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Local Government and Risky Home Loans

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LOCAL GOVERNMENTS AND RISKY HOME LOANS*

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I. INTRODUCTION

MUNICIPALITIES from the Central Valley in California to Upstate New York bear the legacy of reckless mortgage lending. Foreclosed homes and toxic titles[1] have caused blight and cost communities billions of dollars. Many cities[2] tried to halt the risky loans by calling on state and federal legislators and regulators to intervene. Some even passed ordinances aimed at curtailing the high-cost loans that were destroying their neighborhoods. Their pleas were dismissed and their ordinances overturned. The resulting subprime crisis played a central role in the great financial crisis that began in 2008. Millions of people lost their jobs and, as a consequence, lost their homes too. Municipalities have born the burden of empty, dilapidated homes that pepper once vibrant neighborhoods. A handful of cities have sued financial institutions, attempting to recover their losses. The lawsuits have been complex and expensive, and limits on municipal standing have dramatically restricted the relief cities can recover.

The City of Cleveland's (the City) experience demonstrates the challenge municipalities faced when predatory lenders moved into town. Mortgage brokers and lenders began targeting Cleveland and its inner-ring suburbs with predatory loans[3] in the 1990's. The Cleveland City

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1. Titles become toxic when shoddy—and sometimes fraudulent—paperwork during the securitization process clouds the chain of title to the property.

2. Throughout this Article, I use the terms municipalities, cities, towns, and localities interchangeably.

3. In its most simple form, a predatory loan is a loan that a borrower will not be able to repay. Other predatory terms include charging people higher interest rates based on their race, deceiving or defrauding borrowers, hiding key loan terms, and requiring borrowers to waive their right to go to court. Kathleen C. Engel & Patricia A. McCoy, *A Tale*

Council responded with an ordinance[4] designed to halt the plague that was infecting the city. The American Financial Services Association, which represents the credit industry, successfully sued the City and the ordinance was struck down.[5]

The City asked federal and state regulators for help that never came. They went to the state capitol and lobbied for an anti-predatory lending bill. In 2002, several years after the City's elected officials told state legislators in Columbus of their problems with predatory lenders, the legislature passed a law that prohibited cities from regulating lending and credit.[6] The law also established a Predatory Lending Study Committee to report on predatory lending in mortgage originations.[7] The new law did not place any limits on loan terms or practices. Four years later in 2006, after twelve years of rising foreclosures in Cleveland,[8] the state finally passed a law aimed at addressing abuses in the home mortgage market.[9]

A decline in manufacturing jobs had already handicapped the Cleveland economy and the housing market. The rash of predatory loans intensified Cleveland's decline. With entire blocks lined with abandoned, boarded up homes, the City's next step was a lawsuit against the financial institutions that made and financed unaffordable loans.[10] The City hoped

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of Three Markets: The Law and Economics of Predatory Lending, 80 TEX. L. REV. 1255, 1260 (2002).

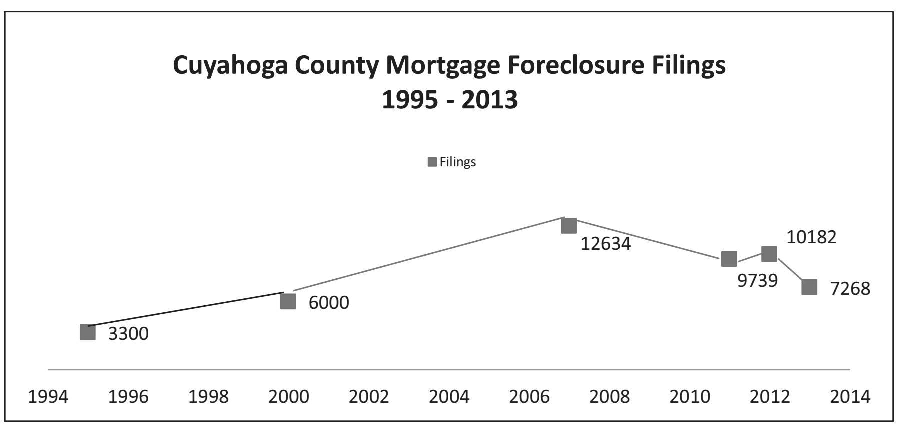
4. CLEVELAND, OHIO, CODE part 6, tit. 3, ch. 659, § 659.01, et seq. (2002).

5. Am. Fin. Services Ass'n v. Cleveland, 112 Ohio St.3d 170, 179 (2006).

6. *Id.* at 175.

7. *See* OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, 124TH GEN. ASSEMB. OF OHIO, http://www.lsc.ohio.gov/fiscal/fiscalnotes/124ga/hb0386en.htm [https://perma.cc/P43V-KLYX].

8. Frank Ford, *Foreclosure and Vacant Property Trends in Cuyahoga County: 1995-2013*, THRIVING COMMUNITIES INST. 2 (Sept. 22, 2013), http://www.wrlandconservancy.org/documents/ForeclosureandVPTrends9-22-13.pdf [https://perma.cc/JV3U-3WD2].



9. *See* Bricker and Eckler LLP, *Summary of Senate Bill 185, Ohio Home Ownership Protection Act*, MARTINDALE.COM (June 22, 2006), http://www.martindale.com/administrative-law/article__235362.htm [https://perma.cc/M327-9UEZ].

10. *See* Second Am. Compl., Cleveland v. Deutsche Bank Trust Co., 2008 WL 4600486 (N.D. Ohio Oct. 8, 2008) (No. 08CV00139).

it could recover for the damage the banks had caused its neighborhoods and the city budget.[11] A federal district court dismissed the City's lawsuit,[12] which the court of appeals affirmed.[13] The blight Cleveland tried to prevent persists and Cleveland has no recourse.

In this Article, I analyze the legal and regulatory problems municipalities encountered when they attempted to restrict high-risk mortgage loans. I argue that these problems are the result of a broader, more systemic issue: municipalities are severely limited in their ability to act against commercial interests that cause harm to their communities. In the case of risky mortgage lending, I contend that the sensible policy is to expand localities' power to protect against actions by financial institutions that threaten or impose costs on communities. There are, of course, other important areas where the actions of commercial interests cause harm to municipalities, such as polluting and selling guns. While it is possible that these issues might also be better addressed by expanding the power of localities, my focus is on mortgage lending.

In Part II below, I chronicle the efforts that cities, states, and the federal government made (or did not make) to rein in abusive lending. I then review, in Part III, how the three levels of government responded to the foreclosure crisis. I have separated the three level of governments' ex ante and ex post efforts because the tools employed to prevent harm differ from those used to ameliorate harm. The purpose of Parts II and III is to describe the ways in which state and federal governments failed to assist cities and the ways in which the law stymied municipal efforts to prevent harm and recover for the damages caused by risky home loans. After demonstrating that cities lack the power to prevent or recover for risky loans that harm their neighborhoods in Part IV, I provide rationales for giving localities authority to regulate mortgage lenders. Part V contains models for local regulation of home mortgage lending. I then conclude in Part VI.

II. EFFORTS TO HALT ABUSIVE LOANS

A. Predatory and Subprime Lending

Predatory lending began in the 1990s in areas of the country where demand for credit was high, consumer protection laws were lax, and po-

11. *See id.* It goes without saying that financial institutions were not the sole cause of the mounting foreclosure rates in Cleveland. The point of this Article is to highlight a gap in governance, not to identify a single culprit behind the foreclosure epidemic. There were borrowers who knowingly took out risky loans, hoping they could ride the home appreciation wave. Many investors walked away from loans when the economy began its downward slide. And as I mention in the text, Cleveland was suffering from a post-industrial downturn. Lastly, many of the homes in Cleveland that went into foreclosure were post-World War II bungalows that did not have the amenities borrowers now seek. All these factors contributed to the foreclosure rates.

12. Cleveland v. Ameriquest Mortg. Sec., Inc., 621 F. Supp. 2d 513, 536 (N.D. Ohio 2009).

13. Cleveland v. Ameriquest Mortg. Sec., Inc., 615 F.3d 496, 499 (6th Cir. 2010).

tential borrowers were less sophisticated, often because past discrimination and credit rationing[14] prevented them from gaining experience with credit transactions. These borrowers frequently, but not always, had limited credit histories or blemishes on their credit reports.[15]

In the initial stage, mortgage brokers identified prospects by searching city hall records to find people with outstanding housing code violations and by scouring newspapers to find older women who had lost their husbands.[16] They then reached out to people by putting flyers on their doors and calling them during dinner with offers to refinance their existing loans. The brokers' loans contained onerous terms like credit life insurance, for which the entire premium was paid at closing out of the loan proceeds. The points and fees could be astronomical—for example, as much as $25,000 in points on a $100,000 loan.[17] Worst of all, the loans were usually unaffordable from the start. As soon as borrowers were on the brink of default, their brokers appeared to refinance the loan, extracting huge fees, and increasing the principal with each round of refinancing; default and foreclosure inevitable. Deception, intimidation, and targeting Black and Latino people with the priciest loans when they actually qualified for less-expensive prime-rate loans were all common place.[18] As a result, many borrowers lost their homes.[19]

Predatory lenders initially were small, non-depository institutions. Over time, they grew larger. Soon national banks saw the opportunity to make high-cost loans.[20] The banks entered the market by acquiring subprime lenders or by establishing affiliates to make such loans.[21] With more players in the market, competition increased. And, with more mainstream institutions in the space, the terms of loans and the practices of brokers and lenders improved some.[22] Even with the somewhat less onerous terms, lenders were making loans that borrowers could not afford and borrowers were still losing their homes to foreclosure.[23]

In the section below, I discuss whether and how cities, states, and the federal government attempted to protect borrowers from abusive loans. The programs and lawsuits I discuss are representative, not exhaustive.

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14. *See* Engel & McCoy, *supra* note 3, at 1271-73 (describing credit rationing in mortgage markets).

15. For a full description of the operations of predatory and subprime lenders, see Kathleen C. Engel & Patricia A. McCoy, The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps 21-42 (Oxford University Press 2011).

16. *Id.* at 21.

17. *Id.* at 24.

18. *Id.* at 25, 30.

19. *Id.* at 121.

20. *Id.* at 25-6.

21. *Id.* at 26.

22. *Id.* at 26.

23. *Id.* at 25-42.

B. City Efforts

1. *City Ordinances*

Several counties and cities, including Cleveland, attempted to use their home rule authority to curtail predatory lending by passing ordinances that limited interest rates and prepayment penalties on home loans, and mandated counseling for borrowers before they could enter into high-cost mortgage loans.[24] The financial services industry trade group responded with lawsuits seeking to enjoin enforcement of the ordinances on the grounds that the localities had exceeded their home rule authority.[25] Courts consistently outlawed the ordinances. The courts' decisions were not surprising given the way judges have interpreted home rule doctrine in recent years.

The boundaries of cities' powers are elusive. As one writer stated, "the most authoritative explication of the contemporary state of the police power is in McQuillin's local government treatise,[26] which is essentially a three volume tome of several hundred years of conflicting court decisions."[27]

State legislatures and courts have attempted to delineate the power of cities within their realm, adopting one of three broadly defined approaches. The oldest and first construction, known as Dillon's Rule, disavows home rule.[28] In these jurisdictions, municipalities can exercise powers expressly granted by the state, powers implied by or incident to the expressly granted powers, and lastly, those powers that are "essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient but indispensable."[29] A second approach, known as *imperium in imperio* home rule, gives localities the authority to

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24. Geoffrey Walsh, *The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide*, 44 Suffolk U. L. Rev. 139, 181-82 (2011). These included Chicago, Cleveland, Cleveland Heights (OH), Cook County (IL), Dayton, DeKalb County (IL), Detroit, Los Angeles, New York City, Oakland, Philadelphia, and Toledo. At least two cities, Cleveland and Philadelphia, have passed ordinances that impose standards like those in the Community Reinvestment Act on banks that hold city funds. Raymond Brescia & Sonia Steinway, *Scoring the Banks: Building a Behaviorally Informed Community Impact Report Card for Financial Institutions*, 18 Fordham J. Corp. & Fin. L. 339, 353-358 (2013).

25. *See, e.g.*, Am. Fin. Services Ass'n v. Toledo, 112 Ohio St. 3d 323 (2006) (overturning Toledo's ordinance); Am. Fin. Services Ass'n v. Cleveland, 112 Ohio St. 3d 170, 179 (2006) (overturning Cleveland's ordinance); Am. Fin. Services Ass'n v. Oakland, 34 Cal. 4th 1239, 1245 (2005) (overturning Oakland's ordinance); Mayor of New York v. Council of the City of New York, 4 Misc. 3d 151, 162-63 (N.Y. Sup. Ct. 2004) (overturning New York City's ordinance).

26. McQuillin Mun. Corp. § 24:1 et seq. (3d ed.).

27. Stephen Miller, *Community Rights and the Municipal Police Power*, 55 Santa Clara L. Rev. 675, 680 (2015).

28. *Conflicts Between State Statutes and Municipal Ordinances*, 72 Harv. L. Rev. 737, 739 (1959). For a discussion of the history of home rule, see Paul A. Diller, *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109, 1112-21 (2012); Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 Denv. U. L. Rev. 1337, 1340-44 (2009).

29. J. Dillon, Municipal Corporations 448-50 (5th ed. 1911).

pass ordinances that address local concerns.[30] Lastly, there are jurisdictions that have that adopted legislative home rule, under which local governments have the same authority as the state, unless the state explicitly provides that it is the sole authority in specified areas.[31]

It is the role of the courts to determine whether the actions by a particular locality are *ultra vires.*[32] Although the three models[33] for allocating power to cities appear fairly well delineated, when challenges to ordinances come before courts, judges often disregard the applicable state home rule model.[34] Instead, they ask whether a particular local regulation could have extraterritorial effects or would impede statewide uniformity.[35] Accordingly, if the reach of an ordinance extends beyond the boundaries of the local jurisdiction, courts tend to strike down the ordinance on the grounds that it is not "local." Consistent with this approach, courts typically hold that ordinances governing land are local in nature.[36] If a city requires that homeowners procure permits before installing new kitchens or imposes fines on those who allow their grass to grow above six inches, it is hard to see any statewide concerns. These examples are unequivocally local.

Courts most often embrace the statewide uniformity rationale when it comes to regulations affecting commerce.[37] The argument is that local regulations should not impose undue burdens on commercial enterprises and should not interfere with the right to contract. As markets have moved from the local sphere to statewide, national, and even global arenas, courts have struck down almost all local regulations affecting commerce.[38] It appears that the driving principle in home rule cases has become protecting commercial enterprises and, for that reason, courts have enjoined local anti-predatory lending ordinances.

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30. Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 203 (2016).

31. *Id.* at 254-5. For an example of a court's application of legislative home rule, see Easthampton Savings Bank v. Springfield, 470 Mass. 284, 285 (2014) (preempting a city's ordinance mandating arbitration of foreclosure claims).

32. Baker & Rodriguez, *supra* note 28, at 1338.

33. Among the fifty states, four are classified as Dillon Rule jurisdictions, and the remaining forty-six states are divided equally between legislative and *imperio* home rule jurisdictions. *Id.* at 1374.

34. *See, e.g.*, Stahl, *supra* note 30, at 186-7 (describing a California Supreme Court decision that was inconsistent with the contours of the state's home rule standard).

35. Baker & Rodriguez, *supra* note 28, at 1349, 1352; Stahl, *supra* note 30, at 208.

36. The reality is, however, that ordinances governing property can have extraterritorial effects; for example, a local prohibition on building low-income housing could force other communities to address the housing needs of lower-income people. Stahl, *supra* note 30, at 219.

37. *Id.* at 208.

38. *Id.* Professor Stephen R. Miller traces the shifting contours of home rule authority over time in his article, *Community Rights and the Municipal Police Power*, *supra* note 27, at 682-703; *see also* Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, HARV. ENVTL. L. REV. (forthcoming 2016) (draft at 3) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2689834 [https://perma.cc/J9QB-U8F3]) (arguing that for the purpose of preemption analysis, regulation of energy-related activities should be divided into different strands (e.g., locating sites for drilling versus financing or development). The job of courts would then to be to make preemption decisions on each strand.).

2. Signs of a Move Toward "Progressive Federalism"?[39]

In recent years, municipalities have mounted new efforts to curtail industries that are harming their communities. [40] As one reporter described, "as the federal government remains gridlocked and some states fail to act, cities are stepping into the breach."[41] Whether these ordinances will withstand challenges is largely unknown at this point.

Dallas imposed a five-cent tax on plastic bags to help reduce the almost $4 million a year it was spending on litter removal.[42] Seattle, San Francisco, Miami Beach, Washington, D.C., and other municipalities have banned styrofoam.[43] Lincoln, Nebraska, banned police drones.[44] In 2014, numerous cities passed minimum wage laws that exceed the federal minimum wage.[45] Philadelphia Mayor, Jim Kenney, has proposed a tax on soda to fund citywide pre-kindergarten.[46]

In a bold move toward greater autonomy, about 150 jurisdictions have passed "community rights" ordinances, which proclaim they have the right to self-governance.[47] The residents of Grant Township in Pennsylvania went even further and adopted an ordinance to legalize nonviolent civil disobedience to protect residents who protested a proposed well for depositing toxic wastewater from fracking.[48]

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39. Progressive federalism refers to policies that advance progressive causes, such as a higher minimum wage, at the local level. *See* Mike Konczal, *Why We Need Progressive Federalism*, NATION (Mar. 21, 2012), http://www.thenation.com/article/why-we-need-progressive-federalism/ [https://perma.cc/4L3C-LY3F].

40. Andrew Ryan, *On range of issues, mayors are taking the initiative*, BOSTON GLOBE (June 21, 2016), https://www.bostonglobe.com/metro/2016/06/20/federal-authority-last-century-big-city-mayors-are-new-power-centers/yyZlHolrjB8Dbpd6J2Yd1O/story.html.

41. Lydia DePillis, *'We've got 'em on the run': Texas cities work to rein in payday loans*, WASH. POST (July 14, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/14/weve-got-em-on-the-run-texas-cities-work-to-rein-in-payday-loans/ [https://perma.cc/KQC6-XFC8].

42. Lisa Falkenberg, *For Abbott, government's the problem unless it's the solution*, HOUS. CHRON. (Jan. 10, 2015), http://www.houstonchronicle.com/news/columnists/falkenberg/article/For-Abbott-government-s-the-problem-unless-it-s-6007001.php [https://perma.cc/XY9Y-X2LT]. After plastic bag manufacturers and recyclers sued Dallas saying the City did not have the authority to impose the ban, Dallas repealed the ban. Merrill Hope, *Dallas Trashes the Plastic Bag Ban*, BREITBART (June 4, 2015), http://www.breitbart.com/texas/2015/06/04/dallas-trashes-the-plastic-bag-ban/ [https://perma.cc/N2ND-BSL5].

43. Amy Scott, *"Styrofoam" bans expand as plastic falls out of favor*, MARKETPLACE (Jan. 4, 2016, 1:07 PM), http://www.marketplace.org/2016/01/01/world/styrofoam [https://perma.cc/3VBQ-7BVB]. A court struck down a similar ban in New York City. Benjamin Mueller, *Judge Strikes Down New York City's Ban on Foam Food Containers*, N.Y. TIMES (Sept. 22, 2015), http://www.nytimes.com/2015/09/23/nyregion/judge-strikes-down-new-york-citys-ban-on-foam-food-containers.html [https://perma.cc/7A9S-73WY].

44. Jenni Bergal, *Cities Forge Policy Apart From States*, PEW CHARITABLE TRUSTS (Jan. 15, 2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/15/cities-forge-policy-apart-from-states [https://perma.cc/T3VT-CE2Z].

45. *Id.*

46. Eric Duvall, *Clinton, Sanders at odds over Philly soda tax plan*, UPI (Apr. 22, 2016, 4:56 PM), http://www.upi.com/Top_News/US/2016/04/22/Clinton-Sanders-at-odds-over-Philly-soda-tax-plan/1171461356991 [https://perma.cc/L6SX-C2DX].

47. Miller, *supra* note 27, at 676.

48. Kate Stringer, *Faced With a Fracking Giant, This Small Town Just Legalized Civil Disobedience*, YES MAG. (May 13, 2016), http://www.yesmagazine.org/planet/faced-with-a-

Increasingly, payday-lending ordinances have sprung up, especially in Texas where the state places no limits on the amount payday lenders can charge customers. Cities, including Houston, Dallas, Austin, El Paso, and San Antonio, elected to adopt their own local payday lending ordinances.[49]

The Dallas City Council used its zoning authority to prohibit payday lenders from operating near highways and in residential areas.[50] The ordinance also restricts the location of auto title lenders, who loan cash to owners of cars and take the borrowers' car titles as collateral.[51] A trade association of lenders challenged the ordinance, seeking declaratory and injunctive relief on the grounds that state law preempted the Dallas ordinance.[52] Because the ordinance allowed imposition of a fine for violators and was intended to protect the public at large, the trial and appellate courts found that the statute was penal in nature and, therefore, that civil courts did not have subject matter jurisdiction.[53]

In California, cities have banned payday lenders from low-income neighborhoods, placed limits on the total number of pay-advance stores in their jurisdictions, and mandated that payday lenders be no closer to

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fracking-giant-this-small-town-just-legalized-civil-disobedience-20160513 [https://perma.cc/4V74-KPXH].

49. Falkenberg, *supra* note 42. A bill to restrict payday lending failed in the Texas legislature. DePillis, *supra* note 41.

50. DePillis, *supra* note 41.

51. Masako Melissa Hirsch, *Opponents keeping up pressure on payday lenders in Texas,* DALLAS MORNING NEWS (Sept. 28, 2014, 12:01 AM), http://www.dallasnews.com/news/metro/20140927-opponents-keeping-up-pressure-on-payday-lenders-in-texas.ece [https://perma.cc/N9SP-PRL6]. *See also* Olivia M. Pena, *Municipal Regulation of Payday & Title Loans in Texas*, 17 J. CONSUMER & COM. L. 71 (2014) (discussing the various payday lending ordinances in Texas and the potential challenges lenders might raise). The auto loan provisions also limit the size of loans based on borrowers' income or the value of their cars, restrict loan renewals, and mandate that borrowers make minimum payments. Hirsch, *supra* note 51.

52. Hirsch, *supra* note 51.

53. Consumer Serv. Alliance of Tex. v. Dallas, 433 S.W.3d 796 (Tex. App.—Dallas 2014, no pet.). The appellate court found that "the Ordinance states its primary purpose is 'to protect the welfare of the citizens of the city of Dallas by monitoring credit access businesses in an effort to reduce abusive and predatory lending practices.' As such, it is clearly addressing a wrong to the public at large." *Id.* at 803 (citing Dallas, TEX., CODE § 50–144). Unless a party is claiming that an ordinance is "unconstitutional and its enforcement will result in irreparable injury to vested property rights," the vehicle through which to contest a penal ordinance is by defending a charge under the ordinance. *Id.* at 805.

The Court of Appeals rejected the trade association's equitable argument on the grounds that the members had not demonstrated that they had a vested property right:

> Appellants contend they have property, such as business plans, existing customer lists and loan portfolios, forms, websites, and business methods, that will be affected by the Ordinance. However, they do not argue that the Ordinance forbids them from engaging in the lending business—nor can they, since the Ordinance on its face only regulates the terms under which appellants may offer their services. Appellants, therefore, cannot establish that the Ordinance harms their vested property rights, as necessary for the trial court to have equity jurisdiction to entertain appellants' suit.

Id. at 807.

each other than one-quarter of a mile.[54] As of my writing of this Article, the California and Texas ordinances have not been struck down.

Although many of the new local ordinances have not yet worked their way through the courts, in 2015, the Supreme Court had an opportunity to consider a case that tangentially involved home rule authority.[55] There, Highland Park, Illinois, passed an ordinance banning assault weapons. The Illinois State Rifle Association challenged the ordinance and the case worked its way up to the Supreme Court, which declined to grant certiorari.[56] We cannot know the Court's rationale for denying cert, but we can surmise that the Court concluded that it was not essential for them to consider the legality of Highland Park's ordinance.

While there is reason to believe that there is increasing deference to home rule, many local regulations have generated extensive pushback from industry and state governments.[57] In Texas, several communities passed ordinances forbidding fracking rigs near homes, schools, and churches.[58] Denton, Texas went further and banned fracking within the city limits.[59] In response to these local efforts, the state legislature passed a law that prohibited localities from limiting fracking,[60] and also stripped towns of "the power to regulate many other aspects of the industry that had been commonly regulated, like fracking wastewater disposal."[61] Fracking is not the only topic that has generated discord between cities

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54. Tom Gogola, Jennifer Wadsworth & Josh Koehn, *Local Lawmakers Forced to Take on "Predatory Lenders,"* SAN JOSE INSIDE.COM (Oct. 9, 2014), http://www.sanjoseinside.com/2014/10/09/local-lawmakers-forced-to-take-on-predatory-lenders/ [https://perma.cc/9UG5-S5LB]; *see also* Antonio Olivo, *Fairfax to control increasing presence of outfits offering high-interest loans*, WASH. POST (Nov. 17, 2015), https://www.washingtonpost.com/local/dc-politics/fairfax-to-control-increasing-presence-of-outfits-offering-high-interest-loans/2015/11/17/e0c69b10-8d83-11e5-ae1f-af46b7df8483_story.html [https://perma.cc/NVK9-644L] (discussing a similar ordinance in Fairfax, Virginia).

55. Friedman v. Highland Park, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015).

56. *Id.* The appeal focused on residents' Second Amendment rights, not on the municipality's home rule authority. There are many reasons why the court may have denied the writ. It could be that the Court was waiting for a better case to decide the contours of the Second Amendment.

57. Rick Moran, *States Stepping in to Deny Excessive Regulation by Local Governments*, AM. THINKER (May 18, 2015), http://www.americanthinker.com/blog/2015/05/states_stepping_in_to_deny_excessive_regulation_by_local_governments_.html [https://perma.cc/FA7G-B233].

58. Falkenberg, *supra* note 42.

59. *Id.*

60. Peter Gorman, *Home Rule Under Fire*, FORT WORTH WKLY (Apr. 8, 2015), http://www.fwweekly.com/2015/04/08/home-rule-under-fire [https://perma.cc/ZXT5-8FHQ].

61. Wade Goodwyn, *New Texas Law Makes Local Fracking Bans Illegal*, NPR (May 20, 2015), http://www.npr.org/2015/05/20/408156948/new-texas-law-makes-local-fracking-bans-illegal. The Colorado Supreme Court struck down similar city bans on fracking on the grounds that they would "render the state's statutes and regulatory scheme superfluous for at least a lengthy period, materially impeding Colorado's interests in efficient development of oil and gas resources." David Bailey, *Colorado Supreme Court Voids Two City Voter-Approved Fracking Bans*, REUTERS (May 2, 2016), http://www.reuters.com/article/us-usa-fracking-colorado-idUSKCN0XT1VA [https://perma.cc/R9U7-UXR7]. For a discussion of both legislative actions and judicial decisions overturning local fracking ordinances, see Alex Ritchie, *Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation*, 76 LA. L. REV. 809 (2016).

and states. Recently, states have enacted laws preventing cities from regulating the size of sodas, passing minimum wage laws, imposing taxes on using plastic bags at grocery stores, and requiring paid sick days.[62]

In sum, it is impossible to know whether there is a trend toward expanded local authority.

3. *City Litigation*

Sometimes cities can achieve through litigation what they cannot through ordinances. In reviewing city efforts to combat unfair lending, I have not uncovered any municipal lawsuits to enjoin predatory lending. As with home rule, limitations on municipal power likely explain the paucity of filings by cities. The biggest hurdle for cities is establishing standing to sue. Standing is a somewhat abstract doctrine, the terrain of which frequently shifts. Thus, it is difficult to assess whether cities will have standing in any given situation.[63]

There are two bases on which cities can potentially bring claims. The first is to sue to protect residents. Professor Kathleen Morris refers to "claims brought to remedy harms sustained by local constituents" as "constituent cases."[64] In general, cities may not recover damages on behalf of residents. In contrast, when a city seeks to recover for direct injuries to itself, the claim is based on the city's proprietary interests. Professor Morris refers to "claims brought to remedy harms sustained by the locality itself" as "city cases."[65] Cities suing in their proprietary capacities can recover the same array of remedies that any private party can recover under the applicable law.

When municipalities bring common law claims in state court, they have standing to the extent allowed under their state constitutions. If they are in federal court, they must meet Article III and prudential standing

62. Bergal, *supra* note 44; Adam Sternbergh, *The Ban on Plastic Bags vs. the Ban on Bag Bans*, N.Y. MAG. (July 15, 2015), http://nymag.com/daily/intelligencer/2015/07/plastic-bag-bans.html [https://perma.cc/RN36-AGK7]; David A. Lieb, *States saying 'no' to cities seeking to regulate businesses*, CHI. TRIB. (May 17, 2016), http://www.chicagotribune.com/news/nationworld/ct-businesses-banning-bans-20150517-story.html [https://perma.cc/5GZY-AJ7E]. A Tempe, Arizona city councilwoman, on her behalf and not as a member of the city council, filed a lawsuit in response to a state law prohibiting cities from limiting plastic bags at grocery stores. *Lawsuit Filed Against State Bill that Prevents Plastic Bag Bans*, PHOENIX 12 NEWS (Sept. 30, 2105), http://phxux.12news.com/story/news/local/arizona/2015/09/30/lawsuit-filed-against-state-bill-that-prevents-plastic-bag-bans/73098734/ [https://perma.cc/323K-WQ5U].

63. For example, in 2014, the Supreme Court reconfigured the prudential arm of standing, holding that at least two of the requirements are subsumed under other doctrines. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387-388, 1395 (2014). For a discussion of the *Lexmark* decision, see Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 62 (2014).

64. Kathleen Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 7 (2012).

65. *Id.*

requirements.[66]

If cities sue under a federal or state statute, the statute may give them statutory standing, i.e., expressly or impliedly the right to file suit. Depending on the language of the statute and the forum, cities may still have to meet Article III and prudential standing requirements in federal court or state constitutional standing requirements in state court. The determination whether a city has standing to bring a claim under a statute ultimately depends on: (1) the language of the statute under which it is suing; (2) the remedies the city is seeking, e.g. injunctive relief, damages, or civil penalties; (3) whether the city is seeking remedies for its own injuries or those of others; and (4) the requirements of Article III in federal court,[67] or the relevant state constitution in state court.

Statutory prohibitions on unfair and deceptive acts and practices (UDAP) would be the most natural vehicles through which cities could challenge exploitative loans. The laws of all fifty states and the federal government's Federal Trade Commission Act (FTC Act) [68] allow recovery for UDAP violations. Unfortunately for cities, UDAP statutes present challenges. The first and most obvious is that the FTC Act[69] and most state statutes do not give municipalities the right to bring UDAP claims. Only seven states allow city or county UDAP claims; eleven others provide statutory standing to district attorneys to bring criminal actions under their UDAP laws.[70] In addition to these limitations, some state laws preclude UDAP claims arising out of credit transactions.[71]

66. *See* Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 368-70 (2006) (discussing Article III and prudential standing requirements).

67. In the recent *Spokeo v. Robins* decision, the Supreme Court held that in a claim based on a statute, plaintiffs can potentially satisfy the requirement of injury-in-fact under Article III by demonstrating a tangible harm or a material risk of real harm. 136 S. Ct. 1540, 1549 (2016). Arguably, the *Spokeo* decision reduces the burden on cities seeking to establish Article III standing in statutory claims. For a discussion of Spokeo, see Craig Konnoth and Seth F. Kreimer, *Spelling out Spokeo,* U.PENN. L.R. ONLINE (forthcoming 2016).

68. 15 U.S.C. § 41 et seq. There are other federal laws that regulate mortgage lending; however, on their face, these laws do not give standing to municipalities. *See* Truth in Lending Act (TILA), 15 U.S.C. § 1601, et seq.; Home Ownership and Equity Protection Act (HOEPA), 15 U.S.C. § 1639 (a subsection of TILA); Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 et seq.

69. 15 U.S.C. § 45(a)(2). The Dodd-Frank Act, 12 U.S.C. § 5331(a), gave the Consumer Financial Protection Bureau (CFPB) the authority to bring claims for unfair, deceptive *and* abusive acts.

70. *E.g.*, 73 PA. STAT. AND CONS. STAT. ANN. §§ 201-4, 201-4.1 and 201-8; *see also* Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L. J. 1903, 1906, 1911 (2013) (providing an extensive review of each state UDAP statute and finding that some of the laws "limit the local public entities that can bring suit, and/or incorporate procedural safeguards, such as requiring prior state certification of localities as enforcement agents, prior approval by the state before filing suit, or prior notification to the state before filing suit.").

71. Carolyn Carter, *Consumer Protection in the States*, NAT'L CONSUMER L. CENTER 14 (Feb. 2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf [https://perma.cc/2HPD-W3HZ].

Even when cities do have statutory standing under state laws, rarely can they bring claims to protect the interests of their residents. For example, Massachusetts has one of the most liberal UDAP laws with a broad standing provision.[72] The statute allows claims "by any person" or "any person who engages in the conduct of any trade or commerce,"[73] which includes municipalities; however, complainants can only obtain relief if they suffer injuries.[74] In state statutes that have an injury requirement, cities must "strain to identify harm to their own interests in order to bring a suit."[75] And then they often "find their efforts blocked by claims that the offensive conduct is too remote from the city's injury and the connection between the two is too tenuous."[76]

California's UDAP law, codified in the Business and Professions Code, illustrates a different approach. The law enables cities[77] to seek injunctive relief and civil penalties[78] against entities that engage in unfair competition *without* any need to prove injury.[79] Because California's Constitution does not include a standing requirement, it is fairly easy for cities to bring claims in California state courts under the UDAP statute simply by showing that a lender has engaged in unfair competition.

The California law does not allow cities to sue to recover compensatory damages on behalf of residents injured by violations of the statute.[80] The likely rationale for this limitation is that if cities could recover damages on behalf of residents, they would be acting as parens patriae, which is not permitted in federal court and most state courts.[81]

There are also local UDAP ordinances. Cleveland has an ordinance that authorizes the city law director to impose fines on and enjoin those who engage in "unfair, deceptive or unconscionable consumer trade practices in the sale, lease, rental or loan, or in the offering for sale, lease, rental or loan of any consumer goods or services."[82] The term "goods and services" precludes most claims based on loans secured by real property. If, however, a mortgage loan were made in connection with the provision of goods or services, such as a secured loan for home repairs, the Cleveland ordinance would apply. The Cleveland ordinance also permits ag-

72. Mass. Gen. Laws, ch. 93A, § 9. For a history of ch. 93A, the first state UDAP law, see Katerina S. Callahan, *Massachusetts General Laws Chapter 93A, Section 11: The Evolution of the "Raised Eyebrow" Standard*, 36 Suffolk. U. L. Rev. 139, 141-63 (2002).

73. Mass. Gen. Laws, ch. 93A, §§ 9, 11.

74. *Id.*

75. Caruso, *supra* note 63, at 62.

76. *Id.*

77. There are specific requirements cities must satisfy under the California statute. For example, smaller cities may have to obtain consent from the district attorney before filing suit for injunctive relief. Cal. Bus. & Prof. Code § 17204.

78. *Id.* at §§ 17204-17206.

79. Unfair competition is defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Id.* at § 17200.

80. The California law does allow cities to recover civil penalties, but any penalties recovered by cities flow only to governmental entities, not to residents. *Id.* at § 17206(c).

81. Engel, *supra* note 66, at 362; Caruso, *supra* note 63, at 69-70.

82. Cleveland, Ohio, Code § 643.02, 643.11(a) (2011).

grieved parties, including the City, to seek injunctions and to recover compensatory damages and civil penalties for their own injuries.[83] However, no provision permits the City to obtain damages on behalf of residents harmed by abusive loans.

Like the situation with the California UDAP statute,[84] if the City could pursue such relief for residents, it would be acting as parens patriae—a power it does not possess. The one exception to the principle that cities cannot recover on behalf of their residents is found in New York City, which has a local consumer protection law that permits the commissioner of consumer affairs to secure civil penalties, and in some situations, restitution for consumers.[85]

In sum, UDAP laws provide little hope to cities that seek to stop high-risk lending because cities rarely have statutory standing under state laws, and when they do, they may not be able to bring claims because they cannot satisfy constitutional standing requirements, the statutes do not cover mortgage lending, or the law requires that cities suffer actual injuries.

C. State Efforts

1. State Laws

Unlike cities, states do have the power to pass laws governing the practices of lenders and the terms of the loans they make. When community activists and consumer lawyers brought stories of abusive lending to their state legislators, some listened and crafted legislation aimed at curtailing the worst practices. North Carolina was at the vanguard. Other states followed North Carolina's path, and by the time the financial crisis dust settled, over half the states had passed some type of anti-predatory loan law.[86] There were also states that, at least initially, went in the opposite direction. Ohio and Pennsylvania not only refused to extend protections to borrowers, but they also passed laws prohibiting municipalities from enacting ordinances to restrict unfair lending.[87] There were many states that took no action or passed laws that simply restated existing federal law.

While states have more power than cities, they too can be stymied. In states where legislators introduced anti-predatory lending laws with strong provisions, lenders and their lobbyists poured money and argu-

83. *Id.* at § 643.11(a), (b).

84. *Supra* note 80.

85. N.Y. City, N.Y. Code § 20-703. Like the Cleveland ordinance, claims under the New York City law can only arise from "the sale, lease, rental, or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts." *Id.* at § 20-700.

86. I am unaware of any state anti-predatory lending laws that permit cities to bring claims. Some states also passed laws governing the regulation and licensing of mortgage brokers.

87. Kimm Tynan, *Pennsylvania Welcomes Predatory Lenders: Pennsylvania's Act 55 Preempts Philadelphia's Tough Ordinance but Provides Little Protection for Vulnerable Borrowers*, 34 Rutgers L.J. 837, 873, 893 (2003).

ments into politicians' pockets in an attempt to derail the legislation. They were often successful at watering down the provisions in the laws.[88] A number of states were able to resist the lobbying blitz and passed anti-predatory lending laws with provisions requiring that loans be affordable and banning some of the most exploitative loan terms in the market, such as pre-paid credit life insurance. In response, the industry began pressuring federal regulators to exempt nationally chartered thrifts and banks from having to comply with the new state laws.[89]

In 1996, the Office of Thrift Supervision (OTS)[90] issued two rulings that preempted state regulation of mortgage loans.[91] As a result, thrifts with federal charters no longer had to comply with state consumer protection laws governing mortgage loans. Despite these rules, in the 1990s, the OTS actively investigated thrifts that made abusive loans in violation of state laws. Things changed at the OTS in 2001 when the George W. Bush Administration began applying the OTS preemption rules to allow thrifts to escape state anti-predatory lending laws.[92]

The Office of the Comptroller of the Currency (OCC), which regulates national banks, worried that national banks would switch to thrift charters to take advantage of the OTS preemption rules. It responded by issuing its own preemption rule.[93] As a result, all federally regulated national banks and thrifts were untouchable. Only state banks and thrifts regulated by the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve Board (FRB), and nonbank lenders were subject to state anti-predatory lending laws. In effect, federal regulators trampled the state anti-predatory lending laws for the country's largest banks.[94]

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88. Glenn R. Simpson, *Lender Lobbying Blitz Abetted Mortgage Mess*, WALL ST. J. (Dec. 31, 2007), http://www.wsj.com/articles/SB119906606162358773 [https://perma.cc/UW22-VQRR].

89. Robert Berner & Brian Grow, *They Warned Us,* BUSINESS WEEK (Oct. 20, 2008), at 36, http://www.bloomberg.com/news/articles/2008-10-08/they-warned-us-about-the-mortgage-crisis.

90. The Dodd-Frank Act eliminated the OTS and its responsibilities were transferred to the OCC.

91. Office of Thrift Supervision, *Lending and Investment: Final Rule*, 61 FED. REG. 50951, 50952 (Sept. 30, 1996) (formerly codified at 12 U.S.C. § 560.2); Office of Thrift Supervision, *Subsidiaries and Equity Investments: Final Rule*, 61 FED. REG. 66561, 66563 (Dec. 18, 1996) (formerly codified at 12 C.F.R. § 559.3(h); Dir. of Office of Thrift Supervision, James Edward Gilleran, Remarks before the Exchequer Club (May 21, 2003), http://www.occ.gov/static/news-issuances/ots/speeches/ots-speech-ts096-05-21-2003.pdf [https://perma.cc/WHD3-AA44].

92. Kathleen C. Engel & Patricia A. McCoy, *Federal Preemption and Consumer Financial Protection: Past and Future*, 31 BANKING & FIN. SERVS. POL'Y REP. 25 (Mar. 2012).

93. Office of the Comptroller of the Currency, *Bank Activities and Operations; Real Estate Lending and Appraisals; Final Rule*, 69 FED. REG. 1904 (Jan. 13, 2004) (formerly codified at 12 C.F.R. §§ 7.4007-7.4009, 34.4).

94. *See generally* Engel & McCoy, *supra* note 92 (detailing history and role of regulatory preemption by banks); Christopher Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1 (2005) (describing how the preemption claims masked a campaign to deregulate the financial services industry).

2. *State Litigation*

States have the power to bring lawsuits to protect the rights of their citizens, and to recover damages for themselves and for private individuals.[95] Under state UDAP and anti-discrimination statutes, attorneys general can seek civil penalties, compensation for victims, and injunctions ordering firms to cease unlawful practices that harm consumers.[96] In most states, attorneys general do not have to prove as many elements as private plaintiffs. In the case of UDAP claims, they are often relieved from having to establish reliance, causation, and injury, and, instead, need only prove that "the defendant's acts had the tendency to deceive or were capable of deceiving."[97] Likewise, some states permit attorneys general to obtain injunctive relief without demonstrating the common factors of irreparable harm and inadequate remedy at law.[98]

Although most states held back from suing lenders either because they did not have the resources to file complicated lawsuits that required extensive knowledge of the financial services industry and complicated mortgage products or because they were captured by the industry,[99] a handful of states did pursue claims against abusive lenders long before subprime loans became a national concern. New York's attorney general, together with other attorneys general, uncovered evidence that Household International, Inc. (Household) had been deceiving borrowers by failing to disclose key loan terms. In 2002, Household entered into a settlement agreement with the states for $484 million.[100] Later, state attorneys general individually and collectively brought lawsuits against financial institutions, such as Ameriquest (2006) and Countrywide (2008), under state UDAP statutes, which resulted in settlements totaling almost $9 billion.[101]

The Massachusetts Attorney General's Office was often at the front of

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95. For a discussion of public enforcement of private rights, see generally Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 12 U. Minn. L. Rev. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503999 [https://perma.cc/R8HQ-2PUX].

96. When statutes fail to provide express enforcement authority to states, they have used their authority as quasi-sovereigns to bring actions as parens patriae. *Id.* at 14-15 (noting that states rarely use their parens patriae power and when they do, they typically seek injunctive relief or compensation to the state and not restitutionary relief for victims of the wrongdoing).

97. Christopher J. Willis & Stefanie H. Jackson, *What is an Attorney General's Burden of Proof? Evidentiary Requirements in UDAP Actions Brought by State Attorneys General*, Strafford 35 (2010), http://media.straffordpub.com/products/udap-litigation-against-financial-institutions-merging-theories-and-the-foreclosure-documentation-crisis-2010-11-30/reference-material.pdf [https://perma.cc/VPE6-HG89].

98. *Id.* at 28.

99. *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, *supra* note 70, at 1905.

100. Press Release, N.Y. Dep't of Fin. Servs., Att'y Gen. Spitzer Announces Historic $484 Million Agreement with Household Int'l, Inc. (Oct. 11, 2002), http://www.dfs.ny.gov/about/ea/ea021011.htm [https://perma.cc/S3CM-5Y8W].

101. Willis & Jackson, *supra* note 97, at 210.

pack, securing settlements with Fremont Investment and Loan[102] and Option One[103] based on violations of state UDAP and anti-discrimination laws. Attorneys general in Colorado, Connecticut, Illinois, and Maine also successfully recovered funds from mortgage lenders for violations of state laws.[104] For understandable reasons, states directed the proceeds from their settlements to consumers and their own coffers. Scant dollars were funneled to localities.

D. Federal Efforts

1. Federal Laws

Until Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or the Act) in 2010, there was only one law directly addressing abusive mortgage loans.[105] The Home Ownership and Equity Protection Act (HOEPA), which Congress passed in 1994, restricted or prohibited certain loan terms in high-cost, open-ended home equity loans.[106]

Three years later, in 1997, Congress heard testimony about abusive loans for home purchases and refinancing. A witness from the National Consumer Law Center provided members of the Senate Banking Committee with evidence that foreclosures had tripled since 1982. In 2000, 2001, and 2004 there was further Congressional testimony from professors, attorneys, and consumer advocates about the escalating growth in corrosive loans.[107] Reporters told heart-wrenching stories of people deceived by brokers and lenders into agreeing to unaffordable loans. There was evidence of race-based steering of high-cost loans to borrowers of color. And, more and more people were losing their homes.

Some members of the House and Senate sponsored federal anti-predatory lending laws, but their proposals never made it out of committee.[108] Thirteen years after Congress first heard testimony about abusive loans, Congress passed the Dodd-Frank Act, which established a new federal agency—the Consumer Financial Protection Bureau (CFPB). The CFPB has primary responsibility for consumer financial protection. The law applies uniformly to all entities that broker, originate, or service home

102. Press Release, Att'y Gen. of Mass., Att'y Gen. Martha Coakley Reaches $10 Million Settlement with Subprime Lender Fremont Inv. and Loan (Jan. 9, 2009), http://www.mass.gov/ago/news-and-updates/press-releases/2009/ag-coakley-reaches-10m-settlement-with.html [https://perma.cc/FU73-M9XX].

103. Press Release, Att'y Gen. of Mass., H&R Block Mortg. Co. Will Provide $125 Million in Loan Modifications and Restitution (Aug. 9, 2011), http://www.mass.gov/ago/news-and-updates/press-releases/2011/option-one-settlement.html [https://perma.cc/8ZJB-AATS].

104. Willis & Jackson, *supra* note 97.

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

106. Home Ownership and Equity Protection Act (HOEPA), 15 U.S.C. § 1639.

107. Engel & McCoy, *supra* note 15, at 61. For an example, see Director of the Home Defense Program of the Atlanta Legal Aid Soc'y, William J. Brennan, Jr., Test. Before the Comm. on Banking and Fin. Servs., H.R. (May 24, 2000), http://archives.financialservices.house.gov/banking/52400bre.shtml [https://perma.cc/Y9AQ-WLPM].

108. Engel & McCoy, *supra* note 15, at 153-54.

mortgage loans, with one exception for small credit unions and depository institutions.[109] The Act eliminated the OTS and OCC preemption rules, which means that financial institutions now have to comply with state anti-predatory lending laws, even if the state laws impose more stringent standards than their federal analogues.[110] It is noteworthy that nothing in the Dodd-Frank Act gives cities the power to curtail risky lending.

For purposes of my argument, the failure of the federal government to act to prevent the origination of abusive loans ultimately led to millions of foreclosures. And, while the Dodd-Frank Act provides expanded protection for borrowers,[111] which should also benefit cities by reducing high-risk lending, many members of Congress would like to repeal the Act.[112] If that happens, cities will again be exposed to collateral damage from unfair loans with no ability to protect themselves.

2. *Federal Regulators*

In the 1990s and early 2000s, federal regulators from the Department of Housing and Urban Development (HUD), the Department of the Treasury, and the Federal Reserve Board of Governors, among others, issued reports that raised concerns about abuses and inadequate disclosures in the subprime loan market.[113] In these early days of risky lending, some regulators actively investigated and brought enforcement actions against lenders, which I discuss in the next section. The OTS was the banking regulator that most actively tried to stem predatory lending by proposing new rules to govern depository institutions and by taking action against thrifts that were making predatory loans.[114] Fannie Mae and Freddie Mac joined the effort in 2000 when they amended their purchasing guidelines to preclude their purchase of predatory loans.[115]

President Clinton's presidency came to a close as regulated banks and thrifts were entering the market with subprime loans. The election of George W. Bush signaled a retreat from regulating home mortgage loans. The same bank regulators that raised concerns about abusive loans reported in 2004 that:

> [T]heir monitoring and examination activities [ ] revealed little evidence of predatory lending practices by federally regulated deposi-

109. Dodd-Frank §§ 1021(b), 1024-1026.

110. Dodd-Frank § 1026(a)(2). Institutions with $10 billion or less in total assets are exempt from some of the provisions in the Act. 12 U.S.C. § 5516 (2012).

111. For a description of the borrower protections in the Dodd-Frank Act, see ENGEL & MCCOY, *supra* note 15, at 228-33.

112. Kelsey Snell, *Ryan releases plan to roll back Obama regulations*, WASH. POST (June 14, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/06/14/ryan-releases-plan-to-roll-back-obama-regulations/ [https://perma.cc/FT6L-6867].

113. ENGEL & MCCOY, *supra* note 15, at 62.

114. *Id.* at 154.

115. *Fannie Mae, Lender Letter No. 03-00: Eligibility of Mortgages to Borrowers with Blemished Credit Records* (Apr. 11, 2000); *Bulletin 2000–1* (Washington, DC: Freddie Mac, March 20, 2000), http://www.freddiemac.com/sell/guide/ bulletins/pdf/b11001.pdf.

tory institutions. Accordingly, most banking regulators reported that they have taken no formal enforcement actions related to predatory lending abuses by the institutions they supervise.[116]

To the extent the banking regulators took any action, it was primarily to issue guidances that had no legal power. The OCC did promulgate a UDAP rule requiring the banks they supervised to assess borrowers' ability to repay; however, the rules were vague and left wiggle room for the banks.[117] The OTS was even worse. It pursued an unabashed deregulatory agenda.[118]

The Federal Reserve Board of Governors (the Board) was the entity that could have stepped in early to effectively prevent reckless lending and unaffordable loans. When Congress passed HOEPA, it included a provision stating that:

> The Board . . . shall prohibit acts or practices in connection with—(A) mortgage loans that the Board finds to be unfair, deceptive, or designed to evade the provisions of this section; and (B) refinancing of mortgage loans that the Board finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower.[119]

Alan Greenspan refused to act on this mandate from Congress, even though loans were getting ever riskier under his watch. The only regulatory action the Board took was in 2001 to increase the range of loans covered by HOEPA.[120] In 2008, after Ben Bernanke had become the Chair of the Board and as the subprime crisis was reaching its pinnacle, the Board used its authority under HOEPA to adopt a rule to ban particularly risky home mortgage loans.[121]

3. *Federal Litigation*[122]

Beginning in the late 1990s, the Federal Trade Commission (FTC) brought a series of enforcement actions under the FTC Act against nineteen lenders and brokers who were making predatory loans, includ-

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116. U.S. Gov't Accountability Office, Consumer Protection: Federal and State Agencies Face Challenges in Combatting Predatory Lending 36 (2004), http://www.gao.gov/new.items/d04280.pdf [https://perma.cc/L7JU-EWL6].

117. Engel & McCoy, *supra* note 15, at 169. The OCC also took the lead on interagency guidance on interest-only and pay-option ARMS. *Id.*

118. *Id.* at 183.

119. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325 (codified as amended at 15 U.S.C. §§ 1639(p)(2)) (emphasis added).

120. Engel & McCoy, *supra* note 15, at 195.

121. *Id.* at 196.

122. The FTC Act and FHA were not the only laws that federal agencies were charged with enforcing. There was the TILA disclosure law, HOEPA, and RESPA. Engel & McCoy, *supra* note 3, at 1305-308. The Dodd-Frank Act amended all three of these laws.

ing Capital City Mortgage in 1998,[123] Fleet Financial in 1999,[124] First Alliance Mortgage Company in 2000,[125] and Citigroup in 2001.[126] The Department of Justice (DOJ), which was charged with enforcing the Fair Housing Act (FHA), was less active than the FTC. Just the same, it pursued enforcement actions for reverse-redlining claims against Huntington Mortgage Corporation in 1995,[127] Long Beach Mortgage in 1996,[128] Fleet Mortgage Corporation in 1996,[129] and Delta Funding Corporation in 2000.[130] During that time period, HUD, which enforces the Real Estate Settlement Procedures Act (RESPA) and the FHA, pursued some administrative actions against lenders and brought several RESPA enforcement claims.[131]

President George W. Bush took office in 2001. From that time until President Obama took office, it does not appear that the federal agencies initiated any new enforcement actions related to subprime or predatory lending.

III. EFFORTS TO ADDRESS EXTERNALITIES[132]

The rapid growth of reckless, subprime lending triggered a generalized financial crisis that led to a dramatic surge in foreclosures. Below, I re-

123. Press Release, Fed. Trade Comm'n, Cap. City Mortg. Settles FTC Charges (Feb. 24, 2005), https://www.ftc.gov/news-events/press-releases/2005/02/capital-city-mortgage-settles-ftc-charges [https://perma.cc/L6JE-NCXC] (outlining settlement terms of $750,000 for consumer redress and injunctive relief).

124. Complaint, FTC v. Fleet Fin., Inc., (FTC Oct. 5, 1999) (No. C3899), https://www.ftc.gov/sites/default/files/documents/cases/1999/10/ftc.gov-fleetfinancecmp.htm [https://perma.cc/RV28-RPWZ] (resulting in a $1.3 million settlement for consumers and injunctive relief).

125. Press Release, Fed. Trade Comm'n, Home Mortg. Lender Settles "Predatory Lending" Charges (Mar. 21, 2002), https://www.ftc.gov/news-events/press-releases/2002/03/home-mortgage-lender-settles-predatory-lending-charges [https://perma.cc/2TFV-6LPX].

126. Press Release, Fed. Trade Comm'n, Citigroup Settles FTC Charges Against the Assocs. Record-Setting $215 Million for Subprime Lending Victims (Sept. 19, 2002), https://www.ftc.gov/news-events/press-releases/2002/09/citigroup-settles-ftc-charges-against-associates-record-setting [https://perma.cc/CF8D-ADJ4] (reporting on $215 million settlement with Citigroup for violations of the FTC Act).

127. Complaint, United States v. Huntington Mortg. Co. No. 1:95 CV 2211 (N.D. Ohio Oct. 18, 1995).

128. Complaint, United States v. Long Beach Mortg. Co., No. 96 Civ. 6159 (C.D. Cal. Sept. 5, 1996).

129. Complaint, United States v. Fleet Mortg. Corp., No. 96-CV-2279 (E.D. N.Y. May 7, 1996).

130. Complaint, United States v. Delta Funding Corp., No. 00-CV-01872 (E.D. N.Y. 2000).

131. U.S. Gov't Accountability Office, Consumer Protection: Federal and State Agencies Face Challenges in Combatting Predatory Lending, *supra* note 116, at 8-9.

132. By externalities, I mean situations in which cities bear the costs of transactions to which they were not parties, and the parties to the transaction do not bear any of the costs they impose on the communities. In the lending situation, financial service providers who entered into exploitative lending contracts with borrowers, imposed costs on cities in the form of reduced tax revenues, increased demand for social services, and costs to tear down abandoned homes.

view responses to the foreclosure crisis and evaluate the efforts at the local, state, and federal levels, and their impact on localities.

A. Foreclosure, Abandonment, and Distress[133]

Cities were not parties to the unaffordable mortgage loan contracts and they did not invite the brokers and lenders into their communities. Yet, cities have borne tremendous costs. Foreclosures led to property depreciation of both foreclosed and nearby homes. Many properties did not produce any tax revenue.[134] Cities took further hits to their tax proceeds when homeowners, in response to declines in their property values, petitioned to have their home values reassessed so their tax bills would be lower. Cities ultimately lost billions in property tax revenue.[135]

By 2010, approximately eight percent of residential units in the country were vacant.[136] Properties became vacant when people moved out because they could not afford their mortgages or because they mistakenly believed a foreclosure was imminent. When properties are vacant, cities are hard-pressed to collect outstanding taxes. If a city cannot locate the responsible party, it cannot recover the taxes nor can it drag the responsible party into court. And when banks or securitization trusts become property owners following foreclosures, they can impede city efforts to tax them by not recording their foreclosure deeds.[137]

Sometimes vacant properties end up in legal purgatory. The most frequent scenario occurs when homeowners move out of their homes after receiving foreclosure notices, and the banks or other financial institutions elect not to follow through on the foreclosures because there are title issues or because the outstanding taxes and liens exceed the value of the property. If the foreclosures had been completed, the purchaser—usually the foreclosing entity—would have to pay off any outstanding taxes and

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133. Many authors have chronicled the damage communities have suffered. *See* David Kane, Comment, *Restoration Remedies for Remaining Residents*, 61 UCLA L. Rev. 812, 814-15, 825-28 (2014).

134. City tax collectors can obtain liens against the property for the unpaid amounts; they can then seek to enforce the liens through a tax lien foreclosure. Depending on the number of lienholders and the jurisdiction, such foreclosures can cost many thousands of dollars. And at the end of the process, cities own property they often don't want.

135. *Vacant Properties: The True Cost to Communities*, Nat'l Vacant Prop. Campaign 7 (Aug. 2005), http://www.smartgrowthamerica.org/documents/true-costs.pdf [https://perma.cc/2PBX-CPY7].

136. U.S. Gov't Accountability Office, Consumer Protection: Federal and State Agencies Face Challenges in Combatting Predatory Lending, *supra* note 116, at 8-9. Sixteen percent of homes that had mortgages were in some stage of foreclosure. Ben Beachy, *A Financial Crisis Manual: Causes, Consequences, And Lessons Of The Financial Crisis* (Global Dev. and Env't Institute, Working Paper No. 12-06, 2012), http://www.ase.tufts.edu/gdae/Pubs/wp/12-06BeachyFinancialCrisis.pdf [https://perma.cc/54MF-KWD6].
Properties are typically considered vacant when they have been unoccupied for at least three months.

137. William Weber, *Who's Responsible? Liability for the Deterioration of Properties Abandoned during or after Foreclosure Proceedings*, 82 U. Cin. L. Rev. 663, 663-64 (Winter 2013).

liens and, going forward, would be responsible for the real estate taxes and property maintenance. Vacant properties that lenders have not foreclosed upon are sometimes referred to as "zombie homes." One mayor in New York State reported that there is a zombie home on almost every block in her town of Mastic Beach.[138]

Regardless of who owns the vacant property, it is cities that frequently pick up the tab for maintenance. Empty houses invite trespassers who start fires, run drug operations, and steal anything from toilets to copper piping, all of which necessitate more active policing and fire protection.[139] Cities also have the burden of mowing the lawns, boarding up windows, and demolishing houses.[140] One estimate of the cost to cities for each abandoned[141] property was between $7,000 and $30,0000.[142] In 2014, Cleveland had 6,000 condemned buildings to be torn down and another 6,000 abandoned buildings. The estimated cost of demolishing the 12,000 buildings was $120 million.[143] These are all ex post costs, many of which could have been avoided had cities been able to stop the risky, unaffordable loans in their communities.[144]

Vacant and abandoned property also imposes costs on neighbors.[145] Researchers have used various methods to calculate the impact of vacant, abandoned, tax delinquent, and foreclosed property on the value of surrounding homes. One study in Cuyahoga County, Ohio, found that home values dropped by as much as 2.7 percent for each vacant and tax-delinquent property within 500 hundred feet.[146]

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138. Tim Henderson, *'Zombie Houses' Multiply in Some States*, STATELINE (Feb. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/02/29/zombie-houses-multiply-in-some-states.

139. *See* Kelly D. Edmiston,?*Property Conditions and Neighborhood Crime*, FED. RES. BANK OF KANSAS CITY 10-13 (Jan. 15, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567835 [https://perma.cc/DM7W-YD6C] (empirically demonstrating the relationship between crime and the condition of nearby properties); *see generally* Engel, *supra* note 66, at 357-59; Kermit J. Lind, *Perspectives on Abandoned Houses in a Time of Dystopia*, 29 PROB. & PROP. 52, 53 (2015).

140. James J. Kelly, *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 113 (2013); ENGEL & MCCOY, *supra* note 15, at 143.

141. Property that is no longer being maintained is considered abandoned.

142. *Defaulting on the Dream: States Respond to America's Foreclosure Crisis*, PEW CHARITABLE TRUST 12 (Apr. 2008), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/subprime_mortgages/defaultingonthedreampdf.pdf [https://perma.cc/CJ8U-SGP6].

143. Lind, *supra* note 139, at 54.

144. The entire country felt the impact of risky loans, but some areas were hit harder than others. In those places, the foreclosure crisis continues to hamper communities. *See generally* Michael L. Hanley & Ruhi Maker, *In the Eye of the Storm: Why the Threat of Foreclosure Damage Continues*, EMPIRE JUS. CENTER (Mar. 2015), http://www.empirejustice.org/assets/pdf/publications/reports/monroe-report—in-the-eye-of-the-storm/report-in-the-eye-of-the-storm.pdf [https://perma.cc/8DFS-NWEW].

145. Stephan Whitaker & Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on?Sales Prices of Neighboring Homes* 35 (Fed. Res. Bank of Cleveland, Working Paper 11:23R, Mar. 2012).

146. *Id.*; *see also* Norman G. Miller, Stephanie Y. Rauterkus & Michael A. Sklarz, *The Neighborhood Impact of Subprime Lending, Predatory Lending and Foreclosure*, HOYT GRP., http://hoytgroup.org/wp-content/uploads/2012/12/The-Neighborhood-Impact

Communities of color have been hit hardest by foreclosures because many predatory and subprime lenders targeted people of color with the worst loans.[147] Studies by academic and government researchers have repeatedly revealed that white borrowers with the same credit profiles as black and Latino borrowers often paid less for credit during the lending boom.[148] These practices were not only illegal and unfair, but also increased the likelihood that people of color would default and their homes would become vacant.[149]

The problem of vacant homes in cities intensified when whistleblowers and consumer advocates uncovered serial wrongdoing and fraud among mortgage loan servicers, who were responsible for foreclosing on property. During the heyday of subprime lending, money flowed quickly, but paperwork and recordkeeping was shoddy. Loans that were sold did not always include the endorsements needed to transfer ownership. Similarly, mortgages often lacked the requisite assignments when they were sold. Other records reflecting payments and defaults were missing from the files.

When it came time to foreclose on homes, law firm "foreclosure mills" and servicers dealt with the missing paperwork and other issues that impeded efficient foreclosures by falsifying documents to give the impression that they had substantiated the right to foreclose. Once these frauds were discovered, foreclosures came to a halt for a time. Years later, some homes are still in limbo as servicers continue to search for the documents necessary to prove they have a right to foreclose. The delays increased blight because homeowners, knowing they were likely to lose their homes in the future, had little reason to maintain their property.

The legal problems created by foreclosures differ from those created by reckless subprime and predatory lending. In the latter case, the primary legal challenge was regulating the exploitative financing activities of lenders. In the former, the primary problem for cities was finding ways to address vacant homes and blight.

B. City Efforts

1. City Ordinances

Cities harnessed their home rule authority—sometimes successfully, sometimes not—to ameliorate the vacancies and neighborhood distress that subprime lending left in its wake.

.pdf [https://perma.cc/4BBS-FZYV] (discussing research on the impact of foreclosures on area home values).

147. *See generally Housing Finance at a Glance: A Monthly Chartbook*, Urb. Inst. 6 (Apr. 2015), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000194-Housing-Finance-Chartbook-April-2015.pdf [https://perma.cc/NBS7-92T2].

148. Charlie Savage, *Wells Fargo Will Settle Mortgage Claims*, N.Y. Times (July 12, 2012), http://nyti.ms/M4YN4A [https://perma.cc/SYX8-X8LZ].

149. Kathleen C. Engel & Patricia A. McCoy, Segregation: The Rising Costs to America 79, 89-99 (James H. Carr & Nandinee K. Kutty, eds., 2008); Engel & McCoy, *supra* note 15, at 22, 28.

a. Property Registration

To address the problem of uncertainty about who owned property, numerous cities passed ordinances requiring that lenders register vacant properties so the cities would know to whom to send tax bills and against whom to enforce code violations.[150] The problem with these ordinances is that if the owners of vacant properties fail to comply with the registration requirements, cities have no idea who to fine for violating the ordinances requiring them to register.

b. Mow to Own

In recent years, cities employed imaginative vehicles to help defray some of the maintenance costs associated with abandoned properties. Several cities adopted programs coined "mow to own," through which people earn $25 in credit toward a home purchase every time they mow the lawn of an abandoned home.[151]

c. Receivership

Cities have also passed ordinances allowing community development non-profits to file petitions with courts asking to be named receivers of vacant properties that are creating nuisances and violating local codes. Once appointed, the organizations can repair and maintain the property. A lien for their expenses is placed on the property and the organizations can then foreclose on the lien and obtain title to the property unless another lienholder steps in to cover the cost of the repairs. Cities' ability to use receivership in this manner without state legislative approval depends on the scope of their home rule authority[152]

d. Eminent Domain

Some cities have explored using the age-old tool of eminent domain to seize underwater[153] mortgages and negotiate new mortgage loans with homeowners.[154] Using these powers, cities would pay the fair market

150. Webber, supra note 155 at 671-3; Raymond Brescia & Nicholas Martin, *The Price of Crisis: Eminent Domain, Local Governments, and the Value of Underwater Mortgages*, 24 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2016) (draft at 15), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498651 [https://perma.cc/D2BT-M3SG].

151. *See* Linda A. Moore, *Memphis mow-to-own program passes final vote in City Council*, COMMERCIAL APPEAL (Nov. 17, 2015), http://www.commercialappeal.com/news/government/city/memphis-mow-to-own-program-passes-final-vote-in-city-council-24abb49c-9791-7630-e053-0100007fa76d-351215011.html [https://perma.cc/MY3Q-SDE6].

152. Kelly, *supra* note 140, at 132-34.

153. The term underwater means the value of the home is less than the amount owed on the mortgage loan.

154. For an excellent discussion of the use of eminent domain powers to reform mortgage terms, see generally, Brescia & Martin, *supra* note 150. For a discussion of the legal and practical hurdles to using eminent domain in this fashion, see Jacob R. Shelton, *Constitutional Constraints on Using Eminent Domain to Write-Down Underwater Mortgages*, 13 CORNELL REAL EST. REV. 46 (2015).

value of the mortgages[155] to the owners of the loans, which typically would be securitization trusts. The cities would then assist the borrowers in obtaining new loans, or the cities might initially finance the loans themselves. The loans would have significantly lower principal amounts, taking into account the market value of the property. The loans could potentially even be sold back into the original securitization trusts.[156]

The goals of eminent domain proposals are to prevent foreclosures and neighborhood blight while minimizing the losses to investors in securitization trusts. Proponents argue that investors have good reasons to support this use of eminent domain. In 2015, fifteen percent of homes with values under $200,000 were underwater.[157] As many as seventy percent of seriously underwater homes go into foreclosure,[158] and the recovery on foreclosed homes is significantly less than the amount of the mortgage loans secured by the properties. Lastly, evidence shows that mortgage loans with principle reductions are less likely to redefault than loans with other types of modifications.[159] As of the writing of this Article, no cities have implemented a plan to seize mortgages using their eminent domain powers.[160]

2. *City Litigation*[161]

Left with abandoned property, reduced tax revenues, and increased calls for police and fire protection, cities turned to the courts to seek

155. Alternatively, cities could pay the mortgagees a percent of the fair market value of the property.

156. Brescia & Martin, *supra* note 150. Commentators have explored a number of different models, including having the securitization trusts loan the money to municipalities to buy the loans on underwater homes. The cities would then re-convey the modified loans back to the trusts as payment or make monthly payments to the bondholders from the amounts the homeowners remit. *See* Brian Cullin, *Taking on Water: Local Government, Eminent Domain, and the Foreclosure Crisis*, 4 U. BALT. J. LAND & DEV. 1, 3-5 (2014); Robert Hockett, "*We Don't Follow, We Lead:" How New York City Will Save Mortgage Loans by Condemning Them*, 124 YALE L. J. F. 131, 136, 138 (2014).

157. Paul Solman, *Why the foreclosure crisis isn't over yet*, PBS NEWSHOUR (Sept. 24, 2015, 4:45 PM), http://www.pbs.org/newshour/making-sense/foreclosure-crisis-isnt-yet/ [https://perma.cc/26ZS-MPWP]. Among more expensive homes, five to six percent were underwater in 2015. *Id.*

158. Hockett, *supra* note 156, at 134.

159. U.S. GOV'T ACCOUNTABILITY OFFICE, TROUBLED ASSET RELIEF PROGRAM: TREASURY COULD MORE CONSISTENTLY ANALYZE POTENTIAL BENEFITS AND COSTS OF HOUSING PROGRAM CHANGES 23 (July 2015), http://gao.gov/assets/680/671167.pdf [https://perma.cc/6J8U-PGGT].

160. *See generally* Lydia DePillis, *Wall Street has so far crushed a drastic foreclosure fix. One California town could change that.*, WASH. POST (Sept. 10, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/09/10/wall-street-has-so-far-crushed-a-drastic-foreclosure-fix-one-california-town-could-change-that/ [https://perma.cc/M4VG-3247]; Marc Joffe, *Social impact bonds: A better way to combat blight*, CAL. ECON. SUMMIT (July 13, 2015), http://www.caeconomy.org/reporting/entry/social-impact-bonds-a-better-way-to-combat-blight [https://perma.cc/U6WN-4F9N].

161. For a deeper discussion of the lawsuits that municipalities brought against lenders, see Kathleen C. Engel, *The State of Play in City Claims against Financial Firms*, 40 FORDHAM URB. L. J. CITY SQUARE 82 (2014); *see also* KATHLEEN MORRIS, HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY 189, 192-201 (Ray Brescia and John Travis

damages they alleged were caused by lenders making unaffordable loans that resulted in foreclosures.

a. Housing Code Enforcement

Housing codes give cities the power to sanction homeowners who do not maintain their properties. Code enforcement is not a panacea. For cities with limited resources for housing inspectors and tens of thousands of homes with code violations, it is impossible to fully enforce the codes. Even when homeowners are cited, many do not have the financial resources to make the required repairs. Too often properties are vacant and the citations go unheeded.[162]

Cleveland, which was the epicenter of abusive loans, tried to use housing code violations to force owners of foreclosed homes to maintain their properties. If the owners were in the area, it was not difficult to drag them into the Cleveland Housing Court; however, Wall Street banks rarely showed up to hearings. Judge Pianka of the Housing Court began trying the corporations, even though they had not appeared in court. The trials in absentia led to fines of $1.4 million against multiple financial services companies. The Ohio Supreme Court eventually held that Judge Pianka could not try the property owners in absentia.[163]

Indio, California, adopted a criminal ordinance that allowed the city to impose misdemeanor fines on homeowners who did not maintain their properties. Indio used this ordinance to go after Citibank and Washington

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Marshall, eds., 2016) (cataloging recent efforts by cities to curtail activities that were harming their communities); *see generally* Raymond Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change*, *Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y (2012) (discussing the challenges cities face when bringing claims that address broad social issues). Counties have brought fraud actions against the Mortgage Electronic Registration System (MERS). The Illinois county of St. Clair settled a lawsuit against MERS for $800,000 based on allegations that MERS had committed fraud by evading requirements that mortgages be filed with the county recorder. St. Clair Cnty, Ill. v. Mortg. Elec. Registration Sys., Inc., 2012 WL 11966902 (Ill. Cir. Ct.); Beth Hundsdorfer, *St. Clair County settles lawsuit against banks for $800,000*, BELLEVILLE NEWS-DEMOCRAT (Dec. 1, 2015), http://www.bnd.com/news/local/article47324295.html [https://perma.cc/MV7Y-7269]. Other localities have filed similar suits alleging they are entitled to recover the recording fees that the MERS system evaded. *E.g.*, Cnty of Ramsey v. MERSCORP Holdings, Inc., 776 F.3d 947 (8th Cir. 2014) (reporting on two counties suing MERS); Ellen Brown, *The Looming Foreclosure Crisis: As the Fed Runs Out of Bullets, Local Governments Step In*, HUFFPOST BUS. (July 8, 2014), http://www.huffingtonpost.com/ellen-brown/the-looming-foreclosure-c_b_5561871.html [https://perma.cc/WB38-FN73]. In jurisdictions that do not mandate recording of title transfers, courts have dismissed claims against MERS. Ben Lane, *MERS wins in class-action suit from Minnesota counties*, HOUSINGWIRE (Dec. 23, 2014), http://www.housingwire.com/articles/32434-mers-wins-in-class-action-suit-from-minnesota-counties [https://perma.cc/4995-LEX9].

162. Kelly, *supra* note 140, at 111.

163. Cleveland v. Wash. Mut. Bank, 929 N.E.2d 1039 (Ohio 2010). For a discussion of Judge Pianka's efforts, see Creola Johnson, *Fakers, Breachers, Slackers, and Deceivers: Opportunistic Actors during the Foreclosure Crisis Deserve Criminal Sanctions*, 40 CAP. U. L. REV. 853, 853-57 (2012); Joe Guillen, *Ohio Supreme Court rules against city of Cleveland in housing case*, PLAIN DEALER (May 26, 2010), http://www.cleveland.com/open/index.ssf/2010/05/ohio_supreme_court_rules_again.html [https://perma.cc/R6LU-LJCN].

Mutual, and even securitization trusts that neglected properties upon which they had foreclosed.[164]

b. Public Nuisance Claims[165]

Cities have harnessed the tort of public nuisance to try to stop activities that constitute "an unreasonable interference with a right common to the general public."[166] Factors that:

> [M]ay sustain a holding that an interference with a public right is unreasonable include . . . whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.[167]

Under this rubric, cities have sought injunctions and damages against slaughterhouses, predatory lenders, and handgun, tobacco and lead paint manufacturers.[168] Occasionally, cities have been able to obtain injunctions to abate nuisances;[169] however, courts have moved away from allowing equitable relief in city nuisance actions unless the cities themselves have been injured.[170]

The City of Cleveland brought nuisance claims against investment and commercial banks that funded the subprime lending industry, hoping to recover for the damage that risky loans had caused the City.[171] The federal court that heard the case dismissed the suit on the grounds of state law preemption, the economic loss rule, and lack of proximate cause.[172]

Buffalo,[173] Cincinnati,[174] and Los Angeles[175] later brought similar claims against numerous banks alleging that they violated nuisance laws

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164. Nicholas Casey, *Banker: 'What'd I Do Wrong, Officer?' Cop: 'You've Got Algae in the Pool, Sir,'* WALL ST. J. (May 1, 2009), http://www.wsj.com/articles/SB124112509277274533 [https://perma.cc/R8L9-T68S].

165. For a detailed discussion of the muddled history and application of public and private nuisance law, see generally Kermit J. Lind, *Can Public Nuisance Law Protect Your Neighborhood from Big Banks?* 64 SUFF. U. L. REV. 89 (2011).

166. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

167. *Id.*

168. *See* Grand Rapids v. Weiden, 56 N.W. 233 (Mich. 1893) (slaughterhouse); Cleveland v. Deutsche Bank Trust Co., No. 08CV00139, 2008 WL 4600486 (N.D. Ohio Oct. 8, 2008) (predatory lending); White v. Smith & Wesson, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (handguns); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (tobacco); California v. Atlantic Richfield Co., No. 100CV788657, 2014 WL 1385823 (Cal. Super. Ct. Mar. 26, 2014) (Trial Order) (lead paint).

169. *E.g.*, *Atlantic Richfield Co.*, 2014 WL 1385823 (Trial Order) (in lawsuit brought by several localities, issuing an injunction ordering three of the defendants to pay $1.15 billion to abate lead paint in homes).

170. Brescia, *supra* note 161, at 38-45.

171. Complaint, Cleveland v. Deutsche Bank Trust Co., No. 08CV00139, 2008 WL 4600486 (N.D. Ohio Oct. 8, 2008).

172. Cleveland v. Ameriquest Mortg. Sec., Inc., 621 F. Supp. 2d 513 (N.D. Ohio 2009).

173. Buffalo v. ABN AMRO Mortg. Grp., Inc., No. 2200-2008 (N.Y. Sup. Ct. Mar. 11, 2009) (order granting defendants' motion to dismiss in part without prejudice).

174. Cincinnati v. Deutsche Bank National Trust Co., No. 1:12-CV-104, 2016 WL 2897472 (S.D. Ohio May 18, 2016) (denying in part Deutsche Bank's motion for summary judgment).

175. Los Angeles v. Deutsche Bank Nat'l Trust Co., No. BC460878 (Cal. Super. Ct. Apr. 23, 2013) (denying Deutsche Bank's motion to dismiss).

by failing to maintain properties on which they had foreclosed. Thus far, their claims have not been dismissed.

c. Fair Housing Claims

Several cities brought lawsuits against mortgage lenders under the Fair Housing Act (FHA).[176] The cities claimed that banks peddled high-cost subprime loans to African-American borrowers who would have qualified for less expensive, prime loans. Many of the borrowers could not afford their loans and lost their homes to foreclosure, driving down property values and tax revenues for the cities, while at the same time leading to increased demand for city health and safety services.[177] In Baltimore, city officials produced evidence that over half of the homes on which Wells Fargo foreclosed between 2005 and 2008 became vacant and over seventy percent were in predominantly African-American neighborhoods.[178]

Decades ago in *Havens Realty v. Coleman*,[179] the Supreme Court applied a relaxed standing requirement for city claims under the Fair Housing Act. Just the same, lenders contested liability in FHA claims brought by cities on the grounds that: (1) the cities did not meet the Article III injury requirement;[180] and (2) they could not establish proximate cause because intervening causes, such as the recession, broke the chain of causation between any actions of the defendants and the cities' alleged injuries.[181]

Courts have reached inconsistent results when reviewing cities' fair housing claims. A federal district court in California held that the City of Los Angeles met Article III standing requirements.[182] Wells Fargo ap-

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176. For a discussion of the various lawsuits cities have brought alleging violations of the FHA, see Engel, *supra* note 161, at 83-85; Samuel Marll, *Do Municipalities have Article III Standing to Sue Mortgage Lenders under the Fair Housing Act?* 15 U. PA. J. BUS. L. 253, 258-60 (2012).

177. Sudarshan Varadhan, *Judge denies Wells Fargo's bid to dismiss L.A. predatory lending suit*, REUTERS (May 29, 2014), http://www.reuters.com/article/us-usa-wellsfargo-lawsuit-idUSKBN0E906020140529 [https://perma.cc/G97N-SUKB]; Dena Aubin, *Oakland lawsuit accuses Wells Fargo of mortgage discrimination*, REUTERS (Sept. 22, 2015), http://www.reuters.com/article/us-wellsfargo-discrimination-idUSKCN0RM28L20150922 [https://perma.cc/U89S-RRFV]; Dena Aubin, *Los Angeles drops mortgage-discrimination case against JPMorgan*, REUTERS (Sept. 3, 2015), http://www.reuters.com/article/us-jpmorgan-losangeles-lawsuit-idUSKCN0R31WZ20150903 [https://perma.cc/U23P-2CTR]; Mary B. Hogan, *A Novel Suit: Cities Try On The FHA for Size*, LAW360 (July 29, 2014), http://www.law360.com/articles/559808/a-novel-suit-cities-try-on-the-fha-for-size [https://perma.cc/EB7Q-4KPB].

178. Michael Powell, *Banks Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES (June 6, 2009), http://www.nytimes.com/2009/06/07/us/07baltimore.html?_r=0 [https://perma.cc/E532-YACD].

179. 102 S. Ct. 1114, 1124 (1982). The Court reaffirmed this standard in *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 108, 110-11 (1979) (holding that standing under the FHA is "as broad as is permitted by [Article III] of the Constitution").

180. *See* Marll, *supra* note 176, at 254-55.

181. *See* Hogan, *supra* note 177.

182. Los Angeles v. Wells Fargo & Co., 22 F. Supp. 3d 1047, 1055-58 (C.D. Cal. 2014); *see also* Cnty of Cook v. Bank of Am. Corp., 2015 WL 1303313 at *3-5 (N.D. Ill. 2015)

pealed the district court's decision and the Ninth Circuit has not yet ruled on the appeal.

The City of Miami also brought an FHA lawsuit against Wells Fargo[183] alleging that reverse redlining[184] led to increased foreclosures, which increased the City's costs and decreased its revenue. The District Court dismissed Miami's lawsuit based on a failure to adequately plead proximate cause and because "the alleged injuries fell outside the statute's 'zone of interest.'"[185] The Court of Appeals reversed the District Court,[186] holding that the allegation that Miami had lost tax revenue was sufficient to establish standing under *Gladstone Realtors v. Village of Bellwood*.[187] Likewise, the appellate court found that Miami's proximate cause allegations did not defeat Article III standing.[188] On March 4, 2016, Wells Fargo petitioned the Supreme Court to dismiss Miami's claims for lack of standing.[189] The Supreme Court granted certiorari on Wells Fargo's writ.[190]

The City of Memphis brought a similar suit against Wells Fargo. The federal District Court ruled that Memphis had standing under the FHA and under the state's consumer protection law.[191] The case later settled for $132.5 million.[192] Baltimore[193] also brought suit against Wells Fargo under the FHA.[194] The DOJ subsequently began investigating Wells Fargo's lending practices in Baltimore and found evidence of discrimination based on race. Wells Fargo settled with DOJ and the City of Baltimore for $178 million.[195] Not all FHA claims by cities made it past

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(denying Bank of America's motion to dismiss based on lack of standing in a Cook County FHA claim).

183. Miami v. Wells Fargo & Co., 801 F.3d 1258, 1258 (11th Cir. 2015), *cert. granted*, Wells Fargo & Co. v. Miami, 136 S.Ct. 2545 (2016). Miami also brought companion cases against Bank of America and Citigroup. *See* Miami v. Bank of Am. Corp., 800 F.3d 1262, 1262-63 (11th Cir. 2015), *cert. granted*, Bank of Am. Corp. v. City of Miami, Fla., 136 S. Ct. 2544 (2016); Miami v. Citigroup, Inc., 801 F.3d 1268 (11th Cir. 2015). Miami also brought unjust enrichment claims against the banks. *Citigroup, Inc.*, 801 F.3d at 1268.

184. Reverse red-lining is the targeting of high-cost loans to people of color.

185. *Wells Fargo,* 801 F.3d at 1258; *see also* Miami v. Wells Fargo & Co., No. 13-cv-24508, 2014 WL 11380948 at *2 (S.D. Fla. 2014) (dismissing complaint). The District Court also held that the City's claims were outside the statute of limitations. *Id.*

186. *Wells Fargo*, 801 F.3d at 1265.

187. 441 U.S. 91, 113-16 (1979).

188. *Wells Fargo*, 801 F.3d at 1265-66.

189. Alana Semuels, *Who Can Go After Banks for the Foreclosure Crisis?*, ATLANTIC (May 3, 2016), http://www.theatlantic.com/business/archive/2016/05/who-can-go-after-banks-for-the-foreclosure-crisis/480588/ [https://perma.cc/94TS-PNVD].

190. Wells Fargo & Co. v. Miami, 136 S.Ct. 2545 (2016).

191. Memphis v. Wells Fargo, N.A., No. 09-2857-STA, 2011 WL 1706756 at *8-10 (W.D. Tenn. May 4, 2011) (denying motion to dismiss).

192. Ted Avanoff, *Wells Fargo Goes from Foe to Partner in Memphis*, COMMERCIAL APPEAL (June 3, 2012), http://www.commercialappeal.com/business/wells-fargo-goes-from-foe-to-partner-in-memphis-ep-385748672-323882731.html [https://perma.cc/FKF6-3ACA].

193. Mayor and City Council of Baltimore v. Wells Fargo Bank, N.A., No. JFM-08-62, 2011 WL 1557759 at *1 (D. Md. Apr. 22, 2011) (denying motion to dismiss).

194. 15 U.S.C. § 1691 et seq. (prohibiting creditors from discriminating based on an applicant's protected class).

195. Ylan Q. Mui, *Wells Fargo, Justice Department settle discrimination case for $175 Million*, WASH. POST (July 12, 2012), https://www.washingtonpost.com/business/economy/

motions to dismiss. In 2009, a federal court dismissed a Birmingham, Alabama, FHA suit against Citigroup for lack of standing.[196]

Suits alleging that banks engaged in redlining[197] are also working their way through the courts. In 2014, the City of Providence, Rhode Island, sued Santander Bank under the FHA on the grounds that, after the financial crisis, the bank reduced its home mortgage loans in parts of the city where a significant percent of people of color live, while increasing loans to those in parts of the City where whites live. The case settled for $1.3 million.[198]

C. State Efforts

States initiated a number of efforts to help homeowners avoid foreclosure; these programs helped reduce the burden of vacant homes on municipalities. The programs included funding to refinance borrowers into affordable loans and also providing smaller loans to help borrowers manage short-term cash flow problems. To connect people with resources to help them keep their homes, states funded consumer counseling and media campaigns to educate borrowers about their options. Some states also began regulating "foreclosure rescue scams," which promised to save borrowers from foreclosure. The scams provided few or no services and charged high fees.[199]

In New York, Attorney General Eric Schneiderman negotiated a deal with financial institutions representing seventy percent of the state's mortgage market to adopt "best practices" for addressing the problems caused by vacant and abandoned homes. Under the agreement, banks and other entities inspect properties with delinquent mortgage loans to determine whether they are occupied or require repairs. The firms also register any abandoned or vacant properties with the state.[200]

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wells-fargo-justice-department-settle-discrimination-case-for-175-million/2012/07/12/gJQAX66ZgW_story.html [https://perma.cc/998H-FPUB].

196. *See* Birmingham v. Citigroup Inc., No. CV-09-BE-467-S, 2009 WL 8652915 (N.D. Ala. 2009). Three Georgia counties have lawsuits pending against several financial institutions, alleging reverse red-lining. *See Cobb County, DeKalb County, and Fulton County, Georgia File Federal Fair Housing Act Lawsuit Against Bank of America Corp., Bank of America, N.A., Countrywide Financial Corp., Countywide Bank, FSB, and Merrill Lynch & Co. for Discriminatory Mortgage Lending, Servicing and Foreclosure Practices: Civil Action No. 15-CV-04081*, PR Newswire (Nov. 23, 2015), http://www.prnewswire.com/news-releases/cobb-county-dekalb-county-and-fulton-county-georgia-file-federal-fair-housing-act-lawsuit-against-bank-of-america-corp-bank-of-america-na-countrywide-financial-corp-countywide-bank-fsb-and-merrill-lynch—co-for-disc-300183587.html [https://perma.cc/2XMT-CEE2]; *see also* Dekalb Cnty v. HSBC N. Am. Holdings, Inc., No. 1:12-CV-03640-SCJ, 2013 WL 7874104 at *1 (N.D. Ga. 2013).

197. Red-lining is the practice of refusing to make loans to people of color.

198. *Providence settles redlining lawsuit with Santander Bank*, Providence J. (May 29, 2016), http://www.providencejournal.com/article/20141105/News/311059930 [https://perma.cc/WGT4-TLEJ].

199. *See generally Defaulting on the Dream: States Respond to America's Foreclosure Crisis*, *supra* note 142.

200. Press Release, N.Y. Dep't of Fin. Servs., Gov. Cuomo Announces Major Mortg. Cos. Agree to Measures to Combat Vacant and Abandoned "Zombie Properties" (May 18, 2015), http://www.dfs.ny.gov/about/press/pr1505181.htm [https://perma.cc/T5EA-TKN6].

D. Federal Efforts

1. Federal Laws and Programs

When the foreclosure crisis began, the federal government showed little interest in helping homeowners. Loan modifications were off the table, as was government-sponsored counseling for borrowers in trouble.[201] President Bush did establish a program called FHA-Secure, which allowed creditworthy borrowers to refinance unaffordable loans into Federal Housing Administration- insured loans. Over three years, just over 4000 loans were refinanced through the FHA-Secure program.[202] At that time, millions of borrowers were facing foreclosure because they could not afford their loan payments. A second refinancing program under President Bush, Home for Homeowners, was an even bigger failure: only 71 borrowers had their loans refinanced.[203]

The Bush government did recognize that subprime loans were devastating communities and responded by creating the Neighborhood Stabilization Program (NSP) as part of the Housing and Economic Recovery Act of 2008 (HERA).[204] Congress channeled $7 billion dollars to areas that were suffering the most from foreclosures and the financial crisis.[205] Unfortunately, the size of the fund was small relative to the ongoing crisis.

The federal government under President Obama created the Home Affordable Modification Program (HAMP),[206] the Home Affordable Refinance Program (HARP),[207] and other programs designed to increase loan modifications with the goal of reducing foreclosures. With many millions of borrowers in foreclosure or underwater, there was great hope that the federal programs would help restore a healthy housing market. That did not happen. Seventy percent of those who applied under HAMP were denied modifications.[208] Those who received modifications often had large amounts of deferred principal and balloon payments tacked onto the end of their loans. The technical details of the program were regularly changing, which meant servicers had to constantly tinker with their systems and retrain their workers. Other federal programs suffered from similar problems.[209]

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201. ENGEL & MCCOY, *supra* note 15, at 82-83.
202. Marc Gans, *HAMP: Doomed From The Start*, 10 CORNELL REAL ESTATE REV. 54 (2012).
203. *Id.*
204. Pub. L. No. 110-289, 122 Stat. 2654.
205. OFFICE OF THE COMPTROLLER OF THE CURRENCY, NEIGHBORHOOD STABILIZATION PROGRAM 1 (July 2011), https://www.hudexchange.info/resources/documents/OCCNSPFactSheet.pdf [https://perma.cc/4MNG-RRSB].
206. 12 U.S.C. 5201, et seq.
207. *Id.*
208. Brena Swanson, *SIGTARP report reveals massive failure of HAMP*, HOUS. WIRE (July 29, 2015), http://www.housingwire.com/articles/34609-sigtarp-report-reveals-massive-failure-of-hamp [https://perma.cc/9TN3-V79Z].
209. *Id.*; Raymond H. Brescia, Elizabeth A. Kelly & John Travis Marshall, *Crisis Management: Principles that Should Guide the Disposition of Federally Owned, Foreclosed Properties*, 45 IND. L. REV. 305, 309-13, (citing Legislative Proposals to End Taxpayer

Both HAMP and HARP will expire at the end of 2016,[210] yet the foreclosure crisis continues. As of 2016, over 6 million homes have gone into foreclosure,[211] 400,000 homes are in the process of being foreclosed upon,[212] almost 1.2 million mortgage loans are seriously delinquent,[213] and 3.2 million homeowners are underwater.[214] Plus, there is still a backlog of homes that are slated for foreclosure. As evidence of this, in twenty states, the number of foreclosure "starts" has increased from a year ago.[215]

Some of the ways the federal government handled loans in default actually exacerbated the distress in blighted communities. For example, in order to replenish funds in the Federal Housing Administration insurance program, HUD decided to sell Federal Housing Administration-insured loans that were in default to the highest bidders, primarily private equity firms. The problem with this approach is that private equity firms had no interest or expertise in stabilizing neighborhoods.

HUD could have sold the loans to community development financial institutions[216] or other entities whose business models focused on investing in borrowers and neighborhoods, not in "extracting maximum profit

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Funding for Ineffective Foreclosure Mitigation Programs: Hearing Before the Subcomm. on Ins., Hous., and Cmty. Opportunity of the H. Comm. on Fin. Servs., 112th Cong. 32 (2011) (prepared statement of Hon. Neil Barofsky, Spec. Inspector Gen., Troubled Asset Relief Program)). As increasing numbers of homes went into foreclosure, many people called on the federal government to develop a program akin to the Depression-era Home Owners' Loan Corporation, under which the government issued bonds the proceeds of which were used to purchase and refinance underwater homes. *Id*. at 315-22.

210. Brian Honea, *FHFA Announces Extension of HARP and HAMP Until the End of 2016*, DS News (May 8, 2015), http://www.dsnews.com/news/05-08-2015/fhfa-announces-extension-of-harp-and-hamp-until-the-end-of-2016.

211. *37,000 Completed U.S. Foreclosures in October, Says CoreLogic*, World Prop. J. (Dec. 9, 2015), http://www.worldpropertyjournal.com/real-estate-news/united-states/irvine/home-foreclosure-data-2015-october-2015-national-foreclosure-report-corelogic-serious-delinquency-mortgages-data-frank-nothaft-anand-nallathambi-9550.php [https://perma.cc/3DYW-BGTT].

212. *National Foreclosure Report: February 2016*, Core Logic 4 (Feb. 2016), http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-february-2016.pdf [https://perma.cc/ET6L-5H3N].

213. *Id.* at 5.

214. Diana Olick, *How are millions still underwater as home prices rise?* CNBC (Apr. 4, 2016), http://www.cnbc.com/2016/04/04/how-are-millions-still-underwater-as-home-prices-rise.html [https://perma.cc/ZGA9-AB5B].

215. Daren Bloomquist, *Q1 2016 Foreclosure Activity Below Pre-Recession Levels in 36 Percent of U.S. Housing Markets*, RealtyTrac (Apr. 15, 2016), http://www.realtytrac.com/news/foreclosure-trends/q1-2016-u-s-foreclosure-market-report/ [https://perma.cc/LE3Z-J9CX]. Professor Matthew J. Rossman takes the position that "the political will to fund these initiatives began to evaporate as the national housing market ended its freefall, but well before many communities had shown signs of recovering home values." Matthew J. Rossman, *Counting Casualties in Communities Hit Hardest by the Foreclosure Crisis*, 2016 Utah L. Rev. 245, 265 (2016).

216. *See* Press Release, N.J. Cmty. Cap., N.J. Cmty. Cap. to Help Hundreds of Homeowners Avoid Foreclosure (Dec. 4, 2012), http://www.newjerseycommunitycapital.org/about-us/media/new-jersey-community-capital-help-hundreds-homeowners-avoid-foreclosure [https://perma.cc/A4F6-G6X2] (describing New Jersey Community Capital's purchase of distressed mortgage loans from HUD with the goal of financing new loans for borrowers so they can remain in their homes).

for the benefit of investors."[217] Alternatively, HUD could have crammed down the principal amounts of borrowers' loans. HUD was selling the loans for between fifty and seventy-seven percent of the value of the property.[218] Had HUD reduced the principal balances of borrowers' mortgage loans by these amounts, at least some, if not many, of the borrowers could have kept their homes. By pursuing what it believed to be the highest possible return for the Federal Housing Administration insurance program, HUD ignored its legally mandated mission to stabilize neighborhoods.[219]

For borrowers, HUD's sale of their loans had an additional impact; if the purchasers of their loans did not participate in the HAMP loan modification program, the borrowers could not take advantage of the HAMP benefits that might have enabled them to keep their homes.[220]

HUD was not the only federal entity that auctioned its loans to the highest bidders, rather than to bidders who would help communities recover. Freddie Mac sold hundreds of billions of dollars of defaulted loans to for-profit companies.[221] At the same time, the Federal Housing Finance Agency (FHFA), the conservator for Fannie Mae and Freddie Mac, refused to write down the principal on loans that it held in portfolio or that it guaranteed.[222] Not until April 2016 did the FHFA institute a program to reduce the principal on delinquent, underwater mortgage loans owned or guaranteed by Fannie Mae and Freddie Mac.[223]

217. Connie M. Razza, *Vulture Capital Hits Home*, RIGHT TO THE CITY ALLIANCE & THE CENTER FOR POPULAR DEMOCRACY 7 (Sept. 2014), https://populardemocracy.org/sites/default/files/HUD.DASP_.RTC_.v15.pdf [https://perma.cc/48F5-RZY2]; *see also* Jared Bennett, *HUD mortgage sales harm black neighborhoods, lawsuit says*, CENTER FOR PUBLIC INTEGRITY (Aug. 17, 2016), https://www.publicintegrity.org/2016/08/17/20073/hud-mortgage-sales-harm-black-neighborhoods-lawsuit-says (describing class action lawsuit against HUD claiming that HUD's auction program discriminates against African-American neighborhoods).

218. Razza, *supra* note 217, at 4.

219. For borrowers, HUD's sale of their loans had an additional impact; if the purchasers of their loans did not participate in the HAMP loan modification program, the borrowers could not take advantage of the HAMP benefits that might have enabled them to keep their homes.

220. Rachel Laforest & Kevin Whelan, *Communities lose when HUD sells loans to Wall Street*, HILL (Oct. 2, 2014), http://thehill.com/blogs/congress-blog/economy-budget/219380-communities-lose-when-hud-sells-loans-to-wall-street [https://perma.cc/JZ5F-GVRB].

221. Razza, *supra* note 217, at 2.

222. Christopher Matthews, *Is Fannie and Freddie Honcho Ed DeMarco "America's Most Dangerous Man?"*, TIME (Apr. 11, 2012), http://business.time.com/2012/04/11/is-fannie-and-freddie-honcho-ed-demarco-americas-most-dangerous-man/ [https://perma.cc/M4DK-4LPF].

223. News Release, Fed. Hous. Fin. Agency, FHFA Announces Principal Reduction Modification Program and Further Enhancements to NPL Sales Requirements (Apr. 14, 2016), http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-PRM-Program-and-Further-Enhancements-to-NPL-Sales-Reqts.aspx [https://perma.cc/A6SL-4M6X]. In a parallel move, in May 2016, HUD announced that it would issue new rules governing the types of modifications purchasers of government-guaranteed loans could negotiate; this move was in response to reports that the purchasers were not modifying loans to make them affordable to the homeowners. Matthew Goldstein, *Housing Agency Plans Mortgage Sale Reforms after Criticism*, N.Y. TIMES (May 18, 2016), http://www.nytimes.com/2016/05/

There is another way in which Fannie Mae and Freddie Mac were complicit in the deterioration of neighborhoods. Both entities, through their conservator, the Federal Housing Finance Agency, have successfully challenged the requirement that they comply with local ordinances requiring the registration of vacant properties they own.[224] By avoiding registering the properties they own, Fannie Mae and Freddie Mac avoid taking responsibility for maintaining the properties.

2. Federal Litigation

In contrast to the George W. Bush years, the federal government under President Obama forcefully pursued claims against banks, servicers, and other providers of financial services. [225] For example, in 2009, the FTC brought suit against a company that was engaged in foreclosure relief scams.[226] In 2011, Bank of America settled with DOJ for $335 million based on evidence that its former subsidiary, Countrywide, had charged equally qualified African-American and Hispanic borrowers more than whites.[227] In 2014, Bank of America again settled with DOJ, this time for $16.65 billion.[228] The claims against Bank of America arose from its own and its subsidiaries' origination and securitization activities. Seven billion dollars was dedicated to homeowner relief.[229]

Private and public interest attorneys asked agencies like HUD and DOJ to join them in bringing claims for unfair lending. For example, in 2012, the National Fair Housing Alliance (NFHA) filed a complaint with HUD alleging that Wells Fargo did a better job maintaining and marketing properties in white neighborhoods than the bank did in predominantly black and Latino communities.[230] HUD, NFHA, and numerous

18/business/dealbook/housing-agency-plans-mortgage-sale-reforms-after-criticism.html [https://perma.cc/X3EV-DLXB].

224. Matthew Connelly, *Rejecting Federal Preference: Why Courts Should not Exempt Fannie Mae and Freddie Mac Properties from Cities' Vacant Property Registration Ordinances*, 49 WASH. U. J.L. & POL'Y 181.

225. The Consumer Financial Protection Bureau, which was created by Dodd-Frank, has been thoroughly investigating lenders and servicers, and where investigators have uncovered evidence of wrongdoing, pursued many lawsuits under an array of federal laws since the agency went live in 2011.

226. Press Release, Fed. Trade Comm'n, Fed. & State Agencies Target Mortg. Foreclosure Rescue and Loan Modification Scams (July 15, 2009), https://www.ftc.gov/news-events/press-releases/2009/07/federal-state-agencies-target-mortgage-foreclosure-rescue-loan [https://perma.cc/2HG5-ZSKB].

227. *Bank of America settles discrimination suit for $335M*, CBS MONEY WATCH (Dec. 21, 2011), http://www.cbsnews.com/news/bank-of-america-settles-discrimination-suit-for-335m/ [https://perma.cc/75WZ-LSMP].

228. Press Release, U.S. Dep't of Just., Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading [https://perma.cc/FZB6-JFQH].

229. *Id.*

230. NAT'L FAIR HOUS. ALLIANCE, ZIP CODE INEQUALITY: DISCRIMINATION BY BANKS IN THE MAINTENANCE OF HOMES IN NEIGHBORHOODS OF COLOR (Aug. 27, 2014), http://www.mvfairhousing.com/ai2015/2014-08-24_ZIP_Code_Inequality.pdf [https://perma.cc/7KS9-5EFC] [hereinafter ZIP CODE INEQUALITY].

fair housing organizations settled with Wells Fargo for over $39 million that will go toward helping neighborhoods recover.[231]

Similarly, state attorneys general sometimes partner with federal agencies. When servicing abuses came to light in the late 2000s, state attorneys general, DOJ, and HUD put together a $25 billion settlement with the five largest mortgage servicers.[232] The bulk of the settlement dollars were dedicated to providing borrowers with relief through short sales,[233] loan modifications, and principal reductions. Sources have reported that between $3.5 and $4.25 billion was to be distributed to the states.[234]

For understandable reasons, the settlements in the federal cases focused primarily on providing relief to homeowners. Just the same, the terms of some agreements did channel money to non-profit organizations to fund neighborhood stabilization projects to combat blight. And while some states did use part of their settlement proceeds to help local governments in struggling communities, none of the settlements contained outlays to municipal governments.

IV. JUSTIFICATIONS FOR EXPANDING LOCALITIES' AUTHORITY TO REGULATE LENDERS OF HOME LOANS

In reviewing local, state, and federal responses first to predatory and subprime lending, and then to the foreclosure crisis, some patterns emerge. The first is that communities' hands are tied by home rule and standing doctrines. They lacked the power to stop exploitative home mortgage loans. Similarly, it was extremely difficult for them to obtain compensation for the damage such loans caused. A second pattern is that states are not reliable protectors of localities. States can be passive in the

231. NAT'L FAIR HOUS. ALLIANCE, THE BANKS ARE BACK-OUR NEIGHBORHOODS ARE NOT (2012), http://www.nationalfairhousing.org/Portals/33/REO%20powerpoint%20Webinar.pdf; ZIP CODE INEQUALITY, *supra* note 230; Press Release, Nat'l Fair Hous. Alliance, Nat'l Fair Hous. Alliance and Wells Fargo Announce Collaboration To Rebuild NFHA Homeownership Opportunities in 19 Cities (June 6, 2013), http://www.nationalfairhousing.org/Portals/33/NewsReleaseWellsFargoNFHA130606.pdf. Wells Fargo is not the only bank that has been accused of racial discrimination in the care and marketing of its REO properties. *See* REO Complaints and Press Releases, Nat'l Fair Hous. Alliance, Mortgage Giant Fannie Mae Accused of Racial Discrimination in 34 U.S. Metro Areas (May 13, 2015), http://www.nationalfairhousing.org/REO/tabid/4265/Default.aspx.

232. Press Release, Nat'l Ass'n of Att'ys Gen., State Att'ys Gen., Feds Reach $25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs (undated), http://www.naag.org/naag/media/naag-news/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php?searched=foreclosure+wrongs&advsearch=allwords&highlight=ajaxSearch_highlight+ajaxSearch_highlight1+ajaxSearch_highlight2 [https://perma.cc/9S34-M653].

233. With a short sale, the holder of the mortgage agrees that the borrower can sell the house to a third party for an agreed upon amount that is less than the outstanding principal.

234. Press Release, *supra* note 232; Press Release, U.S. Dept. of Just., Fed. Gov't and State Att'ys Gen. Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest [https://perma.cc/TJ77-7CM6].

face of local crises, and worse yet, can undermine cities' efforts to help themselves, for example, by prohibiting localities from enforcing their anti-predatory lending ordinances. The third and related pattern is that federal regulators have been willing to insulate commercial enterprises from state laws designed to protect consumers.

Lastly, and this is not new news, political ideology determines the extent to which the federal government responds to the exploitation of borrowers. The free market views of many members of Congress, and President George W. Bush and his Administration allowed predatory and subprime lenders to proceed unchecked. Congress chose not to enact any anti-predatory lending bills, implicitly endorsing exploitative lending. The regulators of national banks were captured by the banks they regulated, and actually made it possible for banks to peddle unaffordable loans with impunity. And executive branch agencies like HUD, FTC, and DOJ were beholden to George W. Bush's "hands-off" approach to consumer protection.

No laws, regulations, or lawsuits have changed the reality for cities: they are unable to protect themselves or their residents when abusive lenders sweep into town. They cannot rely on state and federal governments to help or protect them. And, they must internalize any externalities that lenders impose on them.

It is a crisis of governance when no government entity is both willing and able to protect people from corporate wrongdoing. When governance fails, change is needed. In this section of the paper, I lay out various arguments for why local governments should be given some power to regulate home mortgage loans. In the subsequent section, I describe models for expanding cities' power.

A. Local Ordinances

1. Police Power and Real Property

The term police power is a shorthand way of saying that municipalities have the obligation and the authority to take care of and preserve their communities. For this reason, local governments provide police and fire protection, and are responsible for public water, trash disposal, and the like. Cities also have ordinances designed to reduce the incidence of fires, crime, and injuries to people in houses. These can include requirements that homes have smoke detectors and that occupants keep grills a certain number of feet away from homes. Other provisions restrict the number of unrelated people who can live in a dwelling. When people build or renovate their homes, they must obtain permits, have the work inspected, use licensed contractors, and receive certificates of occupancy, all to be sure the construction is of good quality.

Some regulations are geared at maintaining the housing stock. There are communities that require regular inspections of the exterior of homes; those properties not in compliance are issued citations. City codes can also require point-of-sale inspections. If code violations are detected, sellers must either correct the defects or place money in escrow for the buyers to make the repairs.[235] Local ordinances prohibit nuisances by mandating that people mow their lawns, and forbidding the storage of junk, appliances, unregistered cars, and combustible or construction materials in yards.[236] These requirements help maintain the appeal of the community and the strength of the tax base. If homeowners are not obligated to maintain their homes, they could blight the neighborhood, causing home values to drop to the detriment of their neighbors and their communities.

Of all the features in a community, there is nothing as definitively local as the land and homes that lie within its borders. That is why cities can exercise their police powers to regulate how people use their property.[237] For this reason, I contend that it is consistent with police power to allow cities to protect against exploitative mortgages that encumber property and can result in foreclosure and vacancy.

The response to any effort along these lines would undoubtedly be that city ordinances that influence the terms of mortgage loans would impede statewide uniformity and impose a burden on commerce. My first response borrows from the Supreme Court, which in the 1872 *Slaughter-House Cases* stated, "'private interests must be made subservient to the general interests of the community.' This is called the police power."[238] A more contemporary response is that technological developments in financial services undercut arguments against local control. Increases in computing power have enabled lenders to develop and offer hundreds of loan products with an array of moving parts and variable terms. It should not be difficult for them to develop software that, likewise, accommodates different regulatory regimes. In fact, lenders that make loans nationally already take into account differences in state laws governing mortgage loans.[239] Thus, the rationales for limitations on local control— uniformity and the risk of burdening commerce, have little sway when it comes to home mortgage loans.

Lenders and states might also argue that local mortgage lending ordinances would interfere with state regulation of lenders. So long as local ordinances do not require less of lenders than state laws require, there is little or no risk that local ordinances would impede state regulators. As Professor Vaubel has stated, "[h]ome rule should rest solidly on furthering the goal of protecting municipal power until it is clearly established

235. Joe Goldian, *Point of Sale Requirements for Cleveland's Suburbs*, REMAX PROS (Feb. 16, 2015), http://clevelandhousehunt.com/point-of-sale-requirements-for-clevelands-suburbs/ [https://perma.cc/TC3V-EZGF].

236. Kenneth Pearlman, Elizabeth Linville, Andrea Phillips & Erin Prosser, *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119, 1144 (2006).

237. Since the Supreme Court's decision in *Village of Euclid, Ohio v. Ambler Realty Co.* in 1926, localities have been able to use restrict the use of land through zoning ordinances. 272 U.S. 365.

238. 83 U.S. 36, 62 (1872) (quoting Chancellor Kent, 2 Commentaries, 340).

239. For a discussion of this contradiction, see Stahl, *supra* note 30, at 44-45.

that its exercise will frustrate the state's regulatory purpose."[240] At a minimum, courts should take into account the locality's interests and not just the states and the industries' interests when reviewing efforts by cities to limit abusive loan terms.[241]

2. Lobbyists, PACs and Local Issues

To date, financial services lobbyists and PACs have focused their efforts on state and federal politicians and governments. If cities are given the power to regulate home loans, the industry will not be equipped to influence local ordinances to the same degree they have federal and state laws and regulators.

In 1999, $300 million in financial services lobbying spurred banking deregulation.[242] Between 1998 and 2008, the financial sector donated over $1.7 billion to candidates in federal elections and spent $3.3 billion on registered lobbying activities.[243] Individual banks spent as much as

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240. George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417, 432 (1995). Vaubel argues that:

> [C]ourts [should] invalidate municipal measures only when both state and municipal requirements cannot possibly be met or when following municipal directives would defeat clearly expressed state objectives. Guidelines for achieving these objectives can be summarized: courts should (1) subject literal quantitative conflict to careful examination in order to determine the scope of state prohibitions; (2) prevent literal statutory "permissions" from being used as a means for manipulating municipal power; (3) limit implications to those based on fact; (4) accept qualitative conflict as necessary for the protection of state interests; and (5) require clear evidence of legislative regulatory purpose as a pre- requisite to determining qualitative conflict.

Id. at 439.

241. This argument was advanced over fifty years ago:

> It seems that the purposes of the home-rule provisions could be better carried out if the courts would take note of the policies underlying them. Municipal government has at least two advantages over state government. A municipal administration is more responsive to the needs of local citizens, since it must depend exclusively on these people for re-election. Second, a local government is more efficient to the extent that efficiency is increased by closeness to the scene of operations and accessibility to the criticism and suggestions of the persons governed. Yet no court, in deciding whether the ordinance or statute should prevail, has examined these advantages. Rather, it is always held to be controlling that the matter regulated will have an effect on citizens living outside the municipality. Even in those matters most intimately connected with municipal government, however, there is necessarily some state- wide effect. A test that looks only to the existence of some state interest as a basis for declaring an ordinance which conflicts with a statute invalid renders it almost impossible to reach a decision in favor of the ordinance. A more realistic test would weigh the state's interest against the advantages of local autonomy.

Conflicts Between State Statutes and Municipal Ordinances, 72 HARV. L. REV. 737, 742 (1959).

242. Lisa Lerer, *McCain guru linked to subprime crisis*, POLITICO (Mar. 28, 2008), http://www.politico.com/story/2008/03/mccain-guru-linked-to-subprime-crisis-009246 [https://perma.cc/S7CT-6ZVE].

243. Robert Weissman & James Donahue, *Wall Street's Best Investment: Ten Deregulatory Steps to Financial Meltdown*, 30 MULTINATIONAL MONITOR (2009), http://www.multinationalmonitor.org/mm2009/012009/weissman.html [https://perma.cc/VGV3-9HMJ].

$100 million on federal elections and lobbying during this period.[244] In 2010, financial services lobbyists outnumbered members of Congress 5:1.[245]

Financial firms influence state politicians, too. One lobbying firm spent $6.3 million over several years to lobby against state anti-predatory lending laws.[246] Mortgage lenders donated millions of dollars to the campaign of Arnold Schwarzenegger, whose state was home to several notorious subprime lenders. One of those lenders, Ameriquest Mortgage, contributed $10.8 million to politicians and industry groups in California to defeat proposed anti-predatory lending laws.[247]

Given these numbers, it is not surprising that economists Sufi and Mian found that contributions from financial firms played a significant role in defeating legislation designed to protect borrowers against financial institutions' abusive loan products.[248] They found that between 2001 and 2006, the mortgage industry significantly increased its campaign contributions to representatives in districts with a high volume of subprime loans.[249] They also found that "the predictive power of mortgage campaign contributions on a representative's voting behavior increase[d] sharply during the subprime mortgage credit expansion," which "suggests that the mortgage industry viewed high subprime share representatives as potential allies in shaping subprime market legislation."[250] Financial institutions' largess makes it difficult for state and federal politicians to act against the industry's interests.

If cities had the power to place limits on abusive home mortgages, it is unlikely that the financial services industry could use its money to influence localities across the country, especially in the face of another scourge of exploitative loans. To chill local efforts, the industry would have to funnel money to unseat local pro-consumer elected officials and replace them with politicians who were sympathetic to the industry.[251]

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244. *Id.*

245. M.B. Pell & Joe Eaton, *Five lobbyists for each member of Congress on financial reforms*, CENTER FOR PUBLIC INTEGRITY (May 21, 2010), https://www.publicintegrity.org/2010/05/21/2670/five-lobbyists-each-member-congress-financial-reforms [https://perma.cc/JL2E-XCT5].

246. Simpson, *supra* note 89.

247. Dan Morain, *Schwarzenegger raked in subprime lender campaign money*, PROTECT CONSUMER JUSTICE.ORG (Nov. 1, 2009), http://www.protectconsumerjustice.org/schwarzenegger-raked-in-subprime-lender-campaign-money-2.html [https://perma.cc/698L-8K6A].

248. Atif Mian, Amir Sufi & Francesco Trebbi, *The Political Economy of the Subprime Mortgage Credit Expansion*, 8 Q. J. POL. SCI. 373, 376 (2013).

249. *Id.*

250. *Id.* at 376-77, 393. The authors also found that a "sharp increase in mortgage industry campaign contributions and campaign lobby expenditure coincides with a sharp increase in securitization and mortgage lending to high subprime zip codes that occurs from 2001 to 2006 [citation omitted]." *Id.* at 388. Between 2002 and 2006, contributions by participants in the mortgage industry increased by eighty percent. Contributions by other financial institutions increased forty percent. *Id.*

251. Commentators have raised concerns that wealthy institutions will use their money to influence local elections through super PACS following the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). *See* Paul Blumenthal, *Your State And Local Elections Are Now A Super PAC Playground*, HUFFPOST POL. (Oct.

Given that there are approximately 20,000 cities in the United States, even the largest institutions do not have sufficient resources to fund thousands of local electoral campaigns. [252]

3. *Cities as Laboratories*

An advantage of cities regulating mortgage loans is that they can serve as laboratories. Communities can adopt different approaches and policymakers and the public can learn what approaches are effective. Experimenting on a small scale is less risky than national or even statewide efforts. If problems arise, local governments can more readily amend their ordinances.[253] Other communities, and maybe even state and federal governments will gain information that can inform their laws. Ineffective or unworkable policies can be rejected, and good ones adopted.[254]

B. Lawsuits

1. *Localities Can't Always Count on State or Federal Action*

When a problem is localized, state and federal governments may not be as responsive as they would be to an issue with a wider impact. This could be because they do not recognize the seriousness of the problem or because they do not become concerned until a problem is more pervasive.[255] In large states, where the seats of power can be hundreds of miles from local problems, the seat of government can be too geographically removed from the experiences of far-off communities. In contrast, local governments know what is happening in their towns and will be more responsive than their equivalents in a state capital. Furthermore, cities can respond in ways that address the needs of their particular

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31, 2015), http://www.huffingtonpost.com/entry/2015-elections-super-pac_us_5633d165e4b0c66bae5c7bbb [https://perma.cc/E6TL-C53Z]; *see also* Alex Roarty, *Super PACs' Next Target: Local Elections*, Atlantic (May 18, 2015), http://www.theatlantic.com/politics/archive/2015/05/super-pacs-next-target-local-elections/435639/ [https://perma.cc/87W8-5QFH].

252. National League of Cities, *Number of Municipal Governments & Population Distribution (undated),* http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/number-of-municipal-governments-and-population-distribution. In this respect, local control furthers democratic principals and repudiates corporate political influence.

253. Diller, *supra* note 28, at 1136.

254. *See id.* (noting that "the dynamic of policy experimentation . . . is the primary normative justification for home rule."). Professor Diller also discusses the argument that increasing the authority of municipal governments supports democratic principles. On a local level—especially in smaller communities, voters have a greater ability to influence politicians and policies, and find it easier to contact local representatives than state or federal representatives. *Id.* at 1135. *See also* Bergal, *supra* note 44 (quoting James Brooks, City Solutions Director for the National League of Cities, saying, "I think the cities have the political will and consensus to move when the federal government and the state may be paralyzed or polarized . . . . City leaders are implementing the things citizens seem to want, and voters seem to be supportive of all of this").

255. *See* Caruso, *supra* note 63, at 86 (arguing in the context of litigation, "if a city is prepared to invest the resources and political capital to speak on its residents' behalf in the face of a stalemate or opposition at a higher level of government, there seems little justification to shutting the courthouse doors to the local perspective.").

communities.[256]

Many of even the most community-oriented state politicians did not appreciate the experience of localities blighted by bad loans. In fact, the costs that predatory and subprime lenders imposed on communities were often invisible to politicians until the financial crisis. This was even truer for federal representatives and government officials.

2. *Resource Limitations at State and Federal Governments*

State attorneys general and federal agencies cannot pursue every violation of laws governing mortgage lending. As a result, they have to select among countless possible violations, usually focusing on wrongdoing with the biggest impact in terms of the severity of the harm or the number of people affected. Cities could help fill the enforcement gap and further the mission of federal and state attorneys general if they were permitted to bring lawsuits against lenders to protect their communities from unlawful loans and to recover for the damages those loans cause the cities themselves. There is an added benefit to giving municipalities the power to sue lenders: the cities have a significant information advantage over state and federal governments. They understand their communities, the local housing market, and lenders' and brokers' activities in their communities.

V. PROPOSALS FOR REFORM

I am not suggesting a global expansion of cities' powers. Rather, I am proposing that cities have the power to protect residents and themselves from mortgage loans that contain terms that create a high risk of default and foreclosure.

Some of the proposals below will likely increase the cost of credit to people who live in localities that seek to curtail risky lending. It may be that people will accept the higher cost of credit in order to preserve the value of their homes and the vitality of their neighborhoods.

A. Curtailing Loans Likely to Result in Foreclosure

1. *Amending UDAP Laws*

Professor Kathleen Morris has proposed amending state UDAP statutes to give cities with populations over 50,000 standing to enforce consumer protection laws.[257] Ideally, the state statutes would obviate the need to demonstrate standing, including injury.[258] Because some UDAP

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256. *See id.* at 94 (noting that "[w]here a particular issue is important and controversial enough to deadlock state or federal governments, cities can be nimbler, and may bear uniquely local burdens which push them to try innovative responses."); *see also* Lind, *supra* note 139.

257. How Cities Will Save the World: Urban Innovation in the Face of Population Flows, Climate Change and Economic Inequality, *supra* note 161, at 189, 203; *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, *supra* note 70, at 1908.

258. Article III requirements would apply in federal court.

laws only cover goods and services, legislators would have to expand their coverage to include transactions involving real estate.

Professor Morris has also proposed amending the FTC Act to allow claims by municipalities.[259] While there is no indication in the legislative history or the statutory language that Congress ever intended the FTC Act to provide private rights of action, members of Congress have periodically entertained proposals to expand the entities that can sue under the Act.[260] For example, in 1977, the House considered legislation[261] to, among other things, "provide for private rights of action based on violations of Commission rules."[262] The Chairman of the FTC supported the legislation, stating during Committee hearings that:

> [T]here is no way that the Commission will be able to file an action against every person who violates the rules that the Commission has adopted or is contemplating. Private suits could permit the Commission to focus its resources on other problem areas where individual injury does not provide an incentive to seek relief.[263]

Thus far, Congress "has not seen fit to alter the statutory plan established in 1938."[264]

As an alternative to legislatively expanding the entities that can bring claims under the FTC Act, Professor Morris suggests that the federal government contract with cities to enforce the FTC Act, which the government has done with enforcement of immigration laws.[265] I endorse Professor Morris's proposals, but would not restrict the size of the cities that could bring claims. Small localities might be targeted for abusive loans if a high concentration of people of color live there—a pattern we have already experienced. Also, limiting the size of the localities that can bring claims privileges urban areas over rural areas, both of which are deserving of protection.

I would also expand on Professor Morris's approach to permit cities to bring claims under the Dodd-Frank Act, the consumer protection statutes it amended, and the many state anti-predatory lending laws. These laws more directly address specific features of loans that have been used to exploit borrowers.

2. *Ordinances Under Zoning Authority*

Cities' zoning authority might be a vehicle for curtailing risky loans. Municipalities have successfully employed their zoning authority to restrict payday lenders. The same approach might work with predatory

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259. *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, *supra* note 70, at 1916-17.

260. *See* S. 1823, H.R. 1078, 5368, 92d Cong., 1st Sess. (1971).

261. H.R. REP. 3816, 95th Cong., 1st Sess. (1977).

262. H.R REP. No. 95-339, 95th Cong., 1st Sess. 9 (1977).

263. *Id.* at 15.

264. Holloway v. Bristol-Myers Corp., 485 F.2d 989, 1001 (D.C. Cir. 1973).

265. *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, *supra* note 70, at 1916.

lenders. For example, a city could adopt an ordinance stating that no property can be encumbered by mortgage loans with specific, prohibited terms. Cities already impose restrictions on how land can be used, for example prohibiting commercial establishments in residential areas or limiting the location of mobile homes.

3. *Home Rule Authority to Regulate Lending*

The most dramatic move would be for states to explicitly grant municipalities the power to regulate loans secured by real property. State and federal laws would have to serve as floors. In other words, cities could not adopt ordinances that reduced the burdens below those imposed by state and federal laws.

It is not unusual for states to make explicit grants of authority to localities to prevent blight. New Jersey, for example, recently passed a law providing that "the governing body of any municipality may adopt ordinances to regulate the care, maintenance, security, and upkeep of the exterior of vacant and abandoned residential properties on which a summons and complaint in an action to foreclose has been filed."[266]

4. *Mechanisms to Encourage More Responsive State and Federal Governments*

It might be possible to adopt procedural rules that would enable municipalities to seek injunctions against lenders who are making risky loans only after formally requesting that state and federal governments take action on behalf of the localities. The state and federal governments would evaluate cities' requests and determine whether to proceed – a procedure that could be akin to a *qui tam* proceeding. If neither government authority elected to pursue the case, they could delegate to the city their authority under the relevant law. Cities would not be allowed to file a lawsuit until they completed this process.

B. Solutions to Address Blight: Taxing Authority

1. *Real Estate Taxes*

The proposals I have discussed thus far focus on ex ante solutions. Cities also need help when home loans result in foreclosure. One avenue would be for cities to use their authority to tax real estate to impose an "impact tax" whenever lenders or other institutions foreclose on property. The tax proceeds would go into a fund that cities could use to cover the cost of externalities that foreclosures impose.

2. *Federal Policies to Reduce Blight*

On the federal level, the agencies that sell homes that the government has foreclosed upon should require that purchasers bring houses up to

266. N.J. Stat. Ann. § 40:48-2.12s (West 2016).

code within a specified time frame. The same obligation should apply when purchasers of home loans owned or guaranteed by the government foreclose on property. Lastly, the FHFA and HUD need to reverse course. Instead of permitting the agencies to sell mortgage loans and houses to large for-profit entities, Congress should require them to manage the sale of the loans and properties in a way that strengthens rather than decimates communities.

VI. CONCLUSION

The United States has not fully recovered from the financial crisis. In some parts of the country, housing prices are depressed to well below their levels before the subprime boom, and communities are still contending with vacant homes and blight. The housing market in most parts of the country is flush with homes but short on purchasers. One would expect that people would flock to communities where the inventory of homes for sale is high. That has happened. Banks are cautious about making loans to people with less than pristine credit histories, in part because of provisions in the Dodd-Frank Act. Private securitizations of home loans are few. And, homes that have been neglected for years are invariably riddled with problems that scare potential purchasers away.

Despite the lingering effects of the crisis, lenders are beginning to introduce new loan products that are available to people with blemished credit histories, or limited resources for down payments. The financial services industry is innovative and we should expect the emergence of more home mortgage products that do not fit the conventional mold. Some of these products will enable people to obtain homes and sustain homeownership. Others will create risks to borrowers and their communities. To borrow from Camus, a virus "never dies or disappears for good . . . it can lie dormant for years and years and then for the bane and enlightenment of men, rouse up its rats again."[267] We need to explore expanding cities' powers to regulate mortgages while the virus is dormant.

267. ALBERT CAMUS, THE PLAGUE 308 (Vintage Books N.Y., 2012).