. Moreover, even if one (unrealistically) assumed that people do always maximize their own narrowly-

28. *But see* Susan Block-Lieb & Edward J. Janger, *Reforming Regulation in the Markets for Home Loans*, 38 FORDHAM URB. L.J. 681 (2011). Some judges or justices who are ideologically predisposed toward financial regulation, or that hold a principled stance in favor of judicial deference to the executive branch, might uphold implementing regulations that call for specific consumer protections Congress considered, but omitted, from the final financial reform legislation. But I am doubtful that many—and certainly not most—of the relevant judges or justices fall into those categories.

29. *See, e.g.*, Felix Salmon, *Obama Likes Financial Innovation*, REUTERS (Sept. 14, 2009, 12:13 EDT) (reporting on a speech by President Obama in which he said he "wants to do regulatory reform 'in a way that doesn't stifle innovation'"), http://blogs.reuters.com/felix-salmon/2009/09/14/obama-likes-financial-innovation/.

understood welfare through more choice, the fact is that many people are affected by *other* peoples' choices that impact the stability of the housing market. Children who lose their family home because a parent entered into an imprudent mortgage, neighbors whose housing values plummet and basic services disappear because of foreclosures, and retirees whose pensions go underfunded because the pension fund invested in overvalued MBS all lose out as a result of *other* peoples' choices.

Perhaps in part because housing is a domain where such externalities abound, there is, in fact, a long tradition of constraining individual choice and requiring the use of certain standardized forms in the area of real property law generally, and in the context of mortgages in particular. What makes a mortgage a mortgage rather than an installment land contract, legally, is that mandatory rights and obligations are read into the agreement between borrower and lender, whatever the parties contractually intended.[30] Viewed in the broader swath of Anglo-American legal history, the essence of mortgage law is legal constraint on ad hoc innovation, in the interest of preserving social stability and protecting the vulnerable.

Indeed, as Henry Smith and Thomas Merrill have asserted, what arguably distinguishes the domain of property law from that of contract law is that property law insists upon a high degree of standardization and, in that sense, simplification.[31] Smith and Merrill root property's traditional demand of standardization in the benefits of reducing transaction costs for third parties to property transactions, but the recent housing and MBS crises suggest that this tradition can also be defended as a means of protecting parties to property transactions from the cognitive pitfalls of complexity and underhandedness of those who would take advantage of those pitfalls (and from the resulting social costs in the form of lost homes and stressed communities). The recent crisis also underscores the wisdom of the tradition in property of constraining and overriding private party choice in the interest of preventing or overcoming excessive fragmentation of interests in real property.

IV. THE OWNERSHIP SOCIETY OBJECTION

If mortgages and MBS were standardized and simplified, the average costs of borrowed money for purchase money mortgages might not climb but it is certainly possible that both some buyers would not be able to buy

30. *See* Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 DUKE L.J. 609 (exploring the boundary line between the mortgage and the installment land contract).

31. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 68-70 (2000).

as expensive a home as they otherwise would have; and, some buyers with poor credit histories or limited income and assets would be unable to buy a home at all. With respect to the first possibility, I think the best response is, why would that be a bad thing? Until very recently, the average size of new U.S. homes has steadily increased as the size of the households occupying them has declined, or at most remained steady.[32] The result is more sprawl, fossil fuels consumption, and greenhouse gas emissions, and not necessarily more happiness, at least as far as anyone can objectively measure happiness. Moreover, households that have invested heavily in homes are not acting in accord with standard portfolio theory, which teaches that the best way to temper financial risks is to diversify one's investments.[33] From this perspective, many households that sank all their available capital and committed all their anticipated earnings in a single asset—a house—would have been much better off diversifying by buying less house AND investing more in their human capital (e.g., education) or other, more liquid forms of capital (e.g., bonds, stocks, life insurance).

But what about people who, under a regime of only traditional mortgage instruments and straightforward, reasonably strict underwriting, would be left out of the housing-ownership market altogether? The ownership-society school of social policy and popular commentary teaches that by owning homes, people achieve greater personal and familial success, communities become more stable, and social ills are reduced.[34] If ownership equals greater individual and social welfare, is not anything that reduces that rate of ownership a bad thing?

Recent scholarship calls into question the necessary connection between ownership, and stability and human flourishing.[35] But even if we accept that connection, the fact is that owning a fee simple is not the only way to gain the emotional attachment and longer-term perspective that we believe is the mechanism by which "ownership" confers individual and social ben-

32. The average U.S. house increased in size from 1400 square feet in 1970 to 2521 square feet in 2007. *See Home Size Continues to Decline; Buyers Increasingly Opt for Single-Story Homes*, NAT'L ASS'N OF HOME BUILDERS (June 14, 2010), http://www.nahb.org/news_details.aspx?newsID=10898.

33. *See generally* HARRY M. MARKOWITZ, PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS 1 (1959) ("A good portfolio is more than a long list of good stocks and bonds. It is a balanced whole, providing the investor with protections and opportunities with respect to a wide range of contingencies.").

34. Support for low-income home ownership has crossed political lines, but the ownership society idea itself has conservative political roots. *See* Naomi Klein, *Disowned by the Ownership Society*, NATION (Jan. 31, 2008), http://www.thenation.com/article/disowned-ownership-society.

35. *See, e.g.*, Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1109-10 (2009).

efits. In the United States, there are relatively few protections for residential renters from displacement by landlords, government action, or market forces. Most available leases are one-year or month-to-month, and there are very few protections in more than a handful of locations against landlord's decisions not to renew leases or to drastically increase rent at the time of lease renewal. If the menu of rental arrangements available to low-income households included ones that offered more of the stability that (sometimes) is offered by a fee simple, while costing less than a fee simple and thus being genuinely affordable to these households, many of the benefits of the ownership society could be achieved.[36] Providing people with greater ownership in their places of employment and in their local schools could also go a long way to achieving the benefits of an ownership society.

V. THE HARD REALITY OF POLITICS AND THE NEED FOR CAMPAIGN FINANCE REFORM

So what is to be done? If Dodd-Frank gets us (almost) nowhere and something more radical and much more simple is needed, how can that be achieved? The answer is that simplified legislation will only come from new Executive leadership or new legislation, and there is no reason, under the current politics, to anticipate either.[37] Thus, the only "solution" is a terribly hard one: to change the politics. But, as many commentators have noted, both political parties appear aligned with, if not captive to, the interests of the financial industry and the apparent goal of that industry to essentially continue functioning as if the housing and MBS crises never happened. This alignment, at least in part, reflects the reality of the huge financial contributions that that industry makes and, after *Citizens United v. FEC*,[38] will be freer to make than ever before. What that means is that new legislation is needed to reform campaign finance and pressure the Supreme Court to temper its First Amendment absolutism when the interests of large corporations are at issue. Hence the catch and the challenge: we need (at a minimum) new rules for campaign finance to get better politics, but until we get better politics, we cannot get the new rules. So, somehow, we need

36. A broader menu of rental alternatives might well develop if some of the explicit and implicit subsidies for home ownership were eliminated. *Cf.* R.S. Radford, *Regulatory Takings in the 1990's: The Death of Rent Control?*, 21 SW. U. L. REV. 1019, 1109-20 (1992) (discussing the role of implicit subsidies in driving up rental rates). To my knowledge, no one has adequately explained why there is such a drastic bifurcation in U.S. residential housing between short-term leases and fee simples.

37. *See How Republicans May Change Dodd-Frank After Elections*, REUTERS (Oct. 6, 2010), http://www.cnbc.com/id/39537984/How_Republicans_May_Change_Dodd_Frank_After_Elections.

38. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

to achieve meaningful, constructive political change even under rules that have led to dominance by two parties that cannot (or will not) undertake the reforms that are needed for our public welfare. It is a hard challenge, but our politics have overcome even harder challenges—the Great Depression, World War II, Jim Crow—and prevailed. It is time to do that again.