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## RETHINKING THE HOMEOWNERSHIP SOCIETY: RENTAL STABILITY ALTERNATIVE

*By Arlo Chase\**

### INTRODUCTION

For more than 85 years, the United States government has promoted homeownership through mortgage programs, tax subsidies and popular rhetoric. The exhortations of homeownership became even more pronounced throughout the 1990s and this decade. President George W. Bush's campaign for the "Ownership Society"<sup>1</sup> represented the culmination of this

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<sup>1</sup> See, e.g., Robert J. Schiller, *American Casino*, ATLANTIC, Mar. 2005, available at <http://www.theatlantic.com/doc/200503/shiller> (detailing former President George W. Bush's proposed "ownership society," which planned to let people "own" their Social Security contributions, in the form of personal retirement accounts; "own" their health care, through portable health savings accounts; and own their homes in greater numbers, through bigger homeowner subsidies, noting that such proposals would encourage individual saving, but also increase the risk to which most American households would be subject); see also Greg Ip et al., *Housing Bust Fuels Blame Game*, WALL ST. J., Feb. 27, 2008 (quoting President George W. Bush as stating, as part of the "ownership society" that, "we want everybody in America to own their own home").

push for homeownership. While there are arguments to be made in favor of facilitating homeownership for qualified households, in recent decades such promotion went beyond qualified households and thereby helped fuel a housing bubble that ultimately burst, resulting in a severe economic recession and the foreclosure of millions of households. For the past 30 years, government programs and resources have largely ignored the other dominant tenure form—renting.<sup>2</sup> This neglect of rental housing and rental households has helped create a troubling situation in which nearly half of all rental households spend more than the government recommends on housing,<sup>3</sup> putting such households at risk of having insufficient resources for other necessities like food, medical care, transportation and education.

The current housing crisis offers a historical opportunity to assess our national and local housing policies.<sup>4</sup> In sum, the continued focus on homeownership, to the exclusion of renting, is in need of immediate revision. A policy shift is in order—government needs to direct immediate attention and increased resources to rental housing. Such a shift would belatedly acknowledge the fact that, notwithstanding the last eight decades

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<sup>2</sup> See, e.g., Clean Benson, *Building a Better Public Housing Policy*, CONG. Q. (July 17, 2009) available at <http://www.cqpolitics.com/wmspage.cfm?parm1=1&docID=news-000003168984> at 1–2 (quoting Bruce Katz, stating that for the past eight years “[w]e had a really imbalanced housing policy, not just in the private sector, but in the public sector, toward homeownership”); see also Ip et al. *supra* note 1 (quoting Richard Styron, former CEO of Freddie Mac stating “[w]e went crazy as a country with the goals, saying everybody’s got to have a house”) (internal quotation marks omitted).

<sup>3</sup> See *infra* Section IV.A–B.

<sup>4</sup> See, e.g., Robert J. Shiller, *A Time for Bold Thinking on Housing*, N.Y. TIMES, Nov. 25, 2007, at 4 (arguing that the current housing price downturn indicates a need for innovation in housing, including better management of risk); Press Release, Nat’l Found. for Credit Counseling, Survey Reveals Long-Term Implications of Mortgage Meltdown (June 23, 2009), available at <http://www.nfcc.org/NewsRoom/newsreleases/files09/HomeownershipSurvey.pdf> (finding that popular attitudes about benefits of homeownership have changed dramatically in the wake of the foreclosure crisis).

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 63

and hundreds of billions of dollars encouraging and subsidizing homeownership, almost one third of the households in the U.S. currently rent, and at least 95% of all Americans rent at some point in their lives.<sup>5</sup> Specifically, additional resources and programs are needed which promote opportunities for increased rental stability and affordability. The need for these changes is evidenced by (i) the excess demand for rental housing compared with supply which has resulted in the affordability crisis for so many rental households;<sup>6</sup> and (ii) the number of households that have overstretched their budgets in order to buy homes they could not afford, often because the rental options available to them were simply not stable and/or affordable enough.<sup>7</sup>

To address this increasingly untenable situation, I propose a rental stability program that would offer tenants an option for longer lease terms, rights to lease renewal, temporary regulation of rent increases, and federal rental subsidies to cover rent increases for rent-burdened low and moderate income households.<sup>8</sup> My proposal is essentially a modest one that provides renters with additional opportunities for stable tenancy and time limited price protection, while maintaining market-based incentives for owners to create new rental housing units and maintain existing ones.

A brief review of our current national housing policy—provided in Part I of this article—will set the stage for the reforms urged herein. I rely on existing literature for both Part I and Part II, in which I examine the extraordinary societal

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<sup>5</sup> See Bruce Katz & Margery Austin Turner, *Rethinking U.S. Rental Housing Policy*, BROOKINGS INSTITUTION, 2007 [http://www.brookings.edu/papers/2007/0228metropolitanpolicy\\_katz\\_Opp08.aspx](http://www.brookings.edu/papers/2007/0228metropolitanpolicy_katz_Opp08.aspx); see also WILLIAM APGAR, *RETHINKING RENTAL HOUSING: EXPANDING THE ABILITY OF RENTAL HOUSING TO SERVE AS A PATHWAY TO ECONOMIC AND SOCIAL OPPORTUNITY* 1 (Dec. 2004) <http://www.jchs.harvard.edu/publications/markets/w04-11.pdf> [hereinafter “Apgar 2004”].

<sup>6</sup> See *infra* Section IV.A.

<sup>7</sup> See *infra* Section IV.B.

<sup>8</sup> See, e.g., Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1059 (2008) (“Longer and better leaseholds and reform of homeownership’s tax advantages are worthy goals . . .”).

benefits afforded to promote homeownership and the reasons typically given for them. I discuss several poignant studies that raise serious concerns about the degree to which U.S. policies promoting homeownership actually serve the stated goals of household and neighborhood stability. Currently, it must be acknowledged, the immensity of the homeownership subsidies provided is matched only by the immensity of the devastation wrought on individual households and surrounding communities by the current foreclosure crisis. In Part II, I integrate the findings of several housing studies to argue that the goals underlying the homeownership push can be met equally by enhanced rental stability.

In Part III, I briefly review the enormously destabilizing effects of the foreclosure crisis on both individuals and communities. This leads into what I consider to be my real contribution to the existing literature: Part IV in which I lay out the factual case for expending more government resources and creating new legal protections for renters. Part V details the components of my proposed rental stability program and a discussion of how it serves my goal. That goal is to create increased opportunities for renters to obtain some meaningful measure of security in their tenure while avoiding excessive distortions in the rental market. I also evaluate the likely effects of my proposed program and respond to some likely critiques. Finally, in Part VI I examine three distinct recent policy proposals to addressing the housing crisis.

## I. U.S. HOUSING POLICY IS SKEWED TO HOMEOWNERSHIP

### A. *History*

Since the Great Depression, our national housing policy has been primarily aimed at increasing homeownership.<sup>9</sup> These

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<sup>9</sup> See, e.g., Anthony Downs, *Why Rental Housing Is the Neglected Child of American Shelter* in RETHINKING RENTAL HOUSING 7–8 (2008) [hereinafter Downs, *Why*]; see also ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 48 (2006); Rachel D. Godsil & David V. Simunovich,

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 65

efforts included the development of the Federal Housing Administration (FHA) and U.S. Department of Veterans Affairs (VA) homeownership loan programs, which guarantee up to 90% of the value of a home as collateral for loans from private banks.<sup>10</sup> Another Depression Era creation, the Federal National Mortgage Association, more commonly known as Fannie Mae, began in 1968 to offer similar mortgage guarantees to a broader cross section of Americans.<sup>11</sup> In 1990 the Federal Home Mortgage Corporation, otherwise known as Freddie Mac, began to offer similar products as those of Fannie Mae.<sup>12</sup> Given their hybrid status as government created but privately owned corporations, Fannie Mae and Freddie Mac are known collectively as Government Sponsored Enterprises, or GSEs.<sup>13</sup>

Perhaps more important than the mortgage insurance offered by FHA, VA and the GSEs, these entities introduced and standardized many aspects of the mortgage industry that we now take for granted, such as the 30 year self-amortizing mortgage, the standardized appraisal process and the reduction of the downpayment required to 10% or lower.<sup>14</sup> These advances, combined with significant economic growth in the post WWII

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*Protecting Status: The Mortgage Crisis, Eminent Domain and the Ethic of Homeownership*, 77 *FORDHAM L. REV.* 949, 956–57 (2008) (“[The] high rate of homeownership is largely a product of the federal government’s decision . . . to subsidize homeownership for the middle class.”).

<sup>10</sup> See SCHWARTZ, *supra* note 9, at 50; Godsil & Simunovich, *supra* note 9, at 957–58.

<sup>11</sup> See David Reiss, *The Federal Government’s Implied Guarantee of Fannie Mae and Freddie Mac’s Obligations: Uncle Sam Will Pick Up the Tab*, 42 *GA. L. REV.* 1019, 1030 (2008).

<sup>12</sup> See *id.* at 1029 (“[Fannie Mae’s and Freddie Mac’s] purchasing practices have since converged.”).

<sup>13</sup> See Reiss, *supra* note 11, at n.22 (“The term GSE refers to a federally chartered, privately owned, privately managed financial institution that has only specialized lending and guarantee powers and that bond market investors perceive as implicitly backed by the federal government.”) (internal citations and quotation marks omitted).

<sup>14</sup> See SCHWARTZ, *supra* note 9, at 50–51; see also KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 203–18 (1987).

years, were extremely successful in increasing homeownership in this country. Between 1940 and 1970, the percentage of American homeowners increased from 44% to 65% of all households.<sup>15</sup> Between 1970 and 1990 that rate stayed substantially the same, but then increased to over 67% by 2000 and 69% at the end of 2004.<sup>16</sup> With the foreclosure crisis beginning in 2006, the homeownership rate has been contracting from the previous highs and by the middle of 2009 was at 67.4%.<sup>17</sup> The reduction from 69% to 67.4% of all households may sound small, but it represents over two million households.<sup>18</sup> Notably, this represents the first significant decline in homeownership since the 1930's.<sup>19</sup>

### B. Homeownership Subsidies

In addition to the federal mortgage programs discussed above, which are aimed at increasing the availability of home financing, federal and state governments provide a number of other direct and indirect financial benefits to homeowners. Most significantly, homeowners are entitled to deduct from the income on which they have to pay income taxes both the amount they

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<sup>15</sup> Godsil & Simunovich, *supra* note 9, at 957 n.22.

<sup>16</sup> Gale et al., *Encouraging Homeownership Through the Tax Code*, 115 TAX NOTES 1171 (2007).

<sup>17</sup> See U.S. Census Bureau News, *Census Bureau Reports on Residential Vacancies and Homeownership*, July 24, 2009, at 4, <http://www.census.gov/hhes/www/housing/hvs/qtr209/filesq209press.pdf>; see also Kathleen M. Howley, *U.S. Home Vacancies Hit 18.7 Million on Bank Seizures*, BLOOMBERG.COM, July 24, 2009, <http://www.bloomberg.com/apps/news?pid+20601206&sid=ajlP7ROLo39w> (describing that the homeownership rate had dropped to 67.3%); John Leland, *Homeownership Losses are Greatest Among Minorities, Report Finds*, N.Y. TIMES, May 13, 2009, available at <http://www.nytimes.com/2009/05/13/us/13homeowner.html>.

<sup>18</sup> See US Census Bureau Web Page, *America's Families and Living Arrangements: 2008: Table H1—Households by Type and Tenure of Householder for Selected Characteristics: 2008*, Feb. 25, 2009, <http://www.census.gov/population/www/socdemo/hh-fam/cps2008.html> (estimating total number of American households).

<sup>19</sup> See SCHWARTZ, *supra* note 9, at 14 fig. 2.2.

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 67

pay in real property taxes<sup>20</sup> and interest paid on a mortgage secured by a personal residence.<sup>21</sup> The mortgage interest deduction includes second homes in addition to primary residences, with an overall limit for each taxpayer of mortgages totaling up to \$1 million.<sup>22</sup> Other tax benefits include the fact that imputed rental income is not considered income for tax purposes and therefore is not taxed.<sup>23</sup> Furthermore, in 1996 the tax code was amended at the initiation of the Clinton Administration so that homeowners selling their primary residence could exclude the first \$250,000 of gain (\$500,000 for married couples) from their reported income.<sup>24</sup> Acknowledging all of these benefits to homeowners, two law professors conclude that “[h]omeowners are afforded both significant monetary benefits and social capital that renters are denied.”<sup>25</sup>

Scholars have identified a number of problems with the mortgage interest deduction and other federal tax benefits provided to homeowners. First, the current subsidies accrue disproportionately to households in higher income brackets.<sup>26</sup>

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<sup>20</sup> 26 U.S.C. § 164(a) (2009).

<sup>21</sup> 26 U.S.C. §§ 163(h), 164 (2000).

<sup>22</sup> *See id.*

<sup>23</sup> Imputed rent is a tax concept that refers to the amount of rental income that the housing unit would generate if it were rented out. Imputed rent is taxed in a number of countries, such as Italy, Norway, and Denmark. *See Fennell, supra* note 8, at 1058 n.42 (citing sources); *see also* James R. Follain & Lisa Sturman Melamed, *The False Messiah of Tax Policy: What Elimination of the Home Mortgage Interest Deduction Promises and a Careful Look at What it Delivers*, 9 J. HOUSING RES. 179 (1998) (discussing importance of nontaxation of imputed rent).

<sup>24</sup> 26 U.S.C. § 121. This tax advantage can be claimed only once every two years, and certain limited conditions must be met regarding the ownership and use of the home. *See* Vikas Bajaj & David Leonhardt, *Tax Break May Have Helped Cause Housing Bubble*, N.Y. TIMES, Dec. 19, 2008 (describing how this tax advantage coincided, and may have helped cause the incredible run up in housing prices from 1997–2006).

<sup>25</sup> Godsil & Simunovich, *supra* note 9, at 953.

<sup>26</sup> *See, e.g.,* Gale et al., *supra* note 16, at 9 (describing the deduction as “upside down”); SCHWARTZ, *supra* note 9, at 72–76; Downs, *Why, supra* note 9, at 9–10.



Deductions increase in value as a household's taxable income increases, so that higher-income taxpayers in the 28 percent marginal tax bracket save 28 cents for every dollar of mortgage interest deduction, and lower income taxpayers in the 15 percent marginal tax bracket saves 15 cents for every dollar of mortgage interest deduction. As a result, in 2005 wealthy households (earning more than \$200,000 per year) took more than eight times as much mortgage interest deduction than middle class households (earning between \$50-75,000).<sup>27</sup> Also, more significantly, homeowners who do not itemize their taxes do not benefit at all from the mortgage interest and real property tax deductions. Because many choose to take the standard deduction, only half of all homeowners benefit from these crucial government subsidies.<sup>28</sup> Furthermore, other borrowers (such as credit card borrowers) are not entitled to deduct interest expenditures at all.<sup>29</sup>

The total annual cost to the federal government, in terms of tax expenditures and indirect subsidies of the GSEs, is in the \$150 to \$200 billion range annually. Even without the benefits provided through the GSEs and FHA and VA, which are difficult to quantify,<sup>30</sup> the tax revenue lost annually to

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<sup>27</sup> See Gale et al., *supra* note 16, at 9–10.

<sup>28</sup> See Roger Lowenstein, *Tax Break: Who Needs the Mortgage Interest Deduction*, N.Y. TIMES, Mar. 5, 2006.

<sup>29</sup> The Tax Reform Act of 1986 eliminated the deductibility of other kinds of interest payments, including credit cards, pushing more homeowners into increasing their mortgages. See Lowenstein, *supra* note 28.

<sup>30</sup> The actual subsidy to the GSEs prior to 2008 was difficult to quantify because most of the subsidy was the implicit federal guarantee of the GSEs' obligations, which in turn allowed them to access capital at a cheaper cost. Compare Gale et al., *supra* note 16, at 1777 (noting that to the extent it can be quantified, the Congressional Budget Office estimated subsidy to GSEs at \$23 billion in 2003) with Reiss, *supra* note 11, at 1048–49 (noting that a Federal Reserve researcher “has estimated that the present value of the federal government's subsidy of Fannie and Freddie is nearly \$150 billion . . .”). In September 2008, the US Treasury Department announced that Fannie Mae and Freddie Mac were in danger of falling into insolvency and would be placed into conservatorship, governed by the newly created Federal Housing Finance Agency. See James R. Hagerty et al., *U.S. Seizes*

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 69

homeownership benefits was in excess of \$155 billion for 2006,<sup>31</sup> over \$125 billion for 2007 and approximately \$230 billion in 2009.<sup>32</sup> It is far from clear how we as a society benefit from these subsidies. Many economists believe that the tax benefits simply push up the price of homes and do not increase the levels of homeownership.<sup>33</sup> Professor Schwartz of the New School notes that homeownership rates in the United State are comparable to those in Canada, Australia and several European countries, despite the fact that none of those countries subsidize homeownership nearly as much as the U.S.<sup>34</sup> Most notably, none of those countries provide for the deductibility of mortgage interest or property taxes. In addition to having a dubious impact on the rate of homeownership, the tax incentives encourage

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*Mortgage Giants*, WALL ST. J., Sept. 8, 2008, at A1. While the Treasury initially pledged \$100 billion, it was quickly raised to \$200 billion to cover the losses of Fannie and Freddie. As of the date of this article that amount has been increased to \$400 billion [on source], with close to \$85 billion already distributed. See Chris Isidore, *Fannie & Freddie: The Most Expensive Bailout*, CNNMONEY.COM, July 22, 2009, [http://money.cnn.com/2009/07/22/news/companies/fannie\\_freddie\\_bilout/index/htm](http://money.cnn.com/2009/07/22/news/companies/fannie_freddie_bilout/index/htm).

<sup>31</sup> See, e.g., Gale et al., *supra* note 16, at 1174. This includes approximately \$30 billion in benefits accumulated from the non-taxation of imputed rent, as well as the deductibility of mortgage interest, property taxes and the exclusion from capital gains of sales proceeds.

<sup>32</sup> See Godsil & Simunovich, *supra* note 9, at 958 (regarding 2007). It is unclear if this calculation includes the value of the non-taxation of imputed rent). In *Housing Bust, Government Increasingly Favors Homeowners Over Renters*, WALL ST. J., Nov. 17, 2009 (compared with \$60 billion in aid to renters for 2009).

<sup>33</sup> See, e.g., Gale et al., *supra* note 16, at 1180 (“[T]ime series evidence in the U.S. provides little reason to believe that the [mortgage interest deduction] has a substantial influence on homeownership.”); Steven Malanga, *Obsessive Housing Disorder*, CITY J., Spring 2009, at 10, available at [http://www.city-journal.org/2009/19\\_2\\_homeownership.html](http://www.city-journal.org/2009/19_2_homeownership.html) (suggesting elimination of the mortgage interest deduction); Edward Glaeser & Joseph Gyourko, *Two Ways to Revamp U.S Housing Policy*, N.Y. TIMES, Dec. 16, 2008, <http://economix.blogs.nytimes.com/2008/12/16/two-ways-to-revamp-us-housing-policy/>.

<sup>34</sup> See SCHWARTZ, *supra* note 9, at 76; see also Gale et al., *supra* note 16, at 1181–83.

homeowners to buy more expensive houses and borrow more (up to \$1 million), thereby increasing their tax deductions. These incentives are perverse in two ways: (i) they encourage homeowners to over-leverage their properties; and (ii) they encourage bigger and generally speaking more energy consumptive housing.<sup>35</sup>

The critiques of the mortgage interest deduction come from all sides of the political spectrum, including liberal housing scholars like William Apgar,<sup>36</sup> more conservative housing economists from the American Enterprise Institute<sup>37</sup> and the Manhattan Institute,<sup>38</sup> economists from the Brookings Institute and MIT<sup>39</sup> and an economic columnist from the New York Times.<sup>40</sup> While the effect of eliminating the mortgage interest deduction is debated,<sup>41</sup> along with what should replace it, these

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<sup>35</sup> See Andre F. Shashaty, *Help Us Shape the Future of Affordable Housing Policy*, AFFORDABLE HOUSING FINANCE, Mar. 2008, at 24 (quoting Brett Harvey).

<sup>36</sup> See Apgar 2004, *supra* note 5, at 5–9.

<sup>37</sup> See EDWARD GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* (AEI Press, 2008) (proposing that the mortgage interest deduction be substantially reduced to a cap of \$300,000 in large portions of the country that restrict housing through local zoning and land use regulations). *But see* Letter from Charles McMillan, President, Nat'l Assoc. of Realtors, to President Obama (Feb. 26, 2009) (“The National Association of REALTORS® believe the [Mortgage Interest Deduction] is the single most important tax provision for our nation and our families.”)

<sup>38</sup> See Steven Malanga, *Obsessive Housing Disorder*, CITY J., Spring 2009 at 10.

<sup>39</sup> See Gale et al., *supra* note 16.

<sup>40</sup> See Lowenstein, *supra* note 28.

<sup>41</sup> See Follain & Melamed, *supra* note 23, at 195–96 (arguing that the elimination of the mortgage interest deduction might not produce the predicted effects of equalizing the tax treatment of higher and lower income households, since higher income households might be able to finance their home purchases through other means like cash purchases and noting that the nontaxation of imputed rent might be more important to address than the mortgage interest deduction). *Cf.* Gale et al., *supra* note 16, at 16–17 (arguing that eliminating the mortgage interest deduction will increase investment in rental properties, but will also encourage owners to sink more

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 71

critiques have made it into reform proposals. For example, in 2005 President Bush's Bipartisan Advisory Panel on Federal Tax Reform proposed changing the mortgage interest deduction to a 15 percent credit and making it available to all tax filers, regardless of itemization status.<sup>42</sup> President Obama proposed a similar plan during his campaign.<sup>43</sup> As with other plans to restrict or amend the mortgage interest deduction, neither proposal has gathered momentum in Congress. Still, other changes have been proposed. President Obama's fiscal year 2010–11 budget proposal advanced the idea of reducing the rate of mortgage and other deductions available to taxpayers in the highest tax brackets.<sup>44</sup> This budget proposal did not pass however, as the National Association of Realtors and other real estate interest groups responded with their usual predictions of disaster if such a change were enacted.<sup>45</sup>

## II. WHY DO WE SPEND ALL THIS MONEY TO SUPPORT HOMEOWNERSHIP?

In the midst of the great depression, President Franklin Roosevelt argued that, “special safeguards should be thrown around home ownership as a guarantee of social and economic stability.”<sup>46</sup> But that begs the question. Assuming for a moment that the various homeownership subsidies outlined above actually

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equity into their homes and thus may end up in increasing total investment in housing).

<sup>42</sup> See Lowenstein, *supra* note 28, at 4–5.

<sup>43</sup> See Nick Timiraos, *Homeownership Push is Rethought*, WALL ST. J., Sept. 12, 2008 (“Senator Obama has proposed a 10% mortgage interest tax credit for homeowners who don't itemize.”).

<sup>44</sup> See OFFICE OF MANAGEMENT AND BUDGET, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 29–30 (2009), available at [http://www.whitehouse.gov/omb/assets/fy2010\\_new\\_era/A\\_New\\_Era\\_of\\_Responsibility2.pdf](http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf).

<sup>45</sup> See Press Release, Nat'l Ass'n of Realtors, NAR Opposes Mortgage Interest Deduction Provision on Obama's Budget Proposal, (Feb. 26, 2009), available at [http://www.realtor.org/government\\_affairs/mortgage\\_interest\\_deduction/mid\\_obama\\_budget\\_proposal](http://www.realtor.org/government_affairs/mortgage_interest_deduction/mid_obama_budget_proposal).

<sup>46</sup> See Godsil & Simunovich, *supra* note 9, at 985 n.168.

do increase the rate of homeownership, there still remains the question of why our society should spend all these resources to privilege homeownership over renting. The main reasons proffered for supporting homeownership are: (i) homeownership benefits individual households; and (ii) an increase in homeownership creates positive externalities, or positive spillover effects that are shared by the community surrounding the homeowner households.

*A. Homeownership Benefits Individuals*

We can further divide the first claim—that households benefit from homeownership—into two basic components. The first is that enabling households to purchase homes will benefit those households financially.<sup>47</sup> The financial benefit is also multifaceted. First, by having to make mortgage payments and thereby gaining equity, homeownership “gives households a default mechanism for savings.”<sup>48</sup> That increased equity, in turn, “permits the owner to leverage capital, which can help to buy investment properties, start a new business, send a child to college, or save for retirement.”<sup>49</sup> In addition to promoting savings and enabling households increased access to capital, homeowners enjoy a measure of price protection against housing cost increases that enable them to better plan financially.<sup>50</sup> Of course the price protections are not absolute: real estate taxes, insurance and homeowners association or cooperative/condominium dues may increase, as may borrowing costs of borrowers who have taken out adjustable rate or payment option mortgages.<sup>51</sup> But, at least compared with renters

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<sup>47</sup> *But see* Nat’l Found. For Credit Counseling, *supra* note 4 (finding that “almost half of all American adults, more than 100 million people, no longer believe that homeownership is a realistic way to build wealth”).

<sup>48</sup> *See Shelter or Burden?* ECONOMIST, Apr. 16, 2009 (quoting Richard Green of the University of South Carolina).

<sup>49</sup> *See* Godsil & Simunovich, *supra* note 9, at 954.

<sup>50</sup> *See* Fennell, *supra* note 8, at 1054–55 (discussing price protection and caveats).

<sup>51</sup> *See id.* at 1055.

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 73

who are subject to market based rent increases on annual intervals, most homeowners' housing costs are more predictable.

Scholars also attribute increased stability to homeownership.<sup>52</sup> This is related to price stability, of course, but the notion is somewhat broader than just price. The argument is that homeowners enjoy a psychic benefit resulting from their property rights to exercise dominion over their homes, exclude outsiders, and to remain in perpetuity (subject, of course, to the rights of lenders and governments to foreclose for non-payment of mortgages or taxes).<sup>53</sup> Furthermore, as Professors Godsil &

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<sup>52</sup> While most scholars identify increased stability as a positive effect, there is some debate. *Compare* Apgar 2004 at 41–42 (“[R]esidential stability not only appears to promote community involvement and development of beneficial social capital but also effects educational outcomes.”) with Ingrid Ellen & Brendan O’Flaherty *How New York Housing Policies Are Different—And Maybe Why*, in *THE WELFARE STATE IN NEW YORK CITY* (Irwin Garfinkel and Marcia Meyers eds., Russell Sage Foundation (forthcoming 2010), at 33 (“While stability may be good for neighbors and for children, subsidizing it can create deadweight losses. Mobility gets workers to where they are most productive.”); see also Robert C. Ellickson, *The Mediocrity of Government Subsidies to Mixed-Income Housing Projects*, 16–17 & n.28 (Yale Law & Economics Research Paper No. 360, 2008), available at <http://ssrn.com/abstract=1217870> [hereinafter Ellickson, *The Mediocrity*] (discussing mixed results of lock in effect resulting from rent regulation and project based subsidies); Godsil & Simunovich, *supra* note 9, at n.100 (noting negative effect on the efficiency of labor markets resulting from housing stability; see also Sam Roberts, *Slump Creates Lack of Mobility for Americans*, N.Y. TIMES, Apr. 22, 2009 (Census Bureau has found that fewer people are moving in the recessionary economy, creating fears that job-related moves are getting suppressed and workers are not re-sorted to the jobs that best use their skills). See Generally Robert C. Ellickson, *Legal Constraints on Households Moves: Should Footloose Americans Envy the Rooted French*, 6 n.8 (Yale Law & Economics Research Paper No. 300, 2009) available at <http://ssrn.com/abstract=1445603> [hereinafter Ellickson, *Legal Constraints*] (reviewing differences in moving patterns among countries and discussing normative questions of which is preferable).

<sup>53</sup> See Godsil & Simunovich, *supra* note 9, at 954–56 (citing psychological benefits of homeownership); see also Gale et al., *supra* note 16, at 1171 (“Owning one’s home is widely viewed as an integral part of the American Dream . . . Americans are taught from an early age to aspire to homeownership . . . .”); Apgar 2004, *supra* note 5, at 56 (“Residential

Simunovich write, once a down payment has been made and a mortgage obtained, “the household tends to be less mobile because the transaction costs associated with moving have been increased. This reduced mobility . . . translates into both commitment to place and stability for family.”<sup>54</sup> And, for children, “[i]n the educational arena, residential stability helps students avoid the disruption linked to the relocation from one school to another.”<sup>55</sup> In sum, scholars find a number of positive effects for households who achieve residential stability.

### *B. External Benefits of Homeownership*

The positive community benefits associated with increased homeownership are well summarized by Gale *et al.*:

[m]ost importantly, homeowners may be more likely to be active citizens working for long-term, communitywide benefits. Homeowners may also take better care of their houses than renters would. High rates of homeownership may reduce crime in the area, perhaps because the greater geographic stability of homeowners vs. renters means that someone committing a crime would be recognized. Any of these behaviors, if sufficiently prevalent, could plausibly raise property values in the community at large and hence provide a benefit to people other than the homeowner.<sup>56</sup>

The general theory posits that the value of homes are so dependent on the health of their surrounding community that

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stability also enables parents to develop deeper and more meaningful attachment to social support networks, and to access existing job and human service referral networks.”).

<sup>54</sup> Godsil & Simunovich, *supra* note 9, at 971–72.

<sup>55</sup> See Apgar 2004, *supra* note 5, at 41 (citing Eric A. Hanushek et al., *Disruption Versus Tiebout Improvement: The Costs and Benefits of Switching Schools*, 88 J. PUB. ECON. 1721–46 (2004)).

<sup>56</sup> See Gale et al., *supra* note 16, at 6; see also Fennell, *supra* note 8, at 1098–99, n.209 & n.213; Godsil & Simunovich, *supra* note 9, at 970 (“A range of empirical studies have concluded that homeownership does in fact have salutary benefits for households and communities . . .”).

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 75

homeowners have a strong self interest in improving and maintaining their neighborhoods.<sup>57</sup>

*C. The Reasons for Supporting Homeownership Argue  
Equally For Enhanced Rental Stability*

Many of the arguments supporting homeownership follow from the claim that homeownership is a more stable form of tenure than renting. But there is no reason to think that the positive effects for individual households and surrounding communities associated with the stability offered by homeownership are restricted to homeownership. As Apgar states, while “the social/psychological aspects of housing are discussed in terms of owner-occupied housing . . . there is nothing inherent in the concept of ‘home’ that is necessarily linked to homeownership.”<sup>58</sup> And there is empirical support for

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<sup>57</sup> Godsil & Simunovich, *supra* note 9 at 972 (“Once a homeowner has developed a financial stake in a particular dwelling, there is a close link between that financial stake and the well-being of the community in which the dwelling is located.”); see WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 9–12 (2001) (arguing that homeowners are so concerned about property values that they become risk averse to a fault, making homeowners into “NIMBYs” even when a proposed change carries a positive expected value). There is, however, substantial debate concerning whether increased homeownership is merely *correlated* with these benefits or whether it in fact *causes* such outcomes. See Fennell, *supra* note 8, at n.213 (“Selection bias presents a difficulty in interpreting empirical results, however—do people with good-neighbor characteristics just happen to become homeowners, or is there something about homeownership that improves their neighborliness.”). Gale et al., conclude that, “while there are some compelling arguments in theory for external benefits from homeownership, there is little evidence in practice to support those arguments. That does not prove that the arguments are wrong, but the burden should be on advocates of homeownership subsidies to make the case, and that case has not yet been made in a compelling fashion.” See Gale et al., *supra* note 16, at 7; see also Apgar 2004, *supra* note 5, at 4 (“[P]olicy makers are often less than cautious in interpreting the existing literature [regarding benefits of homeownership].”).

<sup>58</sup> See Apgar 2004, *supra* note 5, at 15; see also Ellen & O’Flaherty, *supra* note 52, at 33 (“To the extent that rent control and rent subsidies mean that tenants realize consumer surplus from their apartments in New York,



this assertion: a much cited study from two leading housing economists finds that much of the positive spillover effect associated with increased homeownership in fact results from longer term residences, and *not* homeownership *per se*.<sup>59</sup> This finding is supported by a research report from the National Association of Realtors, one of the biggest proponents of homeownership subsidies.<sup>60</sup>

The findings of this study make intuitive sense. Long-term tenants have the same interest as owners in living in clean and safe neighborhoods with good schools. Thus, long-term tenants are similarly likely to be engaged in civic affairs. While it is true that renters do not have the same profit motive as homeowners in creating desirable living conditions, it is

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they have a stake in the outcome of local political decisions, and so are more likely to participate intelligently in the development of those policies. This argument is usually made for homeownership [citing sources], but if it is true, then rent control and rent subsidies provide the same sort of advantages.”); *see also id* at 31 (“Both rent control and subsidies to single-family owners help to further population stability.”); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (“[T]enancy, no less than a single-family house, is the sort of property interest in which a person becomes self-invested; and after the self-investment has taken place, retention of the interest becomes a priority claim over curtailment of merely fungible interests of others.”).

<sup>59</sup> Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 J. URB. ECON., 354–84, (1999).

<sup>60</sup> *See* Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 591 & n.91 (2009) [hereinafter Adams, *Homeownership*] (quoting from Research Div., Nat’l Ass’n of Realtors, *Social Benefits of Homeownership and Stable Housing* (2006)), <http://www.realtor.org/research/research/homeownershipbenefits> (click “Social Benefits of Homeownership and Stable Housing” hyperlink) (“[T]he purported benefits of homeownership may partly arise not directly from the ownership, but from greater housing stability and social ties associated with less frequent movements among homeowners. Therefore, policies to boost homeownership can raise positive social outcomes, but only to the extent that homeownership brings housing stability. Also, if it is in fact the case that housing stability matters more than homeownership in bringing social benefits, then the policy implication is not necessarily to promote homeownership but to assist in residential stability.”).

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 77

unreasonable to say the lack of such a motive would eliminate the desire to live in good conditions for one's family.<sup>61</sup> Indeed, one notable scholar, William Simon, argues that the increased stability achieved by rent control in fact encourages more robust long-term community involvement than homeownership because it forces the tenant to stay in place to share the benefits of community improvement, rather than enabling the resident to benefit from those improvements by selling their home at a premium.<sup>62</sup> These studies suggest that a housing policy seeking to strengthen residential stability should encourage longer term stays in both owned homes and rentals. This would mean focusing on increasing "sustainable" homeownership, as well as increasing rental stability. This is the focus of my paper.

Now we turn briefly to measure our current level of residential stability. In sum, the foreclosure crisis has had a devastating impact on the stability of millions of American households, their neighborhoods, and state and local governments. The devastation wrought by this crisis belies the notion that home ownership always promotes social and economic stability.<sup>63</sup>

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<sup>61</sup> For the reasons identified above, I believe that Lawrence Summers, the head of the President Obama's Council of Economic Advisors is wrong to compare renting a home to renting a car. See Conor Dougherty, *In the Exurbs, the American Dream Is Up for Rent*, WALL ST. J., Mar. 31, 2009, at A18. (attributing to Laurence Summers the following statement: "No one in the history of the world ever washed a rental car"). My rejoinder is that many people wash leased cars that they have for one year, which is more akin to rental housing than renting a car for a weekend. Renting a car for a weekend is better analogized to renting a hotel room for a weekend, which I would agree, rarely gets cleaned by its occupants.

<sup>62</sup> William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1360 (1991); see also Benjamin D. Barros, *Home as a Legal Concept*, SANTA CLARA L. REV. 225, 290 n.147 (discussing the Simon article and economic and moral arguments involved in rent regulation).

<sup>63</sup> See *Shelter or Burden?*, ECONOMIST, Apr. 16, 2009 ("[P]erversely, the decade of obsession with homeownership may actually have reduced neighborhood stability.").

## III. THE FORECLOSURE CRISIS AND RESULTING INSTABILITY

A. *Foreclosure Crisis: The Statistics*

It was distressing to learn recently that, despite some stabilization in home prices,<sup>64</sup> the increase in foreclosures has not abated.<sup>65</sup> In fact, the first six months of 2009 were the worst on record. New foreclosure filings reached over 1.5 million for the first half of 2009 according to RealtyTrac, the highest since it began recording in 2005.<sup>66</sup> A report issued by the Mortgage Bankers Association on August 20, 2009 found that the combined percentage of loans in foreclosure and those otherwise delinquent was over 13% of all mortgages outstanding (more than one in eight loans), “the highest ever recorded in the MBA delinquency survey,” which commenced in its current form in

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<sup>64</sup> See David Streitfeld, *Housing Perks Up*, N.Y. TIMES, Aug. 26, 2009, available at [http://www.nytimes.com/2009/08/26/business/economy/26econ.html?\\_r=1&sep+1&sq=housing%20perks%20up&st=cse](http://www.nytimes.com/2009/08/26/business/economy/26econ.html?_r=1&sep+1&sq=housing%20perks%20up&st=cse) (citing Case-Schiller index report showing modest increases in housing prices in June 2009 in 18 of the 20 major U.S. metropolitan areas).

<sup>65</sup> The detailed causes of the foreclosure crisis have been much discussed and debated. Neither of the thesis points in this paper, that our homeownership policies have not resulted in a stable housing situation and that a focus on rental housing is needed, are contingent on identifying the exact causes and culprits. However, I do believe the causes are complex and involve the following intertwined phenomenon: (i) the development of an overheated secondary market for funding mortgage loans, (ii) the creation of more exotic, complex and risky loan products that were designed for subprime borrowers but were soon pushed on all borrowers; (iii) an unparalleled run up in home prices; (iv) Americans taking out more and bigger mortgage loans and home equity loans throughout the late 1990s and early 2000; and finally (v) a severe economic recession and resulting job losses. See generally Adams, *supra* note 60, at 599–607 (discussing above mentioned causes of the foreclosure crisis); Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617, 618, 620–27 (providing statistics on the subprime mortgage crisis).

<sup>66</sup> See Les Christie, *1.5 million homes in foreclosure in '09*, CNNMONEY.COM, July 16, 2009 [http://money.cnn.com/2009/07/16/real\\_estate/RealtyTrac\\_foreclosure\\_report/](http://money.cnn.com/2009/07/16/real_estate/RealtyTrac_foreclosure_report/).

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 79

1972.<sup>67</sup> Notably, the foreclosure problems are increasingly affecting prime borrowers who have lost their jobs, as opposed to the 2006–2008 foreclosures which primarily affected those with subprime and/or adjustable rate loans.<sup>68</sup> Experts predict that in 2009, 2.4 million homes will be lost to foreclosure or short sales.<sup>69</sup> Another 1.7 million homes were foreclosed in 2008.<sup>70</sup> Overall, between 2009–2012, Credit Suisse estimates that between 8 and 9 million homes will be foreclosed.<sup>71</sup> And many of these homes, once foreclosed, are lying dormant. In July 2009 the US Census Bureau estimated that more than 10% of all homes were vacant.<sup>72</sup>

The foreclosure crisis demonstrates one of the downsides of the constant push for homeownership. By creating incentives for borrowers to incur more and more mortgage debt and shielding the profits from capital gains tax, federal housing policy

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<sup>67</sup> See Press Release, Mortgage Bankers Association, Delinquencies Continue to Climb, Foreclosures Flat in Latest MBA National Delinquency Survey, (Aug. 20, 2009), available at <http://www.mortgagebankers.org/NewsandMedia/PressCenter/70050.htm>.

<sup>68</sup> See Peter Goodman & Jack Healy, *Job Losses Push Safer Mortgages to Foreclosure*, N.Y. TIMES, May 24, 2009, at A1; Nick Timiraos, *Souring Prime Loans Compound Mortgage Woes*, WALL ST. J., Aug. 21, 2009, at A4. “Subprime” mortgages are intended “for borrowers with significant credit history problems.” SCHWARTZ, *supra* note 9, at 234 (internal quotation marks omitted).

<sup>69</sup> Center for Responsible Lending, *Subprime Spillover: Accelerating Foreclosures to Cost Neighbors \$502 Billion in 2009 Alone*, May 7, 2009, <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-accelerating-foreclosures-to-cost-neighbors-436-billion-in-2009-alone-73-4-million-homes-lose-5-900-on-average.html>.

<sup>70</sup> Simon, *Banks Ramp Up Foreclosures*, WALL ST. J., Apr. 15, 2009, at A1 (citing estimates available at <http://www.economy.com>).

<sup>71</sup> Rod Dubitsky et al., *Foreclosure Update: Over 8 Million Foreclosures Expected*, CREDIT SUISSE, Dec. 4, 2008, at 1.

<sup>72</sup> See U.S. Census Bureau News, *supra* note 17, at 1; see also Haya El Nasser, *Open House, Anyone? 1 in 9 Homes Sit Empty*, USA TODAY, Apr. 10, 2009; cf. John Leland, *With Advocates Help, More Squatters Are Calling Foreclosures Home*, N.Y. TIMES, Apr. 10, 2009, at A1 (describing growing phenomenon in Philadelphia, Minnesota, Miami, where organized grassroots efforts are placing homeless persons in foreclosed or abandoned homes).

distorted the housing market and contributed to the real estate bubble and subsequent crash. The millions of foreclosures have had a devastating effect on the affected households, their surrounding neighborhoods, and local governments.<sup>73</sup> These effects are reviewed below, beginning with individual households.

### *B. Resulting Instability*

#### *1. Foreclosure Effects on Individuals*

At its core, foreclosure leaves a family without a place to live and increases the risk of homelessness. On a financial level, foreclosure results in the loss of the largest financial asset most households will ever own.<sup>74</sup> This greatly compromises the household's ability to borrow for important investments like higher education, retirement, or to provide for future generations.<sup>75</sup> The lowered credit score resulting from

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<sup>73</sup> Tad Friend, *Cash for Keys*, NEW YORKER, Apr. 6, 2009 (describing the dramatic dislocation effects of foreclosure on individual households and the potential for social upheaval as a result of foreclosure crisis); see, e.g., Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 726–27 (2008) (describing the devastating impact to individual households and neighborhoods, especially where foreclosures are concentrated). See generally Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C.L. REV. 817 (2008) (describing the impact of eviction on families and society at large).

<sup>74</sup> NEIGHBORHOOD HOUS. SERVICES OF CHICAGO, PRESERVING HOMEOWNERSHIP: COMMUNITY-DEVELOPMENT IMPLICATIONS OF THE NEW MORTGAGE MARKET 21 (Mar. 25, 2004), available at <http://www.nw.org/network/neighborworksProgs/foreclosuresolutionsOLD/documents/preservingHomeownershipRpt.pdf>.

<sup>75</sup> Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOY. U. CHI. L.J. 557, 607 & n.274 (Spring 2009) (“At the point where a consumer’s liabilities eclipse his or her assets, the indicators of upward class mobility—economic equilibrium and stability, the ability to enhance human capital in order to specialize, the wherewithal to take risks and have a positive vision of the future, as well as the capacity to offer future generations greater opportunities—correspondingly

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*RETHINKING THE HOMEOWNERSHIP SOCIETY* 81

foreclosure makes future homeownership more difficult, may decrease job prospects, and limits the ability to obtain insurance or rental housing.<sup>76</sup> The changes in school, friends and social networks are disruptive to children's development.<sup>77</sup> The accumulation of these decreased opportunities as a result of the loss of one's home affect an individual's positive vision of the future and ability to rebound—ultimately resulting in the loss of middle class status.<sup>78</sup>

## 2. Foreclosure Effects on Neighborhoods

At a community level, foreclosures lead to blight and disinvestment.<sup>79</sup> Most immediately, foreclosures of multifamily

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disappear . . . . Moreover, the loss of a home is the loss of an asset that could have been handed down to the next generation.”).

<sup>76</sup> Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POLICY DEBATE 57, 58 (2006); see also, NEIGHBORHOOD HOUS. SERVICES OF CHICAGO, *supra* note 74, at 13–20.

<sup>77</sup> See Christine Vidmar, *Seven Ways Foreclosures Impact Communities*, NeighborWorks America, Aug. 2008, available at [http://neighborworks.issueelab.org/research/listing/seven\\_ways\\_foreclosures\\_impact\\_communities](http://neighborworks.issueelab.org/research/listing/seven_ways_foreclosures_impact_communities); see also Phillip Lovell & Julia Issacs, *The Impact of the Mortgage Crisis on Children*, FIRST FOCUS, May 2008, at 1, available at <http://www.firstfocus.net/Download/HousingandChildrenFINAL.pdf>.

<sup>78</sup> Jeannie Suk, *Taking the Home*, 20 CARDOZO STUD. LAW & LITERATURE 291, 295 (“The social meaning of home loss is the loss of a family's economic stability, and with that the loss of middle-class status.”); see also Robert Schiller, *The Scars of Losing a Home*, N.Y. TIMES, May 18, 2008, at 5 (“[I]t is important to consider the psychological trauma of foreclosure [since homeownership is a] fundamental part of a sense of belonging to a country.”); Brad Heath & Charisse Jones, *In Denver, Foreclosures and a Dramatic Exodus*, USA TODAY, Apr. 2, 2008, at A1 (“For hundreds of homeowners in this mostly middle-class corner of Denver—and an estimated 1.2 million more nationwide—the wave of foreclosures battering U.S. financial markets is quickly unraveling the American dream. Those who have lost homes here describe seeing their lives crumble into anxiety and embarrassment.”).

<sup>79</sup> See Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 686 (2008) (“Rising foreclosures have started to blight certain areas of American cities

buildings usually result in the displacement of tenants. Secretary Shaun Donovan of the U.S. Department of Housing & Urban Development (HUD) recently stated that 40% of those displaced to date from the foreclosure crisis have been renters.<sup>80</sup> The federal government has tried to address the effect of foreclosures on tenants. Congress passed a new law in May 2009 that protects tenants from immediate eviction by persons or entities that become owners of property through foreclosure. Under the law, the immediate successor in interest at foreclosure must: (a) provide bona fide tenants with 90 days notice prior to eviction; and, (b) allow bona fide tenants with leases to occupy property until the end of the lease term, except the lease can be terminated on 90 days notice if the unit is sold to a purchaser who will occupy the property.<sup>81</sup> In New Jersey and New Hampshire, with statutes that restrict a landlord's right to evict for good cause, bona fide renters are protected when their buildings are foreclosed.<sup>82</sup> Despite these efforts to limit the effects of foreclosure, communities surrounding foreclosed homes have suffered greatly in the current crisis.

Increasingly, foreclosures result in vacancies, which in turn lead to an array of public health concerns. These concerns include arson, which in turn exposes lead paint, trash accumulation, illegal dumping, and rodent infestations.<sup>83</sup> In

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hit hardest by the problem.”).

<sup>80</sup> Erika Morphy, *HUD Plays Key Role in Financial System Revamp*, GLOBE ST., June 18, 2009, available at [http://www.globest.com/news/1435\\_1435/washington/179338](http://www.globest.com/news/1435_1435/washington/179338); see also, Abby Goodnough, *Hard Times Hitting New England Three Deckers, New England's City Backdrop*, N.Y. TIMES, June 20, 2009, at A1 (chronicling how multifamily buildings in New England's cities are being foreclosed on as a higher rate than homes overall); Vicki Been & Allegra Glasshauser, *The Worst of Times: Perspectives on and Solutions for the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV 1, 2-3 (2009) (chronicling how foreclosure crisis is “significantly impacting renters throughout the country” because most states allow the purchaser at a foreclosure sale to evict the existing tenants).

<sup>81</sup> See Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009).

<sup>82</sup> See Been & Glasshauser, *supra* note 80, at 16.

<sup>83</sup> John P. Relman, *Foreclosures, Integration, and the Future of the Fair*

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 83

addition, foreclosures result in higher crime rates for the surrounding community.<sup>84</sup> This type of blight decreases property values of neighboring homeowners and thus dissuades further investment.<sup>85</sup> Community destabilization and disinvestment are especially pronounced where foreclosures are geographically concentrated.<sup>86</sup>

*3. Foreclosure Effects on  
Local Governments*

Finally, foreclosures have a detrimental impact on the fiscal stability of states and localities in which they occur. For example, one study found that foreclosures in Chicago involve

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*Housing Act*, 41 IND. L. REV. 629, 650 (2008) (“Foreclosures mean abandoned homes; increased risks of fire, crime, and drugs; increases in homelessness and job loss; deterioration of schools; and a crippling shortage of city funds for existing social programs.”)

<sup>84</sup> Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUSING STUD. 851, 863 (2006) (“These findings suggest that foreclosures may have important social and economic consequences on neighborhoods beyond effects on the finances of households directly affected by the foreclosure. An increase in violent crime is an important social cost, as well as an economic cost, that must be incorporated into policy making concerning real estate and mortgage lending policies and regulation.”); *see also*, Michael Powell & Janet Roberts, *Minorities Affected Most as New York Foreclosures Rise*, N.Y. TIMES, May 16, 2009 (citing Immergluck & Smith).

<sup>85</sup> *See* Immergluck & Smith, *supra* note 84, at 58; *Soaring Spillover: Accelerating Foreclosures to Cost Neighbors \$502 Billion in 2009 Alone*, CENTER FOR RESPONSIBLE LENDING, May 7, 2009, <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-accelerating-foreclosures-to-cost-neighbors-436-billion-in-2009-alone-73-4-million-homes-lose-5-900-on-average.html>; *see also* Vidmar, *supra* note 77; Elsa Brenner, *Freeing Towns to Tackle Blight*, N.Y. TIMES, Apr. 5, 2009, at RE9 (describing effect of foreclosures on local property values in affluent neighborhoods of Mount Vernon, NY).

<sup>86</sup> *See* Jenny Schuetz et al., *Neighborhood Effects of Concentrated Mortgage Foreclosures* (NYU Center for Law and Economics, Working Paper No. 08-41 2008), available at <http://ssrn.com/abstract=1270121>; Cox, *supra* note 79, at 693.



more than a dozen city agencies and generate costs that in some cases exceeded \$30,000 per property.<sup>87</sup> Other effects include declining property tax revenues resulting from declining property values described above.<sup>88</sup> Thus the foreclosures create a downward spiral effect: just at the time that local governments are called on to deal with the effects of the foreclosure crisis, that very crisis has resulted in less tax revenue with which to help.

In sum, the detrimental effects of the housing bubble and crash have extended far beyond the foreclosed homeowners. One category of victims of the foreclosure crisis, renters, have been suffering from decades of government neglect.

#### IV. THE CRISIS IN RENTAL HOUSING

The damage wrought by millions of foreclosures has, among other things, exposed the chronic crisis in the rental housing market. There are two fundamental defects in the rental housing market: (i) there is a desperate lack of rental housing affordable to low- and moderate- income households; and (ii) there is a need for increasing the options through which renters can obtain economic and psychological stability in their housing. Each will be explored in turn.

##### *A. Need for More Affordable Rental Housing*

As noted in the introductory section, almost one third of all Americans (36 million households) are renters.<sup>89</sup> Furthermore,

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<sup>87</sup> WILLIAM C. APGAR & MARK DUDA, WASH. DC: HOMEOWNERSHIP PRESERVATION FOUND., COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 4 (2005), [http://www.995hope.org/content/pdf/Apgar\\_Duda\\_Study\\_Short\\_Version.pdf](http://www.995hope.org/content/pdf/Apgar_Duda_Study_Short_Version.pdf).

<sup>88</sup> Alan Weinstein, *Current and Future Challenges to Local Governments Posed by the Housing and Credit Crisis*, 2 ALB. GOV'T L. REV. 259, 266 (2008) (describing challenges including revenue shortfalls and rising costs); see also Vidmar, *supra* note 77 at 2-3.

<sup>89</sup> See Donald R. Haurin et al., *The Impact of Neighborhood Homeownership Rates: A Review of the Theoretical and Empirical Literature*,

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 85

the number of households needing rental housing is expanding. A recent report found that: “the number of renter households jumped by 2.8 percent or nearly one million in 2007.”<sup>90</sup> And that trend had already begun before the worst of the foreclosure wave hit—the foreclosure crisis has added many families to the list of those who are in need of rental housing.<sup>91</sup> All renters must deal with the fact that the supply of rental units has not been keeping up with demand.<sup>92</sup> One study found that “84% of all the new housing units built from 1990 to 2006 were single family units . . . although an average of 34% of all households were renters during that entire period.”<sup>93</sup> A vast majority of these single family units built were for sale and not offered as rentals.<sup>94</sup>

The failure of the rental supply to meet the growing demand has exacerbated the affordability gap that has long plagued many rental households. Indeed, by the end of 2007 almost half of all rental households in the United States were rent burdened<sup>95</sup> (spending more than 30% of their gross income on housing

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J. HOUSING RESEARCH 119–51 (2003); *see also* Apgar 2004, *supra* note 5, at 3; *see also* Katz & Turner, *supra* note 5, at 2.

<sup>90</sup> *See* HARVARD UNIV. JOINT CTR. FOR HOUS. STUDIES, AMERICA’S RENTAL HOUSING—THE KEY TO A BALANCED NATIONAL POLICY 2 (2008) [hereinafter HARVARD UNIV. CTR. FOR JOINT HOUSING STUDIES, BALANCED POLICY], *available at* [http://www.jchs.harvard.edu/publications/rental/rh08\\_americas\\_rental\\_housing/rh08\\_americas\\_rental\\_housing\\_bw.pdf](http://www.jchs.harvard.edu/publications/rental/rh08_americas_rental_housing/rh08_americas_rental_housing_bw.pdf); *see also id.* at 8 (“Today’s mortgage makers woes will not only force many owners into the rental market but also limit the homebuyers opportunities for other lower-income renters.”); *id.* at 9 (“If foreclosures continue to rise, renter household growth could return to levels not seen in a decade.”).

<sup>91</sup> *See id.* at 8.

<sup>92</sup> *See, e.g.,* Benson, *supra* note 2, at 2 (“For years, growth in the number of renters at all income levels has far outpaced the construction of new rental units.”).

<sup>93</sup> *See* Downs *Why*, *supra* note 9, at 7.

<sup>94</sup> *See id.*

<sup>95</sup> *See* SCHWARTZ, *supra* note 9, at 23. (“The most common standard of housing affordability in the [U.S.] is 30% of income. Households spending 30% or more of their pre-tax income on housing are viewed as having a excessive housing cost burden.”).

costs) and 24% of all rental households were severely rent burdened<sup>96</sup> (spending more than 50% of their gross income on housing costs).<sup>97</sup> These numbers represented significant increases from just seven years prior, in 2001.<sup>98</sup> Looking at such numbers, as well as the increased number of rental units needed to house foreclosed households, Arthur Nelson, director of the University of Utah's Metropolitan Research Center, recently concluded that half of all the units built in the coming years need to be rentals.<sup>99</sup> Whether or not that figure is precise, the larger point is that the United States needs significant investment in rental housing in order to correct the market imbalances and bring rents more in line with families' incomes.

Notably, two corollaries of the current housing crisis—the glut of vacant homes and increased number of homes converted from for sale to rental status—seem to be reducing market rents charged.<sup>100</sup> In Phoenix investors are reportedly purchasing

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<sup>96</sup> See *id.* (“Housing cost burdens are defined as severe when housing expenses amount to 50% or more of income.”).

<sup>97</sup> HARVARD UNIV. JOINT CTR. FOR HOUS. STUDIES, THE STATE OF THE NATION'S HOUSING 2009 3 tbl.A-5 (2009), available at <http://www.jchs.harvard.edu/publications/markets/son2009/son2009.pdf> [hereinafter JOINT CTR. FOR HOUS. STUDIES, State of the Nation]; see Katz & Turner, *supra* note 5, at 38 (“[G]ross rents . . . have grown faster than inflation while median renter's monthly income has declined 7.3 percent since 2000.”); NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 4 (2009) available at <http://www.nlihc.org/oor/oor2009/oor2009pub.pdf> (calculating the current “housing wage,” or the amount it takes to afford a modest two-bedroom apartment at 30 percent of income, with the 2009 the national average housing wage is \$17.84 per hour, which was more than \$3 in excess of the average national hourly wage and more than \$10 in excess of the national minimum wage).

<sup>98</sup> See HARVARD UNIV. CTR. FOR JOINT HOUSING STUDIES, STATE OF THE NATION, *supra* note 97, at 38 tbl.A-5 (11.2% increase in households rent burdened and 19.2% increase in those severely rent burdened).

<sup>99</sup> See El Nasser, *supra* note 72 (noting that edges of metropolitan areas will turn into “exurban ghettos” as many units are turned over to renters).

<sup>100</sup> See Nick Timiraos, *Apartment Glut Expands*, WALL ST. J., Oct. 6, 2009 (citing a report showing 7.9% vacancy rate for apartments and a 2.7% decrease in effective rental prices nationally); Shahien Nasiripour, *Unable to Sell Their Houses, Millions of Homeowners are Turning Into Landlords*,

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 87

foreclosed homes from banks at drastically reduced prices and then renting them to the same households that have been foreclosed.<sup>101</sup> Along with others,<sup>102</sup> Dean Baker of the Center for Economic Policy Research has proposed that mortgage servicers be forced to rent to delinquent homeowners at market rental prices as a part of a negotiated foreclosure.<sup>103</sup> Reportedly, officials from the Obama Administration are considering Baker's proposal.<sup>104</sup> While future substantial drops in rental prices may occur, the real estate crisis thus far has resulted in only a relatively small reduction in rental prices.<sup>105</sup> There is no evidence that the housing market has in any long lasting way addressed the affordability crisis that has built up since the 1980s.<sup>106</sup>

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HUFFINGTON POST, Sept. 14, 2009, [http://www.huffingtonpost.com/2009/09/14/unable-to-sell-their-hous\\_n\\_283655.html](http://www.huffingtonpost.com/2009/09/14/unable-to-sell-their-hous_n_283655.html) (describing 2.5 million units being converted from for sale to rentals since 2007, although many may be rentals only until the for sale market picks up).

<sup>101</sup> See David Streitfeld, *Amid Housing Bust, Phoenix Begins a New Frenzy*, N.Y. TIMES, May 24, 2009, at A1.

<sup>102</sup> See, e.g., David Kappell, *A Rental Model Could Solve The Housing Crisis*, NEWSDAY, Apr. 17, 2009, available at <http://www.newsday.com/opinion/a-rental-model-could-solve-the-housing-crisis-1.1219384>. The author, a former mayor on Long Island, notes the fact that millions of homes lie dormant waiting for buyers while millions of households need housing as a result of foreclosure, proposing that mortgage servicers agree to rent homes in foreclosure to the current occupants.

<sup>103</sup> See DEAN BAKER, THE RIGHT TO RENT PLAN (Ctr. for Econ. Policy Research 2009), available at <http://www.cepr.net/documents/publications/right-to-rent-2009-07.pdf>.

<sup>104</sup> See Patrick Rucker, *Obama Mulls Rental Option for Homeowners*, REUTERS, July 14, 2009, <http://www.reuters.com/article/euRegulatoryNews/idUSN1429055220090714>.

<sup>105</sup> See Timiraos, *supra* note 100 (citing a 2.7% decrease in effective rental prices nationally); JOINT CTR. FOR HOUS. STUDIES, State of the Nation, *supra* note 97 at 21 (real rents fell by 0.2 percent nationally in 2008).

<sup>106</sup> See JOINT CTR. FOR HOUS. STUDIES, *Balanced Policy*, *supra* note 90, at 3 ("With these large, unprecedented shifts on both the demand and supply sides of the rental market, the direction of rents is impossible to predict."); see also Joint Center for Housing Studies, *Fact Sheet-America's Rental Housing-The Key to a Balanced National Policy*, Apr. 30, 2008 (noting new

As detailed below, changes to U.S. government housing policy<sup>107</sup> over the past thirty years have resulted in fewer rental units being built and maintained that are affordable to low and moderate income households. The first of these changes has been the dramatic decrease in federal funding appropriated through HUD for rental subsidies.<sup>108</sup> (As discussed in Section I.B, this has been accompanied by a dramatic increase in federal subsidies going to homeowners). Specifically, HUD has funded virtually no new public housing units since 1980 and drastically cut back on the number of projects receiving building wide Section 8 assistance.<sup>109</sup> Not only has new production of HUD-assisted units diminished, but also hundreds of thousands of previously HUD-assisted units have been removed by their owners from the applicable governmental programs and brought to market rate.<sup>110</sup> In addition, changes to the Income Tax Law in

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wave of foreclosed homes being rented but stating that “most renters do not have adequate income to take advantage of these opportunities”); National Low Income Housing Coalition, *New Census Housing Data Confirm Number of Renters Facing Housing Problems on the Rise*, Sept. 23, 2009 (analyzing national census data and finding that, from 2006 to 2008, median gross rents increased from \$763 to \$824 and that the number of rent burdened households increased by 600,000).

<sup>107</sup> While I focus here on national housing policy, local governments have also played a role in restricting the number of rental units. Many of the suburban and exurban communities which have grown so quickly over the past thirty years have increasingly restricted zoning to exclude larger multifamily buildings, or even rentals at all. This drives up the price of land in communities which do allow for rentals and thereby decreases the supply and affordability of housing that can be built. *See* SCHWARTZ, *supra* note 9, at 37.

<sup>108</sup> *See* SCHWARTZ, *supra* note 9, at 40–42.

<sup>109</sup> *See id.* at 42. Project based Section 8 was a HUD administered program during the 1980’s which gave owners rent subsidies for all qualified units.

<sup>110</sup> *See id.* at 36; *see also* Benson, *supra* note 2, at 2 (“Beyond cutting back the level of spending on public housing operations and maintenance, the Bush administration set policies at HUD that effectively reduced the number of rental vouchers in use. Meanwhile, demolitions under HOPE VI, signed into law by President George Bush in 1992, have driven a net loss of about 165,000 public housing units since 1995.”).

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 89

1986 eliminated most of the accelerated depreciation benefits that had until then been provided to investors in all rental housing projects, with even more generous benefits for investors of low income rental housing.<sup>111</sup> While the introduction of the low income housing tax credit (LIHTC)<sup>112</sup> has had some success in replacing accelerated depreciation as an incentive for equity investment in low income rental projects, LIHTC funded projects have not been able to stem the overall loss of affordable units.<sup>113</sup> Overall, the federal government spends roughly \$30 billion annually to support rental housing for low to moderate income households.<sup>114</sup> This is less than one fourth of what it spends for homeownership programs.<sup>115</sup> This disparity, together

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<sup>111</sup> See SCHWARTZ, *supra* note 9, at 63, 78–81. In addition to the challenge to the equity side of the financing model presented by the Tax Reform Act of 1986, debt financing for multifamily rental housing was severely curtailed by the failure of so many thrifts on the 1980's which had been the primary lenders for such rental projects. See *id.* at 62. The legislative response to the failure of thrifts (the S+L Crisis) exacerbated this development, creating significantly more restrictions on lending to multifamily buildings as compared with single family properties. See *id.* at 62–63.

<sup>112</sup> See I.R.C. § 42 (LEXIS 1986).

<sup>113</sup> See SCHWARTZ *supra* note 9, at 81.

<sup>114</sup> See Gale et al., *supra* note 16, at 1172–73 (citing \$30 billion number for 2005, which includes grant funds administered through HUD and the Department of Agriculture for farmer/rural housing as well as various tax benefits administered by the Treasury Department which support the investment in low income rental housing, note that some of the funding in this category goes to support homeownership programs as well so getting the exact amount spent on rental programs is difficult); see also SCHWARTZ, *supra* note 9, at 69 (citing \$30 billion in “direct” housing subsidies, as opposed to tax expenditures, some small percentage of this includes homeownership subsidies); Downs, *Why*, *supra* note 9, at 7 (reporting that the total federal outlays on rental housing were approximately \$32.3 billion for 2005. The highest percentage of this category of federal spending is forgone tax revenue supporting the LIHTC program, as well as federal outlays made to fund Section 8 vouchers). Section 8 vouchers provide a direct rental subsidy to households, enabling them to spend no more than 30% of their gross income on rent. *Id.*

<sup>115</sup> See Apgar 2004, *supra* note 5, at 12. (“For example, in fiscal year 2001, program outlays for the U.S. Department of Housing and Urban

with federal funding decisions begun after World War II which have prioritized highways over mass transit and similar anti-urban and anti-density measures, have distorted the market for rental housing by favoring construction and ownership of single family suburban and exurban homes.<sup>116</sup>

Beyond the need for more rental units generally, and affordable units in particular, there is a further need for more stable rental options for a growing number of households.

### *B. Need for Rental Stability*

A report completed before the foreclosure crisis found that the number of stable renters was already significant: “More than a quarter of renter households surveyed in 2005 reported they had lived in their units for five or more years.”<sup>117</sup> With more opportunities for stable tenure and some rent protection as proposed below, that number would undoubtedly be significantly higher. The category of households seeking stable tenancies includes, at a minimum, low- to moderate-income families who are looking to put down roots in a community, senior citizens

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Development totaled \$33.6 billion. In contrast, that same fiscal year federal tax expenditures for housing totaled \$121.2 billion with tax related expenditures for homeowners (including mortgage interest and property tax deductions, and capital gains exclusion) accounting for \$106 billion of that total.”); *see also* Section II.B and sources cited therein.

<sup>116</sup> See Thomas J. Sugrue, *The New American Dream: Renting*, WALL ST. J., Aug. 15, 2009 (“Federal housing policies changed the whole landscape of America, creating the sprawlsapes that we now call home and in the process, gutting inner cities . . .”). *See generally* JACKSON, *supra* note 14.

<sup>117</sup> HARVARD UNIV. JOINT CTR. FOR HOUSING. STUDIES, THE STATE OF THE NATION’S HOUSING 2008, *supra* note 52, at 23. *Cf.* Ellickson, *The Mediocrity*, *supra* note 52, at 15 (stating that each year “about one-third of U.S. tenant households move to new quarters” according to a 2003 study from the U.S. Department of Commerce); Ellickson, *Legal Constraints*, *supra* note 52, at 6 n. 8 (citing an annual moving rate in the United States of 32.5% for renters and 9.1% for owners, compared with annual moving rates of 17% for French renters and 4% for French homeowners).

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 91

and the disabled.<sup>118</sup> In addition, the millions of foreclosures will dramatically increase the number of tenants who need augmented rental stability.<sup>119</sup> To the extent that some of these households can create *sustainable* homeownership solutions, such a result would be a good outcome for those households. But there is undoubtedly some significant percentage of the American population for which homeownership does not make sense.<sup>120</sup> Under our free market based economic and property systems, many households do not have the financial means and/or the desire to be homeowners, with the full set of responsibilities that homeownership entails.<sup>121</sup>

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<sup>118</sup> See Courtney Gross, *Affordable Housing Not Included*, Gotham Gazette, Oct. 5, 2009 (describing disabled woman whose rent in the gentrified neighborhood of Williamsburg, Brooklyn was recently raised from \$550 to \$2100 when her building was purchased by a new owner).

<sup>119</sup> See *supra* notes 74–76 and accompanying text.

<sup>120</sup> See Apgar 2004, *supra* note 5, at 5 (“Public policy should focus on the larger goals of promoting access to decent and affordable housing, along with expanding social and economic opportunity for all, and in doing so recognize that promoting homeownership is just one of many possible means for achieving these end goals.”). *But see* Dalton Connolly, Op Ed., *Safe at Home*, N.Y. TIMES, Aug. 4, 2009 (arguing in favor of increased programs to promote and protect homeownership options for low-income households).

<sup>121</sup> See Godsil & Simunovich, *supra* note 9, at 969–70 for a discussion of the rights and responsibilities of homeowners and renters (“[He or she] who owns a fee simple possesses the largest possible share of the rights in the iconic property bundle (use, possession, the right to exclude, and the right to transfer), while a person or family who possesses a leasehold interest has occupancy rights to the property only for a specified period of time . . . . [T]he fee owner of a rental property is also subject to legally imposed obligations to the leaseholder, like ensuring that the property is habitable.”); *see also* Apgar 2004, *supra* note 5, at 10 (“[T]enant/landlord laws and regulations govern the obligation of the property owner to meet certain standards of service provision and process concerning rent setting and eviction, as well as responsibilities of the tenant (including making rent payments in a timely manner). At the same time, tenants retain the option to vacate the property on relatively short notice . . . . Home owners generally have a more expansive set of rights, but also more responsibilities. Local zoning, building and health codes along with other land use regulations impose responsibilities on owners . . . or otherwise place limitations on the use of an owner occupied property.”).



As demonstrated above, the demand for moderately priced rental units exceeds supply in many parts of the United States. This gives landlords enormous leverage over low to moderate-income rental households, and puts such tenants at a severe disadvantage when trying to bargain for long-term rental security. Thus many tenants are vulnerable to eviction on thirty days notice at the end of their leases.<sup>122</sup> Indeed, a study completed in 1999 found that more than 97% of all private market residential leases (outside jurisdictions with rent regulation<sup>123</sup>) are for 1 year or less.<sup>124</sup>

Given the failure of the market to provide sufficient affordable and stable rental units, it is understandable that many families overstretched their budgets in the past 15 years to purchase a home.<sup>125</sup> One recent study demonstrated the relationship between the lack of affordable and stable rental options and the demand for homeownership by proving that households use homeownership to insure or “hedge” against predicted increases in future rent payments.<sup>126</sup> The authors

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<sup>122</sup> See Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL’Y DEBATE 461, 463 (“[F]ew lower-income tenants have leases, and if there is no lease . . . a landlord can evict without stating a reason, with only 30 days’ notice.”); Apgar 2004, *supra* note 5, at 56 (“[M]any families with children presumably would also value a chance to remain in their rental apartment for some time, but lacking a steady and secure source of income struggle to do so.”).

<sup>123</sup> In this paper I use the term “rent regulation” to refer generally to local and state laws which restrict the ability of landlords to raise rents. Thus rent regulation includes rent control, rent stabilization, rent restrictions and the like.

<sup>124</sup> See David Genesove, *The Nominal Rigidity of Apartment Rents* 16, tbl.7 (Nat’l Bureau of Econ. Research, Working Paper No. 7137, 1999), available at <http://www.nber.org/papers/w7137> (using data obtained from the Property Owners and Managers Survey).

<sup>125</sup> See Apgar 2004, *supra* note 5, at 5 (“[M]any low-wealth and low-income families are being ‘pushed’ into homeownership, not necessarily because they fully appreciate the implications of their choices, but because they perceive (or rather hope) that homeownership in and of itself will help them achieve a better life.”).

<sup>126</sup> Todd Sinai & Nichola S. Souleles, *Owner-Occupied Housing as a Hedge Against Rent Risk*, 120 Q. J. ECON., 763 (2005); see also Fennell,

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 93

summarized their findings by saying that “the rent-hedging benefit substantially increases the demand for owner occupied housing, for the population as a whole and especially for the elderly.”<sup>127</sup> This study, together with the inadequacy of the rental options available to households at the lower end of the socio-economic scale, suggest that improving the availability of affordable and stable rental options would reduce the demand for homeownership among such households. While such reduced demand is inconsistent with housing policy of the past 20 years, it is exactly the right response to the current foreclosure crisis.<sup>128</sup>

## V. RENTAL STABILITY PROGRAM PROPOSED

Now is the time for policy makers to implement new protections for rental households. The growing crisis for families seeking affordable and stable rental options makes this a crucial imperative. The harder question to answer is what kind of rental protections are needed and what effect such protections will have on the overall market for rental housing. In drafting my proposal, my fundamental goal is to create increased opportunities for renters to obtain some meaningful measure of security in their tenure. Achieving stability of an infinite duration, as promised by homeownership<sup>129</sup> (the present

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*supra* note 8, at 1054–55 (“A much-cited advantage of owning a home is the element of price protection it provides. In housing markets without rent control, tenants face significant uncertainty about how much their current housing will cost in future periods.”).

<sup>127</sup> Sinai & Souleles, *supra* note 126.

<sup>128</sup> See JOINT CTR. FOR HOUS. STUDIES 2009 at 25 (advocating for “new recognition of the risks that homeownership brings” and suggesting that now is a good time “to rethink federal affordable housing policy, which has until recently strongly favored homeownership programs”). Cf. Joseph Williams, *President Shifts Focus to Renting, Not Owning*, BOSTON GLOBE, Aug. 16, 2009 (quoting Massachusetts Representative Barney Frank as stating that “the American dream should be a home—not homeownership”).

<sup>129</sup> See Fennell, *supra* note 8, at 1056 (“In contrast [to renters], all homeowners possess something very valuable—the option to remain in their current homes for as long as they wish, provided they make the necessary mortgage and tax payments.”).

foreclosure crisis notwithstanding) is not my goal. Rather, tenants should have the *option* to enter into leases for a minimum of 5 years, and have rights to renew leases at reasonable rental increases for some certain amount of time, I propose ten years, absent certain changed or exigent circumstances on the landlord's side.<sup>130</sup>

#### *A. Rental Stability Program Detailed*

The Rental Stability Program (hereinafter "the RSP") I propose for states and localities to consider<sup>131</sup> has a basic structure akin to the rent stabilization regime currently in effect in New York City,<sup>132</sup> with some important differences that seek to accomplish my goals of increasing rental stability without undermining the basic market incentives for landlords. Under the RSP, landlords of buildings with more than 5 rental units would be required to register their rental units with an administrative body at an initial rent set only by the market. Landlords would be required to offer tenants the option to lease for terms of at least 1, 2 or 5 years.<sup>133</sup> No matter which term of

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<sup>130</sup> See Apgar 2004, *supra* note 5, at 56 ("To help families maintain longer term occupancy, and make better use of available support services, it would be useful to create model landlord tenant laws that include clearly articulated and easily enforceable residential leases designed to promote longer-term, more stable occupancy.").

<sup>131</sup> As detailed *infra* in Section V, my proposal would require enabling legislation at the state level, and then be subject to adoption (or not) by municipal governments. Since RSP is designed to be appropriate in a number of urban housing markets, some of its parameters are subject to change as dictated by choices by state and local governments.

<sup>132</sup> For an introduction to New York City's rent stabilization regimes, see TIMOTHY COLLINS, AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM (New York City Rent Guidelines Bd. ed., 2006) (2001), *available at* <http://www.housingnyc.com/html/about/intro/toc.html>.

<sup>133</sup> With this requirement, I seek to adapt a small portion of the European model of residential leases to the American context. France requires a minimum lease term of 3 years for apartments owned by individuals, and 6 years for units owned by corporations, after which time the owner may

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 95

lease is chosen by the tenant, each year rent increases<sup>134</sup> would be allowed up to the maximum permitted by a rent guidelines board (hereinafter “RGB”), as is currently in place in New York City.<sup>135</sup> The RGB would consider all of the landlords’ legitimate costs in operating buildings (taxes and other fees, maintenance, utilities, labor, cost of capital) and calculate reasonable increases for the coming year.<sup>136</sup> Additional increases would be allowed based on needed repairs completed to the individual unit or the building. In addition to the rent increases to cover the landlords’ costs, the landlord would be permitted market-based increases at the earliest of the following points in time: (i) ten years after the initial lease date of that tenant; (ii) the commencement of the fourth consecutive lease renewal by the same tenant; and (iii) vacancy of the unit. At the end of the term of the lease, absent certain good cause factors, the landlord would be required to offer tenants a renewal lease with the same term options (1, 2 or 5 years). New tenants would have the exact same deal, that is, the initial rent would be set at market and the

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terminate the lease or get market rent increases. *See* Jane Ball, *Renting Homes: Status and Security in the UK and France: A Comparison In the Light Of the Law Commission’s Proposals*, 67 CONV. & PROP. LAW. 50 (2003); *see also* Andrea Carroll, *The International Trend Toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States*, 38 SETON HALL L. REV. 427, 440, 446 n.139 (2008) (discussing the reasons a French landlord can terminate a lease and describing a 1978 Landlord Tenant law which dictates that Italian leases cannot be less than 4 years).

<sup>134</sup> The rationale for annual rent increases is based largely on my interview with Marvin Markus, who explained that projecting costs more than one year in advance is purely speculative. It was this rationale, Markus stated, that led to a change in 1983 which limited the choice of New York City Rent Stabilized tenants to one or two years; prior to the enactment of the Omnibus Housing Act of 1983, tenants were given the additional option of choosing three year leases. Interview with Marvin Markus, Chairman, Rent Guidelines Bd. held at Markus’ offices at Goldman Sachs on June 1, 2009; *see* COLLINS, *supra* note 132, at 35 (stating legal change but not asserting rationale).

<sup>135</sup> For an introduction to the RGB in New York City, *see* generally COLLINS, *supra* note 132.

<sup>136</sup> For a list of factors the New York RGB considers, on which my proposal is based, *see* N.Y. Unconsol. Law § 26-510 (McKinney 2009).

tenant would have the option of a 1, 2 or 5 year lease, with annual increases set by the RGB.

To protect the settled economic expectations of certain classes of tenants who desire long-term stability, an integral part of the RSP is a new rental subsidy modeled loosely on New York's existing Senior Citizen Rent Increase Exemption.<sup>137</sup> Tenants under a specific income threshold, which I suggest be set at somewhere between 80-120% of the area median income,<sup>138</sup> would be entitled to a federally funded rental subsidy<sup>139</sup> to cover all rent increases from the initial registered rent (which include the allowable increase for that year as set by the RGB, as well as increases permissible for that specific building or unit due to improvements). In addition to the income

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<sup>137</sup> See N.Y. Unconsol. Laws. Law § 26-509 (Mckinney 2009); see also ANDREW SCHERER & FERN FISHER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK §4:305 (2008) (summary of SCRIE law).

<sup>138</sup> I suggest that the RSP rental subsidy be provided to households with incomes at or below 80–120% of Area Median Income (AMI) for the following reasons: First, for the 80% ceiling, HUD defines low income as households at or below 80% of AMI and any low income household should be included in the rental subsidy. A higher threshold of eligibility for the RSP rental subsidy may be appropriate for areas which have exceptionally high housing costs—for example, the City of New York Housing Development Corporation has programs targeting households with incomes at or below 130% of AMI, recognizing that in such an expensive city, higher income households still need assistance with housing expenses. See New York City Hous. Dev. Corp., *New Housing Opportunities Program—New HOP*, [http://www.nychdc.com/pdf/developers/new.hop.termsheet\\_2008.pdf](http://www.nychdc.com/pdf/developers/new.hop.termsheet_2008.pdf) (last visited Sept. 30, 2009) (term sheet for the 2008 “New HOP” program). As background, the website for Freddie Mac defines “Area Median Income” as follows: “Midpoint in the family-income range for a metropolitan statistical area or for the non-metro parts of a state. The figure often is used as a basis to stratify incomes into low, moderate and upper ranges.” Cf. Adams, *Homeownership*, *supra* note 60, at 577 (quoting Census Department definition of Median income: “the amount which divides the income distribution into two equal groups, half having incomes above the median, half having incomes below the median”).

<sup>139</sup> Cf. BRUCE KATZ & MARGERIE AUSTIN TURNER, RETHINKING U.S. RENTAL HOUSING POLICY 8–9 (Harvard University Joint Center for Housing Studies 2007) (suggesting new pools of housing vouchers, akin to Section 8, to address rental needs in high cost areas).

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 97

threshold, receipt of the RSP rental subsidy would be available only to households who do not already receive Section 8 or other rental subsidies, and who affirm in a sworn statement that (i) the rent exceeded 30% of the household's gross income for the year prior to lease renewal as reported on tax returns,<sup>140</sup> and (ii) they expected that the household's income would remain below the threshold income level for the coming year. Subsidies for the future years of the lease term would be subject to the tenant providing similar proof and affirmation to the RSP administrative entity. When the landlord takes a market based increase as allowed under the RSP (at the earlier of the fourth consecutive lease renewal or the tenth year from the date of the initial lease), then the rental subsidy would end. It may seem counterintuitive for the RSP rental subsidy to terminate at the point at which market based increases could be taken, since this is the very point at which households would be most vulnerable.<sup>141</sup> However, ending the rental subsidy at this point is consistent with the RSP's overall structure as a modest, time limited program which is designed to keep costs at a minimum.<sup>142</sup> The opposite policy of allowing the rental subsidy to continue indefinitely would require the government to subsidize potentially unlimited rent increases. This would lead to budgetary challenges as well as a possible erosion of public support.

*B. The Fine Print: Legal/Administrative Structure of RSP*

The RSP is shaped to adapt to many of the urban rental

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<sup>140</sup> Households spending more than 30% of gross income on housing expenses are considered "rent burdened." See SCHWARTZ, *supra* note 9, at 23.

<sup>141</sup> I would suggest that the RSP be accompanied with programs similar to those in effect in New York City protecting the elderly and disabled after RSP protections and subsidies expire. See generally COLLINS, *supra* note 127 (describing the New York City Rent Guidelines Board and Rent Stabilization System).

<sup>142</sup> See *infra* Section V.C.

housing markets throughout the United States.<sup>143</sup> There are important differences in these rental markets which impact not only whether a regime like the RSP is good policy, but also the exact contours the program should take.<sup>144</sup> These decisions are best left to state and local legislatures. Some of the pertinent differences include the density of the locality,<sup>145</sup> the kind and size of rental projects that exist in each community,<sup>146</sup> and, with

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<sup>143</sup> Even among some rent regulation defenders, there is some debate as to whether it should apply outside of New York City. Interview with Marvin Markus., Chairman, Rent Guidelines Bd., held at Markus' offices at Goldman Sachs on June 1, 2009). They point to New York City being unique in terms of the importance and expense of rental housing to that City. Ellen & O'Flaherty, *supra* note 52, at 19-36, offer an interesting discussion on this question. They review the statistics comparing New York City to the nation's nine other biggest cities as well as the nine other most dense cities in terms of percentage of persons who rent, the cost of housing, the length of the rentals, and the density. On the percentage of renters, with 70% New York City is at the top of the biggest cities, but is roughly equal to many smaller cities such as Patterson, Jersey City, San Francisco and Cambridge. Similarly, while New York City is near the top of the list in terms of cost of housing, it is not the highest and when compared with income, is more in the middle of the pack. The only 2 categories analyzed in which New York City is an outlier is the level of density, and the length that New York City households remain in their apartments. Thirty Five percent of New York City renters remained in their apartments between 1990 and 2000, while the comparable number for the U.S. as a whole was under ten percent. Notably, none of the other 9 biggest cities exceeded 18%, and none of the other 9 densest cities exceeded 23%. *See id.* at 32 & 51 tbl.711.

<sup>144</sup> There are a number of specific components of the rent stabilization portion of RSP that need fleshing out, for example whether to allow succession rights to units for cohabitating family members. As indicated *infra*, the time limited nature of the rent regulation makes these questions less crucial than under unlimited systems.

<sup>145</sup> *See* Ellen & O'Flaherty, *supra* note 52, at 31 (noting that localities might be more likely to try to promote residential stability in dense "residential environments [where the] development of trust and social capital among neighbors seems more critical").

<sup>146</sup> *See* JOINT CTR. FOR HOUS. STUDIES, State of the Nation, *supra* note 97, at 22 & tbl.W-7 (noting that less than 10% of rentals are in buildings with at least fifty units, more than a third of rental units are single-family homes, including condominiums, and more than half are in buildings with fewer than five apartments; also stating that "[s]ize is important because

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 99

respect to the households seeking rental accommodation, their ideal degree of mobility and economic make-up. For example, jurisdictions that have a very high percentage of owners and in which most renters are transitory or temporary may not want or need the RSP. On the other hand, these very communities many have pent up demand for rental units, which would emerge if more stable rental options were offered. Recall the study which found that more than 97% of all residential leases in non-regulated markets are for one year or less.<sup>147</sup>

Since states and localities would both be involved in implementing the RSP, legislative action at each level would be appropriate. I suggest state legislatures pass authorizing legislation that would enable, but not compel, localities to adopt the RSP within certain state prescribed programmatic parameters.<sup>148</sup> Local governments would then choose whether or not to adopt the RSP and if so, exercise discretion to choose the best program within the state prescribed parameters. In addition, I suggest that one state agency be designated as the regulatory authority for each of the localities in the state that adopt the RSP.<sup>149</sup> This would ensure consistent statewide application and enforcement of the RSP. That state agency could also supervise the RGB that sets annual cost based increases.<sup>150</sup>

In addition, the use of federal funds for the RSP rent subsidy requires a programmatic vehicle for distributing these funds. I

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[different sized] rental buildings differ systematically in location, year of construction, and types of households they attract”).

<sup>147</sup> Genesove, *The Nominal Rigidity of Apartment Rents*, *supra* note 124.

<sup>148</sup> *See, e.g.*, N.Y. Unconsol. Law § 8605 (McKinney's 2009) (better known as the Urstadt Law, which prevents the City of New York from enacting rent regulation in a manner more restrictive than that authorized by the New York State Legislature).

<sup>149</sup> In New York State, the Division of Housing & Community Renewal is charged with this role. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.1 (2009) (recognizing powers granted under Chapter 888 of the Laws of New York of 1985).

<sup>150</sup> As opposed to the practice in the State of New York, in which each locality with rent regulation has its own rent setting board, I would suggest one statewide RGB, with members appointed by the Governor, the tenant community and the landlord community.



would suggest that the RSP rental subsidy funds be distributed by HUD as a block grant to each state.<sup>151</sup> The amount provided to each state would be determined by the number of rental households in the state, a statistic gathered by the U.S. Census Bureau. States that choose not to implement the RSP could use the money for additional Section 8 Voucher Certificates, which are distributed to very low income households to assist in making rent payments.<sup>152</sup>

*C. RSP Evaluation & Discussion: Primary & Secondary Goals*

*1. Primary Goal*

As stated above, the fundamental goal of the RSP is to enable renting households to obtain more housing stability. How will the results of the RSP match this goal? First, all renters would have the option of longer lease terms, up to five years, with rights to renew absent good cause for eviction by the owner. Second, all renters would be protected from market based rent increases (and low to moderate income households who are rent-burdened would be protected from all rent increases) for the shorter of ten years and the initiation of the fourth consecutive lease renewal. Taken together, these first two results meet my primary goal of providing more stable options for renting households.

While the ten year limitation to the RSP's rent benefits would undoubtedly be a material hardship for some households, there are compelling reasons to design the RSP in this way. First, ten years of rent protection and rent subsidy (for eligible households) provides families and individuals with sufficient

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<sup>151</sup> HUD administers a number of block grant programs which provide grants to the states for certain prescribed uses, within which the states have discretion to choose individual projects. The original program was the Community Development Block Grant Program, enacted by Congress in 1974. See 24 C.F.R. 570.1 (2009).

<sup>152</sup> For a brief description of the Section 8 Voucher Program, see *supra* note 110.

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 101

time to settle in a community, attach roots, and begin to climb the economic ladder so that market-based rentals would not be out of reach.<sup>153</sup> If a family moved into the RSP protected apartment when a child was eight, in third grade, the family's housing would be protected until the child became 18 and scheduled to graduate from high school. Furthermore, most renting households, whether in jurisdictions with rent regulation or not, end up moving within ten years.<sup>154</sup> The reform of the federal welfare programs in the 1990's provides an apt analogy. These changes included eliminating a guarantee of eligibility for the main cash welfare program (Aid to Families With Dependent Children) as well as the addition or enhancement of other benefits, including job training, child care and other resources designed to enable recipient to gain increased economic independence.<sup>155</sup> By some accounts, these reforms helped push

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<sup>153</sup> Cf. Robert I. Lerman & Signe-Mary McKernan, *Promoting Neighborhood Improvement while Protecting Low-Income Families*, 8 URB. INST., OPPORTUNITY AND OWNERSHIP PROJECT 2 (2007), available at <http://www.urban.org/publications/311457.html> (proposing 10 years as length of guarantee for tenants of expected future benefits from renter insurance product, discussed further infra Section VI.A). A valuable addition to RSP, one wise commentator suggested to this author, would be a forced savings program to run contiguously during the ten year period of rental regulation and rental subsidy. This would help ensure that households were indeed more able to afford market rents. Cf. Gale, *supra* note 16, at 1180-81 (proposing savings program to encourage low and moderate-income households to save for down payments as a part of a complete overhaul of the federal mortgage interest deduction). While devising such a program is beyond the scope of this paper, I note that the Obama Administration proposed a similar concept as part of the 2010 Federal Budget as an alternative to the 401(k) employee savings plans. See Pat Regnier, *Why it's Time to Create an Auto-IRA*, CNNMONEY.COM, Feb. 27, 2009, <http://moneyfeatures.blogs.money.cnn.com/2009/02/27/why-its-time-to-create-an-auto-ira/>.

<sup>154</sup> See Ellickson, *Legal Constraints*, *supra* note 52, at 8 ("Over a ten year period, 83 percent of Chicago's renting households changed dwellings, compared to 65 percent of New York [City]'s."); see also William M. Rohe et al., *The Social Benefits and Costs of Homeownership*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY 13 (2001) (renters maintain their residences for a median duration of 2.1 years).

<sup>155</sup> See Ron Haskins, *What Works is Work: Welfare Reform and Poverty*

millions of Americans into the work force; they also took away much of the force of the conservative critiques of the existing federal welfare program.<sup>156</sup> Similarly, limiting the RSP rent regulation and rental subsidy to ten years would likely push households to increase economic self-sufficiency, thereby helping to assuage potential conservative critics of the RSP.<sup>157</sup>

More generally, the ten year limitation fits within the RSP's overall structure as a modest program designed to have an acceptably limited impact on the budget constrained federal government as well as the applicable rental markets.<sup>158</sup> The RSP is thus designed to work within the existing governmental and market parameters. The ten-year limitation thus increases the likelihood that an RSP type program will be adopted. The interest in rental housing demonstrated by the Obama Administration provides hope that the RSP will receive a sympathetic consideration in Washington.<sup>159</sup>

The RSP's ten-year limit on rent protection reveals another important point about what the RSP aims to achieve and what it doesn't. The RSP is not aimed at creating affordable housing and should not be judged on such grounds. Why not? Because, the RSP, and rent regulation generally, are not the proper tools for creating or maintaining affordable housing for the long term. While this is contrary to the arguments of some tenant advocates and scholars,<sup>160</sup> rent regulation regimes (including the RSP) are

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*Reduction*, 4 NW. J. L. & SOC. POL'Y 30 (2009).

<sup>156</sup> See *id.* at 46.

<sup>157</sup> The ten year limitation would help assuage the conservative critiques of government funded subsidy programs which are of an infinite duration. See, e.g., the critiques coming from Ronald Utt of the Heritage Foundation, objecting to Public Housing and Section 8 benefits as creating "a culture of dependency that doesn't encourage families to work or to improve their lot in life." Benson, *supra* note 2, at 4.

<sup>158</sup> The importance of the ten year limitation to RSP's limited impact on markets is discussed more below.

<sup>159</sup> See Joseph Williams, *President Shifts Focus to Renting, Not Owning*, BOSTON GLOBE, Aug. 16, 2009 (detailing Administration's plans to use stimulus funds to create more rental housing affordable to low and moderate income households).

<sup>160</sup> See Chester Hartman, *Evictions: The Hidden Housing Problem*, 14

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 103

too blunt to achieve the narrow tailoring that the most effective affordable housing programs demand.<sup>161</sup> For example, empirical studies of New York City's rent regulation have found that households with higher incomes are more likely to live in rent regulated housing as compared with low income households.<sup>162</sup> The fact that wealthy households benefit from rent regulation in addition to, or even more often than, poor households, does not necessarily mean that that rent regulation should be discontinued. Rather, it means that proponents of rent regulation (and the RSP) must be able to identify important goals served by such programs other than income redistribution.<sup>163</sup> In this case, the RSP serves the crucial goal of increasing tenant stability.<sup>164</sup> The RSP is favorable to usual rent regulation schemes because it has a more limited effect on the overall rental market and because it features a federally funded rental subsidy which is restricted to low to moderate income households.

While the RSP is not an affordable housing program, I strongly support increased funding of the Section 8 Voucher Program and other programs which enable low to moderate

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HOUSING POL'Y DEBATE 461, 463 (2003).

<sup>161</sup> See Edgar Olsen, *Is Rent Control Good Social Policy?*, 67 CHI. KENT L. REV. 931, 938-40 (1991) (detailing studies showing that benefits of rent regulation accumulate differently to different classes of people, and concluding that due to such random effects, rent regulation "has no merit as a redistributive device").

<sup>162</sup> See Ellen & O'Flaherty, *supra* note 52, at 9; see also Barros, *supra* note 62, at 288.

<sup>163</sup> Ellen & O'Flaherty, *supra* note 52, at 28 (identifying income redistribution as one of the usual reasons for housing policy).

<sup>164</sup> This is the view of Marvin Markus, chair of the Rent Guidelines Board of New York City, who recently stated that New York City's Rent Stabilization regime is important as a "guarantee of tenure system . . . its basic premise is not affordability. It is to protect the tenant in occupancy from illegal and large-scale gouging." See Eliot Brown, *Rent Board Chief Marvin Markus Pleads for 'Rationality'*, N.Y. OBSERVER, May 18, 2009, available at <http://www.observer.com/2009/real-estate/rent-board-chief-marvin-markus-pleads-rationality>; see also Greg Smithsimon, *Rent Regulation: The Right Tool for the Right Job*, PLANETIZEN, May 14, 2007, <http://planetizen.com/node/24451> (suggesting that rent regulation's purpose is to provide housing stability not affordable housing).

income households obtain decent housing at rents they can afford.<sup>165</sup> Recent budget proposals and public statements by HUD Secretary Donovan indicate that more resources for rental housing are forthcoming.<sup>166</sup> Increasing the strength of programs like the Section 8 Voucher Program is the ultimate answer for those households that are forced to move from the RSP-covered housing after the ten years and are unable to afford market rentals in acceptable areas.

## 2. Secondary Goal

Now I move to an evaluation of how the RSP serves my secondary goal, which is avoiding excessive distortions in rental housing markets and thereby maintaining market-based incentives for landlords. The formulation of this goal is partially based on sensible critiques of rent regulation.<sup>167</sup> More

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<sup>165</sup> See generally Ed Koch & Robert Weiner, *Renters Across America Need More Help from Congress*, DAILY NEWS (New York City), July 5, 2009, available at [http://www.nydailynews.com/opinions/2009/07/05/2009-07-05\\_renters\\_across\\_america\\_need\\_more\\_help\\_from\\_congress.html#ixzz0KTdnOBHC&C](http://www.nydailynews.com/opinions/2009/07/05/2009-07-05_renters_across_america_need_more_help_from_congress.html#ixzz0KTdnOBHC&C).

<sup>166</sup> See, e.g., Eugene Gilligan, *90-Degree Turn: Stimulus Package Redirects Housing Efforts to Affordable Rentals*, MULTI-HOUSING NEWS, Apr. 14, 2009 (describing how \$13 billion in stimulus money is going to HUD's budget, including \$2.3 billion in the Tax Credit Assistance Program which will go to fill gaps in budgets for low income rental construction and rehabilitation projects); Sule Aygoren Carranza, *Experts Look at Housing Under Obama Administration*, GLOBEST.COM, Jan. 26, 2009, at 3, [http://www.globest.com/news/1332\\_1332/insider/176529-1.html](http://www.globest.com/news/1332_1332/insider/176529-1.html) (discussing inclusion in stimulus bill of substantial resources to address multifamily rental housing); Secretary Shaun Donovan, 2009–10 Housing and Urban Development Budget (May 7, 2009) (stating that for too long there has been a federal homeownership policy at expense of a federal policy aimed at affordable rentals and detailing an increase in federal money for rental program, including increased Section 8 voucher funding).

<sup>167</sup> See, e.g., Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741 (1988). Epstein's piece was the seminal article which drew 7 response papers, all printed in a volume of the Brooklyn Law Review. See *id.* at 1215–80; see also William Tucker, *How Rent Control Drives Out Affordable Housing*, Cato Institute Policy Analysis

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 105

specifically, the consequences I seek to avoid or at least minimize with the RSP include the following: (i) disincentivizing the creation and maintenance of rental housing;<sup>168</sup> (ii) creating

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No. 274 (May 21, 1997), available at <http://www.cato.org/pubs/pas/pa-274.html> (stating that cities that do not use rent control policies are “rewarded with a normal competitive housing market in which housing is available at every price level but [t]hose cities that succumb to the disease of rent control are doomed to never-ending, house-to-house warfare over an ever-diminishing supply of unaffordable housing”); Michael H. Schill, *Comment on Chester Hartman and David Robinson’s Evictions: The Hidden Housing Problem, Protection or Protraction?*, 14 HOUSING POL’Y DEBATE 503, 513 (2003) (to properly address society housing problems, reforms must work with the market system, and not it against it); *c.f.* Andrea B. Carroll, *The International Trend Toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States*, 38 SETON HALL L. REV. 427, 446 n.139 (2008) (making the case against adopting good cause requirements for eviction, which are often but not always accompanied by rent regulation). *But see* Margaret Jane Radin, *Residential Rent Control*, 15 PHILOSOPHY & PUBLIC AFFAIRS 350, 365 (Autumn 1986) (“A tenancy, no less than a single-family house, is the sort of property interest in which a person becomes self-invested; and after the self-investment has taken place, retention of the interest becomes a priority claim over curtailment of merely fungible interests of others.”). *But see* Michael J. Mandel, *Does Rent Control Hurt Tenants?: A Reply to Epstein*, 54 BROOK. L. REV. 1267, 1273–74 (“It seems clear that rent control is not a perverse public policy which hurts everyone. There are winners and there are losers, and it is important to identify who is who. On the landlord side the losers are people who owned rental housing at the time the original rent control law was passed, and the winners are builders of new apartments . . . . On the tenant side, the elderly and long-term stable households benefit from the low levels of their original rent. People just entering the rental market and renters who move frequently tend to pay higher rents . . . or face long housing searches. Often this means that low-income households do not receive as much protection from rent regulation.”); Alyssa Katz, *OUR LOT: HOW REAL ESTATE CAME TO OWN US* 189 (2009) (“[I]t’s impossible to make a blanket case for or against rent control . . . the success or failure depends on gathering good information, exercising the political will to calibrate the annoying details of administration and taking leadership to reconcile conflict.”); Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) (property decisions involve “plural values” and cannot be “adequately understood or analyzed through a single metric”).

<sup>168</sup> See Epstein, *supra* note 167, at 763–67 (criticizing rent control

rules that are difficult for governments to administer or for owners and tenants to understand and comply with;<sup>169</sup> (iii) creating opportunities for abuse, or for shadow rental markets to emerge; and (iv) incentivizing landlords and tenants to dispute and litigate.<sup>170</sup>

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regimes for, among other reasons, creating disincentives for housing production and maintenance); *see also* Tucker, *supra* note 167, at 162. However, the empirical case regarding the effects of rent regulation on new construction and housing maintenance are disputed. *See* Ellen & O’Flaherty, *supra* note 49, at 24 (citing various studies and concluding that “models that forecast the effects of rent control and rental subsidies on the costs of . . . uncontrolled rental housing . . . are extremely complex and do not give unambiguous answers”); J. Gilderbloom & R. Appelbaum, RETHINKING RENTAL HOUSING 57–67 (1988) (citing numerous studies of landlord behavior and rental housing markets and finding a minimal effect of rent regulation on levels of new construction and maintenance of existing housing); Kenneth K. Baar, *Would the Abolition of Rent Controls Restore A Free Market*, 54 BROOK. L. REV. 1231, 1232–33 (1989) (citing numerous studies from the 1970s and 1980s, including many commissioned by governments, and concluding that the reports that included data “on new apartment construction in rent controlled jurisdictions have been mixed in their conclusions”); Olsen, *supra* note 163, at 942–43 (“[T]he effect of rent control on the maintenance of the controlled [housing] stock is ambiguous on theoretical grounds . . . [and] the empirical literature contains no compelling evidence.”); Collins, *supra* note 133, at 22 (finding that “New York [City’s] two great housing booms . . . occurred during periods when strict rent controls were imposed on existing units”); *see also* Peter D. Salins, *Reflections on Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 775, 779 (1988) (opponents of rent regulation who make this argument [as to inefficiency] have also relied too heavily on theory, and too little on empirical proof); *see also id.* at 780 (“[N]o one has yet discovered the research design that will succeed in definitively making the deregulation case.”).

<sup>169</sup> For an example of a well intentioned scheme that may be administratively difficult *see* Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 307 (2006) (suggesting that, when considering an eviction, a decision maker evaluate various prescribed factors to assess the degree to which a subsidized tenant considers a dwelling to be a home and if so indicated, “the burden should shift to the opposing stakeholder to justify the basis for eviction”).

<sup>170</sup> *See* Michael J. Mandel, *Does Rent Control Hurt Tenants? A Reply to*

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 107

For this secondary goal, avoiding the above-described unintended consequences, the RSP serves its purpose well, albeit not perfectly. Generally, the RSP seeks to combine the best aspects of existing rent regulation systems and rental subsidy programs, with certain additions suggested by the commercial leasing framework, specifically longer lease options with periodic step up rent increases. Specifically, the RSP would avoid unintended consequences by creating a stock of rental units priced at or near market rents. Units would be priced at or near market because under the RSP landlords could take market increases, at a minimum, every ten years, as well as annual increases to cover increased costs in maintaining and improving their buildings. The protection for tenants is from market increases during their tenancy, up to their fourth lease renewal or ten years. By making the rent regulation time limited and subjecting all units in a jurisdiction to its purview, the RSP

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*Epstein*, 54 *BROOK. L. REV.* 1267, 1271 (1989) (“I agree with Epstein that rent control leads to increased litigation between landlords and tenants. In fact, the primary negative effect of rent regulation, from the viewpoint of landlords, seems to be that it enmeshes them in a bureaucracy designed to regulate housing prices, housing quality, and landlord-tenant relations.”). Other critiques of rent control include the following: (i) it leads to the misallocation of space (see Edward L. Glaeser & Erzo F.P. Luttmer, *The Misallocation of Housing Under Rent Control* (Nat’l Bureau of Econ. Research, Working Paper No. 6220, October 1997); Richard A. Epstein, *Rent Control Revisited: One Reply to Seven Critics*, 54 *BROOK. L. REV.* 1281, 1289-90 (1988); (ii) that it is arbitrary, (iii) difficult to remove once enacted and introduces politics into housing markets; and (iv) that it is a poor toll for redistributing wealth. My response to these potential critiques of RSP is as follows: (i) I agree that households which change in size during the ten year maximum of rent regulation will have incentives to keep the unit and not move to the appropriate sized unit, but given the important goals served by RSP and the time limitation of this incentive, I am not terribly concerned; (ii) RSP, by incorporating an income restricted rental subsidy, attempts to address this arbitrariness; (iii) while it is important to consider the political economy of rent regulation systems, as Epstein reminds us, like (i) above, in light of the important goals furthered by RSP, ultimately this should not stop any jurisdiction from adopting such a regime; (iv) I agree but as described above, RSP is not aimed at wealth distribution but rather household and neighborhood stability.



would eliminate much of the difference in rents charged to existing and new tenants. This is an important and positive change to most existing rent regulation schemes, since it reduces the current incentives for landlords to harass tenants into leaving. The decreased harassment would likely reduce the amount of landlord-tenant litigation, which in turn would reduce the state's administrative burden. Similarly, the ten-year limit on rent regulation would greatly reduce the benefit of passing the housing unit to a relative, and therefore the battles over succession rights would be reduced. In addition, in another positive change for landlord tenant relations, the RSP's rent subsidy for income and rent-burdened households would come at the expense of the federal government and not landlords. Finally, as an ancillary benefit, the federal funds for the RSP rental subsidies would take one step towards achieving a more balanced allocation of federal benefits allocated to renters and owners.

#### *D. RSP: Addressing Critiques & Concerns*

The most basic question is why the RSP is needed. If it were true, as Richard Epstein asserted in 1989, that those seeking increased residential stability could simply purchase homes instead of renting,<sup>171</sup> then this would be a short paper indeed. However, Epstein made this assertion prior to the foreclosure crisis, and I am not sure that he would repeat the statement today.<sup>172</sup> It is evident from my arguments thus far that there are

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<sup>171</sup> See Epstein, *supra* note 167, at 1293 ("So long as the market is well functioning, then persons who desire to have long-term attachments to property can buy instead of rent.").

<sup>172</sup> However, Epstein has stated that much of the expense of housing results from unneeded and unconstitutional government interference in the housing market through building codes and zoning restrictions. See Epstein, *supra* note 9, at 1287. It is possible that Epstein would argue that, free of such constraints, the market would produce housing at all price points. While such an assertion has a certain ideological appeal for Epstein, it would mean that government would allow housing to be of questionable quality and standard. See SCHWARTZ, *supra* note 9, at 37 ("It is not certain that the

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 109

a certain percentage of households that simply do not have the economic ability to be homeowners, no matter their desire for stability.<sup>173</sup>

The more nuanced question is why renters who desire increased stability do not negotiate for longer lease terms. There is some disagreement among wise minds on this question. Robert Ellickson asserts that landlords cannot find tenants to take the longer leases,<sup>174</sup> while Professors Fennell & Roin posit that landlords are fearful of such arrangements since tenants have significantly less at stake to hold them to the lease terms, specifically just a security deposit, while landlords are compelled to comply by the tenants' presence and the availability of court protection.<sup>175</sup> Neither Ellickson nor Fennell & Roin cite empirical findings to support their respective propositions but I am inclined to join Fennell & Roin on this point, especially with respect to tenants at the lower-end of the economic spectrum. As

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removal of such [building code] restrictions would make housing affordable to the lowest income households . . . society may not accept the changes in building and community standards that would be necessary if housing costs were to be reduced to such levels.”). The regulation of single room occupancy or “flophouse” hotels in New York City and San Francisco in the 1970s is one example of the tensions governments must weigh between trying to improve housing conditions and eliminating the market altogether. See Supportive Housing Network of NY, What is Supportive Housing? *available at* [http://www.shnny.org/what\\_is\\_history.html](http://www.shnny.org/what_is_history.html) (“SRO hotels in New York City were particularly vulnerable to conversion or demolition because of a city tax abatement program . . . [which] created incentives for converting SRO units into market-rate apartments, commercial hotels, or offices. Federal urban renewal programs like Title I also led to the condemnation and demolition of the SRO stock, particularly in midtown Manhattan.”).

<sup>173</sup> See *supra* Part IV.B.

<sup>174</sup> See Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 951 (1991) (“A residential tenant could also stave off the risk of a rent increase by negotiating a long-term lease; in practice, however, residential landlords, not tenants, typically push to lengthen leases.”).

<sup>175</sup> See Lee Ann Fennell & Julie Roin, *Controlling Residential Stakes* 15 (Univ. of Chicago Law Sch., John M. Olin Law & Econ. Working Paper No. 477, 2009), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1452887](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1452887) [hereinafter Fennell & Roin, *Controlling*].

demonstrated in Section IV, because of the disparities in supply and demand, low-income tenants have little leverage for decent units priced at rents they can afford. Therefore, I suspect that the landlords are dictating the lease terms in such cases. This strongly implies that landlords are reluctant to enter into longer-term leases, since 97% of the leases in non-regulated markets are for less than a year.<sup>176</sup>

RSP would also face critiques from scholars, like Ellickson who have questioned the need for rent protection to increase rental stability. Ellickson states, “[r]ather than opportunistically exploiting tenants who have put down roots, landlords instead seem to give them price breaks.”<sup>177</sup> While it makes sense for landlords to give some price break to long-term tenants who are proven reliable, public policy cannot rely on such whimsical and haphazard protection for a matter as dire as rental stability. Indeed, if we could rely on landlords to maintain reasonable rents for long-term tenants, landlords would not object to current “moderate” rent regulation statutes, which allow for periodic rental increases.<sup>178</sup> If Ellickson’s statement were the full story,

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<sup>176</sup> See Genesove, *supra* note 124, at 123. It does seem reasonable that some rental households are reluctant to sign long term leases, which require them to pay for the unit without any “out” clause for changed economic or personal circumstances. This assumed reluctance on the part of tenants might be somewhat addressed by having the rental subsidy proposed by RSP for income challenged tenants, as well as having reasonable rights to assign and/or sublease the unit. For RSP, I would incorporate the New York State Real Property Law Section 226-b. This law provides that a residential tenant may not assign his/her lease without the written consent of the owner, unless the lease expressly provides otherwise. It also provides that a tenant has the right to sublet his/her apartment, even if subletting is prohibited in the lease, provided that the tenant complies strictly with the provisions of the statute, which requires detailed notice to owner. N.Y. REAL PROP. LAW § 226-b (2006).

<sup>177</sup> See Ellickson, *supra* note 174, at 951 (“Contrary to their unsavory reputations, residential landlords are not apt to jack up the real rents charged sitting tenants. Olsen cites five studies that indicate that longtime tenants tend to pay *lower* rents than do more recently arrived tenants who move into comparable housing units.”).

<sup>178</sup> See Mandel, *supra* note 165, at 1269–70 (distinguishing “strict” rent control systems “which do not allow pass-throughs of rising operating costs,

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 111

rent regulation would simply enforce what landlords would be doing anyway. The vehemence of the landlord's objection to rent regulation disproves this potential objection to the RSP.

Landlords subject to rent regulations that currently exempt new units from regulation<sup>179</sup> would, at least initially, object to the RSP requirement of having rents on new units regulated. However, this is a crucial feature of the RSP since it would result in substantially one class of tenants and owners, eliminating the two tiered or "shadow markets" phenomenon occurring under rent stabilization that Epstein and others decry.<sup>180</sup> More nuanced critics and landlords will focus not on the fact of regulation, but the nature of regulation. Under the RSP all units must be registered and the initial rents will be set *by the market*. Similarly, at year ten, or when the tenant vacates or initiates his or her fourth lease renewal, the landlord would be able to take a market increase. In between day one and year ten (at the latest), landlords could take increases for increased costs and repairs. While far from the unregulated market preferred by Epstein and the landlord lobby, the RSP does not impose unreasonable controls.

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[resulting in landlords finding that] it may become unprofitable to maintain or even keep the building, which leads to abandonment" and "moderate" rent control, which "allow[s] regulated rents to rise with inflation and increased operating costs" noting that moderate rent control laws are much more common than strict rent control and not bad policy); *see also* GILDERBLOOM & APPELBAUM, *supra* note 168, at 128–132 (distinguishing "strict" rent control which sets price limits without guaranteeing any right of return from moderate rent control, as defined by Mandel, and "strong" rent control, which was in effect in the 1980s in Santa Monica, Berkeley and West Hollywood, which allow increases lower than the Consumer Price Index and no vacancy decontrol).

<sup>179</sup> Most current regulation programs exempt new construction from regulation. This includes the programs in New York City, as well as all of the California jurisdictions which have rent regulation. *See* Katz, *supra* note 5, at 192.

<sup>180</sup> *See* Epstein, *Rent Control Revisited*, *supra* note 170, at 1287 ("[I]t is not possible to run a well-functioning two-tiered market, with some deregulated and some regulated units."); *see also* Tucker, *supra* note 167, at 3–4 (discussing shadow markets).

This leads us to consider another likely critique from landlords in jurisdictions with no rent regulation or good cause eviction laws. Such landlords could object to the interference of government in their market. However, the RSP rests on solid legal and programmatic precedent.<sup>181</sup> Operating residential rental housing in urban areas is a highly regulated enterprise, whether or not rent regulation applies. Governments must be finely attuned to the external effects of land uses, given the high levels of density in urban areas.<sup>182</sup> Therefore, owners of such properties are familiar with government regulation in a number of contexts.<sup>183</sup> Almost all owners are subject to building code regulations and most are subject to zoning constraints as to the type of building and size of buildings that are allowed.<sup>184</sup> In addition, several states and many localities restrict owners' rights to evict only for prescribed "good cause."<sup>185</sup> Finally, many states and localities restrict owners' ability to convert units to condominium or cooperative status.<sup>186</sup>

Finally, there is no doubt that the RSP will come with administrative costs. My proposal suggests that, in order to ensure consistent statewide application, each state designate an agency as the regulatory authority for each of the localities that

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<sup>181</sup> See *Block v. Hirsch*, 256 U.S. 135 (1921) (upholding Washington D.C. rent regulation scheme from constitutional attack); *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (following *Block v. Hirsch*); *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993) (citing *Block v. Hirsch* as good law).

<sup>182</sup> See *Ellen & O'Flaherty*, *supra* note 52, at 31 (noting that localities might be more likely to try to promote residential stability through regulation in dense "residential environments [where t]he development of trust and social capital among neighbors seems more critical").

<sup>183</sup> See *Apgar 2004*, *supra* note 5, at 10 ("[T]enant/landlord laws and regulations govern the obligation of the property owner to meet certain standards of service provision and process concerning . . . eviction . . . . [Also] zoning, building and health codes along with other land use regulations impose responsibilities on owners . . . or otherwise place limitations on the use of an owner occupied property.").

<sup>184</sup> See *Baar*, *supra* note 168, at 1234–35.

<sup>185</sup> See *Roisman*, *supra* note 73, at 834–35.

<sup>186</sup> See 15A AM. JUR. 2D *Condominiums* § 16.

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 113

adopt the RSP. Said state agency would also supervise the RGB that sets annual cost based increases. The exact costs to state government in administering the RSP would depend on a variety of factors, including the number and population size of the localities which adopt the RSP, the number of complaints and disputes to be adjudicated and other factors. It is likely that there would be a fairly significant amount of resources needed at the commencement of the RSP; from then on a professional staff at the agency would likely suffice. Localities could consider funding the RSP through user fees assessed against landlords and/or tenants, or through general purpose tax revenues.

When calculating whether to adopt the RSP, sophisticated states and localities would focus on the potential benefits in addition to the administrative costs. The benefits of the RSP would be increased stability for tenant households and the accompanying spillover benefits to the surrounding communities. These include an increase in citizen participation in the community, better maintenance of their houses, and lower rates of neighborhood crime.<sup>187</sup>

In conclusion, the goals served by the RSP—increasing tenant and neighborhood stability—outweigh the costs and potential inefficiencies of the program.

## VI. ALTERNATIVES TO THE RSP

Happily, I am far from alone in concluding that the current state of housing policy needs substantial revision to assist rental and owner households. Below are three examples of innovative new approaches to housing policy formed in response to the current crisis. While all three offer some improvement over the current system, I argue that they all fall short of the RSP in terms of alleviating housing instability.

### *A. Rental Insurance*

Robert Lerman & Aigne-Mary McKernan have promoted the

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<sup>187</sup> See *supra* Section II.C.

development of a financial risk or hedge product, which would enable renters to buy protection against future rent increases, based on some composite index of rents in the applicable neighborhood or market.<sup>188</sup> Their approach builds on the work of Robert Shiller, who assisted in developing markets which enable homeowners and other traders to purchase and sell insurance tied to reductions in area house prices.<sup>189</sup> Lerman & McKernan seek to extend such a concept to renters.

The authors argue that such an approach is preferable to rent regulations or rent subsidies. They cite the usual arguments against rent regulations, namely that such regulation reduces property owners' incentives to maintain property and to invest in added housing thereby "inducing shortages and higher prices for uncontrolled units." As to rent subsidies, the authors object to the fact that subsidies in gentrifying neighborhoods will exceed those in lower income areas. They argue that their approach "improves on rent control and some subsidy approaches by divorcing the compensation (for area rent increases) from the renter's subsequent choice of locations."<sup>190</sup>

The idea proposed by Lerman & McKernan has a number of elegant features. Most notably, after the market for such rental insurance is created and perfected, government's role can be relatively minor. Indeed, regulating the market for such a product should be much less involved than the administrative role under the RSP in setting rent increases, monitoring compliance and settling disputes. Furthermore, it creates no incentives for conflict between landlords and tenants.

For all its theoretical advantages, however, the proposed rental insurance product raises a number of unanswered questions and concerns. First, who would pay for such a product

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<sup>188</sup> See Robert I. Lerman & Signe-Mary McKernan, *Promoting Neighborhood Improvement while Protecting Low Income Families*, 8 URBAN INST., May 2007, available at [http://www.urban.org/UploadedPDF/311457\\_Promoting\\_Neighborhood.pdf](http://www.urban.org/UploadedPDF/311457_Promoting_Neighborhood.pdf).

<sup>189</sup> See Robert Schiller, *Mortgages of the Future*, N.Y. TIMES, Sept. 21, 2008, available at <http://www.nytimes.com/2008/09/21/business/21view.html>.

<sup>190</sup> See Lerman & McKernan, *supra* note 188, at 2.

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 115

for low and moderate-income households?<sup>191</sup> Second, the complexity of the product proposed is worrisome.<sup>192</sup> The product seems difficult to create: it requires an extremely accurate measure of rents down to a fairly granular level—zip code. It is questionable whether reliable data for this index currently exists. Even more problematic, the complexity of the product seems to limit its usefulness for the intended beneficiaries, at least those without a high degree of financial sophistication. As we have seen from the subprime mortgage example, devising complex financial products for low to moderate-income households regarding their housing situation is fraught with risk. In this case, the success of the insurance product depends on renters choosing the right amount of coverage—not an easy task.

Perhaps these concerns can be addressed. For now, it suffices to say that the RSP is a more viable program. No new markets or inventions are needed and the households that are the intended beneficiaries will be protected by a legal system that is administered by a government agency specifically charged with its enforcement.

*B. Requiring Good Cause For Eviction*

In her recent article,<sup>193</sup> Florence Roisman identifies the lack of restriction on landlords' abilities to evict or fail to renew leases as the primary problem for tenants. She advocates for courts, through common law contract doctrines, to enact a requirement that landlords have good cause before evictions. She notes that protected tenancies should not be restricted to those who can "negotiate long-term leases" but to all.<sup>194</sup>

Roisman clearly shares my goals of providing additional stability for rental households, however, she does not address

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<sup>191</sup> See Fennell & Roin, *Controlling*, *supra* note 175, at 19.

<sup>192</sup> See *id.* at 19-22 (attempting to develop the proposal that Lerman & McKernan sketched out, acknowledging a number of unanswered questions and logistical difficulties).

<sup>193</sup> Roisman, *supra* note 73.

<sup>194</sup> *Id.* at 829.



whether or how tenants would be shielded from eviction resulting from an inability to pay for rent increases. The RSP incorporates Roisman's central point by requiring as an essential component that landlords have good cause to evict or fail to renew a lease. The RSP goes further by addressing the economic side of the equation: specifically the RSP offers all tenants a certain degree of rental protection for ten years, and to those who are low- to moderate-income and rent burdened, a subsidy to cover the allowable increases.<sup>195</sup>

### *C. New Models of Homeownership*

Lee Ann Fennell of the University of Chicago Law School has offered one of the most creative proposals aimed at reforming the current model of homeownership, called Homeownership 2 or H2.0.<sup>196</sup> H2.0 is designed to enable aspiring homebuyers to purchase a home but limit the extent of their investment (and risk of loss) to factors within the homeowner's control. Specifically, H2.0 seeks to allocate to homeowners the profit and loss properly tied to the condition

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<sup>195</sup> There are of course other rental models that could be considered. One interesting example is that of Sweden, described in detail in *One Nation's Dream, Another's Realty: Housing Justice In Sweden*, 22 BROOK. J. INT'L L. 63, 94-96 (1996). In Sweden, the government plays a much more significant role in the rental market than in the U.S., significantly more than even those jurisdictions under rent control. Construction and operation of most rental housing in Sweden is financed by the government and therefore the rent setting process and admissions process is heavily controlled by the government as well. Among other aspects, Swedish tenants are protected from eviction by good cause requirements and prospective tenants obtain newer apartments by waiting list. Furthermore, "[r]ents are determined on an annual basis pursuant to negotiations between the municipal housing corporations and tenants' associations." *Id.* at 94-95. Kenn finds much to admire in the Swedish model, but the amount of subsidies and degree of governmental involvement required do not make it a good fit for the current political and economic system in the United States. *See also* Roisman, *supra* note 73, at 856 ("The provision of decent, affordable housing for poor people is not an area for private enterprise. It is a government responsibility . . .").

<sup>196</sup> *See* Fennell, *supra* note 8.

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 117

and improvements made to the house and site-specific factors they can control. The risk and reward attributable to local off-site factors (schools, crime rates, neighborhood amenities) as well as broader economic risks (real estate prices, economic cycles) would be purchased by a market of investors.<sup>197</sup> Thus, Fennell envisions a new option for homebuyers—the right to purchase a home and keep the equity based on payments made and improvements to the house and site but to avoid the broader economic investment that is currently required.<sup>198</sup>

Fennell's proposal has a great deal of promise. I believe that she accurately posits that a significant percentage of prospective homebuyers would be interested in exchanging some of the potential upside of their home investment for a product that limits the potential downside as well. This is especially likely in turbulent real estate market cycles such as the current one. Indeed, if it could be perfected, H2.0 could be the kind of tool that gets prospective buyers "off the sideline" as has been the common refrain among real estate professionals and many

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<sup>197</sup> *See id.* at 1072.

<sup>198</sup> As Fennell discusses, H2.0 is a variation on a more traditional shared equity or shared appreciation type of homeownership program. *See id.* In such a program, a public or private entity contributes part of the upfront cost of purchasing a home. In exchange, such investor entity shares in any future house appreciation. Public investors, usually municipal governments, use such appreciation to enable low to moderate income households to purchase the house when it is put up for re-sale. *See id.* at 1064–66. In Australia, a privately created product called the Equity Finance Mortgage uses future house appreciation to replace monthly payments on a second position loan that is made to enable the household to afford the downpayment. *See* Equity Finance Mortgage, <http://www.efm.info/pdf/EFMBrochureV3.pdf> (last visited Sept. 30, 2009). When the household sells the property or refinances, it must repay the principal balance of the second loan plus up to a 40% share of any increase in the value of the property. *See id.* Other intriguing proposals to revise the current model of homeownership include Robert Schiller's idea of the continually adjusting mortgage. This mortgage product, to be offered by banks, would reduce defaults by automatically adjusting payments due each month according to fluctuations in the economic and real estate markets. *See* Robert Schiller, *Mortgages of the Future*, N.Y. TIMES, Sept. 21, 2008, available at <http://www.nytimes.com/2008/09/21/business/21view.html>.

economists in recent months. H2.0 has the additional promise of maintaining the economic incentives for homeowners to improve their property as well as the local conditions under their control. This adds a layer of sophistication to her proposal.

However, H2.0 does not seek to address the crisis experienced by millions of households who are seeking more affordable and stable rental options.<sup>199</sup> Indeed, by excluding rental housing from its purview, I fear that H2.0 continues the emphasis on homeownership as the Holy Grail for both household satisfaction and economic recovery. To achieve the balance between homeownership and rental programs, I would urge adoption of the RSP or other rental programs as a complement to H2.0.

#### CONCLUSION

Our current policies of prioritizing homeownership to the exclusion of the needs of rental households have failed. We as a society need to stop over subsidizing and promoting homeownership as the only model for successful American households. Changes to policy are particularly urgent now as millions of Americans have been forced from homeownership into rental housing as a result of the foreclosure crisis and the economic recession.

The RSP offers one step towards reclaiming an equilibrium in government preferences between homeownership and renting. By enabling households to achieve stability while renting, the RSP provides benefits for those households and also their neighbors and larger communities. While the specific contours of the RSP are subject to further conversation, this paper makes

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<sup>199</sup> Fennell and her colleague Julie Roin, propose revising the incentives for both renters and homeowners. They seek to right size the incentives of both understaked households, renters and homeowners with no or negative equity, and “overstaked” homeowners who oppose sensible zoning ordinances and other neighborhood changes. *See generally* Fennell & Roin, *Controlling*, *supra* note 175. The authors urge that local governments have an important stake in such “right staking” and, subject to state constitutional constraints, engage in such efforts.

*RETHINKING THE HOMEOWNERSHIP SOCIETY* 119

clear that the conversation regarding our national housing policy needs to be amended to include the needs of renters.