2013

New Formalism in the Aftermath of the Housing Crisis

Nestor M. Davidson
Fordham University School of Law, ndavidson@law.fordham.edu

NEW FORMALISM IN THE AFTERMATH OF THE HOUSING CRISIS

NESTOR M. DAVIDSON*

* Professor, Fordham University School of Law. For helpful comments on earlier drafts, the author thanks Greg Alexander, Michelle Anderson, Jane Baron, Bethany Berger, Andrea Boykin, Anupam Chander, Eric Claeys, Hanoch Dagan, Annie Decker, Rashmi Dyal-Chand, Sheila Foster, Clare Huntington, Gerald Korngold, Joseph Singer, and Dale Whitman, as well as participants in the Association for Law, Property, and Society Annual Conference at Georgetown University Law Center, the Northeastern University School of Law Faculty Colloquium, and the Progressive Property Conference at Harvard Law School. Remy Roizen, Brittany Robbins, and Robert Sanchez provided excellent research assistance.

The housing crisis has left in its wake an ongoing legal crisis. After housing markets began to collapse across the country in 2007, foreclosures and housing-related bankruptcies surged significantly and have barely begun to abate more than six years later. As the legal system has confronted this aftermath, courts have increasingly accepted claims by borrowers that lenders and other entities involved in securitizing mortgages failed to follow requirements related to perfecting and transferring their security interests. These cases – which focus variously on issues such as standing, real party in interest, chains of assignment, the negotiability of mortgage notes, and the like – signal renewed formality in nearly every aspect of the resolution of mortgage distress.

This new formalism in the aftermath of the housing crisis represents something of an ironic turn in the jurisprudence. From the earliest history of the mortgage, lenders have had a tendency to invoke the clear, sharp edges of law, while borrowers in distress have often resorted to equity for forbearance. The post-crisis caselaw thus upends the historical valence of lender-side formalism and borrower-side flexibility.

Building on this insight, this Article makes a normative and a theoretical claim. Normatively, while scholars have largely embraced the new formalism for the accountability it augurs, this consensus ignores the trend's potential negative consequences. Lenders have greater resources than consumers to manage the technical aspects of mortgage distress litigation over the long run, and focusing on formal requirements may distract from responding to deeper substantive and structural questions that still remain largely unaddressed more than a half decade into the crisis. Equally telling, from a theoretical perspective, the new formalism sheds light on the perennial tension between law's supposed certainty and equity's flexibility. The emerging jurisprudence underscores the contingency of property and thus reinforces – again, ironically – pluralist conceptions of property even in the crucible of hard-edged formalism.

INTRODUCTION

The aftermath of last decade's housing boom and bust has generated an ongoing legal crisis. In the ten years prior to 2007, mortgage delinquencies averaged 4.7% annually, and the foreclosure start rate in that same period was a relatively low 0.42%.[1] After the housing crash, mortgage delinquencies increased to a January 2010 high of 10.57%,[2] and although they have dropped since then, more than a quarter of all homeowners currently owe more on their mortgages than their homes are worth.[3] Not surprisingly, nearly four million homes have gone through foreclosure since 2008,[4] and the percentage of outstanding loans in foreclosure continued through the end of 2012 to be at a historically high average rate of just over 3.5%.[5] Thus, even as the economy has begun to recover, foreclosures and housing-related bankruptcies continue to roil the legal system.

As borrower advocates have responded to this surge in mortgage distress, they have found success raising a series of largely procedural defenses to foreclosure and mortgage-related claims asserted in bankruptcy. These challenges have focused on issues such as lender or servicer standing, real party in interest, faults in the chain of mortgage and note assignment, and notice requirements, the bulk of which reflect problems in the process of

---

[1] *See* U.S. DEP'T OF HOUS. & URBAN DEV., U.S. HOUSING MARKET CONDITIONS 78 tbl.19 (2009), *available at* http://www.huduser.org/portal/periodicals/ushmc/fall09/USHMC_Q309.pdf. For data on foreclosure-related bankruptcies (compiling data from the Mortgage Bankers Association's National Delinquency Surveys), see *infra* note 41.

[2] LENDER PROCESSING SERVS., LPS MORTGAGE MONITOR: DECEMBER 2012 MORTGAGE PERFORMANCE OBSERVATIONS 6 (2012), *available at* http://www.lpsvcs.com/LPSCorporateInformation/CommunicationCenter/DataReports/MortgageMonitor/201211MortgageMonitor/MortgageMonitorNovember2012.pdf (tracking loan-level data). The delinquency rate as of the end of December 2012 was 7.17%, a drop from the December 2011 rate of 9.11%. Kerri Ann Panchuck, *Mortgage Delinquencies Tick up in December*, HOUSINGWIRE (Jan. 13, 2013, 8:19 AM), http://www.housingwire.com/news/2013/01/23/mortgage-delinquencies-tick-december.

[3] Dino Grandoni, *29% of U.S. Homes Underwater (Figuratively)*, ATLANTIC WIRE (Nov. 8, 2011), http://www.theatlanticwire.com/national/2011/11/29-us-homes-are-underwater-figuratively/44699/.

[4] Press Release, CoreLogic, CoreLogic Reports 55,000 Completed Foreclosures in November (Jan. 3, 2013), *available at* http://www.corelogic.com/about-us/news/corelogic-reports-55,000-completed-foreclosures-in-november.aspx.

[5] LENDER PROCESSING SERVS., *supra* note 2, at 6. At the peak (or, perhaps, nadir) of the foreclosure crisis, in the fourth quarter of 2010, the average foreclosure rate on outstanding mortgages nationwide was 4.6%. Press Release, Mortg. Bankers Ass'n, Delinquencies and Foreclosures Decline in Latest MBA Mortgage Delinquency Survey (Feb. 16, 2012), *available at* http://www.mortgagebankers.org/NewsandMedia/PressCenter/79827.htm. These average figures obscure the depth of the crisis in particular states and communities, given that the foreclosure crisis has hit different housing markets in very different ways. *See 1.8 Million U.S. Properties with Foreclosure Filings in 2012*, REALTYTRAC (Jan. 14, 2012), http://www.realtytrac.com/content/foreclosure-market-report/2012-year-end-foreclosure-market-report-7547 (reporting the concentration of foreclosures in states such as Arizona, Nevada, California, and Florida).

mortgage securitization.[6] The requirements at issue in these cases are all longstanding, but were rarely invoked before the housing crisis.[7] Indeed, until the collapse of recent years, the mortgage system largely accommodated the demands for informality that characterized the growth of the secondary market during the housing boom, masking what former New York Chief Judge Kaye has described as "the incongruity between the needs of the modern electronic secondary mortgage market and our venerable real property laws."[8]

This renewed formalization in the mortgage distress system is a curious turn in the jurisprudence on several levels. From the earliest history of mortgage law, lenders have had a tendency to invoke the hard edges of law's formal clarity, while borrowers have often resorted to equity to obtain a measure of substantive fairness in the face of such strictures. This tension began with the emergence of the mortgage as a form of conveyance, with lenders able to retain title if borrowers did not repay their debt in full on the precise day and place due.[9] This requirement, strictly construed by courts of law, created obvious incentives for lender opportunism, and borrowers began to invoke equity's flexibility to respond to the resulting unfairness.[10] The Chancellor accordingly allowed borrowers to redeem their property within a reasonable period of time if they could repay their debt, and eventually lenders sought to foreclose what became known as the equity of redemption.[11] This basic tension has continued in various guises throughout the development of the mortgage, playing out over time in ways that have left a residue on a number of contemporary doctrines.[12]

The recent turn in the caselaw thus represents an intriguing inversion of the historical valence of law and equity in the realm of mortgages, and property more broadly.[13] As borrowers have successfully argued for strict application of a variety of formal requirements, lender-side interests have responded by making essentially equitable arguments for flexibility, invoking what they posit is substantial, even if not technical, compliance.[14]

---

[6] *See infra* Part I.B.

[7] *See* JOHN RAO ET AL., NAT'L CONSUMER LAW CTR., FORECLOSURES: DEFENSES, WORKOUTS, AND MORTGAGE SERVICING § 4.4.1, at 113 (3d ed. 2010) ("Before the rise of securitization, advocates seldom raised questions about the foreclosing party's authority to proceed.").

[8] MERSCORP, Inc. v. Romaine, 861 N.E.2d 81, 86 (N.Y. 2006) (Kaye, C.J., dissenting).

[9] *See* 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.2, at 7-8 (5th ed. 2007).

[10] *Id.* § 1.3, at 8-9.

[11] *Id.*; *see also infra* note 136 and accompanying text.

[12] *See infra* Part II.A.

[13] The concept of formalism is being deployed here less in the classical sense of a complete, hermetic, and rationally determined legal system, and more in the sense of a relatively mechanistic rule orientation. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 159-67 (2010).

[14] *See infra* Part I.B.

This ironic reversal holds lessons for evaluating the emerging post-crisis jurisprudence and also sheds light on core debates in property theory. Normatively, the courts' new-found aggressive enforcement of longstanding formal requirements has been lauded by scholars focused on the consumer-protection aspects of this development.[15] Peter Pitegoff and Laura Underkuffler have argued, for example, that the emerging caselaw embodies "several important principles," including protection for the home as shelter, preserving the burden of proof on the party who would involuntarily transfer that home, and the necessity of judicial oversight.[16] David Dana has offered a similar defense of what he calls "mortgage formalities," arguing that beyond keeping people in their homes, these requirements are important to reflect the expressive value of home and equality before the law, as well as to prevent future foreclosure crises.[17] These perspectives are in line with the views of many advocates and regulators that the informality of the secondary market has caused real harm to consumers.[18]

On one level, this view is undoubtedly correct, and for any homeowner facing foreclosure or a claim in bankruptcy, the guarantee of procedural regularity would be hard to gainsay. This understanding, however, is both incomplete and overly optimistic. The role that equity has historically played for borrowers suggests reasons for caution in embracing an emphasis on technical precision over substantive review, and the emerging trend may have unintended consequences in the long run.

It likely will not take long for servicers, lenders, securitization intermediaries, and investors to adapt to the new landscape of mortgage distress. If the current trend holds, borrowers may find themselves, once again, on the historical short end of the formalism/flexibility balance. Moreover, there is a distinctive mismatch between the new formalism and equity's traditional

---

15 Conversely, some commentators have been critical of the new formalism as providing a windfall where there is little doubt that a borrower is in default. *See* Les Christie, *Foreclosure Free Ride: 3 Years, No Payments*, CNNMONEY (Jan. 1, 2012, 4:40 PM), www.money.cnn.com/2011/12/28/real_estate/foreclosure/index.htm (arguing that homeowners asserting formal defenses to foreclosure "are staying in their homes based on a technicality").

16 *See* Peter Pitegoff & Laura Underkuffler, *An Evolving Foreclosure Landscape: The* Ibanez *Case and Beyond*, 5 ADVANCE 131, 138-42 (2011).

17 David A. Dana, *Why Mortgage "Formalities" Matter*, 24 LOY. CONSUMER L. REV. 505, 507-08 (2012).

18 *See, e.g.*, Complaint at 5, People v. JPMorgan Chase Bank, N.A., No. 2768-2012 (N.Y. Sup. Ct. Feb. 3, 2012), 2012 WL 361985 (alleging that the Mortgage Electronic Registration Systems, Inc. (MERS) created a "bizarre and complex end-around of the traditional public recording system"). For a discussion of the emerging trend as bringing much-needed accountability to a mortgage system plagued by what some advocates have described as "fraudclosure," see Peter Linzer & Donna L. Huffman, *Unjust Impoverishment: Using Restitution Reasoning in Today's Mortgage Crisis*, 68 WASH. & LEE L. REV. 949, 967 (2011).

role in assuring substantive protection for the more vulnerable party in residential mortgage transactions – a mismatch that highlights the need for a more context-sensitive approach.[19] While it is true that claims based on technical requirements may leverage a more substantive regulatory agenda, it is also possible that focus on procedural regularity will distract from structural reform.[20]

Indeed, the current crisis has yet to produce significant structural changes in the realm of home lending akin to what earlier economic crises generated. The New Deal, for example, witnessed widespread debt moratoria and provisions for mortgage restructuring, and although some recent efforts have been made in this direction,[21] they are relatively modest.[22] Regulators are starting to develop these structural reforms, and the Consumer Financial Protection Bureau's implementation of the Dodd-Frank Act may make a difference for new loan originations.[23] Most contemporary regulatory approaches in this arena, however, are prospective, and it is not yet clear how deep the change will be even from those approaches. Policymakers and scholars are thus grappling with how to reform the home-finance system in ways that retain the benefits of securitization for liquidity and access to global capital markets, but that attend to the reality that the underlying assets for residential mortgage-backed securities are people's homes.[24]

---

[19] This is not to make an overly reductionist argument that law's rule orientation safeguards only lenders and equity's flexible standards protect only borrowers. Equity can aid lenders – as with the historical development of the foreclosure of the equity of redemption – and there are borrower-protective, classically crystalline procedural rules. *See infra* Part II.B.

[20] *See infra* Part III.B.

[21] *See* Geoff Walsh, *The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide*, 44 SUFFOLK U. L. REV. 139, 139-44 (2011) (describing Depression-era foreclosure-relief legislation, and providing an overview of current statutory and regulatory responses to the foreclosure crisis).

[22] Most notably, home mortgage debt, which was carved out of the reach of bankruptcy in 1978, retains immunity from mandatory modification and other relief, despite significant calls for reform. *See generally* Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565; Juliet M. Moringiello, *Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor*, 79 FORDHAM L. REV. 1599 (2011).

[23] *See* Susan Block-Lieb & Edward J. Janger, *Reforming Regulation in the Markets for Home Loans*, 38 FORDHAM URB. L.J. 681, 682-83 (2011).

[24] *See, e.g.*, Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727, 732 (2009); Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 COLUM. L. REV. SIDEBAR 19, 24-26 (2011), http://www.columbialawreview.org/wp-content/uploads/2011/03/19_Marsh.pdf; Dale A. Whitman, A Proposal for a National Mortgage Registry: MERS Done Right (Oct. 5, 2012) (unpublished manuscript) (on file with author).

This Article seeks to add to the discourse an understanding of relevant remedial dynamics in light of the longstanding divide in mortgage history between law and equity. The phenomenon of borrowers pressing for a more rule-like environment for the resolution of mortgage distress, and courts rejecting lender-side arguments for flexibility, underscores the need for caution. In designing a home-finance system moving forward, it would be problematic to shift too far toward procedural reform over structural efforts to respond to the legacy of the housing crisis.[25]

The other primary ambition of this Article is to link the shift underway in mortgage law to longstanding debates in property theory, most notably property law's balance between formalism and flexibility.[26] Property theory is experiencing a resurgence as a locus for conceptualism, which valorizes property's seemingly enduring forms, with scholars emphasizing the simplicity and clarity of a conceptual core to property.[27] Property, however, has always had its equitable adjustments to counterbalance the perceived benefits of formalism's purported certainty, and this perspective informs a competing pluralist understanding that privileges contingency and the social function of property.[28] The mortgage has long been a prime locus for this tension between fundamental conceptions of property – what Carol Rose famously described as cycles of "crystals" and "mud" in property law.[29]

At first blush, the new formalism would seem to support the primacy of conceptualism in this dialectic, with its emphasis on rule-like approaches to resolving conflicts in property. The emerging mortgage jurisprudence,

---

[25] This formalism is problematic for lenders and mortgage investors as well, although the focus of this Article is primarily on the trend's implications for mortgagors. It now takes nationally an average of 414 days to foreclose, with state averages reaching a high of 1089 days in New York, 987 days in New Jersey, and 853 days in Florida. *1.8 Million U.S. Properties with Foreclosure Filings in 2012*, *supra* note 5. The so-called "overhang" in housing stock this has left in a number of markets has been a serious impediment to housing recovery. *See* Alan Mallach, *REO Properties, Housing Markets, and the Shadow Inventory*, *in* REO & VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION 13, 16, 20 (Fed. Reserve Banks of Bos. & Cleveland & the Fed. Reserve Bd. eds., 2010), *available at* http://www.bos.frb.org/commdev/REO-and-vacant-properties/13-Mallach.pdf.

[26] For a discussion of the landscape of property theory in the housing crisis, see generally Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607 (2010).

[27] *See, e.g.*, Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1700-16 (2012) (elaborating on a modular theory of property).

[28] *See generally* Joseph William Singer, *The Rule of Reason in Property Law* (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 12-39, 2012).

[29] Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 583-85 (1988). As Rose described it, the pattern (evident particularly in mortgage law) has been one of seemingly determinate entitlements yielding to judicial meddling in the face of otherwise harsh results, followed by attempts at contractual clarity, only to be further muddied by judicial intervention. *Id.* at 585.

however, has sprung up in response to the felt necessities of the crisis in a highly contextual manner. Courts have responded to consumer claims by reshaping old doctrines to rebalance a mortgage distress system that had grown overly informal in the tide of securitization. In a final irony, then, the very contingency that is reflected in the new formalism actually underscores the pluralism inherent in equity's adjustments.

The Article proceeds as follows. Part I provides context for understanding the legal consequences of the housing crisis, noting the particular challenges posed by the intersection of primary mortgage market fundamentals and norms that until recently predominated in the secondary market. It then outlines several aspects of formalization as individual borrowers have defended against foreclosures and related proceedings. Part II situates this emerging jurisprudence in the context of the longstanding tension in mortgage history between law and equity, and explores the irony of lender-side arguments for retaining liquidity-related informality. Part III, finally, reflects on what the new formalism means for ongoing debates about both home-finance reform and property theory. It evaluates explanations for this new trend and notes some grounds for caution about the mark it might leave as the housing crisis reshapes mortgage law and, perhaps, property law more generally.

I. IN THE AFTERMATH: THE HOUSING CRISIS IN THE COURTS

The aftermath of the housing crisis that began to emerge in 2007 has brought to the surface deep tensions between two very different systems that constitute our housing-finance system. Securitization facilitates liquidity and reduces locational distortions in real estate markets by linking mortgage lending to broader capital markets. This superstructure exists on top of a traditional property system that recognizes the distinctive nature of the home as collateral and prioritizes the consumer-protection aspects of the home mortgage. As the crisis has evinced, this dual system has had repercussions not just in terms of the macro economy, but also for the daily functioning of the mortgage system. This Part accordingly begins with some context for understanding this dynamic, describing the basic landscape of these two systems and the crisis that has brought them into conflict. It then describes how securitization is changing mortgage-distress practices in the legal fallout from the housing crisis.

A. *The System Breaks Down*

1. A Snapshot of the Housing Boom and Bust

The basic arc of the housing bubble, its collapse, and the aftermath over the past decade and a half is well rehearsed at this point, and only a few significant highlights bear repeating for present purposes.[30] For more than a half century,

[30] For an excellent survey of the causes of the crisis, see Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1181 (2012). *See generally*

starting with a series of federal reforms in the New Deal, the home-finance system followed a relatively simple model. Savings and loan associations and commercial banks used their own insured depositor funds to originate new home loans, which were predominately long term, fixed rate, and self-amortizing, and then held and serviced those loans.[31] Home-price appreciation from the end of World War II through the late 1990s was relatively stable, with fairly minor fluctuations and generally modest appreciation.[32]

For a variety of reasons that are still under debate,[33] however, from roughly 1997 to a peak in 2006, home prices in the United States increased by roughly eighty-five percent, adjusted for inflation.[34] Some of the supply- and demand-side factors that scholars have pointed to as influencing this rapid increase include monetary policy that held interest rates low after the dot-com crash at the end of the 1990s; the loosening of credit and origination standards, originally in the subprime market, but eventually in the prime market as well; federal policies that sought to bolster the homeownership rate; market fundamentals in particular regions; and even the irrational belief that housing prices would continue to increase regardless of such fundamentals.[35]

Professors Levitin and Wachter have convincingly argued that an underappreciated explanation for the housing bubble is what they describe as an excessive supply of housing credit caused by information asymmetries in private-label mortgage securitization that allowed financial institutions to underprice risk at the expense of investors.[36] At the same time, it is well documented that during the early to mid-2000s, there was a proliferation of home-finance products such as adjustable-rate mortgages with artificially low teaser rates, self-amortizing loans, and other options that were unsustainable

---

Andrew W. Lo, *Reading About the Financial Crisis: A Twenty-One-Book Review*, 50 J. ECON. LIT. 151 (2012) (reviewing academic and popular accounts of the broader economic crisis).

[31] *See* EDWARD M. GRAMLICH, SUBPRIME MORTGAGES: AMERICA'S LATEST BOOM AND BUST 13-17 (2007); Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSP. 93, 97 (2005). As Green and Wachter point out, there were a number of significant developments in the market and regulatory structure for home mortgages in this period, notably a credit crisis in the late 1960s that led to the privatization of Fannie Mae and the creation of Freddie Mac, as well as the savings and loan crisis of the 1980s. *See id.* at 97-99.

[32] *See* ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT 33 fig.2.1 (2008) (reviewing data).

[33] *See* Levitin & Wachter, *supra* note 30, at 1179. As Levitin and Wachter observe, "[t]here is little consensus" on causation. *See id.* at 1179.

[34] SHILLER, *supra* note 32, at 32.

[35] *See* Levitin & Wachter, *supra* note 30, at 1212-28.

[36] *See id.* at 1203-10, 1228-32. Levitin and Wachter argue that there were actually distinct phases in the period that is considered the housing bubble, with fundamental market forces explaining more of the price expansion from roughly 1997 through 2003, and only thereafter did housing prices become decoupled from those fundamentals. *Id.* at 1203-10.

and hard to understand for many borrowers.[37] In other words, opacity in both the terms of loan origination and in the mortgage-securitization process were key factors in the boom, just as they would turn out to be in the bust.

Starting in 2006, a series of interconnected phenomena started a "cascade" that rapidly reversed this price spike. Interest rates began to rise at the same time that home prices began leveling off, and even declining in some local markets.[38] This generated a negative feedback loop that reduced demand in the communities where price appreciation had been most concentrated, at the same time that borrowers were experiencing significant interest-rate resets in adjustable-rate mortgages.[39] The downward spiral this sparked in the housing-finance sector rapidly radiated out to freeze credit markets more generally, as financial institutions exposed to now unpriceable debt holdings began to fail, causing a global economic crisis that continues today.[40]

Beyond the macroeconomic consequences of this residential real estate expansion and collapse, the perhaps inevitable legal fallout has loomed large, as distressed loans originated during the boom, particularly those that were securitized, have generated a significant surge in foreclosures and mortgage-related bankruptcies.[41] Over the past five years, there have been on average

---

[37] *See, e.g.*, GRAMLICH, *supra* note 31, at 17-22; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-656, MORTGAGE REFORM: POTENTIAL IMPACTS OF PROVISIONS IN THE DODD-FRANK ACT ON HOMEBUYERS AND THE MORTGAGE MARKET 1, 8-9 (2011) (stating that the foreclosure crisis has been "fueled in part by the proliferation of mortgage products in the early to mid-2000s that have come to be associated with poorer loan performance," such as "mortgages with interest rates that increased sharply after a few years, did not require a down payment or full documentation of income, or allowed borrowers to defer principal and interest payments, increasing their indebtedness over time"); *cf. id.* at 11 (observing that subprime and near-prime originations accounted for nearly forty percent of the market in 2006).

[38] *Cf.* JAMES R. BARTH ET AL., THE RISE AND FALL OF THE U.S. MORTGAGE AND CREDIT MARKETS: A COMPREHENSIVE ANALYSIS OF THE MARKET MELTDOWN 73-74 (2009) (recounting that "[f]alling prices unleashed a cascade of consequences").

[39] *See id.* at 74-99 (explaining that "borrowers with [adjustable-rate mortgages] were unable to refinance before their rates reset," and soon the credit crunch "spilled over to the real economy," with unemployment rising "as recessionary effects set in").

[40] *See* Davidson & Dyal-Chand, *supra* note 26, at 1627-29.

[41] *See supra* text accompanying notes 1-5. Homeowners in default on their mortgage loans often file Chapter 13 bankruptcy, despite the fact that home-mortgage debt is not dischargeable in such a proceeding. *See* 11 U.S.C. § 1322(b)(2) (2006) (allowing debtors to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence"). Indeed, a 2001 study by the Consumer Bankruptcy Project concluded that 75% of Chapter 13 cases were filed by homeowners, whereas only 30% of Chapter 7 cases were filed by homeowners. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 141 n.127 (2008) (indicating that the Consumer Bankruptcy Project data is on file with the author). Approximately 400,000 homeowners file Chapter 13 each year. *Id.* at 166; *see also Quarterly Non-Business Filings by Chapter (1994-2012)*, AM. BANKR. INST., http://

more than 1.5 million foreclosure starts every year,[42] and nearly four million completed foreclosures.[43] This mortgage distress, moreover, has been concentrated in states that saw some of the largest price appreciation during the boom, thus magnifying the effect of the crisis in certain regions.[44] And the crisis in the legal system left by the aftermath of the housing crisis is continuing. Indeed, by some estimates, roughly five million homes are expected to go through foreclosure in the next three years,[45] which means that the after-effects of the crisis are likely to continue to be felt in the courts for some time to come.[46]

2. The Structural Interface Between Primary and Secondary Mortgage Markets

In order to understand the formalist turn in the jurisprudence as courts have confronted this continuing aftermath, it is worth pausing briefly to note some salient functional features of mortgage securitization.[47] Although the line between "primary" and "secondary" mortgage markets has become increasingly indeterminate, it is still possible to discuss two relatively distinct arenas in which single-family residential financing transactions play out.[48] The primary market involves the origination and servicing of mortgages, where individual borrowers take out purchase-money and home-equity loans in ways that, on the surface, have not changed drastically since the standardization of

---

www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=66157 (last visited Jan. 31, 2013).

[42] Jonathan Stempel, *Top Massachusetts Court Limits Foreclosure Relief*, REUTERS (June 22, 2012, 4:15 PM), http://www.reuters.com/article/2012/06/22/us-massachusetts-foreclosures-idUSBRE85L18I20120622 (citing data indicating an annual average of about 1.6 million foreclosure starts).

[43] *See supra* text accompanying note 4.

[44] *See supra* note 5.

[45] Editorial, *Still Depressed, After All These Years*, N.Y. TIMES, June 23, 2012, at SR12 (explaining that, in addition to these five million homes, there are five million homes in the United States that have already been foreclosed upon). About 1.8 million foreclosures were filed in 2012, and over 1.5 million homes were in some stage of foreclosure at the end of 2012. *1.8 Million U.S. Properties with Foreclosure Filings in 2012*, *supra* note 5.

[46] Although the number of underwater homes has been decreasing, 10.9 million, or 26% of mortgage holders, owe at least 25% more on their homes than they are worth. *1.8 Million U.S. Properties with Foreclosure Filings in 2012*, *supra* note 5.

[47] *See generally* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257 (2009); Kathleen C. Engel & Patricia A. McCoy, *Turning A Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039 (2007). On the structure of mortgage markets more generally, see Green & Wachter, *supra* note 31.

[48] *See* Ingrid Gould Ellen, John Napier Tye & Mark A. Willis, *The Secondary Market for Housing Finance in the United States: A Brief Overview*, *in* THE AMERICAN MORTGAGE SYSTEM: CRISIS AND REFORM 7, 8-17 (Susan M. Wachter & Marvin M. Smith eds., 2011).

the thirty-year fixed-rate mortgage in the New Deal.[49] In the secondary market, which is a relatively recent innovation in the long history of mortgages,[50] those loans are packaged and sold into trusts that then issue – and create a market for the subsequent trading of – securities backed by mortgage debt.[51] Securitization thus turns a relatively long-term, illiquid payment stream due on residential mortgages into a relatively liquid asset, designed to shield investors from claims arising from the original loan as well as to provide bankruptcy remoteness.[52]

The basic structure of securitization is not hard to describe, although the details can vary significantly in different transactional contexts.[53] Essentially, what are called "private label" securities begin when home loans are originated, directly by a lender or through a mortgage broker. The individual loan is then recorded and sold to an intermediary, or "sponsor," who then typically packages the loan into one or more pools that are sold to a special-purpose entity, or "depositor."[54] The final step involves transferring the loans into a trust governed by pooling and servicing or trust agreements.[55] At each

[49] Beyond the basics, individual lending, of course, has changed significantly in many respects, whether in terms of the structure of the institutions making home loans, the automation of credit evaluation, the rise of the mortgage brokerage industry, or other examples. That said, borrowers still apply for and receive individual loans in ways that would have been relatively familiar to home buyers two or three generations ago.

[50] The early post-War expansion of homeownership, with its expanding mortgage market, developed with a relatively modest secondary market. To get a sense of the scale of the current market, as of the third quarter of 2012 over $6 trillion dollars (with a "t") of residential mortgage-related securities were outstanding. *See* SEC. INDUS. & FIN. MKTS. ASS'N, RESEARCH QUARTERLY: 3Q 2012, at 8 (2012), *available at* http://www.sifma.org/WorkArea/DownloadAsset.aspx?id=8589941159.

[51] *See* Eggert, *supra* note 47, at 1266. Some loans are still held in portfolio, but the bulk of all loans are now sold to investors or securitizers. Levitin, *supra* note 22, at 584-85.

[52] *See, e.g.*, Levitin, *supra* note 22, at 583 (explaining that the "originate-to-distribute (OTD) model" based on securitization was "designed to increase liquidity"); John Patrick Hunt, Richard Stanton & Nancy Wallace, The End of Mortgage Securitization? Electronic Registration as a Threat to Bankruptcy Remoteness 16 (Aug. 12, 2011) (unpublished manuscript available at http://faculty.haas.berkeley.edu/stanton/papers/pdf/mers.pdf) (describing how the process of securitization creates a depositor "designed to be independent from the sponsor and to have no liabilities or risk of bankruptcy"). One of the challenges arising from securitization with respect to individual lenders is that because pools are packaged and repackaged, a single pool of loans, or portions of pools, may be traded in highly fragmented and specialized segments. *See* Levitin, *supra* note 22, at 584-85.

[53] *See* Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securities*, 82 S. CAL. L. REV. 1075, 1078-79 (2008).

[54] Mortgages are now often recorded not in the name of the originator, but rather in the name of MERS as nominee for the originator. *See infra* text accompanying notes 57-60.

[55] Once loans are pooled in the trust, the trustee, often a bank, administers the trust's assets and interacts with borrowers, typically through loan servicers. *See* Gelpern & Levitin,

step, if done correctly, the transfer – from originator to intermediary to depositor to trust – should be evidenced by an assignment of the mortgage note and the mortgage or deed of trust associated with the note.[56]

A foundational, and of late controversial,[57] element in the expansion of the secondary market has been the Mortgage Electronic Registration Systems, Inc., a company known more generally as MERS.[58] MERS maintains a private registry of mortgages, and its members typically list it on the mortgage as "nominee" for the lender, its successors, and assigns. MERS then remains the name of the mortgage holder in the public records. The relevant member registers a given loan with MERS and then, when either servicing rights or beneficial ownership in the mortgage loan is transferred, notifies MERS to update the registry.[59] MERS was arguably critical to creating the kind of secondary market that exploded during the housing boom, not only because it reduced the transaction costs of transferring the ownership of mortgage debt and servicing rights, but also because it created a forum for trading rights in the secondary market.[60]

The caselaw that has found fault with the securitization process in individual foreclosure and bankruptcy cases has spawned an ongoing and vigorous debate about whether that process was meant to comply with state-level formalities related to the assignment of notes and mortgages and has raised questions of lender authority and identity.[61] Indeed, securitization has been criticized as

---

supra note 53, at 1088-89.

[56] This, of course, is the heart of the contention in most of the cases that have emerged since the crisis on the intersection between securitization and traditional foreclosure and bankruptcy practice. *See infra* Part I.B. The response of securitization trustees on behalf of lenders has often been that most residential mortgage notes are negotiable instruments under the Uniform Commercial Code, and that the typical securitization trust provides for negotiation by "indorsement" and transfer of possession, with an assignment of the related mortgage outside of the MERS context. *See* AM. SECURITIZATION FORUM, TRANSFER AND ASSIGNMENT OF RESIDENTIAL MORTGAGE LOANS IN THE SECONDARY MARKET 3 (2010), *available at* http://www.americansecuritization.com/uploadedfiles/asf_white_paper_11_16_10.pdf.

[57] *See* Marsh, *supra* note 24, at 23 (stating that "MERS has been a controversial innovation," partly because of the concern that "the legal fiction of MERS's status as the 'mortgagee of record,' when it holds no beneficial interest in the property, is irreconcilable with mortgage law"); *infra* Part I.B.2.a.

[58] *See generally* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359 (2010); Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805 (1995).

[59] *See* Slesinger & McLaughlin, *supra* note 58, at 806-07.

[60] MERS has a role in the origination of about six in ten U.S. mortgage loans and appears to be the mortgagee of record on more than sixty million mortgages. *See* Bank of N.Y. v. Silverberg, 926 N.Y.S.2d 532, 539 (App. Div. 2011).

[61] The American Securitization Forum, an industry group, has defended the formal

creating an unmanageable "alphabet soup" problem,[62] and a number of vexing questions have arisen about the intersection of negotiable instruments law under the Uniform Commercial Code and state real-property-recordation and priority rules.[63]

The process of securitization, however, is no more inherently complex than many areas of transactional practice, and it is an unfortunate and somewhat facile misconception to frame the challenges arising in foreclosure as a question of opacity. Rather, the tensions between the primary and secondary markets are more a question of traditional real-property-focused norms in the former, and a structure created to facilitate liquidity in the latter. The emerging jurisprudence of mortgage distress has brought those tensions to the fore, as loans securitized during the housing boom have faced default. It is to that caselaw that we now turn.

B. *Patterns in the Ensuing Mortgage Distress Jurisprudence*

In the aftermath of the housing crisis, the primary battleground for resolving mortgage problems has been judicial foreclosure, although there have also been some notable non-judicial foreclosure developments,[64] as well as ripples

---

validity of the typical securitization process in a white paper it released in 2010. *See generally* AM. SECURITIZATION FORUM, *supra* note 56.

[62] *See* Timothy A. Froehle, Note, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements Are Necessary to Prevent Further Loss to Homeowners*, 96 IOWA L. REV. 1719, 1733 (2011) (citing O. Max Gardner III, *The Alphabet Problem and the Pooling and Servicing Agreements*, CREDIT SLIPS (Aug. 14, 2009, 12:59 PM), http://www.creditslips.org/creditslips/2009/08/the-alphabet-problem-and-the-pooling-and-servicing-agreements.html) (pointing out "the complexity of maintaining proper documentation and complying with all the legal requirements for proper conveyances up the chain" of assignments and negotiations, which bankruptcy lawyer O. Max Gardner III terms the "Alphabet Problem").

[63] *See* Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It*, 37 PEPP. L. REV. 737, 741-42 (2010) (arguing that it is nearly impossible to determine negotiability, that the maker of a negotiable note can lose claims against originators, and that the delivery requirements of negotiability are incompatible with the global secondary market).

[64] There are two primary forms of foreclosure, judicial and non-judicial. In judicial foreclosure a party seeking to foreclose files a legal action and the court adjudicates matters such as standing, default, and amount of the lien, and then supervises a judicial sale of the collateral. *See* NELSON & WHITMAN, *supra* note 9, § 7.11, at 806-08. In non-judicial foreclosure a trustee or mortgagee with a power of sale follows statutory requirements for notice and sale, but does not need to involve a court. *Id.* at 845-49. Borrowers can affirmatively contest non-judicial foreclosures, typically seeking injunctive relief. *Id.* A third method, strict foreclosure, is still available in a handful of states, although primarily for specialized circumstances, such as where a mortgagee foreclosed and neglected to join a junior lienholder with a right of redemption. *Id.* at 801-06.

in bankruptcy proceedings.[65] The decisions that have emerged since the crash have yielded several common themes under various procedural headings that, collectively, highlight the informality that pervaded the secondary market before the crash and a new formalism that is taking hold in its wake.[66]

1. Formalism Emerging

a. *Standing, Chain-of-Assignments, and Other Challenges in Judicial Foreclosures*

In a number of recent cases, the failure of banks to properly complete or document mortgage assignments has proven fatal to subsequent foreclosure actions. These deficiencies have sometimes been framed as a question of standing and real party in interest, and sometimes framed as a question of failure of proof on a substantive element needed for foreclosure (which is to say, did the lender actually have the right to foreclose at the time it did?).

The case that first brought significant attention to these problems[67] was Judge Boyko's decision in *In re Foreclosure Cases*.[68] In these consolidated cases, Deutsche Bank, as trustee, sought to foreclose on fourteen securitized mortgages held in trust. In each case, the mortgage and note attached to the foreclosure complaint referred to the originator, not the party before the court.[69]

---

[65] For general discussions of the emerging caselaw, see Victoria V. Corder, *Homeowners and Bondholders as Unlikely Allies: Allocating the Costs of Securitization in Foreclosure*, BANKING & FIN. SERVICES POL'Y REP., May 2011, at 19, 22-24 [hereinafter Corder, *Unlikely Allies*]; Victoria V. Corder, Note, *When Securitization Complicates the Issue: What Are the Homeowner's Defenses to Foreclosure?*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 299, 311-21 (2009); Froehle, *supra* note 62, at 1732, 1734-40; and David R. Greenberg, Comment, *Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures*, 83 TEMP. L. REV. 253, 265-77 (2010).

[66] *Cf.* RAO ET AL., *supra* note 7, at 113 ("Foreclosure laws have been built on a foundation of state real property, contract, and commercial laws. The explosion in securitized mortgage debt occurred with little regard for the details of these fundamental state laws.").

[67] *See, e.g.*, Gretchen Morgenson, *Foreclosures Hit a Snag for Lenders*, N.Y. TIMES, Nov. 15, 2007, at C1.

[68] *In re* Foreclosure Cases, Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007); *see also In re* Foreclosure Cases, 521 F. Supp. 2d 650, 654 (S.D. Ohio 2007) (giving plaintiffs in twenty-seven diversity-jurisdiction foreclosure cases thirty days to prove their standing and the court's subject matter jurisdiction, given that evidence submitted with the relevant complaints called those requirements into question).

[69] *In re* Foreclosure Cases, 2007 WL 3232430, at *1 (observing that plaintiffs had attached affidavits in the consolidated complaints that recited "the averment that Plaintiff is the owner of the Note and Mortgage, without any mention of an assignment or trust or successor interest").

Citing the basic Article III standing requirement of injury in fact, the district court in this diversity action ordered the lenders to submit either affidavits indicating that they were the original mortgagees or copies of the executed assignments demonstrating that they were the holders and owners of the note and mortgage as of the date the complaint was filed.[70] The subsequently filed documents showed the name of the originator, not the foreclosing lender, and affidavits filed in response to further prodding by the court simply recited that there had been present assignments, clearly not prepared or executed at the time of any actual assignment.[71] In a biting opinion highlighting what the judge perceived to be a cavalier attitude on the part of lender counsel, the court dismissed the actions.[72]

In re Foreclosure Cases commenced a series of decisions involving judicial foreclosures that highlighted problems in the assignment of notes and mortgages in securitization. In *Countrywide Home Loans, Inc. v. Taylor*, for example, a New York court dismissed a foreclosure where the relevant assignment was executed a month after the case was filed.[73] In *Deutsche Bank National Trust Co. v. McRae*, another New York court held that the assignment of a mortgage did not constitute proof of the assignment of the related note.[74]

Several similar cases have been framed less in terms of assignment problems and more as closely related challenges to the enforceability of the note as a negotiable instrument. For example, in *Bank of New York v. Raftogianis*, the court dismissed a foreclosure because the plaintiff bank had failed to establish that, at the time of the foreclosure complaint, it or an agent had possession of the note as required by New Jersey law.[75] Other cases have

---

[70] *Id.*

[71] *Id.* at *2.

[72] This case has achieved notoriety, both because it was one of the first post-boom shocks to the system of foreclosure, but also because Judge Boyko ended with a memorable summation. As the Court put it, "'Fluidity of the market' – 'X' dollars, 'contractual arrangements between institutions and counsel' – 'X' dollars, 'purchasing mortgages in bulk and securitizing' – 'X' dollars, 'rush to file, slow to record after judgment' – 'X' dollars, 'the jurisdictional integrity of United States District Court' – 'Priceless.'" *Id.* at *3 n.3.

[73] Countrywide Home Loans, Inc. v. Taylor, 843 N.Y.S.2d 495, 496-97 (Sup. Ct. 2007); *see also* Herrera v. Deutsche Bank Nat'l Trust Co., 127 Cal. Rptr. 3d 362, 372 (Ct. App. 2011) (requiring the foreclosing lender to demonstrate the chain of title for the deed of trust in order to conduct the trustee sale); Fed. Home Loan Mortg. Corp. v. Schwartzwald, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, 1220, at ¶ 28 (finding no jurisdiction because the lender had not been assigned the mortgage or the note until after it filed the foreclosure action); LaSalle Bank N.A. v. Ahearn, 875 N.Y.S.2d 595, 597-98 (App. Div. 2009) (dismissing for lack of standing where the mortgage had not been assigned to the plaintiff at the time of the foreclosure filing).

[74] Deutsche Bank Nat'l Trust Co. v. McRae, 894 N.Y.S.2d 720, 722 (Sup. Ct. 2010).

[75] Bank of N.Y. v. Raftogianis, 13 A.3d 435, 449-50, 458 (N.J. Super. Ct. Ch. Div. 2010) (explaining that naming MERS as nominee did not make MERS the lender and therefore did not separate the note from the mortgage and, thus, MERS could not effectively transfer the

similarly focused on whether the purported agent for the lender was, in fact, authorized to act.[76] These cases continue to be handed down at a regular pace.[77]

b. *Bankruptcy*

Several cases involving problems in securitization have also arisen in bankruptcy, in contexts where lenders seek relief from the automatic stay in order to then proceed to foreclose.[78] In the case of *In re Maisel*, for example, the court found that the trustee for a securitization trust was not a "party in interest" under the Bankruptcy Code because the only assignment brought before the court was dated four days after the filing of the motion for relief.[79] Other cases in bankruptcy have highlighted chain-of-title problems, such as whether assignment of a mortgage in the absence of an assignment of the note is sufficient to confer standing to seek relief from the automatic stay.[80] And

---

interest in the mortgage to the plaintiff). *But see, e.g.*, Citimortgage, Inc. v. Ramirez, No. A-3540-07, 2009 WL 537072, at *2 (N.J. Super. Ct. App. Div. Mar. 5, 2009) (holding that where the foreclosing bank had a copy of the assignment and a certified copy of the note and mortgage, it could foreclose on the home).

76 In *HSBC Bank USA, N.A. v. Valentin*, for example, the originator recorded the borrowers' mortgage, then recorded an assignment of the note and mortgage to HSBC. No. 15968/07, 2008 WL 239932, at *1 (N.Y. Sup. Ct. Jan. 30, 2008), *aff'd as modified*, 900 N.Y.S.2d 350 (App. Div. 2010). When Ocwen Loan Servicing sought to foreclose, the court dismissed because Ocwen could not establish any relationship to the originator or record holder of the mortgage. *Id.* at *2-3 (stating that an employee of Ocwen had submitted an affidavit asserting that she was the "servicing agent and attorney in fact to the holder of the bond and mortgage sought to be foreclosed," but that nothing from the holder was submitted).

77 *See, e.g.*, NTex Realty, LP v. Tacker, 275 P.3d 147, 149 (Okla. 2012) (finding that there was a question of fact as to when the foreclosing entity became a holder permitted to enforce the note).

78 On creditor lack of adherence to bankruptcy formalities, see Porter, *supra* note 41, at 147 (documenting the number of creditors in actions involving foreclosure who could not demonstrate proof of ownership). Failure to include the promissory note and the appropriate documentation for all claims and charges impedes debtors from understanding why they owe certain fees and whether those fees are legal and accurate. *Id.* at 146-47, 153. Despite inadequate servicing, debtors rarely object to vague and suspicious fees, resulting in their overpayment of servicers and increased risk of foreclosure. *Id.* at 171-72, 178.

79 *In re* Maisel, 378 B.R. 19, 21 (Bankr. D. Mass. 2007). In the case, the court then granted the motion notwithstanding this procedural defect, because the debtors had indicated their intent to surrender the underlying property at issue. *Id.* at 22. Additionally, courts have held that a foreclosing party does not have standing if it cannot trace the ownership of the mortgage and note from the original holder to itself. *See, e.g.*, *In re* Hayes, 393 B.R. 259, 267-68 (Bankr. D. Mass. 2008).

80 *See, e.g.*, Veal v. Am. Home Mortg. Servicing, Inc. (*In re* Veal), 450 B.R. 897, 911, 917-18 (B.A.P. 9th Cir. 2011) (denying bank standing to seek relief from stay for failure to demonstrate that it was a "holder" or otherwise "entitled to enforce" the note, even though it

unlike most post-crisis cases, which have been dismissed without prejudice,[81] one bankruptcy court went so far as to eliminate the mortgage debt in response to an inadequate proof of claim.[82]

c. *Non-Judicial Foreclosures*

Non-judicial foreclosures would seem at first blush to be an arena in which formalization would find less traction, given that challenging such a foreclosure requires affirmative litigation on the part of a borrower, and the overwhelming majority of foreclosures never yield litigation.[83] Nonetheless, one of the more significant examples of new formalism arose in a non-judicial foreclosure case, *U.S. Bank N.A. v. Ibanez*.[84] This case involved foreclosures on two similar securitized mortgages by U.S. Bank and Wells Fargo. The relevant mortgages had been originated by other entities and then, through several intermediate steps, eventually assigned into trusts for securitization.[85] In each case the banks, as trustees, had purchased the mortgaged properties at their own foreclosure sales and then sought to quiet title in subsequent actions.[86] In both instances, however, the relevant assignments had not been

had been transferred the mortgage).

[81] *See infra* text accompanying notes 205-06.

[82] *In re* Parades, No. 09-22261, 2009 WL 3571536, at *1 (Bankr. S.D.N.Y. Oct. 9, 2009); *see also* Gretchen Morgenson, *If Lenders Say "The Dog Ate Your Mortgage,"* N.Y. TIMES, Oct. 25, 2009, at BU1 (reporting that the decision "wiped out a $461,263 mortgage debt on the property").

[83] *See* Julie Schmit, *Foreclosure Fight Tracks Paper Trail; "Show Me the Note" Strategy Gives Homeowners Leverage*, USA TODAY, Dec. 21, 2010, at 1B (stating that more than nine out of ten of home-mortgage borrowers in default do not challenge their foreclosures). Non-judicial foreclosures are allowed in over thirty jurisdictions, including the District of Columbia, although in some of those jurisdictions judicial foreclosure is still the local custom. *See* NELSON & WHITMAN, *supra* note 9, § 7.19, at 845 & n.1.

[84] 941 N.E.2d 40 (Mass. 2011). *Ibanez* was unusual compared to many non-judicial foreclosures in that the servicers in the paired cases brought actions to quiet title to the properties, apparently because there was doubt about the adequacy of notice for each foreclosure sale. *Id.* at 44 n.6. The foreclosures were not, however, unusual in that the foreclosing bank in each instance was also the successful bidder at the sale. *See id.*; NELSON & WHITMAN, *supra* note 9, § 8.8, at 995-96 (discussing the advantages that lenders have at foreclosure sales of the collateral they hold). The mortgagors did not initially contest the action, and it was the land court judge who raised the assignment issues. *See Ibanez*, 941 N.E.2d at 44-45.

[85] The initial assignment of the mortgage at issue in the U.S. Bank case (the Ibanez mortgage) had been recorded prior to the foreclosure, but subsequent assignments were not; more than a year after the foreclosure sale another entity executed and then recorded an assignment to U.S. Bank. *Ibanez*, 941 N.E.2d at 46-47. Similarly, for the mortgage at issue in the Wells Fargo case, the assignment from the originator to Wells Fargo was not executed or recorded until about ten months after the sale. *Id.* at 47-49.

[86] *Id.* at 44.

executed or recorded at the time the foreclosure was noticed and the sales took place.[87]

The Massachusetts Supreme Judicial Court began its analysis by reaffirming the proposition that a party seeking to act pursuant to a power-of-sale clause in a mortgage must "'strictly adhere[]'" to the statutory requirements authorizing that sale, notably that the party foreclosing be "'the mortgagee or his executors, administrators, successors or assigns.'"[88] Similarly, the notice required for a foreclosure sale must properly identify "the holder of the mortgage."[89] Both banks asserted their authority to exercise the power of sale based on other, non-direct assignment documents related to the securitization of the mortgages, but the court rejected each one of them as insufficient to show proper assignment.[90]

The most recent iteration in Massachusetts, *Eaton v. Fannie Mae*,[91] involved the opposite problem of the one that plagued the servicers in *Ibanez*. In *Ibanez*, the Supreme Judicial Court was faced with holders of the relevant mortgage notes who could not demonstrate that they had received an assignment of their respective mortgages at the initiation of the foreclosures.[92] In *Eaton*, by contrast, the court confronted a properly assigned mortgage that was sought to be foreclosed upon by a party who was not the holder of the underlying note.[93] For the loan in question, MERS had served as the nominee for the originating lender; then, MERS had assigned the mortgage, but not the note.[94] The Supreme Judicial Court held that to validly foreclose under a power-of-sale provision in the mortgage, the party must hold the mortgage and must either hold the note or be acting as an authorized agent of the note holder.[95]

---

[87] There had been a third case in the lower court involving LaSalle Bank, but in that case the trial court concluded that the foreclosure had not been rendered invalid by failure to record an assignment because the bank was, in fact, the holder by assignment at the time. *Id.* at 45 n.8.

[88] *Id.* at 50 (quoting MASS. GEN. LAWS ch. 183, § 21).

[89] *Id.*

[90] *Id.* at 51-52. The court noted that a recordable assignment is not necessarily required, even if a recorded assignment is the "better practice." The court explained, however, that there must still be proof of assignment, and not simply, for example, a trust agreement referencing the mortgage. *Id.* at 53. The court also rejected arguments that assignments in blank constituted effective assignments, that the mortgage followed the note, and that post-sale assignments should be given retroactive effect. *Id.* at 53-54.

[91] 969 N.E.2d 1118 (Mass. 2012).

[92] *See supra* notes 85-87 and accompanying text.

[93] *Eaton*, 969 N.E.2d at 1120.

[94] *Id.* at 1121-22. *Eaton* arose out of an eviction action by Fannie Mae after it had received an assignment of the winning bid at the foreclosure auction. *Id.* at 1122-23. The homeowner defended against the eviction action by challenging the validity of the foreclosure. *Id.*

[95] *Id.* at 1129-31. The court, however, applied the decision prospectively, that is, only to foreclosure actions subsequently initiated (although apparently applicable to all outstanding

Cases such as *Ibanez* and *Eaton* have already begun to generate waves of reaction in other non-judicial foreclosure states.[96] Together with the reinvigoration of formality in judicial foreclosure and bankruptcy, these cases underscore how broadly technical regularity has become an issue in every aspect of mortgage distress litigation.[97]

2. Anticipations of, and Reactions to, Formalism

This new formalism was prefigured by structural changes in the process of securitization and post hoc reactions, both of which have become fodder for additional legal challenges.

a. *MERS in the Courts*

Although many of the claims raised against MERS are not unique, the company bears special mention in any discussion of the legal consequences of secondary mortgage market informality.[98] In a number of individual cases, borrowers have unsuccessfully challenged the validity of the MERS process of recording as nominee,[99] although enforcement and regulatory actions have gained some traction.[100] Borrowers have had some success, however, raising

---

mortgages). *Id.* at 1133.

[96] *See* Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The* Ibanez *Time Bomb?* 48-49, 55-56, 61-62, 69, 70-78 (Albany Law Sch., Working Paper No. 38, 2012). It should be noted that Massachusetts is a so-called "title" theory state, meaning that a mortgage nominally gives the mortgagee title to the collateral subject to certain rights retained by the mortgagor. *See Ibanez*, 941 N.E.2d at 51. For most purposes, the distinction between this theory and the more common "lien" theory approach, which recognizes a mortgage as merely a lien, has disappeared. *See* Richard D. Gage, Note, *A Remedy Foreclosed? Mortgage Foreclosure and the Fair Debt Collection Practices Act*, 81 FORDHAM L. REV. 283, 298 (2012). Cases such as *Eaton*, however, do rely in part the implications of title theory, which may limit their influence. *See Eaton*, 969 N.E.2d at 1124.

[97] There is some indication that courts are also tightening up other general procedural requirements in foreclosure. The New Jersey Supreme Court's high-profile decision in *U.S. Bank N.A. v. Guillaume*, for example, held that U.S. National Bank violated the state's foreclosure act by listing the name and address of the servicer rather than the name of the lender in the notice of foreclosure. 38 A.3d 570, 583 (N.J. 2012). This was not a striking development in isolation, but was closely watched in New Jersey and had an impact on foreclosure practice in the run-up to the decision. *See* Sarah Portlock, *Future of Foreclosures in N.J. Hinges on State Supreme Court Decision*, STAR-LEDGER (Dec. 4, 2011, 7:00 AM), http://www.nj.com/business/index.ssf/2011/12/future_of_foreclosures_in_nj_h.html (observing that "foreclosure filings" had "all but ground to a halt" pending the decision).

[98] *See supra* text accompanying notes 57-59.

[99] *See, e.g.*, Beyer v. Bank of Am., 800 F. Supp. 2d 1157, 1160-62 (D. Or. 2011) (rejecting an argument that MERS acting as a mortgage beneficiary and the nominee invalidated a foreclosure action).

[100] For example, the Office of Comptroller of the Currency filed a cease-and-desist consent order in April 2011 finding that MERS failed to "exercise appropriate oversight . . .

the structure of MERS's overlapping roles in various aspects of securitization as a defense to foreclosure.[101]

For example, borrowers have raised issues such as whether a servicer can foreclose on behalf of MERS as a "nominee" with the allegation that MERS was the owner of the note and mortgage.[102] And, in *Deutsche Bank National Trust Co. v. Maraj*, the court questioned MERS's practice of having the same official execute assignments on behalf of both MERS and the receiving entity.[103] Similarly, at least a few courts have been receptive to claims that MERS lacks standing to file claims in bankruptcy given the ambiguities of MERS's role as nominee and the lack of a direct interest retained by the company in the mortgage.[104]

b. *Banks and Servicers React: The Problem of "Robosigning"*

It seems evident that when confronted with record-keeping and assignment problems, or perhaps out of longstanding habit, banks and their counsel turned to various procedural methods to overcome formal requirements, including affidavits related to lost notes, the amount of the obligation, the terms of default, and the like.[105] Some of those techniques were undoubtedly legitimate,

---

and maintain adequate internal controls . . . with respect to the administration and delivery of services to Examined Members." MERSCORP, Inc., Consent Order No. 2011-044, Docket No. AA-EC-11-20, at 5 (OCC Apr. 13, 2011), *available at* http://www.occ.gov/static/enforcement-actions/ea2011-044.pdf. Likewise, the New York Attorney General filed suit against MERS in February 2012 for engaging in deceptive practices, misrepresenting facts such as standing, using robosigners, and ultimately filing and encouraging its servicers to file over 13,000 improper foreclosure proceedings against New York homeowners. Complaint at 17-41, People v. JPMorgan Chase Bank, N.A., No. 2768-2012 (N.Y. Sup. Ct. Feb. 3, 2012), 2012 WL 361985.

[101] *See* Peterson, *supra* note 58, at 1380-86; Nolan Robinson, Note, *The Case Against Allowing Mortgage Electronic Registrations Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1645 (2011). When MERS acts as nominee for a lender, it holds no legal or beneficial interest in the loan, although MERS does sometimes take possession of notes. Peterson, *supra* note 58, at 1374-80.

[102] *See, e.g.*, Mortg. Elec. Registration Sys., Inc. v. Medina, No. 2:09-CV-00670, 2009 WL 4823387, at *2 (D. Nev. Dec. 4, 2009). As of July 22, 2011, MERS has prohibited its members from foreclosing in the name of MERS. MERSCORP, INC., RULES OF MEMBERSHIP r. 8.1(d), at 26 (2012).

[103] Deutsche Bank Nat'l Trust Co. v. Maraj, No. 25981/07, 2008 WL 253926, at *2 (N.Y. Sup. Ct. Jan. 31, 2008) (finding that the official claimed at various times to be the vice president of MERS and an official of Deutsche Bank).

[104] *See, e.g.*, Mortg. Elec. Registration Sys., Inc. v. Chong, No. 2:09-CV-00661, 2009 WL 6524286, at *3 (D. Nev. Dec. 4, 2009) (explaining that in order to have standing, MERS must at a minimum substantiate its agency relationship with the real party in interest).

[105] *See* Corder, *Unlikely Allies*, *supra* note 65, at 23 ("Mortgage servicers and securitizing banks have gotten into the habit of filing a 'lost-note affidavit' when they fail to present proof to the court that they own a mortgage. As commentators have observed, lost-

but some banks and their counsel engaged in fairly widespread practices that have charitably been called "robosigning," such as attesting to foreclosure-related facts without first-hand knowledge.[106]

Evidence on the extent of robosigning has been slow to emerge, but the Inspector General for the U.S. Department of Housing and Urban Development (HUD) has provided some insight in a review of five of the largest servicers for mortgages insured by the Federal Housing Administration.[107] The HUD Inspector General reviewed files on claims over the 2009 and 2010 fiscal years, and revealed practices of signing hundreds of affidavits per day, with daily production goals set for the number of affidavits to be processed.[108] One employee, for example, admitted signing "12- to 18-inch stacks of documents at a time without a review,"[109] and notaries were also found to be deficient, with one servicer having had up to 1000 documents per day notarized without witnessing the signature.[110]

Practices bundled under the umbrella of robosigning have begun to show up with some regularity as defenses in foreclosure litigation. In *U.S. Bank N.A. v. Kimball*, for example, the Vermont Supreme Court upheld the dismissal of a foreclosure, in part because an affidavit submitted by the loan servicer attempting to attest to a missing endorsement was not based on personal knowledge.[111] Indeed, several banks and their counsel have been sanctioned

note affidavits are the rule in the industry rather than the exception . . . .").

[106] Although covering a number of questionable practices, robosigning is generally understood as "an employee or agent of [a] servicer signing documents automatically without a due diligence review or verification of the facts." OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URBAN DEV., MEM. NO. 2012-KC-1801, CITIMORTGAGE, INC., FORECLOSURE AND CLAIMS PROCESS REVIEW 1 n.2 (2012), *available at* http://www.hudoig.gov/Audit_Reports/2012-KC-1801.pdf. The scandal that erupted when these practices came to light led a number of prominent servicers and lenders, including GMAC, JPMorgan Chase, Bank of America, and Goldman Sachs, to put a temporary halt to foreclosures. *Robo-Signing Puts Ownership of Thousands of Homes in Question*, AOL REAL ESTATE (Sept. 7, 2011, 10:22 AM), http://realestate.aol.com/blog/2011/09/07/robo-signing-puts-ownership-of-thousands-of-homes-in-question/.

[107] OFFICE OF INSPECTOR GEN., *supra* note 106. The servicers under review by the HUD Inspector General were the same five servicers that were involved in the National Mortgage Settlement. *See infra* note 115.

[108] OFFICE OF INSPECTOR GEN., U.S. DEP'T. OF HOUS. & URBAN DEV., MEM. NO. 2012-FW-1802, BANK OF AMERICA CORPORATION FORECLOSURE AND CLAIMS PROCESS REVIEW 6 (2012), *available at* http://www.hudoig.gov/Audit_Reports/2012-FW-1802.pdf.

[109] *Id.*

[110] OFFICE OF INSPECTOR GEN., U.S. DEP'T. OF HOUS. & URBAN DEV., MEM. NO. 2012-AT-1801, WELLS FARGO BANK FORECLOSURE AND CLAIMS PROCESS REVIEW 4 (2012), *available at* http://www.hudoig.gov/Audit_Reports/2012-AT-1801.pdf.

[111] U.S. Bank N.A. v. Kimball, 27 A.3d 1087, 1093 (Vt. 2011).

for robosigning practices in relation to foreclosures,[112] and several law firms specializing in foreclosures have gone out of business.[113]

Moreover, as discussed below,[114] robosigning abuses led to one of the more significant substantive – and procedural, with respect to servicing practices – responses to the housing crisis, the so-called National Mortgage Settlement between forty-nine state attorneys general and the federal government on one side and the country's five largest loan servicers on the other.[115] The roughly $32 billion settlement, which grew out of state and federal investigations into robosigning, is a rare, if limited, avenue to structural reform in the legacy aspects of the housing crisis.[116]

3. Summary and Perspective

Before reflecting on what unites this caselaw, it is necessary to acknowledge countercurrents in the jurisprudence that represent less strictly formalist approaches.[117] Some courts, for example, have been forgiving of chain-of-assignment problems.[118] Lenders and servicers have also had some success challenging the proposition that a party initiating foreclosure in non-judicial

---

[112] *See, e.g.*, HSBC Bank USA, N.A. v. Taher, No. 9230/09, 2011 WL 6445361, at *4 (N.Y. Sup. Ct. Dec. 22, 2011) (imposing sanctions against HSBC Bank USA, N.A. as a trustee and also sanctioning the bank's counsel because the bank's robosigning practices were found to be frivolous and "completely without merit in law," the bank had asserted "material factual statements that are false," and the bank's continuation of the action was "a waste of judicial resources").

[113] *See, e.g.*, Kimberly Miller, *Thousands of Foreclosures Still in Limbo One Year After Stern Firm's Collapse*, PALM BEACH POST, Apr. 2, 2012, at 1A; Peter Lattman, *Foreclosure Firm Steven J. Baum to Close Down*, N.Y. TIMES DEALBOOK (Nov. 21, 2011, 2:51 PM), dealbook.nytimes.com/2011/11/21/foreclosure-firm-steven-j-baum-to-close-down/.

[114] *See infra* text accompanying notes 190-97.

[115] The National Mortgage Settlement, announced on February 9, 2012 and approved on April 5, 2012, involved Ally/GMAC, Bank of America, Citibank, JPMorgan Chase, and Wells Fargo. *See Fact Sheet: Mortgage Servicing Settlement*, NAT'L MORTGAGE SETTLEMENT, https://d9klfgibkcquc.cloudfront.net/Mortgage_Servicing_Settlement_Fact_Sheet.pdf (last visited Jan. 6, 2013).

[116] *See infra* Part III.A.3.

[117] To be clear, lenders succeeding in resisting claims based on the absence of compliance with formal requirements is not necessarily the same thing as lenders obtaining equitable relief. But in the spectrum between formalism and the flexibility that equity has traditionally involved, these cases at least take a step back from strict formalism. Moreover, as noted below, *see infra* text accompanying notes 222-25, this should not be read to suggest that the courts, and other legal institutions, have entirely ignored other aspects of the housing crisis; some courts have, in fact, validated claims based on substantive grounds of fairness, although such decisions remain relatively isolated in comparison to the proceduralist decisions.

[118] *See, e.g.*, U.S. Bank N.A. v. Knight, 90 So. 3d 824, 826 (Fla. Dist. Ct. App. 2012) (holding that the holder of a negotiable instrument had standing to foreclose, despite the fact that the accompanying mortgage had not been transferred prior to initiation of the action).

foreclosure states, such as California, must have the original note,[119] and some courts have held that borrowers cannot challenge the authority of MERS to initiate foreclosure proceedings.[120] Likewise, some lenders in bankruptcy have been able to demonstrate that they are real parties in interest, notwithstanding confusion about who holds the note and mortgage.[121] That said, the turn in the caselaw is discernible if uneven, and, given the backlog of distressed mortgages arising from the pre-crash bubble, the trend shows little sign of abating, even as lenders and servicers have begun to adjust to the new jurisprudence.[122]

Several common themes emerge from the great many cases that do represent the formalization trend, regardless of their procedural specifics. On a technical level, a number of the cases focus on the relationship between the party initiating the action and the actual holder of the mortgage and note, underscoring the confusion that has emerged about who, precisely, holds any given loan and related security interest at any given point in the securitization

---

[119] *See, e.g.*, Tina v. Countrywide Home Loans, Inc., No. 08 CV 1233, 2008 WL 4790906, at *8 (S.D. Cal. Oct. 30, 2008) (holding that the California Civil Code "does not [require] providing the original note prior to the sale" in a non-judicial foreclosure); Debrunner v. Deutsche Bank Nat'l Trust Co., 138 Cal. Rptr. 3d 830, 836 (Ct. App. 2012) (holding, in an action challenging the assignment of a deed of trust without assignment of the mortgage note, that California law does not require the party initiating non-judicial foreclosure to be in possession of the note); *see also* Murphy v. Aurora Loan Servs., LLC, No. 12-1398, 2012 WL 5439284, at *2 (8th Cir. Nov. 8, 2012) (holding that homeowners could not rely on a "show-me-the-note" theory to estop foreclosure proceedings where they could not show with sufficient particularity that they suffered any harm as a result of servicers proceeding in place of the original note holder).

[120] *See, e.g.*, Boyter v. Wells Fargo Bank, N.A., No. C 11-03943, 2012 WL 1144281, at *5 (N.D. Cal. Apr. 4, 2012) (citing several cases).

[121] For example, in *In re Hwang*, the district court determined that a servicer who had sold the original note to Freddie Mac but remained the holder of the note was the "real party in interest"; therefore, the bankruptcy court should have granted the servicer's motion to lift the automatic stay and allowed the servicer to foreclose on the note. 438 B.R. 661, 665-66 (C.D. Cal. 2010), *rev'g* 396 B.R. 757 (Bankr. C.D. Cal. 2008).

[122] Courts have also intervened in some instances to impose procedural requirements directly on counsel in foreclosure cases, focusing on gatekeepers who can directly influence the course of proceedings. New York, for example, recently issued an administrative order that requires foreclosure actions to include a certification that counsel has personally checked the accuracy of the claim, and mandates that a representative of the plaintiff attest to the accuracy of the underlying documents. *See* Admin. Order No. AO/431/11 (N.Y. Chief Admin. J. Mar. 2, 2011) (revising Admin. Order No. AO/548/10 (Oct. 20, 2010)), *available at* http://www.nycourts.gov/attorneys/pdfs/AdminOrder_2010_10_20.pdf. New York courts are currently divided on the validity of this new requirement. *Compare* Citimortgage, Inc. v. McGee, 915 N.Y.S.2d 436, 438 (Sup. Ct. 2010) (enforcing the October 20, 2010 administrative order), *with* LaSalle Bank, N.A. v. Pace, 919 N.Y.S.2d 794, 803 (Sup. Ct. 2011) (finding that the Chief Administrative Judge's administrative order of October 20, 2010 was "legislative" in nature and therefore "void" under New York law).

process. Similarly, several cases highlight concerns with the process of assignment after origination, in terms of documenting, tracking, and recording such transfers, likewise exposing a secondary market that appears to have valued liquidity over careful procedural regularity. Finally, and crucially, the cases reveal the particular mindset of originators, intermediaries, investors, and servicers, for whom procedural requirements could be gamed, with courts facilitating the flexibility necessary to realize their collateral, despite procedural and technical hurdles.[123]

These cases can thus be understood as the manifestation of a process of lending and securitization in the home-finance sector that, at least until the housing crisis hit, had come to rely on a measure of practical informality to shape the market.[124] For an individual lender holding a loan on its own book, the importance of clear documentation was obvious. But the contemporary secondary market was marked by a combination of MERS, relatively relaxed assignment practices, and a foreclosure system that had come to rely at best on automation and at worst on outright fraud.[125] What these cases reveal is that the superstructure of securitization flourished in the boom in no small measure because of the flexibility inherent – by design or inadvertence – in the secondary mortgage market, and that lender-side interests have tried, with relatively little success, to preserve that flexibility when seeking to realize their collateral in the context of the primary mortgage market.

II. FORMALISM AND FLEXIBILITY IN MORTGAGE LAW

There are many ways to understand the significance of the foreclosure and bankruptcy caselaw emerging in the wake of the housing crisis. This Part

[123] The emerging jurisprudence arguably represents two closely related varieties of formalization: the first in the property law sense that default rules are being enforced in many respects, given the importance of the asset at issue; and the second in terms of contractual formality, given that at least some of the requirements at issue reflect strict compliance with loan terms and securitization documentation.

[124] Moreover, there is an overlap between the rise of the kind of private-label securitization that has proven most problematic in the post-crisis caselaw and the expansion of the subprime and near-prime markets that were integral to that part of the secondary market. *See* Davidson & Dyal-Chand, *supra* note 26, at 1626-27 (stating that "the most exotic were also the most securitized").

[125] Evidence that robosigning might be a symptom of a larger phenomenon can be found in at least one investigation that has unearthed evidence of widespread noncompliance with a range of formalities related to assignments and other requirements. *See* AEQUITAS COMPLIANCE SOLUTIONS, INC., FORECLOSURE IN CALIFORNIA: A CRISIS OF COMPLIANCE 1 (2012), *available at* http://www.sfassessor.org/modules/showdocument.aspx?documentid=1018 (finding, for example, potential violations of California law in eighty-four percent of sampled mortgages). Examples of noncompliance include conflicting assignments of the deed of trust, inconsistency between federal filings and recorded documents, incidences of trustees and assignees signing for assignors, and assignment of the deed of trust after the notice of default. *Id.* at 6-7.

places the jurisprudence in the context of a centuries-old arms race between borrowers and lenders over formalism and flexibility in mortgage law and in property more generally – a tension that reflects the traditional domains of law and equity. From the earliest days of the mortgage, this tension has shaped the interaction between borrowers and lenders. Although the valence has not been entirely uniform, it is possible to discern traces in that history of lenders tending to invoke law's formal strictures and borrowers tending to invoke equity's discretion. This Part traces that history, and highlights the ironies that abound in contemporary lender antiformalism.[126]

A. *The Law-Equity Divide in Mortgage History*

1. Law and Equity's Original Polarities

In many ways, the modern mortgage was born in reaction to the consequences of the formalist strain evident in the procedural strictures of early courts of law.[127] A somewhat simplified version of this history is that mortgages, with some variation, developed early in the Anglo-American tradition as a form of conveyance.[128] In late-twelfth-century England, around the time of Glanvill, use of real property as collateral required a borrower to convey the seisin in the land to the lender, who would hold it in "gage" as a way to fix the obligations of the debtor.[129] This would be a conveyance in fee

---

[126] This Part and the next address contrasts between a series of oppositions: law and equity; formalism and flexibility; and rules and standards. These are related in many ways, but not precisely overlapping: the first derives from historical practice; the second from an orientation to legal conflict; and the third from contrasting modes of decisionmaking. This is not to conflate these dichotomies, but rather to acknowledge their interrelation in the context of the resolution of mortgage distress.

[127] *See* 4 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES §§ 16.1-16.12 (A. James Casner ed., 1952); H.W. Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1, 9-10 (1890). This history recapitulates to some extent the earlier development of the Roman law of real security, which evolved from the *fiducia*, a conveyance with agreement to reconvey upon repayment of the debt, to the *pignus*, in which ownership transferred to the lender, but possession remained with the borrower, and finally to the *hypotheca*, which provided only a security interest. William H. Lloyd, *Mortgages – The Genesis of the Lien Theory*, 32 YALE L.J. 233, 233 (1922).

[128] Chaplin, *supra* note 127, at 6-7. There had been earlier adaptations by Norman judges of Roman forms of security that resembled pledges of land without conveyance, including foreclosure procedures that were equitable from the borrower's perspective. *See id.* at 5-6. By the late twelfth century, however, the pledge of property in a manner that would convert the pledge to an absolute fee interest in the lender had become common. *Id.* at 8-10. In this way, the birth of the mortgage may actually have begun with equity, then capitulated to formalism in law, and then returned to equity.

[129] A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 141 (2d ed. 1986). The form of conveyance varied over time – from a lease for years that would provide for vesting in fee if the debt was not repaid by the end of the term, for example, to the fee simple subject to a condition allowing reentry. *Id.* at 142. In a common form, the mortgagee, prior to the

on condition that, if the debtor repaid the loan on the date and under the terms provided, the debtor would have the right to reenter and terminate the mortgagee's estate.[130]

Over time, the possibility that the lender could take absolute title upon default created substantial incentives for strategic behavior. If a borrower did not repay the debt precisely on what became known as "law day" with the exact repayment down to the farthing, the borrower would forfeit his collateral entirely.[131] Thus, any value in the property above and beyond what could be considered the security interest was transferred to the mortgagee.

As a result, borrowers turned to equity, and the Chancellor began to alleviate the harsh consequences of strict common law formalism.[132] Equity initially allowed borrowers to raise traditional defenses such as fraud and duress.[133] Eventually, borrowers who could repay at some point after law day began to receive the right in equity more generally to redeem the collateral conveyed at law, upon payment of principal and interest.[134] This, of course, became known as the equity of redemption and gives us the term "equity" for the residual value in property above the amount collateralized.[135]

Eventually, the flexibility that equity introduced to protect borrowers from the harsher consequences of lending through the form of a defeasible conveyance became onerous to lenders. At some point, it was only fair for the equity of redemption to run out and for a borrower's inability to redeem to be recognized. Accordingly, the Chancellor began allowing lenders to bring suit to cut off, or "foreclose," the equity of redemption: hence the origins of foreclosure practice as it stands today.[136]

---

condition being exercised, obtained the incidents of legal title, including the ability to pass the title to heirs or devisees, the right to compensation for eminent domain, and potentially even the right to vote associated with the property, among others. NELSON & WHITMAN, *supra* note 9, §1.2, at 7. Early in this development, the lender used the right of possession to collect rents (interest being considered usurious), but in later custom mortgagors could retain possession. *Id.* at 7-8.

130 NELSON & WHITMAN, *supra* note 9, §1.2, at 7.

131 *Id.* at 8; *see also* AMERICAN LAW OF PROPERTY, *supra* note 127, §16.6, at 20 (explaining that because the "value of the property almost invariably greatly exceeded the amount of the debt," there was "a striking actual forfeiture and penalty even though the debt was never enforced").

132 There is some indication that the courts of law had earlier independently interposed essentially equitable considerations into this arrangement, AMERICAN LAW OF PROPERTY, *supra* note 127, at 20-21; Chaplin, *supra* note 127, §16.6, at 9-10, although the essential terms of the formalism/flexibility tension remained.

133 NELSON & WHITMAN, *supra* note 9, §1.3, at 8.

134 *Id.* at 8-9.

135 *See id.*

136 *Id.* at 9.

2. Contemporary Echoes

The long historical back-and-forth between substantive protection for borrowers through equity, on the one hand, and the nominal rights of lenders, on the other, continues to echo in a number of doctrinal areas.[137] Facing the constraints of equity, for example, lenders have attempted to contract around consumer protections and courts have, correspondingly, "jealously" guarded against what is known as "clogging" the equity of redemption.[138] Thus, courts regularly strike down attempts to bar the retention of ownership upon full repayment prior to foreclosure, as well as a number of practices that offer lenders what is considered a "collateral advantage."[139]

The equitable mortgage, moreover, often serves as a tool to police lenders' attempts to evade consumer protections altogether through forms of conveyance that purport not to involve financing.[140] Likewise, when lenders seek to avoid the scrutiny of judicial management through power-of-sale foreclosures, courts respond, albeit not often strongly, by allowing post hoc review of the substantive fairness of the resulting sale, at least slightly more often than in judicial foreclosures.[141]

---

[137] Mortgage law as it was adopted in early U.S. history diverged in some notable ways from British common law and equity – for example, by the early adoption of a lien theory of mortgages that, in an equitable manner, reflected the substantive relationship between the parties notwithstanding contrary terms in mortgage deeds. *See* AMERICAN LAW OF PROPERTY, *supra* note 127, § 16.13, at 31-32; *cf.* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 421-25, 440-47 (2006) (exploring the transformation of the law governing the vulnerability of land to creditor claims). These shifts, however, recapitulated the essential tension between lender-oriented formalism and borrower-oriented flexibility, even if lien theory shifted the conceptual foundations of the mortgage more clearly toward recognition of the interests of the mortgagor.

[138] *See* West v. Reed, 55 Ill. 242, 244 (1870) ("It is settled beyond controversy, that contracts between mortgagor and mortgagee, for the purchase or extinguishment of the equity of redemption, are regarded with jealousy by courts of equity, and will be set aside if the mortgagee has, in any way, availed himself of his position to obtain an advantage over the mortgagor."); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.1 (1997). For a historical perspective, see Bruce Wyman, *The Clog on the Equity of Redemption*, 21 HARV. L. REV. 459 (1908).

[139] Clogging claims often arise in contexts beyond simple contractual bars on redemption, such as options to purchase that are dependent on the default of the borrower, agreements to grant a deed in lieu of foreclosure upon future default, arrangements by which borrowers agree to place a deed in escrow to be released upon default, certain aspects of mezzanine financing, and other modern devices. For an excellent overview, see John C. Murray, *Clogging Revisited*, 33 REAL PROP. PROB. & TR. J. 279 (1998).

[140] *See* Rashmi Dyal-Chand, *From Status to Contract: Evolving Paradigms for Regulating Consumer Credit*, 73 TENN. L. REV. 303, 316 (2006); *see also* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.2 (providing that a deed's conveyance, if intended as a security for an obligation, shall "be deemed a mortgage").

[141] *See* NELSON & WHITMAN, *supra* note 9, §§ 7.13-7.20, at 845-53.

Statutory consumer protection for home finance breaks down similarly along a more equitable focus on the substance of the transaction and on procedural protection that resonates more in formalism.[142] For example, statutory redemption periods, which take effect after foreclosure, recapitulate and extend the traditional equity of redemption.[143] By contrast, the bulk of federal regulation of home borrowing and purchase – such as the Truth in Lending Act (TILA)[144] and the Real Estate Settlement Procedures Act (RESPA)[145] – has traditionally tended to focus on providing information to consumers or ensuring related procedural protections at the outset of the transaction, with an emphasis on disclosure.[146] There are some exceptions,[147] and the regulatory landscape in this arena is beginning to shift toward more substantive approaches with the new Consumer Financial Protection Bureau, but that shift is still in its infancy.[148]

---

[142] There is also a long history of lender challenges to foreclosure moratoria, *see, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444-48 (1934) (upholding a Depression-era state foreclosure moratorium statute), and resistance to both substantive regulation in the primary mortgage market and procedural reforms, such as mandatory mediation, that focus on the underlying substance of a given loan. *Cf.* Walsh, *supra* note 21, at 152.

[143] *See* NELSON & WHITMAN, *supra* note 9, §8.4, at 977-78 (observing that "approximately half the states authorize a statutory right of redemption which provides an additional time period for mortgagors . . . to pay a certain sum of money . . . to redeem the title to the property"). Other statutory protections include the Fair Housing Act's provisions protecting individuals buying, leasing, selling, holding, and conveying real property from discrimination based on race, color, religion, national origin, sex, spousal income, handicapped status, and familial status. 42 U.S.C. §§ 3603-3604 (2006). The defendant has the burden of proving that business necessitated the use of one of these discriminatory practices. 2 NELSON & WHITMAN, *supra* note 9, § 11.5, at 142.

[144] 15 U.S.C. § 1601 (2006) (requiring, for example, disclosure of credit terms to protect consumers from the risks accompanying the uninformed use of credit).

[145] 12 U.S.C. § 2601 (2006) (requiring that information on the nature and cost of the settlement process be given to consumers in a timely manner); *id.* § 2603(a) (requiring the Bureau of Consumer Financial Protection to publish one integrated disclosure for mortgage loan transactions with clear and conspicuous disclosure of all charges to help the borrower or lessee understand the transaction and all technical information in the disclosure); *id.* § 2604 (requiring that the informational booklets be distributed to borrowers).

[146] TILA, for example, mandates that lenders disclose certain financing-related information, 15 U.S.C. § 1601(a)-(b), and RESPA similarly governs the information that must be provided at a real estate closing, 12 U.S.C. § 2605(b).

[147] Since 1994, the Home Ownership and Equity Protection Act, which amended TILA, has regulated the substantive terms of certain high-cost mortgage loans by barring short-term balloon payments, negative amortization, certain prepayment penalties, default interest rates, and other terms. Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, § 152(d), 108 Stat. 2190, 2191-2194 (codified as amended at 15 U.S.C. § 1639).

[148] *See infra* Part III.B.2.

Today, lenders continue to have the arsenal of formalism at their grasp – setting and enforcing the terms of payment deadlines, filing requirements, servicing-related obligations (such as insurance), and other requirements that reflect the approach of early lenders to law day. Borrowers, prior to the housing crisis and since, continue to counter by invoking questions of fraud, usury, and similar substantive claims about the terms or conditions of lending, despite the rarity of decisions that validate these claims. As we shall see, this makes the inversion evident in the aftermath of the housing crisis all the more noteworthy.

B. *The Ineluctable Irony of Lender Antiformalism*

The association between law-as-formalism and lender interests, on the one hand, and debtor protection linked to the flexibility and substantive norms of equity, on the other, is not entirely absolute in the history and structure of mortgage law. Nonetheless, the preceding discussion should make clear that there is a rough correspondence that traces back to the roots of contemporary mortgage law.[149] The valence of this tension, however, is being subverted in the aftermath of the housing crisis, with borrowers holding lenders to account for lack of formality and lenders trying to defend with what are, in essence, a species of equitable arguments.[150] Understanding the irony that this turn represents requires a pause to understand some of the reasons why the historical valence developed and why it is now being subverted.

1. Reversing the Polarity

The divide between law and equity – in mortgages and more broadly – is one variation of the familiar, longstanding debate about the relative merits and

---

[149] It is possible to trace a similar perennial tension between substantive fairness and procedural regularity in the development of bankruptcy, reflected to some extent in arguments between debtors and creditors that parallel the formalism/flexibility tension in mortgage law. Although bankruptcy is a statutory proceeding, some of its more salient features can be traced to historically equitable proceedings that involved the division of limited funds, and it has become a truism of modern bankruptcy practice, however overstated, that bankruptcy courts are courts of equity. *See* Marcia S. Krieger, *"The Bankruptcy Court is a Court of Equity": What Does That Mean?*, 50 S.C. L. REV. 275, 276 (1999) (tracing and thoughtfully questioning repeated invocations of equity in bankruptcy as a historical matter); *id.* at 295-97 (discussing particularly equitable aspects of bankruptcy procedure in a system that combines legal and equitable aspects); *cf.* Moringiello, *supra* note 22, at 1605-06, 1621-22 (discussing equitable strains embodied in the Bankruptcy Code and the interaction between bankruptcy and background state property law). When bankruptcy proceedings address questions such as equitable subordination, and when they grapple with questions such as fraudulent conveyances, the same type of conflict between procedural regularity and contextual fairness that arises in mortgage distress litigation is manifest.

[150] *See supra* Part I.B.

implications of rules versus standards.[151] Law, in this debate, is associated with a substantive approach to doctrine that privileges a certain determinism that can mask inequities in the name of formal norms.[152] Equity, by contrast, is understood as a mode of decisionmaking that attends to questions of substantive fairness between disputants despite contrary form, as reflected in the oft-repeated maxim that "equity deems as done that which ought to be done."[153] Equity is thus sensitive to context and power dynamics between disputants, and correspondingly brings a measure of flexibility to remedial decisionmaking that can accommodate these concerns more easily than rules, given equity's ability to reflect the granular texture of the underlying interaction.[154]

Another iteration of this tension can be understood as a contrast between procedure and substance. This is a slightly trickier divide to discern because formalism has its substance and equity its process. Nonetheless, the instinct toward formalism manifests in a proceduralism that emphasizes clear requirements and unbending strictures. Rule orientation thus tends toward an understanding of fairness as following terms of decision laid down ex ante regardless of the underlying content of the rights at issue and the context of the relevant decision: a deadline is a deadline, regardless of why a party failed to meet it. Standards, by contrast, can more easily attend to the substantive reasons why someone acted or failed to act, leavening otherwise harsh consequences in appropriate cases.

As Kathleen Sullivan has argued, there is not always a direct parallel between law's formalism, particularly in its focus on procedural regularity, and the failure to attend to the substantive concerns often associated with equity, such as sensitivity to context and a functionalism that can be deployed in the service of fair play.[155] Joseph Singer has further argued that the rules/standards

---

[151] The literature on this tension is vast, and of continuing relevance in property theory. *See, e.g.*, David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 142-44 (2009); Singer, *supra* note 28, at 61. The seminal work in this discourse is Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976).

[152] Kennedy, *supra* note 151, at 1691-92.

[153] Bean v. Walker, 464 N.Y.S.2d 895, 897 (App. Div. 1983).

[154] For one of the many classic statements summarizing this aspect of equity, see Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) ("The essence of equity jurisdiction has been the power . . . to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.").

[155] Kathleen M. Sullivan, *The Supreme Court, 1991 Term – Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 96 (1992) ("Few observers today, however, would affirm any strong requisite connection between these political dichotomies and the rules/standards choice."); *id.* at 96-97 ("[T]he political valences of rules and standards shift in cycles over time.").

debate ignores the reality that rules are less bounded than traditional formalist associations suggest, as they are not self-executing and require discretion to determine their scope and application.[156] At the same time, Singer notes, standards are hardly the unpredictable realm of unfettered discretion that they are so often caricatured as, given the constraints of precedent, context, and common sense.[157]

The second-order complexity that Sullivan and Singer highlight is evident as a general matter in property,[158] and in mortgage law specifically, where one can find doctrines with equitable origins that are lender-focused – most notably the basic concept of foreclosure[159] – alongside technical, formal, procedural requirements that are borrower-focused (for example, those that the current jurisprudence reinforces). Indeed, much of the body of foreclosure law provides mortgagors procedural protection of the most basic formal variety. Notice requirements, for example, are ubiquitous in both judicial and non-judicial foreclosure states, as are technical requirements for how the power-of-sale authority must be exercised in foreclosure.[160] Courts regularly declare that such procedural protections must be closely adhered to, largely because of the connection between procedural regularity and the protection of the typically more vulnerable party to the transaction.[161]

There is thus much to be said about avoiding reductionist associations in this discussion,[162] and, as a practical matter, the merger of law and equity obscures the once relatively clear lines between these modes of approach.[163] That said,

[156] Singer, *supra* note 28, at 10-17.

[157] *Id.* at 17-21 (discussing "exemplars" as shaping standards and presumptions as adding predictability to their implementation).

[158] Indeed, Carol Rose argues that in property, there is a "softer, more sociable, and dialogic side to crystal rules," particularly in fostering commerce and ongoing engagement through clear entitlements. Rose, *supra* note 29, at 607.

[159] *See supra* Part II.A.

[160] This is reflected in statutory and regulatory approaches that likewise map procedural or substantive norms. *See infra* Part III.B.2.

[161] Perhaps the most significant lender-side response to procedural requirements and substantive review has been the attempt to avoid judicial oversight altogether. In reaction to the strictures of judicial foreclosure, lenders fairly early in U.S. history began to use deeds of trust instead of mortgages, which provided a non-judicial avenue for realizing collateral. *See* Robert H. Skilton, *Developments in Mortgage Law and Practice*, 17 TEMP. L.Q. 315, 323-35 (1943). As deeds of trust became more common, lenders in states that allowed them began adding "power-of-sale" clauses to mortgages, which had the same effect. Non-judicial foreclosure is regulated by statute in those states that allow it, but the requirements are simpler than for judicial foreclosure and necessitate borrowers filing an affirmative action in order to contest the sale of the mortgaged property. *See supra* notes 64, 84.

[162] *Cf.* TAMANAHA, *supra* note 13, at 160-62.

[163] *Cf.* Henry E. Smith, Response, *Does Equity Pass the Laugh Test?: A Response to Oliar and Sprigman*, 95 VA. L. REV. IN BRIEF 9, 16 (2009), http://www.virginialawreview.org/inbrief/2009/04/20/Smith.pdf ("There has always been a suspicion of equity and the need

there are still strong reasons why the tools that equity deploys remain important in the mortgage context. Equitable "muddy" reasoning importantly attends to substance and not just form. This is particularly critical in a transactional environment – single-family home finance – in which sophisticated repeat players on the lender side control the form of the transaction, often to the detriment of substantive fairness. Similarly, equitable considerations reflect the necessity of attending to power dynamics, again critical in an arena in which power imbalances are endemic.[164]

In a broader sense, what this suggests is that considerations of distributive justice can be implicated by the quality and texture of the process by which relief is granted in an area of law. That proposition can at times be submerged in the rules/standards debate, but is particularly resonant in the context of mortgage law, where the accretion of centuries underscores the link between the predominating mode of judicial reasoning in working through distress and the quality of the ensuing resolution. For reasons discussed below,[165] technical formality and substantive outcomes can be strategically interrelated, but the relative balance between contextual, post hoc resolution of mortgage distress and more atonal formalism that focuses primarily on procedural regularity matters nonetheless.

2. Informality and Liquidity: Securitization as Antiformalism

On the other side of the mortgagor-mortgagee relationship, the emerging new formalism is revealing the breadth of informality that dominated mortgage securitization. In many ways, the expansion of the residential mortgage-backed securities market in the housing boom was predicated on introducing somewhat artificial flexibility into a procedural arena traditionally marked by formality. The legal superstructure of securitization and the mortgage market

---

to keep it cabined (for example, only acting in personam, and only when the legal remedy is inadequate and not in derogation of property rights) but after the fusion of law and equity, our view of formalism versus context-based discretion has become polarized.").

164 To the proposition that lenders control the form of mortgage transactions because mortgage documents are generally not open to negotiation, some counter that rational borrowers will choose lenders that have more favorable terms and reputations. *Cf.* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (2006). It has long been recognized, however, that, for a variety of psychological, cognitive, and informational reasons, borrowers do not do very well shopping for the basic economic terms of home loans. *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, 1110-35 (1984); *see also* Frank Lopez, Note, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL'Y 73, 75-80 (1999) (discussing behavioral disparities in information processing around mortgage options). If that is the case, it is hardly plausible that most home borrowers have the ability to shop for acceptable legal terms.

165 *See infra* Part III.A.3.

as it developed over the past two decades thus stands in tension with the legacy apparatus of realizing collateral in the primary mortgage market.[166]

It is possible to speculate about the reasons why creditor-side interests in the mortgage context have tended to be more comfortable in the arena of law and formalism traditionally, and why that association has been loosened in the era of securitization. Lenders approach many decisions from a risk-management perspective, for example, in shifting from individualized credit evaluation to quantification and automation.[167] It may be that as lending technology has developed, and the information costs associated with so many aspects of origination and servicing have fallen, it has become commonplace to abstract out the granular texture of the individual lender-borrower relationship.

The structure of securitization itself, however, seems to require a certain basic level of flexibility, at least as compared to the norms that prevail in traditional, state-level real property practice.[168] This is inherent in the active trading – which treated mortgage loans technically and literally as indistinguishable from negotiable instruments that make up the staple of commercial paper – facilitated by MERS and by the flouting of state recordation regimes in assignments. Liquidity, as Hernando de Soto has famously argued, requires fungible assets, the essential attributes of which can be communicated across disparate markets.[169] The secondary mortgage market has pushed mortgage lenders in the primary market in this direction for decades.[170] It seems evident, however, that in the housing boom, the move to fungibility shifted to an embrace of informality to the point that when state-level requirements associated with secondary market trades posed a barrier, the industry either attempted to structure around those requirements, as with

---

[166] David Dana has outlined the basic cost-benefit analysis for formality in both initial securitization and the resolution of subsequent mortgage distress. Dana, *supra* note 17, at 508-09 & n.13. As a number of commentators have observed, collective action problems and fragmentation through securitization undermine the incentives that any individual actor on the lender side might have to internalize these costs. *See, e.g.*, Steven L. Schwarcz, *Marginalizing Risk*, 89 WASH. U. L. REV. 487, 501-03 (2012); Note, *The Perils of Fragmentation and Reckless Innovation*, 125 HARV. L. REV. 1799, 1813-14 (2012).

[167] Of course, not all lenders – or intermediaries or investors – are sophisticated commercial entities. There are small and individual lenders in the home-mortgage context, including community banks, seller financing, and interfamily loans. But the securitization cases generally involve relatively large institutional actors on the lending side.

[168] One can quibble with cause and effect here, that is, it is not entirely clear that liquidity in the secondary market during the boom required the informality that MERS and lax assignment and recordation practices provided, or whether at least the latter of those factors was primarily a result of the overheated environment of the boom.

[169] HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 56-58 (2000).

[170] *See* 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, 1267-71 (1991).

MERS, or simply ignored them.[171] Given the history of lender formalism, this is ironic indeed.

III. NEW FORMALISM CONSIDERED

It should be clear at this point that, descriptively, the new formalism runs counter to a tradition in mortgage law of providing substantive protection to borrowers in the face of the potentially harsh consequences of technical requirements that often work to the advantage of lender-side interests. This inversion can be explained in a number of ways, including a simple regression to the mean after an era of procedural laxity in the housing boom, a reinvigoration of vital procedural – as opposed to substantive – protection for home borrowers, or perhaps even much-needed leverage in an era of crisis that largely lacks structural reform. This Part begins by exploring each of these theories in turn.

However the turn in the jurisprudence is best understood, it is also important to attend to its potential consequences, both for the effects this period will have on the system of mortgage distress and for broader efforts at reform. This Part accordingly sounds some notes of caution about the emerging caselaw, however necessary it has been in the immediate aftermath of the crisis, and explores insights that the formalism and flexibility divide provides as efforts to remediate the fallout of the crisis in home finance system continue. Finally, this Part reflects on what the new formalism might mean for property law more generally at a time when theoretical debates about conceptualism and pluralism are again at the forefront of property scholarship.

A. *Explaining the Formalist Turn*

A number of explanations are emerging for the formalist turn. As this Section makes clear, all have their limitations, and they are not necessarily mutually exclusive.

1. Is Everything Old New Again?

An initial, perhaps most intuitive, way to understand the judicial reaction as securitization has crashed into traditional primary mortgage distress law is that the apparent resulting formalism is nothing new. It might be possible, then, to explain the turn in the jurisprudence simply as an overdue corrective to lax practices that were abused, innocently or maliciously, during the heyday of the residential mortgage-backed securities boom. According to this view, issues of standing, real party in interest, assignment chains, and the like have always been fundamental, and the apparent reassertion of their importance is merely a

---

[171] It also bears noting that risk was intermediated in ways that may have exacerbated the tendency toward informality. When one party originates, another securitizes, and yet another holds the security, the incentive for observing required formalities at any given stage in the securitization process is undermined. *Cf.* Korngold, *supra* note 24, at 729-30 (discussing risk allocation in the securitization process).

regression to the procedural mean.[172] Courts, confronted with a significant increase in the opportunity to examine the intersection between the primary and secondary mortgage markets, and with energized advocates pressing claims involving technical irregularity, have had little choice but to validate those assertions that have merit.[173]

This understanding has some appeal. After all, it is certainly true that most of the doctrinal underpinnings of the new formalism were staples, albeit fairly obscure ones, of mortgage distress litigation long before the present crisis. To dismiss the turn in the caselaw in this way, however, ignores the genuine novelty of the dynamics that securitization has generated for the traditional practice of foreclosure and mortgage-related bankruptcies.[174] The ubiquity of securitization has wrought a genuine transformation in terms of fragmentation, informality, and a disconnection between individual borrowers and the lending structures that now dominate the industry. The emerging formalism is thus better recognized as reflecting this new structure.[175] The regression-to-the-technical-mean explanation thus does not seem to capture what is clearly a new phenomenon, even if the rules that are newly salient are longstanding. It also overly discounts the outrage that courts have expressed about the corners lender-side interests have cut,[176] and litigants' repeated recognition that the playing field has changed.[177]

---

[172] This perspective, moreover, emphasizes judicial prerogatives over the instrumental consequences of courts' newfound aggressiveness on procedural regularity in mortgage distress.

[173] This view reflects a variation of the efficiency-of-the-common-law argument positing that borrowers are likely to be defending with all viable claims and courts are simply responding to the most meritorious. *Cf.* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1552-53 (2003) (arguing that the development of the early common law led to the production of efficient rules). In this light, new formalism can be seen as the residue of a legal punctuated equilibrium, providing new prominence to judicial minima in the mortgage distress context, but nothing other than that new salience. *Cf.* Davidson & Dyal-Chand, *supra* note 26, at 1609-10 (discussing evolutionary metaphors for understanding law's response to crisis).

[174] *See supra* note 7.

[175] For an argument that a longstanding antifragmentation principle in property law provides a basis – and constitutional legitimacy – for mortgage modifications, see David A. Dana, *The Foreclosure Crisis and the Antifragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 97, 106-17 (2010).

[176] Indeed, an important subtext here is the institutional prerogatives of the judiciary in the crisis. Judge Boyko and other judges have been open about the fact that their outrage is directed less toward the unfairness posed to borrowers subject to improper foreclosures, and more toward the perceived flouting by lenders, trustees, and servicers of the courts' authority. *See supra* note 72.

[177] *See, e.g.*, RAO ET AL., *supra* note 7, at 113.

2. Vital and Direct Consumer Protection

A second, and increasingly predominating, explanation acknowledges the novelty of the new formalism and highlights the role that courts are playing in protecting borrowers through the revival of procedural regularity.[178] This view focuses on the intersection between formalism in mortgage distress litigation and the recognition that the underlying asset, the borrower's home, is both fraught with symbolic meaning and genuinely represents a locus for financial and social capital, individual identity, and community belonging.[179]

From a broad consumer-protection perspective, then, the requirements newly revived in the aftermath of the housing crisis can be understood as providing fundamental procedural protections against fraud and mistake. If a lender-side party is asserting the right to involuntarily transfer property, the borrower at a minimum must have confidence that she is facing the actual holder of her debt and the lien attached to the debt, that the party seeking to foreclose or make a claim in bankruptcy genuinely has the right to do so at the time of filing, and that no other claimants might be able to make claims on the property if the default at issue is resolved.[180] Moreover, these procedural and technical requirements are also meant to mitigate risk to third parties in foreclosure, as the post-*Ibanez* cases illustrate.[181] Ensuring proper foreclosure requirements thus protects not only parties purchasing through foreclosure,[182] but also title companies and others who rely on procedural regularity.[183]

---

[178] *See* Dana, *supra* note 17, at 507-08; Pitegoff & Underkuffler, *supra* note 16, at 133-34. According to this view, the institutional prerogatives of the courts are less important than the deployment of those prerogatives in the service of protecting borrowers.

[179] *Cf.* Rashmi Dyal-Chand, *Home as Ownership, Dispossession as Foreclosure: The Impact of the Current Crisis on the American Model of "Home," in* THE IDEA OF HOME IN LAW: DISPLACEMENT AND DISPOSSESSION 41 (Lorna Fox O'Mahony & James A. Sweeney eds., 2011) (arguing that the concept of home exists in the law, but the law fails to recognize the importance of the home in the human experience); Lorna Fox O'Mahony & James A. Sweeney, *The Idea of Home in Law: Displacement and Dispossession, in* THE IDEA OF HOME IN LAW: DISPLACEMENT AND DISPOSSESSION, *supra*, at 1, 1-11 (analyzing the government's response to the foreclosure crisis on the American conception of home). *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1097-98 (2009) (arguing that, from the perspective of the empirical evidence available on the long-term psychological harm associated with dispossession, the law overprotects homeownership, including in foreclosure).

[180] *See* Dana, *supra* note 17, at 516 (arguing that absent the formal requirements of foreclosure, "one does not truly know whether the property owners owed what the servicers claim they did").

[181] *See, e.g.*, Bevilacqua v. Rodriguez, 955 N.E.2d 884, 892-93 (Mass. 2011) (applying *Ibanez* to hold that a bona fide purchaser cannot receive title through a void foreclosure sale).

[182] There is always a risk that if the wrong party has foreclosed or there are other procedural irregularities, the foreclosure could be collaterally attacked.

[183] Tying procedural regularity in foreclosure to the structure of the secondary market,

There is much to this view of new formalism, and any advocate would be entirely remiss in failing to press any available claim.[184] Understanding the emerging caselaw purely in terms of the short-term benefits it provides for individual borrowers in distress, however, may obscure larger dynamics about the appropriate balance of procedural regularity and substantive review in responding to the legacy of the housing crisis. These concerns are spelled out in detail below.[185] At this juncture it is sufficient to note that the balance of formalism evident in the caselaw may have longer-term consequences.[186]

3. Procedural Leverage for Substantive Reform

A variation on the view of procedural formality as consumer protection is the understanding that regardless of the direct effects of formalization, courts' receptivity to the evident failure of the securitization process to conform to technical requirements has provided leverage for borrowers in distress with few other tools available. Indeed, for individual borrowers, it seems clear that advocates have sought to use questions such as standing, chain of assignment requirements, holder doctrines, and the like to gain leverage for substantive

---

David Dana also argues that by making foreclosure more costly, strict adherence to mortgage formalities will tend to realign incentives in the securitization process. Dana, *supra* note 17, at 508.

[184] Indeed, it would raise challenging ethical concerns if mortgagor advocates did not advance available formal defenses. There is an extensive literature on potential conflicts between the interests of individual clients and arguably larger public interest concerns that might animate advocacy. *See, e.g.*, Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3-25 (Austin Sarat & Stuart Scheingold eds., 1998). It is beyond the scope of this Article to fully attend to how this conflict might be resolved for advocates concerned about the long-term structure of the mortgage-distress system from a consumer-protection perspective if there were reasonable choices about advocacy strategies available, but the potential for such concern is manifest.

[185] *See infra* Part III.B.1.

[186] This discussion obviously sets to one side the lender-side critique of new formalism as a panoply of meaningless technicalities that only slow down the necessary process of clearing distressed properties. *See supra* note 15. This critique, moreover, dovetails with one standard response to post hoc equitable claims by borrowers that highlights the risk of borrower opportunism. *Cf.* Christopher Mayer et al., *Mortgage Modification and Strategic Behavior: Evidence from a Legal Settlement with Countrywide* 34 (Columbia Law & Econ. Working Paper No. 404, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1836451. There is evidence, however, that borrowers who owe more on their homes than the homes are worth are generally not defaulting at the rate that would be suggested if homeowners were evaluating the investment value of the collateral. Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 983-85 (2010) (proposing that Americans walk away from their substantially underwater mortgages because in strategically defaulting "[m]illions of U.S. homeowners could save hundreds of thousands of dollars").

relief.[187] For such borrowers, this may reflect the fact that they have had little choice – assuming that they even have the resources to challenge a foreclosure (and such challenge is warranted) – other than to pursue what procedural claims can be raised.[188]

Beyond individual claims, it is also possible to understand the formalist turn as a means, or at least an opportunity, to force more systemic change. Litigation unearths lender, servicer, and intermediary technical practices, and allows regulators and other governmental actors to address fundamental questions.[189] Perhaps the most notable example of this leverage from procedural claims can be found in the National Mortgage Settlement. On February 9, 2012, HUD, the Justice Department, and forty-nine state attorneys general announced a settlement with the nation's five leading servicers – Ally, Bank of America, Citi, JPMorgan Chase, and Wells Fargo – stemming from investigations into robosigning allegations that began in the fall of 2010.[190] The settlement was structured to provide up to $17 billion in loan modifications for underwater borrowers, including principal reduction, up to $3 billion in refinancing assistance, and funds both to compensate homeowners who lost their homes in improper foreclosures and to states to fund mortgage-

---

[187] *See* Corder, *Unlikely Allies*, *supra* note 65, at 24 ("[O]ne positive aspect of the standing defense in the eyes of homeowners is that by making it more costly for trustees to instigate foreclosure proceedings and slowing down foreclosures, mortgagors will have more leverage to renegotiate the terms of the underlying loan."); Morgenson, *supra* note 67 (quoting consumer advocate April Charney, in reaction to Judge Boyko's *In re Foreclosure* decision, as stating that "[h]opefully this will convince everybody that the time to work out these home loans is now").

[188] In addition to serving as a tool for leverage over the substantive resolution of mortgage distress, the technical precision evident in the new formalism can also be used to gain information that might otherwise remain opaque. One of the repeated challenges in mortgage distress litigation, from the borrower perspective, is the difficulty in tracing mortgage and servicing information, particularly with respect to MERS. *See* Dana, *supra* note 17, at 513, 519; Robinson, *supra* note 101, at 1638. There are thus not only immediate informational benefits from requirements to trace assignments and the like, but also discovery opportunities in pressing the failure to follow such requirements.

[189] A few judicial flares have exposed more widespread problems in servicing, including foreclosure-related practices. In one recent, although long-pending, bankruptcy case in the Eastern District of Louisiana, *In re Jones*, No. 03-16518, 2012 WL 1155715, at *3 (Bankr. E.D. La. Apr. 5, 2012), the judge reviewed a number of errors by Wells Fargo with respect to the application of payments by the debtor, including improper post-petition charges, which resulted in a net overcharge of nearly $25,000. In a scathing opinion that called Wells Fargo to task for diverting payments as "part of its normal course of conduct," the court found Wells Fargo's actions to be "egregious," in "reckless disregard for the stay it violated," "clandestine," and "disturbing." *Id.* at *5, *7-8. As a result of the widespread servicing failures that Wells Fargo had admitted to and not corrected, the court awarded punitive damages in the amount of $3,171,154. *Id.* at *10.

[190] *See Fact Sheet: Mortgage Servicing Settlement*, *supra* note 115. For background on the underlying robosigning problems, see Hosking Memorandum, *supra* note 106, at 1.

related consumer-protection efforts.[191] In addition to this mortgage relief, the settlement included mandatory servicing standards, such as enhanced pre-foreclosure notification, reforms to filing procedures, loss-mitigation protections, and restrictions on certain servicing fees.[192]

In a prime example of what Steven Davidoff and David Zaring recently described as "regulation by deal" endemic to the response to the economic crisis,[193] the attorneys general and federal negotiators involved in the National Mortgage Settlement were able to obtain significant loan modifications at a scale that other efforts – such as the successive iterations of various federal home-mortgage-modification programs[194] – have largely failed to generate.[195] Although the scale of these modifications is dwarfed by the magnitude of the underwater mortgage debt that remains unaddressed,[196] the settlement does

---

[191] Philip A. Lehman, *Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct Claims*, NAT'L MORTGAGE SETTLEMENT 2-4, https://d9klfgibkcquc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf (last visited Feb. 3, 2013).

[192] *Id.* at 3.

[193] Steven M. Davidoff & David Zaring, *Regulation By Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 535 (2009).

[194] The federal government has promulgated a series of voluntary initiatives in response to structural problems in home finance. The first was a Bush Administration program called the HOPE NOW Alliance, designed to promote counseling and loan workout negotiations. *See* Peter W. Salsich, Jr., *Homeownership – Dream or Disaster?*, 21 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 17, 40-43 (2012) (detailing these voluntary initiatives and related programs). In 2008 the Federal Housing Administration began the HOPE for Homeowners program, implementing a part of the Housing and Economic Recovery Act of 2008 that primarily focused on refinancing federally insured loans. *Id.* at 43-44 (citing Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified in scattered sections of 12 U.S.C.)). The third wave of federal response was the Obama Administration's Homeowner Affordability and Stability Plan, the centerpiece of which has been a Treasury Department voluntary program for loan modifications. *Id.* at 45-50. Although reports of the success of these programs vary, it is generally acknowledged that they have not made significant inroads into structurally rebalancing outstanding mortgage debt at the requisite scale.

[195] Lenders do not often renegotiate seriously delinquent loans; indeed, one study indicated that servicers have undertaken loan modifications that reduce borrower payments in only roughly three percent of seriously delinquent mortgages since the crisis emerged. Manuel Adelino, Kristopher Gerardi & Paul S. Willen, *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization* 3 (Fed. Reserve Bank of Bos., Public Policy Discussion Paper No. 09-4, 2009), *available at* http://www.bos.frb.org/economic/ppdp/2009/ppdp0904.pdf. A number of theories have been offered as to why lenders rarely renegotiate, including the constraints of the pooling and servicing agreements that govern securitized trusts, as well as borrower behavior in terms of re-defaults and borrowers curing delinquencies in the absence of modification. *See id.* at 4-7.

[196] Bishop & Assocs., L.L.C., *National Mortgage Settlement May Not Help Struggling Homeowners*, FINDLAW (Apr. 12, 2012), http://knowledgebase.findlaw.com/kb/2012/Apr/562875.html ("The settlement only addresses about 2.4% of the negative equity in the U.S.

underscore the potential for advocates to use technical failings to move a recalcitrant industry in a substantive direction.[197]

Understanding the leverage that the turn in the jurisprudence has facilitated is important, but, as with the general consumer-protection explanation, this view risks obscuring the larger consequences of individual and collective advocacy choices.

B. *Concerns and Consequences*

However one understands the dynamics driving the new formalism, situating the emerging jurisprudence in the context of the longstanding tension in mortgage history between law and equity gives some reasons for caution, at least with respect to the consumer-protection perspective. At heart, the emerging doctrine valorizes procedural regularity over substantive fairness, and this may leave a more brittle mortgage distress system for borrowers in the long run. The formalist turn also represents a mismatch between the depth of the challenges facing borrowers who took out home loans during the boom – a significant percentage of outstanding mortgage debt, given annual origination levels since the crisis[198] – and the remedies available, which may distract from more fundamental reform.

To be clear, the argument is not that following the requirements for proper assignment, proof of standing, and other basic formalities is not important. It manifestly is, given the importance of people's homes and the myriad of third-party interests implicated in responding to mortgage default. Rather, the argument is that it is important to pay attention to the potential unintended consequences of a system newly re-accustomed to, and focused on, indicia of lender procedural regularity.[199]

---

housing market.").

[197] In a similar example of procedural shortcomings leading to substantive outcomes, fourteen mortgage servicers entered into consent orders with the Office of the Comptroller of the Currency (OCC), the Federal Reserve, and the Office of Thrift Supervision in April 2011, whereby the servicers agreed to review foreclosure actions over the prior two years and, if errors, misrepresentations, or other deficiencies led to financial injury, offer remediation to borrowers. OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF TREASURY, INTERIM STATUS REPORT: FORECLOSURE-RELATED CONSENT ORDERS 3-4 (2012), *available at* http://www.occ.gov/news-issuances/news-releases/2012/2012-95a.pdf. In January 2013 a number of these servicers reached an agreement with the OCC and the Federal Reserve to lift the terms of the foreclosure review in exchange for more than $9 billion in payments and other assistance. *See Correcting Foreclosure Practices*, OFFICE COMPTROLLER CURRENCY, http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html (last updated Jan. 24, 2013).

[198] *See* U.S. DEP'T. OF HOUS. AND URBAN DEV., FHA-INSURED SINGLE-FAMILY MORTGAGE ORIGINATIONS AND MARKET SHARE REPORT 2011 – Q3, at 2 (2011), *available at* portal.hud.gov/hudportal/documents/huddoc?id=fhamktq3_11.pdf (detailing origination levels).

[199] It is certainly possible to argue that the right procedural safeguards can produce

1. The Legacy of New Formalism

a. *Brittleness*

To begin, there is a risk that the success of the formalist turn may leave a mortgage-distress system that is more attuned to procedural regularity than to substantive norms. It is certainly true that formalism need not be equivalent on both sides of a conflict; in other words, the legal system is perfectly capable of allocating the risk of procedural failure on the party best equipped to handle that risk.[200] Thus, the legacy of the emerging jurisprudence may be an asymmetrical formalism that holds lender-side interests – in the main the parties that are the more sophisticated and better able to respond to heightened formality – to a different, and more stringent, standard. Framed in this way, a new system that holds lenders to high standards of technical precision would not adversely affect borrowers, who would still be able to invoke equity where the circumstances demanded.

Advocacy choices regarding which issues to elevate and how to frame claims, however, influence the tenor of any given area of law.[201] Law is not endogenous; it grows in response to the pressures exerted upon it and, as Justice Holmes argued, is shaped less by any inherent logic and more by the accretion of experience.[202] The borrower push to emphasize formalism in mortgage practice, however understandable, may thus give primacy to the set of judicial tools least amenable to claims of individual substantive justice. Indeed, there seems to be little indication, thus far, that courts are drawing fine-grained distinctions in procedural formality based on equitable considerations of context and relative vulnerability.

Moreover, in the long run, lenders, servicers, intermediaries, and investors have much greater capacity to respond to an environment of mortgage law that valorizes technical regularity. This is because of the control this side of the mortgagor-mortgagee relationship has over the initial terms of mortgage loans due to the repeat nature of their relationship with the mortgage-distress system, and because of the greater resources they tend to have in the aggregate. This creates the risk – and only time will tell whether it materializes, but it is worth

equitable outcomes. However, this raises an empirical question that is difficult to answer – namely, how the cases represented by the new formalism are being resolved after dismissal. If the jurisprudence is generally leading to settlements that are favorable to borrowers, the relationship between procedure and substance becomes more complicated; but if lenders are adjusting and re-filing cases, then the immediate consequences of the caselaw are muted. The notes of caution this Article sounds acknowledge the clear potential short-term benefits of the new formalism, but seek to place those benefits in the context of a longer-term perspective.

200 *Cf.* Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 499 (1991).

201 *See* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 3 (1992).

202 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

attending to at this early juncture – that the mortgage-distress system left in the aftermath of the housing crisis becomes more attuned to the sharp edges and clear determinism that repeat players with deeper resources are more likely to find conducive.[203]

b. *Mismatch*

The new formalism also raises a fundamental problem of mismatch, in that the emerging caselaw does not really address the underlying structural or substantive concerns that gave rise to the crisis in the first place.[204] Most of the relevant cases result in a dismissal without prejudice, which allows servicers or securitization trustees to correct the paper trail and re-file the foreclosure or claim in bankruptcy.[205] It is true that this may be the only leverage available for most homeowners, but that fact only underscores the disconnect between that leverage and questions of lending structure, fairness of origination practices, and the terms of resulting loans, all of which are claims akin to traditional equitable defenses.[206]

---

[203] *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103 (1974).

[204] The potential for mismatch between proceduralist approaches and the underlying substantive concerns at issue in any given area of jurisprudence is hardly unique to mortgage distress. Plea bargaining, for example, is an area where the commitments of the criminal adversarial system seem quite divorced from the actual practice of daily criminal procedure, and similar disjunctions occur in many other areas. *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627 (1992) (discussing the evolution of procedural constitutional protection for immigrants in the face of a plenary power doctrine that denies substantive constitutional protection).

[205] *See, e.g.*, *In re* Foreclosure Cases, Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430, at *3 (N.D. Ohio Oct. 31, 2007); *In re* Hayes, 393 B.R. 259, 270 (Bankr. D. Mass. 2008); CitiMortgage, Inc. v. Nunez, No. 2558/09, slip op. at 1-2 (N.Y. Sup. Ct. Dec. 13, 2010) (explaining that the case was dismissed without prejudice so that the bank would have a chance to submit the required affidavit and proceed with foreclosure, because simply "granting a 'timeout' to plaintiff. . . is a waste of judicial resources").

[206] One case that provides an example of a court substantively grappling with the predicate conditions under which mortgage debt was issued is *Commonwealth v. Fremont Investment & Loan*, 897 N.E.2d 548, 556 (Mass. 2008). *Fremont* was brought by the Massachusetts Attorney General against Fremont Investment & Loan and its parent company for acting unfairly and deceptively in originating subprime loans from 2004 through 2007. *Id.* at 550-51. The Supreme Judicial Court affirmed the grant of a preliminary injunction against the lender, given that the loans at issue had short introductory teaser rates that were at least three percent below the index rate – a rate that would have exceeded a 50% debt-to-income ratio for the borrowers – and had a 100% loan-to-value ratio or certain prepayment penalties. *Id.* at 554. Moreover, a handful of New York cases have addressed the behavior of subprime lenders acting in bad faith in the foreclosure and loss-mitigation

In terms of the mismatch between the procedural turn and the structure of the market, there is also an argument that formalization overly impedes a system that should be better at clearing title and returning to the market property that will not be rehabilitated for an individual borrower.[207] This function has an important consumer-protection element, in that the value of the home of any individual borrower is in no small measure dependent on the value of surrounding homes and the local market,[208] both of which are heavily impacted by homes in delinquency but pending foreclosure, as well as the overhang of already-foreclosed-upon but not-yet-sold inventory.[209] David Dana has argued that the cost of ex post formalism will tend to incentivize appropriate ex ante behavior by those involved in the process of securitization,[210] but that it is unlikely to focus those incentives on the terms of loans, the ability of borrowers to pay, or other substantive elements of the initial transaction.[211]

Moreover, one overarching problem with the recent jurisprudence is that, with some notable exceptions, the procedural protections they augur do not readily get at the bulk of how distressed mortgages are resolved.[212] As with the reality that plea deals vastly overshadow criminal trials, it is likewise true that most foreclosures are not the subject of judicial oversight of any sort.[213] This is true in non-judicial foreclosures to the extent that they generally require

process. *See* Moringiello, *supra* note 22, at 1619 n.133.

[207] These are cases, for all of the formal failings of securitization, in which the underlying debt and default are not often seriously at issue. This fact tends to obscure the question of whether an individual borrower should have been marketed a given loan in the first place. Answering that question requires attention to such issues as the fairness of the originating process, unconscionability, equal-credit concerns, and other limits on predatory practices.

[208] *See* LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 2 (2009).

[209] *See* Mallach, *supra* note 25, at 13.

[210] Dana, *supra* note 17, at 508, 512.

[211] It is true that more individualized, contextual review is hardly likely to speed up the process of foreclosure, but many instances of foreclosure could be amenable to alternative means of loss mitigation that might more rationally help housing markets recover. Moreover, it is important to acknowledge that structural reform is not likely to emerge from individual cases resolved through law or equity; that will take legislation and regulation. The only point here is that the structure of ex ante incentives that focus on the procedure of securitization seem more misaligned with those substantive reforms than relief that focuses on issues of fairness in the transactions involved.

[212] For an excellent overview of variables that influence whether borrowers after default end up in foreclosure or are offered loan modifications or other avenues of relief, see Sewin Chan et al., *Pathways After Default: What Happens to Distressed Mortgage Borrowers and Their Homes?* (NYU Law & Econ. Research Paper Series, Working Paper No. 11-33, 2011), *available at* http://ssrn.com/abstract=1928212.

[213] *See supra* note 83.

affirmative litigation on the part of the borrower, but also more generally across the board because most foreclosures are simply not contested.[214] Arguably, this could mean that most borrowers simply have no defense, but the more likely reality is that for a not insignificant number of mortgagors in default, attention to the terms and conditions under which they took on debt in the first place might give an opening to restructuring or other substantive relief.[215]

One should not overly valorize the benefits, or minimize the costs, of a shift toward more equitable approaches to resolving mortgage distress, and concomitant regulatory approaches that are contextual and attend to substantive fairness. There is no panacea here. The more fundamental point, however, is that the current landscape of mortgage distress is too heavily skewed toward formalism. A balance that better reflects the traditional role that equity has played for borrowers is warranted.[216]

c. *Distraction*

One final concern with the emerging post-crisis jurisprudence is the risk that a focus – by advocates, courts, and policymakers – on procedural regularity might undermine efforts to advance substantive and structural reform.[217] Given the depth of the housing crisis, it is notable – although perhaps hardly surprising, given the contemporary political economy of the housing market – how relatively few significant doctrinal and regulatory changes have emerged

[214] Moreover, there is a growing problem of "shadow" foreclosures, a phenomenon in which no formal proceeding is initiated, but mortgagees bring pressure on mortgagors to reach settlement in order to avoid litigation altogether. *See* Dana, *supra* note 17, at 521. This is perhaps another unintended consequence of increasing formalism.

[215] It is also possible that the experience of a mortgage distress system dominated by daunting formalism deters borrowers from challenging foreclosures in the first place. As noted, more than ninety percent of foreclosures are uncontested. Schmit, *supra* note 83. The experience that many borrowers have of an unequal playing field with lenders plausibly translates into a reluctance to venture into the technical aspects of foreclosure defense. This reluctance no doubt partially stems from the expense of such a challenge, but may also stem from the sense that technical regularity will tend to work in favor of repeat players who can master such requirements.

[216] Equitable responses are not appropriate in all cases, perhaps not even in run-of-the-mill cases. But the present landscape of mortgage distress seems largely occupied by challenges that attend to technical requirements. This leaves very little traction for inquiries that focus on the underlying substance of the actual initial mortgage transaction, rare cases like *Fremont* being notable exceptions. *See supra* note 206. Even a modest rebalancing for those borrowers who have plausible claims related to the terms of origination – or even the feasibility of loan modification – would be warranted.

[217] This is not to argue that technical defenses now taking such prominence are playing no role whatsoever in responding to dysfunction in the kinds of practices the cases have brought to light. Rather, there are more fundamental, structural concerns about the lingering aftermath of the housing crisis that are not receiving as much focus.

in response, at least compared to earlier economic crises. Policymaking during the Great Depression, for example, spawned the then-innovative long-term fixed-rate mortgage,[218] and substantive legislative and judicial responses to the immediate crisis included significant moratoria that gave rise to the Supreme Court's famous *Blaisdell* decision.[219]

Very little structural reform of that magnitude has emerged in the years since the crisis leading to the Great Recession began. Indeed, perhaps the most important ground for substantive reform that has notably failed involves efforts to facilitate or mandate mortgage modifications. As observed, the Bankruptcy Code currently gives favored treatment to residential mortgage lenders, since home mortgagors cannot discharge their debt through bankruptcy, in contrast to debtors who are able to modify debt in other contexts.[220] Advocates have pressed for bringing home-mortgage debt into line with the rest of the Bankruptcy Code, and there was a flurry of activity early in the crisis in this direction, but such efforts have largely petered out.[221]

The paucity of substantive responses to the crisis should not be overstated. Courts and legislatures have made some effort to address the fallout of the housing crisis from a substantive and structural perspective.[222] Some states – and the federal government is now turning to this issue with the Consumer Financial Protection Bureau's implementation of the Dodd-Frank Act[223] – have pursued new ex ante consumer-protection measures for home borrowers.[224] Some states have also modified their foreclosure process to respond to the sheer volume of mortgage-distress-related litigation, including by providing for mandatory mediation and servicing reforms that require a single point of

---

218 *See* Green & Wachter, *supra* note 31, at 94-95.

219 Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 444-47 (1934) (upholding a state suspension of mortgagee remedies).

220 In contrast to its treatment of home mortgages, the Bankruptcy Code allows for modification of secured interests in most real estate, such as investment properties and multi-family residences, as well as personal property. 11 U.S.C. § 1322(b)(2) (2006); *see also supra* note 41.

221 *See supra* note 22.

222 One example – although perhaps notable for standing relatively alone in the emerging post-crisis jurisprudence – was the Massachusetts Supreme Judicial Court's opinion in *Fremont*. *See supra* note 206.

223 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37, at 2 (studying the potential impact of reforms such as standards for the payment of loan principal, mortgage term length, lump-sum payments, and evaluation of borrower resources and debt burden).

224 *See* Block-Lieb & Janger, *supra* note 23, at 682 (examining the future role of the Consumer Financial Protection Bureau); Frank A. Hirsch, Jr., *The Evolution of a Suitability Standard in the Mortgage Lending Industry: The Subprime Meltdown Fuels the Fires of Change*, 12 N.C. BANKING INST. 21 (2008); John Pottow, *Ability to Pay*, 8 BERKELEY BUS. L.J. 175, 176 (2011) (discussing lenders' "new duty to assess a consumer's ability to repay mortgage loans").

contact with a servicer and mandatory responses to attempts to renegotiate.[225] But much more energy and attention have been devoted to issues such as robosigning that, while reflective of abuses in lending, obscure deeper substantive questions and leave the use of the leverage evident in both individual cases and broader efforts, such as the National Mortgage Settlement, vulnerable to critique.[226]

For this concern to be worth attending to, it must at least be plausible that legal and popular focus on procedural regularity can detract from political will to undertake more direct reform of the mortgage market. At this point, the lack of any meaningful regulation of the home finance market and the concurrent prominence garnered by procedural concerns are certainly suggestive, although not proof, of a direct causal link. Furthermore, the concern here is a systemic one. Although this is not a zero-sum game, and it would certainly be possible to advance a borrower-focused advocacy strategy on multiple fronts, attention is finite and victories in the procedural arena may give a false sense that more fundamental progress is actually being made.

2. A Frame for Evaluating Housing-Finance Reform

This discussion suggests that situating new formalism in the context of the historical tension between law and equity, as well as the debate over rules and standards, provides a frame, borrowed from that judicial legacy, to evaluate legislative and regulatory reforms emerging in the home-finance sector.[227] There are a number of ways to characterize these responses, but for present purposes, two variables are particularly relevant. The first is a rough dichotomy between policies that respond to the detritus of past financing practices which are now coming to light or have taken a turn for the worst – an ex post framework – and policies that seek to create the conditions that would avoid another similar crisis – an ex ante perspective. The second is a distinction in legal and policy reactions between structural approaches – such as changing the regulatory environment for mortgage markets and attending to the substantive terms of consumer protection – and procedural reforms that

---

[225] *See* Walsh, *supra* note 21, at 162.

[226] Those who criticize the National Mortgage Settlement for being too heavy-handed have argued that it merely sought to exploit the robosigning controversy – and related controversies over servicing practices – and amounts to "additional economic 'stimulus' to housing without going to Congress," and, indeed, a threat to the rule of law. *See* David Skeel, *Mortgage Settlement or Mortgage Shakedown?*, WALL ST. J., Feb. 21, 2012, at A19. This critique suggests a view of the political economy of mortgage regulation that is, to say the least, curious, given the history of multiple bailouts of the finance industry in the crisis and the lack of any significant structural borrower-side reform to date.

[227] For a review of current developments at the federal level, see Block-Lieb & Janger, *supra* note 23, at 683. For an overview of state-level attempts to facilitate modifications prior to foreclosure, see Walsh, *supra* note 21, at 139. *See generally* Kathleen C. Engle, *Symposium – States in the Vanguard: Protecting Consumers During the Financial Crisis – Foreword*, 44 SUFFOLK U. L. REV. 1, 1 (2011).

focus on the technical aspects of the ways in which housing is financed and collateral realized. This classification creates a basic grid of ex ante/ex post and substantive/procedural variations.

Some responses to the crisis implicate multiple parts of this taxonomy, but the formalist turn falls into one particular quadrant: it is an ex post reaction that focuses squarely on the procedural aspects of mortgage distress. A number of states have similarly tried to recalibrate their foreclosure processes, moving the dial toward greater or lesser procedural protection for distressed home borrowers. Some states have placed more extensive litigation requirements on foreclosing parties,[228] some have required more transparency and information from lender-side actors,[229] and others have simply instituted changes speeding up the process of foreclosure.[230] These reforms are all variations of post hoc, procedural approaches that, at best, tangentially address the causes of the housing crisis's lingering legacy.[231]

---

[228] The New York court rule that requires certification for foreclosure, *see supra* note 122, is one example. California, to cite another example, recently enacted two measures that are designed to reform the foreclosure process. Acts of July 11, 2012, chs. 86 & 87, 2012 Cal. Legis. Serv. 2300, 2318 (West) (codified as amended at CAL. CIV. CODE §§ 2920.5-2924.20 (West Supp. 2013)); *see also* Justin T. Hilley, *Homeowner Bill of Rights Signed Into Law*, HOUSINGWIRE (July, 11 2012, 1:52 PM), http://www.housingwire.com/news/homeowner-bill-rights-signed-law. The first measure bars "dual-tracking" or pursuing foreclosures while lenders are considering loss-mitigation efforts such as loan modifications, §§ 2923.6, 2924.11, while the companion measure, like the National Mortgage Settlement and other regulatory efforts, mandates a single point of contact for borrowers to address loan-related concerns, § 2923.7. The latter measure also creates statutory damages of up to $50,000 for fraudulently signing foreclosure documents without verification of accuracy. *See* §§ 2924.12(b), 2924.17, 2924.19(b).

[229] This is primarily seen in servicing reforms that attempt to forestall foreclosure by requiring, for example, servicers to provide new disclosures, respond in a timely manner to complaints, and promptly provide payoff information. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1418, 1463, 1464, 124 Stat. 1376, 2153-54, 2182-85 (2010) (codified at 15 U.S.C. §§ 1638a, 1639f, 1639g and 12 U.S.C. § 2605 (Supp. V 2011)).

[230] Florida, for example, has experimented with a foreclosure "rocket docket." Tami Luhby, *Florida Pulls Plug on Rocket-Docket Foreclosure Courts*, CNN MONEY (May 25, 2011, 1:31 PM), http://money.cnn.com/2011/05/24/news/economy/florida_foreclosure/index.htm.

[231] In terms of on-the-ground consequences of the foreclosure crisis in particular communities, there are a number of place-based interventions being tested to respond to the myriad of interrelated problems posed by mortgage defaults and delinquencies. These include neighborhood-level stabilization efforts, such as: the rounds of federal Neighborhood Stabilization Programs; blight-prevention and remediation initiatives by local communities, non-profits, and even lenders; and a variety of tools to clear the backlog of real estate owned property, both of the FHA and of the banks. *See* Robin S. Golden, *Building Policy Through Collaborative Deliberation: A Reflection on Using Lessons from Practice to Inform Responses to the Mortgage Foreclosure Crisis*, 38 FORDHAM URB. L.J.

There are some promising reforms, however, that have attempted to address the aftermath in more substantive and structural terms, even if fundamental changes such as reform to bankruptcy have not gained traction.[232] Mandatory mediation requirements, which are becoming increasingly common, present an alternative avenue for addressing mortgage distress that is intended to allow borrowers to negotiate loan modifications and other substantive changes to the terms of their mortgages.[233] Moreover, efforts by regulators to mandate loss mitigation that takes into account individual borrower circumstances similarly resonate with the equitable origins of consumer protection in mortgage law.[234]

In terms of restructuring regulation for future mortgages, the historical balance between individual substantive fairness and procedural regularity

---

733, 740 (2011). To return to the grid, these are all in some ways examples of substantive efforts to respond, post hoc, to the crisis.

232 One example of a creative reform effort that is situated in the post hoc substantive arena is a proposal for municipalities to use their power of eminent domain to modify underwater mortgages, using that traditional power to overcome the collective action problems that have impeded even economically rational mortgage modifications that continue to hinder housing recovery. *See* Joe Nocera, *Housing's Last Chance?*, N.Y. TIMES, Jul. 9, 2012, at A21 ("We're four years into a housing crisis. Nothing has yet worked to stem the terrible tide of foreclosures. It's time to give eminent domain a try."); Robert C. Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Economic Recovery* 29 (Cornell Legal Studies Research Paper No. 12-12, 2012), *available at* http://ssrn.com/abstract=2038029. Under the proposal, local governments would "take" selected mortgages, paying just compensation to the affected lien holder, and then work with borrowers to structure repayments discounted to the level at which the borrower would be able to obtain new financing in the current market. Hockett, *supra*, at 30-31. Bond investors have raised concerns about whether this will deter lending, raise interest rates, and leave some borrowers out of relief. *See* Jacob Gaffney, *Investors Warn Eminent Domain Spells Imminent Disaster*, HOUSINGWIRE (July 24, 2012, 10:07 AM), http://www.housingwire.com/rewired/investors-warn-eminent-domain-spells-imminent-disaster. The proposal, however, may mitigate these concerns; in the terms of the matrix outlined above, this proposal seeks to solve the legacy problem posed by the housing bubble and does so in a way that responds to the substantive, particularized circumstances of individual borrowers.

233 This category includes newly enacted mandatory mediation efforts. *See* CONN. GEN. STAT., § 49-31n (2011); DEL. CODE ANN. tit. 10, § 5062D (2012); Saving D.C. Homes from Foreclosure Enhanced Emergency Amendment Act of 2012, 59 D.C. Reg. 7380 (June 22, 2012) (amending D.C. CODE §§ 42-815.01 to 42-815.03). These mediation programs are available in over twenty states and are helping families modify their loans and remain in their homes. Leah Schnurr, *Struggling U.S. Homeowners Avert Foreclosure via Mediation*, REUTERS (July 5, 2012, 12:59 AM), http://www.reuters.com/article/2012/07/05/usa-housing-mediation-idUSL2E8I3F3O20120705.

234 *See, e.g.*, Act of Mar. 31, 2011, No. 885, § 3, 2011-3 Ark. Adv. Legis. Serv. 984, 987 (LexisNexis) (codified as amended at ARK. CODE ANN. § 18-50-104 (2012)); Act of May 10, 2011, Pub. L. No. 170-2011, 2011 Ind. Acts 1891; Act of Aug. 3, 2012, ch. 194, 2012 Mass. Legis. Serv. 705 (West); Act of Apr. 13, 2011, ch. 58, 2011 Wash. Sess. Laws 580 (codified as amended in scattered sections of WASH. REV. CODE chs. 61.24 & 82.45).

suggests that it would behoove regulators to move beyond the informational and procedural structures that have been at the core of regimes such as TILA and RESPA.[235] Where it has become clear that market failures are not likely to be solved by informational strategies, more substantive regulatory approaches are necessary.[236] In sum, the legacy of the substantive focus of equity for borrowers and the irony of lender antiformalism, if nothing else, is a reminder of how important it is to continue to press for reform for borrowers caught up in the aftermath.

C. *Coda: The Crystal This Time?*

This discussion circles back to the question raised at the outset: what does the formal turn suggest about larger theoretical concerns in the development of mortgage law, and of property law more generally? The perennial cycle that Carol Rose described, with hard-edged, law-oriented, relatively clear rules competing with more open-ended, equitable approaches in an ongoing dialectic,[237] has a higher-order parallel in terms of theoretical conceptions of property and the methodology implicit in those approaches. Indeed, the divide between contemporary formalism and pluralism in property theory has taken on new prominence, and the post-crisis jurisprudence offers a chance to evaluate this divide in a moment of rapid change.

On one side of this debate, conceptualists see property (descriptively and normatively) as having a foundational core of bright-line rules, whether because of information-cost advantages, the centrality of moral certainty, or other reasons.[238] Henry Smith, for example, sees property in modular terms, built around an essentially Blackstonian understanding of property.[239] This conception places heavy emphasis on exclusion or exclusive use in the definition of property rights, and the rigid borders that come with those rights. Conceptualists in this mold are not the formalists of old, but, as a methodological matter, tend to see property in relatively static, essentialist terms that map on to the formalist side of the rules/standard debate.[240]

---

[235] *See supra* text accompanying notes 144-48.

[236] As noted, Dodd-Frank's potential for structural regulation of the terms of origination is a promising example of this. *See supra* notes 223-24 and accompanying text.

[237] *See* Rose, *supra* note 29, at 583-85.

[238] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1015-17 (2008) (arguing for a "Blackstonian edifice" consisting of absolute dominion, sole ownership, and broad subject matter). Likewise, neo-Lockean property theory can, at times, carry some reflections of conceptualism in its natural-rights orientation. *See, e.g.*, Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1401 (2010).

[239] *See* Smith, *supra* note 27, at 1694.

[240] The right to exclude, for example, goes to the definition of property and not to the procedures through which property rights are protected. That said, there seems to be a

On the other side, pluralists in property theory counter with conceptions that, from a methodological perspective, privilege context and the contingent nature of property rights.[241] Thus, Joseph Singer has recently argued, convincingly, that there has been a sustained and broad-based shift across a number of domains of property law toward reasonableness standards in the second half of the twentieth century.[242] Tracing the evolution of doctrine in areas such as the right to exclude, immunity from loss, the freedom to use property, and the power to transfer, Singer discerns developments that, in the process of modernizing archaic areas of doctrine, shifted from rule-based approaches to standards that elevate the traditional role of equity in highlighting contextual, ethically sensitive decisionmaking in property.[243]

Rose's observation about the cycle she identifies being generally recurrent[244] – as opposed to linear long-term trends – provides an inroad into this methodological debate. The rise in the kind of formalism evident in the aftermath of the housing crisis might thus seem at first blush to confirm some of the premises of conceptualism, particularly the value of clear notice and the importance of holding those with property interests to the strict terms of their interests, although Rose's view suggests that concerns about brittleness in the foreclosure system may eventually cycle back toward equity.

Approaching new formalism on a deeper level, however, reveals the tension between its emergence and the absolutism that characterizes conceptualism. The shifts in the jurisprudence that have surfaced in the past five years, and which represent a relatively swift reaction to the felt necessity of the crisis, suggest a more contingent, and flexible, foundation for property. Conceptualists in property theory may focus on the endurance and stability of

---

distinctive confluence in the literature between substantive conceptions of the absolute nature of property and respect for procedural regularity in the adjudication of disputes over those strict rights. *Cf., e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1854-55, 1857 (2007).

[241] Pluralists tend to be more agnostic about what is core and what is periphery within property law as a whole and within the particular contexts in which property law plays out – the kind of configuration of entitlements and obligations that Hanoch Dagan has called property "institutions." HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 4 (2011). A pluralist perspective on the new formalism would emphasize the inevitably contingent resolution of the set of conflicting values – certainty and flexibility, the benefit of the bargain and distributive justice, among others – at play in this set of legal developments.

[242] Singer, *supra* note 28, at 3.

[243] *Id.* at 20-49. Surveying doctrines as diverse as trespass and public accommodations, equitable division of property upon divorce, the caselaw on liability for flooding, landlord-tenant law, and the estates system, among others, Singer argues that the rise of reasonableness tests serve broad-based systemic interests in property, including setting minimum standards and more explicitly resolving conflicting values such as autonomy. *Id.* at 49-63. Many of these areas represent overlapping private law concerns at the intersection of property and contract, such as landlord-tenant law. *Cf. supra* note 123.

[244] *See supra* note 237 and accompanying text.

absolute dominion in its various forms, but in practice, the system of property can adapt rapidly to changing circumstances, even if the remedial modalities have given primacy to determinacy in the current crisis.[245] Thus, one final irony that the new formalism underscores is that because the emerging response has been so contextual – driven by individual advocacy choices and the courts' dialectical responses to those choices – it actually supports the assumptions underlying pluralism much more comfortably than the timeless essentialism on which formalism has traditionally depended.

CONCLUSION

The mortgage system is both a microcosm of the larger financial markets in which it now operates and a repository of a long accretion of common law, equitable, and legislative structures for balancing the interests of borrowers and lenders. When the housing crisis emerged, it brought into stark relief a disjunction between traditional norms of the individual mortgage transaction and a secondary market that thrived on informality. As this conflict has been litigated, courts have been increasingly receptive to holding lending-side interests to the strict letter of the law.

The housing crisis will continue to shape property law for years, but in the immediate aftermath, the phenomenon of borrowers invoking the strictures of formalism and lenders seeking the mercies of vague compliance portends a period of heightened formalism. In an era in which there has been relatively little fundamental policy response for distressed borrowers, it is understandable that advocates would reach for any available tool to defend distressed borrowers, and perhaps equally understandable that courts would respond to this advocacy. Moreover, in the absence of significant momentum for structural reform, the leverage this provides might be the best that borrowers can do. If nothing else, the emerging caselaw has exposed serious technical flaws in the mortgage securitization system.

This Article, however, has attempted to situate this emergent shift in both a historical light and also in the theoretical context of mortgage law as a realm of property that brings into particularly sharp focus the tension between formalism and flexibility. For those concerned about the long-term structural balance between procedural regularity and substantive fairness embodied in the traditional realms of law and equity, the brittleness that the new formalism may be ushering in is worth considering and, perhaps, cause for redoubling efforts to find structural solutions to a crisis that even now continues.

---

[245] Moreover, the association between the certainty and clarity that attend formalism and general expectations supposedly at the heart of property law – one of the classic arguments for valorizing formalism – ignores the expectations of many people who approach property with instincts that comport more with equity's concern for contextual fairness. *See* Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 466 (2011).