SCALING PRIVATE REMEDIES TO PUBLIC PROBLEMS: A RESILIENT PROPERTY THEORY ANALYSIS

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INTRODUCTION

In the middle of the twentieth century, the United States federal government got serious about delivering affordable housing to Americans.[1] Through a series of legislative initiatives that included urban clearance programs,[2] the creation of a housing administration agency,[3] and the deployment of publicly

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[1] *See, e.g.*, Lawrence J. Vale, *Public Housing in the United States: Neighborhood Renewal and the Poor*, *in* POLICY, PLANNING, AND PEOPLE 285, 288 (Naomi Carmon & Susan S. Fainstein eds., 2013); LAWRENCE J. VALE, RECLAIMING PUBLIC HOUSING: A HALF CENTURY OF STRUGGLE IN THREE PUBLIC NEIGHBORHOODS (2002); Lawrence J. Vale & Yonah Freemark, *From Public Housing to Public-Private Housing*, 78 J. AM. PLAN. ASS'N 379 (2012).

[2] *See* Berman v. Parker, 348 U.S. 26 (1954) (finding that, with the exception of the Fifth Amendment, legislative acts of regulation for redevelopment can be based in part on concerns over aesthetics and health); *see also* Ralph J. Johnson, *The Housing Act of 1949 and Health Department Programs,* 64 PUB. HEALTH REPS. 1331, 1331-33 (1949). The 1949 Housing Act sought to reform the health of the American people by addressing the habitability of housing. Urban redevelopment programs look to increase the standards of health and sanitation within various slums or indigent areas and were intended to be implemented by local health departments.

[3] Mary Barron, *A History of Anniversaries*, 64 J. HOUS. & CMTY. DEV. 5, 26-30 (2007). The 1937 Housing Act created the first public housing program in the country, and attempted to provide safer and healthier conditions of living for low-income individuals. The president of the National Association of Housing Officials declared that:

owned housing,[4] the federal government seemed poised to reframe the housing market around supply rather than demand.[5] That jumpstart towards a state-backed housing market, though, wouldn't last. What emerged out of that period was an infrastructure that deteriorated before its time,[6] along with the public's confidence in state-owned housing programs.[7] Some of those problems were exacerbated by events the state couldn't

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> Unquestionably, this law is one of the most important pieces of housing legislation enacted in this country. For the first time the Federal Government has outlined a long-term program and established a continuing agency for improvement of law-rent housing, thus giving it at last the national status granted years ago to middle-class housing, home ownership, etc.

The previous quote of course refers to the agency that would later be consolidated to form the Department of Housing and Urban Development ("HUD"). Years later, the Department of Housing and Urban Development Act of 1965 established HUD as Cabinet-level agency. *See also HUD History*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/about/hud_history [https://perma.cc/T6K8-5S4F] (last visited Jan. 18, 2025).

[4] *See* LAWRENCE J. VALE, FROM THE PURITANS TO THE PROJECTS: PUBLIC HOUSING AND PUBLIC NEIGHBORS 162-266 (2000); *see also* Jennifer Stoloff, A Brief History of Public Housing 10-11 (2004) (unpublished manuscript) (on file with ResearchGate). Most of the areas that received the clearance and removal efforts to construct new housing options were those slated as slums or prime locations of urban renewal. The fact that housing efforts were focalized on these areas meant that housing availability was not necessarily increasing, but rather, that types of housing were merely being demolished and then replaced by a different kind. The disproportionate impact of these housing efforts left those who lived in "slum" areas to watch their neighborhoods be destroyed, and somehow wait until other "affordable" housing options became available. Those left to wait for housing did so in vain, as only 26,570 units were constructed each year on average, despite the mandated 810,000 units billed within the 1949 Housing Act**.**

[5] LAWRENCE J. VALE, PURGING THE POOREST: PUBLIC HOUSING AND THE DESIGN POLITICS OF TWICE-CLEARED COMMUNITIES 7-32 (2013) (noting the history of subsidized housing models in the U.S. around the economics of need); *see generally* EDWARD G. GOETZ, NEW DEAL RUINS : RACE, ECONOMIC JUSTICE, AND PUBLIC HOUSING POLICY 25-29 (2013) (arguing that the veil of twice cleared communities driven by a shift in housing policy from private market housing to public supply raised concerns that housing policy was shifting towards socialist rather than capitalist ideals).

[6] *See* Philip M.E. Garboden & Sandra Newman, *Is Preserving Small, Low-End Rental Housing Feasible?*, 22 HOUS. POL'Y DEBATE 507 (2012).

[7] *See* Marc L. Roark, *Under-Propertied Persons*, 27 CORN. J.L. PUB. POL'Y 1, 38-39 (2017); GOETZ, *supra* note 5; Marc L. Roark & Lorna Fox O'Mahony, *Resilient Cities and the Housing Trust*, 76 ARK. L. REV. 713 (2024); Marc L. Roark, *On Propert[ty] Apologies and Resilience Gaps*, 11 J. RACE, GENDER, & ETHNICITY 135 (2022).

control itself,[8] but by the 1960s, the die was cast.[9] State-owned housing would eventually give way to privately owned affordable housing that was subsidized by the state, and the great experiment of converting U.S. housing to supply driven policies was over.[10]

How we solve public problems lies at the heart of this article. As the United States transitioned from publicly owned housing to privately owned developments, it enticed private developers to construct and devote construction projects to the delivery of affordable housing by offering below market interest rate financing, then later subsidized interest rate financing and guaranteed subsidized rentals.[11] In return, developers promised to devote the development to affordable housing delivery for forty years, to limit distributions of equity as a co-insurance program to ensure the property could be maintained, and to abide by the Department of Housing and Urban Development's ("HUD") directives on tenant qualification and subsidy requirements.[12]

While the basic terms of the regulatory agreement and HUD's promise to back the private side mortgages were clear, one

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[8] LORNA FOX O'MAHONY & MARC L. ROARK, SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS ch. 4 (2022).

[9] *See Declining Supply of Low and Moderate Income Rental Housing: Hearing Before the Subcomm. on Hous. & Urb. Affs. of the S. Comm. on Banking, Hous., & Urb. Affs.*, 100th Cong. 118 (1987) (testifying that owners of properties had little incentive to make improvements); *see also id.* at 133 (testifying that certain affordable housing units subsidized by HUD were in "imminent danger of sliding into . . . disrepair"); *see also id.* at 136 (stating in the committee final report that the finance structure of the BMIR Program was "self-defeating").

[10] GOETZ, *supra* note 5; Emily Rees Brown, *Public-Private Partnerships: HUD's Lost Opportunities to Further Fair Housing*, 21 LEWIS & CLARK L. REV. 735, 741-42 (2017); *see generally* Joseph Heathcott, *The Strange Career of Public Housing*, 78 J. AM. PLAN. ASS'N 360 (2012); Charles H. Moore & Patricia A. Hoban-Moore, *Some Lessons from Reagan's HUD: Housing Policy and Public Service*, 23 PS: POLIT. SCI. POLIT. 13 (1990).

[11] *See generally* U.S. DEP'T OF HOUS. & URB. DEV., MAJOR HOUSING AND URBAN DEVELOPMENT LEGISLATION ENACTED SINCE 1932 (2024). The Housing Act of 1961 created the Below Market Interest Rate Program ("BMIR") to cater to low-income housing populations. The Act also authorized grants for mass transportation federal assistance, as well as conservation land acquisitions. Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUS. POL'Y DEBATE 489 (2000); Charles L. Edson, *Affordable Housing—An Intimate History*, 20 J. AFFORDABLE HOUS. CMTY DEV. L. 193 (2011).

[12] National Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149 §§ 101-102, 202-205 (1961).

term would lead to nearly thirty years of litigation between developers and HUD starting in the 1990s. Embedded in the deed of trust was a provision that seemingly allowed developers to prepay the mortgage after twenty years of service, and thereby be released from the regulatory requirements to deliver affordable housing.[13] The Below Market Interest Rate ("BMIR") program represented the first expiring use affordable housing program of the modern era—where property owners might commit their property to a public purpose for a period of time that upon expiration could be redirected to other purposes, namely market rate rentals.[14] Some developers saw this term as a key window of opportunity, allowing them to "play the long game" by building properties in communities that would produce consistent rental rates of return during the affordability period, and then produce significant payouts of equity after they were no longer bound to provide affordable housing.[15] Developers who saw the program as a way of buying into property developments with low-interest financing expressed that they intended to pay back the mortgage as quickly as possible to convert the development to market rate properties.[16] The program proved to be very popular amongst developers, as 544,000 units of affordable housing were constructed under the BMIR Program.[17]

Along the way though, seismic shifts in the economic landscape of cities, the regulatory environment of affordable housing, and the housing market itself, shifted priorities around whether developers would (or should) be able to opt out of affordable housing delivery at all.[18] In 1972, following the demolition of the Pruitt-Igoe homes in St. Louis, Missouri, President Nixon implemented an executive order halting any future development of public housing under the various Housing

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[13] *Id.*

[14] Lawrence Geller, Note, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155 (1989) (the intention behind establishing a system of housing agreements that would expire after a specified time period was to increase the habitability and health conditions of the housing market, especially for low-income demographics).

[15] *Id.* at 156.

[16] *See, e.g.,* Cienega Gardens v. U.S., 331 F.3d 1319, 1353-54 (2003).

[17] Edson, *supra* note 11.

[18] ROARK & O'MAHONY, *supra* note 8.

Acts adopted in the 1940s and 1950s.[19] Nearly simultaneously, HUD began its shift in policy away from a supply side delivery of affordable housing to a demand side subsidy approach.[20] Two years later, the world experienced a series of economic crises, from the utility and energy crisis tipped off by the OPEC embargo in 1973, a currency crisis, and the continued shifting of American cities from urban communities to the suburbs.[21] After the election of President Ronald Reagan, the political winds were hostile toward government spending and entitlement programs as public housing became a prime example of government failure.[22] With the retrenchment of public resources away from public housing programs, which suffered from poor material construction, neglect, and fewer resources to maintain already aged properties, increasing pressure was placed on the expansion of private-side affordable housing availability.[23]

In 1987, Congress enacted the Emergency Act, which implemented a two-year moratorium on developers paying off their mortgages due to increasing pressures on the affordable housing stock and the fear that a housing crisis would be

[19] Marc L. Roark, *Under-Propertied Persons*, 27 CORN. J.L. & PUB. POL'Y 1, 50-54 (2017); Edson, *supra* note 11.

[20] *E.g.*, *Major Housing and Urban Development Legislation Enacted Since 1932*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/sites/dfiles/ENF/images/Legislation_Chronology_2024.pdf [https://perma.cc/EZK9-YBU6] (last visited Jan. 19, 2025).

[21] William Glenn Gray, *Floating the System: Germany, the United States, and the Breakdown of Bretton Woods, 1969–1973*, 31 DIPLOMATIC HIST. 295 (2007); Miguel Centeno & Joseph Nathan Cohen, *The Arc of Neoliberalism*, 38 ANN. REV. SOCIO. 317 (2012); *see generally* William Sites, *Introduction: Globalism and the City, in* REMAKING NEW YORK: PRIMITIVE GLOBALIZATION AND THE POLITICS OF URBAN COMMUNITY (2003).

[22] Marc L. Roark & Lorna Fox O'Mahony, *Resilient Cities and the Housing Trust*, 76 ARK. L. REV. 713, 727-29 (2024); Marc L. Roark, *Housing Trusts and Resilient Cities: Hierarchy, Resources and Resilience*, *in* MARTHA FINEMAN & LAURA SPITZ, LAW, VULNERABILITY AND THE RESPONSIVE STATE: BEYOND EQUALITY AND LIBERTY 139 (2024).

[23] Nicholas Dagen Bloom, *Myth #4: High-Rise Public Housing is Unmanageable*, *in* PUBLIC HOUSING MYTHS 91 (Nicholas Dagen Bloom, Fritz Umbach & Lawrence J. Vale eds., 2015); HIGH RISE STORIES: VOICES FROM CHICAGO PUBLIC HOUSING (Audrey Petty ed., 2013); Moore & Hoban-Moore, *supra* note 10, at 14-16; PAUL PIERSON, DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT (2007).

imminent if developers left the programs *en masse*.[24] A little over two years later, Congress adopted legislation called the Low-Income Housing Preservation, Rehabilitation, and Homeownership Opportunity Act ("LIHPRHO") which implemented a more permanent program that created strict requirements around what properties would qualify for early pay off.[25]

As developers faced the uncertainty that the new legislation presented, they had to adjust development plans. Believing that the legislation no longer afforded a clear path to an early payoff, several developers opted to pursue incentives built into LIHPRHO that were offered as an enticement to continue to hold the properties as affordable housing programs.[26] Others challenged the legislation under a variety of theories.[27] Courts, sorting through the economic rights that the state originally created, assessed claims by developers around three primary theories. First, developers argued the state had promised developers that they could pre-pay their mortgages after delivering affordable housing for twenty years and that the enactment of legislation that delayed or prevented developers from converting properties into market rate rentals was a breach of contract.[28] Second, developers argued that the legislation's interference with the economic rights they held in the property constituted either a per se taking or a regulatory interference that constituted a taking.[29] Finally, developers argued that the administrative delays by HUD

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[24] Emergency Low-Income Housing Preservation Act, Pub. L. No. 100-242, 101 Stat. 1977-78 (1988) (codified at 12 U.S.C. §§ 4101 et seq.); *see also Summary: S.825 — 100th Congress (1987-1988)*, CONGRESS.GOV, https://www.congress.gov/bill/100th-congress/senate-bill/825 [https://perma.cc/782L-Z5X8] (last visited Nov. 18, 2025).

[25] Low Income Housing Preservation and Resident Homeownership Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified at 12 U.S.C. §§ 4101 et seq.); *see also* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006). Later, Congress would adopt the Housing Opportunity Program Extension of 1996 (HOPE) that enshrined an early pay off right for developers, though with lingering requirements under the prior legislation.; *See generally* Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-20, 110 Stat. 834 (1996).

[26] *See* Cienega Gardens v. United States, 331 F.3d 1319, 1353-54 (Fed. Cir. 2003).

[27] *See* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).

[28] *See, e.g.*, Cienega Gardens v. United States, 331 F.3d 1319, 1323-27 (Fed. Cir. 2003).

[29] *Id.* at 1324, 1338.

in implementing the program created damages that entitled developers to remedies under the LIHPRHO.[30]

Over the next thirty years, courts waxed and waned on the relevance of these claims regarding BMIR properties.[31] In doing so, the courts looked to principles of sovereignty, contract privity, economic value, and more, trying to balance the needs of the state with the interests of developers and tenants.[32] The framing of these problems attempted to thread the needle between addressing structural challenges that the U.S. affordable housing market faced, and individual expectations from developers as they entered the program.[33] In the process, the lines blurred between public responsibilities to deliver programs for the general welfare of the state and private burdens.[34]

In this Article, I explore the role of response in the context of public problems. By focusing on the BMIR Program, its intervention into affordable housing, the adaptions made to the program, and litigation as a response to public problems, I consider how the public/private divide distorts how we think about large-scale problems that cannot be contained in one sphere. In doing so, I employ Resilient Property Theory ("RPT") as a methodological intervention for better understanding complex problems through the interests of stakeholders, asking what role the state plays in allocating resilience for some actors to meet the moment that public problems demand.

This Article unpacks the contours of that problem as an example of how framing broader problems around remedies (or litigation) distorts multi-framed problems while failing to account for whether solutions work. Part I provides a brief discussion of RPT as a methodological approach to complexity found in legal

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[30] *Id.* at 1326-27.

[31] *See* Lawrence Geller, Note, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155, 160-61 (1989). To incentivize additional engagement by private developers in lower interest rate housing programs, HUD allowed for participating developers to pay off mortgages after only twenty years' time, as opposed to the normal forty-year time frame.

[32] *See id.*

[33] *See id.* at 159-63. Although there were potentially pure intentions behind the proposal of such programs, the availability of prepayment options were utilized by private developers more than anticipated, leaving the already vulnerable lower-income demographics with even fewer affordable housing options than before.

[34] *See id.*

problems. Part II provides a deep history of the BMIR Program, including the contextual conditions that prompted the program and the conditions that led to conflicts with developers. Part III highlights how the litigation created scaling distortions that did not account for the way public problems were being framed as individual problems.

I. RPT AS METHODOLOGICAL INTERVENTION ON COMPLEXITY

A. Resilient Property Theory and Its Methodological Approach

In *Squatting and the State: Resilient Property in an Age of Crisis*, Lorna Fox O'Mahony and I introduce new methods to explore how normative property ideas are implemented, both explicitly and implicitly, across various legal and historical settings. Utilizing Robert Cover's concept of the legal nomos from his essay "Nomos and Narrative," we highlighted how divergent and opposing property narratives have developed and transformed in regions such as England and Wales, Ireland, Spain, South Africa, and the United States, resulting in each area's unique "property nomos."[35] Understanding the complex, historically informed nature of a property nomo in each jurisdiction has revealed how mixed and multi-level governance strategies have evolved to tackle property issues, even amidst the polarized political rhetoric and partisan conflicts that define 21st-century property discussions. RPT aims to transcend typical partisan rhetoric by avoiding the binary frameworks of liberal property discourse (conservative vs. progressive), which align with political allegiances on a left-right spectrum: such as public sovereignty versus private property, the "essence" of property versus plural values, exclusion versus sharing, freedom versus security, private property rights versus social justice, and the common good.[36]

[35] *See* O'MAHONY & ROARK, *supra* note 8; *see also* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-6 (1983). Complexities can arise when different countries contextualize their property concerns in varying lenses, which can embolden property issues abroad.

[36] *See* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORN. L. REV. 959, 960 (2009) (noting that the more time spent on discussing the motivations of solving property issues, the less time there is spent on understanding the actual mechanism of property and the manner in which it interacts with society on a daily basis). *But see* Ezra Rosser, *The Ambition and*

These structural elements in rhetorical property theorizing—often supported by a focused "private realm" doctrinal perspective—uphold a conservative-neoliberal worldview, which, at least rhetorically, depends on binary distinctions to present private power.[37] Such private power is seen in ownership, robust property rights, and "the market" as origins of individual liberty and wealth maximization; while public power, represented by "the State," is depicted as oppressive, inefficient, and something to be limited and controlled at all costs.[38]

Traditional linear problem-solving approaches in "private law" case analyses often emphasize adversarial roles, reinforcing a binary mindset that overlooks the diverse interests involved in complex property issues and favors winner-takes-all outcomes over compromise solutions. RPT shifts focus to the broader effects of property issues on various stakeholders, moving beyond mere transactional relationships to assess the impact of property law and policy on multiple actors, networks, and the state. RPT uses a "methods assemblage" approach to map the entire problem-space, highlighting state actions in response to property challenges.[39] It analyzes how states, in responding to property issues, perform a dual role: allocating resilience by creating, recognizing, and enforcing entitlements while also reinforcing their own resilience, authority, and legitimacy amid conflict or crisis. State responses are contextualized within constraints both internal and external to the state and the social systems it supports, such as the

Transformative Potential of Progressive Property, 101 CALIF. L. REV. 107, 107 (2013). Yet the distribution of property is inherently founded within the legislation and policies surrounding it, so an argument could be made that prioritizing property's distribution methods, and the sociodemographic castes that are less prioritized, is equally as important as understanding the mechanisms of property itself.

[37] Paul O'Connell, *The Death of Socio-Economic Rights*, 74 MOD. L. REV. 532, 535 (2011); *see also* GREG ALBO, SAM GINDIN & LEO PANITCH, IN AND OUT OF CRISIS: THE GLOBAL FINANCIAL MELTDOWN AND LEFT ALTERNATIVES 28 (2010); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 64-65 (2005); RAYMOND PLANT, THE NEO-LIBERAL STATE 96-97 (2010); Alfred C. Aman, Jr., *Law, Markets and Democracy: A Role for Law in the Neo-Liberal State,* 51 N.Y. L. SCH. L. REV. 801, 804-05 (2006).

[38] O'Connell, *supra* note 37, at 535; *see also* ALBO, GINDIN & PANITCH, *supra* note 37, at 28; HARVEY, *supra* note 37, at 64-65; PLANT, *supra* note 37, at 96-97; Aman, *supra* note 37, at 804-05.

[39] O'MAHONY & ROARK, *supra* note 8, at 216.

market.[40] Government or legal responses to property problems are dynamically shaped and sometimes restricted by a complex set of competing influences, including legal frameworks influenced by multiple or hybrid property ideologies. We illustrated these dynamics in *Squatting and the State* by comparing state responses to squatting across five jurisdictions—England, Ireland, South Africa, Spain, and the United States—and examining the roles of local narratives in cities like New York, Barcelona, and London in shaping property values and advancing towards progressive, compromise solutions.

Resilient Property analyses are deeply embedded in the historical, institutional, and constitutional contexts and narratives of each jurisdiction. While aiming to transcend rhetorical dimensions, RPT fundamentally acknowledges that the rhetorical narratives driving property theories and politics are based on the stories we tell about the origins of property rights in our societies. RPT understands that each jurisdiction possesses a property nomos, or "normative universe," where legal texts, decisions, constitutions, and institutions are situated, and which "determine what law means and what law shall be."[41] The property nomos of each jurisdiction influences and limits state actions or restraint concerning property and serves as an essential perspective for conducting comparative analyses and gaining actionable insights from the experiences of other jurisdictions.[42]

When using this perspective, it's crucial to differentiate between the prevailing narrative of a particular time and the

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[40] *See, e.g.*, David A. McDonald, *Defend, Militate and Alternate: Public Options in a Privatised World*, *in* POLARIZING DEVELOPMENT: ALTERNATIVES TO NEOLIBERALISM AND THE CRISIS 119, 125-26 (Lucia Pradella & Thomas Marois eds., 2015) (identifying the efficacy of context-based approaches that balance a form of acknowledging differences and variations, whilst maintaining a broad-scope analysis).

[41] Cover, *supra* note 35, at 7.

[42] *Id.*; *see also* JOHN LAW, AFTER METHOD: MESS IN SOCIAL SCIENCE RESEARCH 5-7 (John Urry ed., 2004). Law posits that increased effort spent explaining a complex issue (like property concerns) can often lead to the further bolstering of the issue in the first place by making a "mess" of any potential methodology. Continual adaptation toward understanding an issue or complex problem may help prevent the establishment of definitive solutions that are failing to address an issue. In the present context, the ever-evolving nature of property and the concerns that arise from it require a balance of understanding the mechanisms of the area of law, as well as its contemporary influence and interaction with both state and private actors.

nomos that gradually builds and transforms within the property system. For instance, a 2023 interpretation of the United States Constitution might suggest that the American property nomos is defined by extreme individualism with limited room for social justice and the common good. However, Cass Sunstein's analysis of the United States Supreme Court's developments in the 1960s and 1970s indicates that "the Constitution means what the Supreme Court says it means, and with a modest shift in personnel, the Constitution" could have been interpreted to establish social and economic rights similar to those in many modern constitutions, and indeed, in some American state constitutions.[43]

The property nomos in each jurisdiction is a complex blend of diverse norms and commitments, rather than a uniform entity. It is "scaled" in both horizontal dimensions (across different legal institutions such as private property law, housing law and policy, financial services regulation, tax law, succession law, land use regulation, environmental sustainability, criminal justice, etc.) and vertical dimensions (across the multi-layered state, from local authorities and municipalities to national levels, including influences from transnational political and legal trends). Building on insights from wicked problem theory, vulnerability theory, and equilibrium theories, RPT offers methods to structure and fully explore a "property problem" space.[44] By seriously considering the interests of all stakeholders involved in property issues—such as individual interests (owners, neighbors, investors, mortgagors, tenants, trespassers), aggregated interests (neighborhoods, market actors, cities, communities, social movements), and institutional interests (housing systems, economic systems, market systems, ecological systems, private property institutions, and the state)—RPT reveals the importance of compromise in U.S. property law. Moreover, it examines the intricate networks of economic, cultural, political, social, and legal norms and values that define and control what property is and how it works within a legal framework, emphasizing the respect for private property

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[43] Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 4-5 (2005).

[44] *See generally* O'MAHONY & ROARK, *supra* note 8.

rights balanced by social justice considerations.[45] A similar pattern is seen in South Africa's constitutional property clauses, which aim to implement progressive property ideals.[46] André van der Walt described the process of implementing new constitutionalism not as a simple replacement of one orthodoxy with another, but as an ongoing journey of integrative pluralism.[47] He argued that South African courts should navigate the transition from apartheid-era common law orthodoxy, to realizing the dual commitments of new constitutionalism through continuous critical evaluation of competing ideologies.[48] The effort to integrate progressive property concepts within a system that respects private property rights, while promoting social justice and healing divisions, necessitates a dedication to principled and pragmatic compromise.

B. Identifying Stakeholder Resilience in Property Problems

Taking a wholistic approach to property problems, RPT's multi-modal approach is based on three distinct moves to understand the contours of a problem.[49] First, we use Vulnerability Theory to establish constants and variables for a fuller understanding of stakeholder interests. Second, we apply scaling theory to identify how property creates resilience and how

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45 Rachael Walsh & Lorna Fox O'Mahony, *Land Law, Property Ideologies and the British-Irish Relationship*, 47 COMMON L. WORLD REV. 7, 22-26 (2018) (exploring the intersection of contextualized historical approaches and pragmatism can elucidate on the development of the law and the formation of influential policies and legislation).

46 *See generally* A.J. Van Der Walt, *Dancing With Codes — Protecting, Developing and Deconstructing Property Rights in a Constitutional State*, 118 S. AFR. L.J. 258, 262 (2001).

47 *See* A.J. Van Der Walt, *Resisting Orthodoxy – Again: Thoughts on the Development of Post-Apartheid South African Law*, 17 S. AFR. PUB. L. 258, 259 (2002) [hereinafter Van Der Walt, *Resisting Orthodoxy*]; *see also* Van Der Walt, *supra* note 46, at 262.

48 Van Der Walt, *Resisting Orthodoxy*, *supra* note 47, at 259; *see also* Van Der Walt, *supra* note 46, at 262.

49 O'MAHONY & ROARK, *supra* note 8, at 209-220. All three approaches of RPT seek to address the institutional gaps in evaluating how property is valued, distributed, and sustained in light of the competing forces of both the state and private individual acting as property owners. Once again, the lenses through which the state may or may not address a property concern are founded upon the "interests" of the less vulnerable, which further compounds the wicked problem of property and its sustainability in a setting where the weak can only get weaker.

that resilience is scaled across different interest holders. And finally, we apply equilibrium theory to identify how tipping points in resilience can negatively impact the systemic balance between actors.

1. Vulnerability Theory

The RPT approach uses Vulnerability Theory as a foundation for examining how individuals, groups, states, and institutions (such as private property) interact with each other.[50] It begins with the universal truth that all humans share inherent vulnerabilities that are present in individuals and human institutions alike. The theory explains that distinctions arise from the degree to which humans and communities are embedded in institutions. "Imbodiedness," as used in this article, refers to the fundamental needs that all humans have, such as shelter, water, food, clean air, and social interaction. These needs are met through individuals' embeddedness in institutions that provide resilience, like family, property, and faith communities. In *Squatting and the State*, it is noted that the State itself is a vulnerable human institution, striving for its own resilience while simultaneously providing resilience to others.[51] RPT aims to genuinely consider the interests of all stakeholders in problem-solving, focusing on the types of resilience available to stakeholders and the resilience gaps that may exist between them.

2. Scaling Resilience

The varying levels of resilience among different actors (embeddedness) are especially significant. Since scale is inherently a measure, in previous work, this author and co-author acknowledged that different actors have varying access to forms of

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[50] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1-2 (2008). Recognizing states as individual actors falls short of properly contemplating their influence on property concerns. One must note that states themselves are subject to their own forms of vulnerabilities, which thus influences their actions in wanting to lessen their exposure and increase their resilience. Noting the lack of neutrality on behalf of the states and the steps they take in addressing property concerns clarifies just how influential competing interests and vulnerabilities can be.

[51] *See generally* O'MAHONY & ROARK, *supra* note 8.

resilience that help mitigate their vulnerabilities. Specifically, we propose that resilience, especially concerning resource issues like property, is distributed across three dimensions: rhetorical, material, and hierarchical.[52] These dimensions of resilience frequently combine to form hybrid scales. For instance, when a state encourages affordable housing construction through tax incentives, it exemplifies hybrid resilience across multiple dimensions: the rhetorical value of advocating for more housing, the hierarchical authority to manage revenue via taxes, and the material resilience provided by offering tax credits to potential adopters.

These insights revealed that resilience is a scaled concept across three distinct registers as it engages with property and other economic rights. First, resilience can be scaled across hierarchies both in terms of who has the power to allocate resilience and when courts are bound to recognize distinctive resilience claims by others. Hierarchical resilience can be found at the state level relating to which level of the state or branch of state government has the authority to address the problem. Property itself, as an institution of the state, creates hierarchical scaled perspectives as the state grants owners the power to control resources that shapes how the state interacts with owners, as well as how private actors interact with each other around property claims. Because property is an institution of the state, the state's choices to recognize property entitlements in individuals are deploying the state's hierarchy to support claims of private actors. Second, resilience can be scaled across material resources, as in what financial resources do states or individuals have at their disposal to solve certain problems. Material resilience in land can be found in a variety of data values, from the economic valuation of the land to the size of the land, to the location of the land and more.[53] Material resources when the state is involved may be related to the taxable resources a state has access to, or to the

[52] *Id*. *See generally* WILLIAM SITES, REMAKING NEW YORK: PRIMITIVE GLOBALIZATION AND THE POLITICS OF URBAN COMMUNITY (2003). William Sites, *Beyond Primitive Globalization: Policy, Activism, and the Metropolis*, *in* REMAKING NEW YORK: PRIMITIVE GLOBALIZATION AND THE POLITICS OF URBAN COMMUNITY (2003).

[53] *See generally* Marc L. Roark, *Scaling Commercial Law in Indian Country*, 8 TEX. A&M L. REV. 89 (2020).

amount of fiscal resources a state has at its disposal to solve a problem. Finally, resilience can be scaled across rhetorical claims such as [blame] worthiness, responsibility, and other interpretive limitations. Discursive scale represents the ability to validate an entitlement or a claim to resilience. Natural law notions of a "pre-state" natural right to property are rhetorical claims, just like economic efficiency arguments. In both instances, these claims support reasons why resilience in entitlement *should* be recognized.

These three forms of resilience-making in property do not operate in isolation from one another. Many times, they can be combined to provide a hybrid scale on resilience. State choices about how to deploy funding to solve social problems like housing shortages is a hybridized scale of material and hierarchical resilience. When states retrench or restrict assets on the basis of worthiness of actors (such as the poor), the hybridity of rhetorical, material and hierarchical is visible. At other times, one register of scale can distort another register from effective deployment. For example, in the 1940s and 1950s, the U.S. government implemented a policy of public housing.[54] They did so under constraints in the program that implemented austerity approaches. Those austerity approaches could be explained by different justifications. One set of justifications were rhetorical limits, arguing that public housing should be suitable but not luxurious and implying that users of affordable housing were less worthy than others. On the other hand, the material limits that set the value of public investment on a per housing unit scale meant that the driving force behind housing programs should be the production of more housing. These two limits effected the longevity of public housing, causing cheaper materials to be used, cutting out community-oriented space designs, and relegating housing to communities that were already plagued with poverty. Thus, when the public housing program was declared a failure in 1972 with the demolition of Pruitt-Igoe housing, followed by the restriction of future funds for new developments, the rhetorical narrative of state legitimacy, government waste, and public

[54] U.S. DEP'T OF HOUS. & URB. DEV., MAJOR HOUSING AND URBAN DEVELOPMENT LEGISLATION ENACTED SINCE 1932, at 4 (2024).

housing's value limited the deployment of future material resources to support that program.[55] In short, the rhetorical claims imposed themselves as limits on how the state could deploy its sources by reframing the problem as one of government waste and worth, rather than housing need.

3. Resilience and Equilibrium

Recognizing that resilience varies across different actors and forms, we then ask: "How should resilience be distributed?" In RPT, this author and Lorna Fox O'Mahony argue that resilience should be allocated to support the balance of sustainable institutions. This involves ensuring that as resilience is assessed among individuals and institutions, we aim to maintain equilibrium by fostering flexibility in responding to issues, mechanisms for recovery from crises, adaptability, and innovation.[56] A clear sign that the system is out of balance is when certain scales are used to leapfrog others, thereby hindering their distribution. For instance, when rhetorical resilience is utilized to prevent the engagement of other scales to address a problem—such as when housing programs are questioned on the basis of the deservedness of those using the housing resource—it can obstruct the allocation of collective resources to tackle the issue.

C. Applying RPT to Wicked Problems

RPT is a method specifically designed to approach problems that can be framed through stakeholder interests.[57] In *Squatting and the State*, we specifically looked to wicked problem theory as a limit on where RPT should be applied. "Wicked problems are complex, large-scale issues that are social, economic, and political

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[55] Marc L. Roark, *Under-Propertied Persons*, 27 CORN. J.L. & PUB. POL'Y 1, 50-54 (2017); Edson, *supra* note 11.

[56] O'MAHONY & ROARK, *supra* note 8, at 209-20, 342-43. *See generally* Laura S. Underkuffler, *Property, Sovereignty, and the Public Trust*, 18 THEORETICAL INQUIRIES L. 329 (2017). Recognizing the right to property as protective of other human rights helps frame the manner in which responses to issues can be critical. Those capable of remaining resilient in the face of various crises are better equipped to maintain their other rights outside of property. *But see* AJ Van Der Walt, *The Modest Systemic Status of Property Rights*, 1 J.L. PROP. & SOC'Y 15 (2014) (inversely proposing that the right to property does not protect other human rights).

[57] *See generally* O'MAHONY & ROARK, *supra* note 8.

in nature, intertwined within intricate networks of interrelated variables."[58] These problems are often hindered by framing limitations, since agreed solutions can be obstructed by the lack of agreed upon interpretations or collective understanding of the issue. Due to differing starting points or framing limits, responsibility attributions are contested, making definitive solutions difficult to achieve.[59] By recognizing some problems as wicked, RPT seeks to bypass the framing limits inherent in ideologically driven theories. This author aims to define the role of property in problem-solving not as a limiting factor on the range of options—determined by either the actor's identity or the problem's nature—but as part of a holistic approach that appreciates the institution's role and its capacity to provide resilience, in conjunction with other forms of resilience.

Applying wicked problem theory as a limit on RPT's application recognizes that certain challenging problems are often reduced to frames of analysis that fail to account for the entire problem space. In *The Future of Housing: Resilient Property Theory, Systemic Methodology, and Sustainable Solutions*, we described why binary approaches may be attractive to actors, and yet how they limit the available options for addressing problems. We identify three reasons why reductive frames, while illusory, are often deployed in legal analysis: that law operates in a cultural climate of issue reduction due to the attorney-client service relationship; that framing problems allows scholars to ignore ideological challenges they disagree with; and that framing

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[58] O'MAHONY & ROARK, *supra* note 8, at 209-11. The narrative framing of property problems deters general solutions by bogging down efforts into subsects of moral interpretations and definitions. In other words, instead of specifically addressing a concern in its entirety, the inevitable narrative framing of what should be interpreted as most concerning will indubitably influence and piecemeal approaches to redress. Solutions will continue to be difficult to find because approaches are divided and categorized by selective lenses. For example, whatever is selected as the cause of a current property issue will directly influence what method of intervention will be implemented, and subsequently what kind of resolution and preventative measures should be provided, all of which are contingent upon the narrative frame of the party approaching the problem. As previously discussed, the state itself is a vulnerable actor, but is also responsible for addressing property concerns through whichever narrative lens it deems necessary. *See* Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm,* 43 J. COMM'N 51, 52 (1993).

[59] *See* Entman, *supra* note 58, at 52.

allows scholars to address a problem they perceive as too large to solve and therefore allows scholars to narrow the resources necessary to approach a part of a problem.[60]

Housing is a wicked problem as it involves different frames that can limit the way we approach housing solutions.[61] Reductionist binary frameworks and methodologies oversimplify the complexities surrounding the state's role in property and housing. They highlight certain "official,", "relevant," or "legible" aspects of these issues while obscuring other critical dimensions that fall outside the mainstream narrative, a phenomenon John Law describes as "othering."[62] This framing not only raises concerns about justice, but can also impede efforts to tackle intricate or "wicked" problems. When competing ideas are confined to separate frameworks, discussions can devolve into rhetorical stalemates, where analyses and proposals from differing (and often polarized) perspectives fail to engage meaningfully with one another.[63] This creates significant barriers to effective problem-solving. Moreover, when issues are perceived as "lost

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60 *See generally* Lorna Fox O'Mahony & Marc L. Roark, *The Future of Housing: Resilient Property Perspectives and Sustainable Solutions*, OÑATI INT'L INST. FOR THE SOC. OF L. (June 8-9, 2023), https://www.iisj.net/en/workshops/future-housing-resilient-property-perspectives-and-sustainable-solutions [https://perma.cc/6LXJ-B7H3].

61 *See* David Adams, *The 'Wicked Problem' of Planning for Housing Development*, 26 HOUS. STUD. 952 (2011); Nick Gallent, *A Wicked Problem*, *in* WHOSE HOUSING CRISIS? 23, 26 (2019); James Walter & Carolyn Holbrook, *Housing in a Federation: From Wicked Problem to Complexity Cascade?,* 74 AUSTRALIAN J. PUBL. ADMIN. 448, 460 (2015); Sue-Mari Viljoen, *Resistance to Reform Property: A 'Resilient Property' Perspective*, 38 S. AFR. J. HUM. RTS. 24 (2022). We have also discussed the wicked problem of housing in various contexts: ROARK & O'MAHONY, *supra* note 8; Lorna Fox O'Mahony & Marc L. Roark, *Resilient Property Theory*, *in* A RESEARCH AGENDA FOR PROPERTY LAW 77 (2024); Lorna Fox O'Mahony & Marc L. Roark, *Scaling Property Law*, *in* A RESEARCH AGENDA FOR PROPERTY LAW 93 (2024) [hereinafter O'Mahony & Roark, *Scaling Property Law*]; Lorna Fox O'Mahony & Marc L. Roark, *Operationalising Progressive Ideas about Property: Resilient Property, Scale, and Systemic Compromise*, 10 TEX. A&M J. PROP. L. 39, 55 (2024); Marc L. Roark & Lorna Fox O'Mahony, *Comparative Property Law and the Pandemic: Vulnerability Theory and Resilient Property in an Age of Crises*, 82 LA. L. REV. 789, 802-03 (2022).

62 *See* Marc L. Roark, *On Proper[ty] Apologies and Resilience Gaps*, 11 J. RACE, GENDER, & ETHNICITY 135, 152 (2022); JOHN LAW, AFTER METHOD: MESS IN SOCIAL SCIENCE RESEARCH 147 (2004).

63 *See generally* Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm,* 43 J. COMMC'N 51, 52 (1993).

causes," it discourages collective action.[64] Thomas Ross addresses this challenge in his essay, "The Rhetoric of Poverty: Their Immorality, Our Helplessness," where he points out that courts often portray poverty as a nearly insurmountable problem characterized by its complexity.[65] He argues that poverty arises from a complex interplay of political, cultural, historical, psychological, and philosophical factors, suggesting that only in a fundamentally transformed world could poverty be eliminated.[66] Since radically reshaping society is beyond the Court's capabilities, this rhetoric of helplessness contributes to an official narrative that presents "[h]ard choices, suffering, even 'Kafkaesque' results are simply unavoidable."[67] By framing poverty as a "wicked problem," stakeholders—such as judges in Ross's analysis—may feel compelled to relinquish their responsibility for finding solutions, believing they are powerless to effect change.

Private property is often intertwined with complex social issues. Nonetheless, property theories typically approach property-related challenges through normative frameworks that aim to justify the institution of private property, thereby upholding its authority. As we have noted, the concerns surrounding affordable housing crises extend beyond the seemingly neutral transactional aspects of establishing and enforcing property claims.

The concept of property—encompassing both the physical land and the competing claims for its use, exploitation, and occupation—has been used to associate idealized identities of

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[64] *See* Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1499-1501 (1991).

[65] *See id.* Discourse rooted in addressing poverty solutions often becomes skewed by moral notions of how helpless and vulnerable the poor are. Some prefer the view that the lower class lack the initiative to will themselves out of their current situations. Just the previous statement alone demonstrates how often the time spent looking for a solution is doomed to fail. Time would certainly be better spent looking for a way to reform systematic vulnerabilities rather than contemplating whether the impoverished have the motivation to seek higher positioning in the first place. Although society's view of the poor continues to change over time, the physical and proverbial property lines have already been drawn by history, and the more vulnerable classes still suffer from the effects of outdated moral assumptions.

[66] *Id.* at 1510.

[67] *Id.* at 1499.

citizens with interests that are fixed in both physical and legal senses. The values and narratives embedded in property law often shape our perceptions of identity. Property thus acts as a time capsule, preserving legacies and reinforcing the biases that influence our understanding of who we are and what actions we should take.[68] In summary, while property issues are frequently framed within normative parameters that defend its power, they are deeply connected to broader social challenges that affect individual lives and communities. Understanding these intersections is crucial for addressing the complexities of property and its implications for society.[69]

Complex social issues require analytical approaches that embrace multiple viewpoints instead of insisting on a single solution. To address the drawbacks of linear problem-solving, wicked problem-solving employs iterative steps or phases, creating cycles of analysis and synthesis.[70] This process helps develop an "inference model" that enables stakeholders to gain a deeper understanding of the problem landscape and the potential outcomes of various decisions or actions.[71] The essence of managing wicked problems lies in the avoidance of prematurely deciding on a specific type of solution. Instead, wicked problem solving encourages us to "remain in the mess," allowing for the exploration of numerous relationships within the problem structure.[72] By keeping options open for as long as possible, stakeholders can better analyze, understand, and eventually begin formulating solutions that are informed by a comprehensive view of the complexities at hand.[73]

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[68] O'MAHONY & ROARK, *supra* note 8, at 212.

[69] *See* Roark & O'Mahony, *supra* note 7, at 731-32. The very nature of wicked-problems persisting is the failure to properly frame them. As previously mentioned, the normative frames used to address problems have the inherent effect of improperly reducing them to specific variables, which fails to account for the multi-faceted nature of property concerns in the first place.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *See* Tom Ritchey, *Wicked Problems: Modelling Social Messes with Morphological Analysis*, 2 ACTA MORPHOLOGICA GENERALIS 5 (2013). There is a clear danger in assuming the proper solution or goal has been determined before the issue has been properly dissected. In utilizing smaller steps or "cycles" where a state or other influencing actor can address each facet of a wicked-problem as it arises, the fluidity of

Resilient Property Theory introduces a fresh approach and methodology for addressing the complex challenges within property law by providing structured methods to analyze state responses to property issues. Unlike traditional "private" property theories, which often overlook the state's role as a key player in property disputes or portray it as a neutral mediator of conflicting claims, RPT highlights how the vulnerabilities of states influence their responses to property problems. State actors and agencies are driven by a desire to enhance and maintain their own resilience while also distributing resilience to other stakeholders. This dynamic becomes particularly evident when states take action to reinforce their authority and legitimacy during times of conflict or crisis. Importantly, this perspective reveals that states, especially during property crises, do not operate as impartial arbiters among competing claims.[74] In summary, RPT emphasizes the active role of the state in property matters, challenging the notion of neutrality and underscoring the complexities of state involvement in property crises.

The extent to which state actors and agencies view their role in the housing market—whether as facilitators enabling individuals to provide housing for themselves or as providers of public services—significantly influences their responses to the demand for affordable housing. Much of the public framework for developing affordable housing has positioned the state as a catalyst for tax credit financing aimed at private developers, who, in return, agree to designate a portion of their units as affordable housing.[75] In this context, affordable housing emerges from both the public and private sectors, intertwining the state's capacity to allocate resources through tax credits with the motivation for private owners to engage in these initiatives. This dual approach highlights the collaborative nature of addressing affordable housing needs, as it relies on both government support and private sector participation. In summary, the role of state actors in the housing market is crucial, as their perspective shapes

a solution can match pace with fluidity of the issue, otherwise the wicked-problem will continue to out-pace the potential solutions.

[74] O'MAHONY & ROARK, *supra* note 8, at 209-11.

[75] *See* CTR. FOR CMTY. CHANGE, OPENING DOORS TO HOMES FOR ALL: THE 2016 HOSING TRUST FUND SURVEY REPORT 17 (2016).

strategies for meeting the pressing demand for affordable housing through a blend of public resources and private investment.

When states allocate resources to help individuals access housing—such as through subsidies or the direct provision of public housing—they often do so within a rhetorical context that blames individuals for their financial struggles, attributing their circumstances to laziness, poor choices, or failures in responsible citizenship.[76] This framing exposes the state to criticism regarding public spending, excessive taxation, and accusations that state actions promote dependency and irresponsible behavior. However, navigating this landscape is not a straightforward policy decision for local state actors and agencies.

Narratives advocating for state withdrawal from housing provision are challenged by the intertwined nature of the state's own interests in housing delivery and the multitude of issues for which state actors are accountable, particularly at the local level.[77] For instance, public health outcomes are closely linked to the quality and stability of housing, while educational and economic results are also affected by a person's living conditions. Addressing the issues arising from housing instability can lead to cost savings for the state while providing greater stability for program participants.[78] Research indicates that states may incur higher costs related to policing and regulating homelessness, as well as increased healthcare and education expenses due to a lack of affordable housing.[79]

The state's approach to affordable housing challenges has significant implications for individuals and communities, economic and social institutions, public narratives, and the state itself. The real-time effects of these policies manifest in markets and social

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[76] *See* Ross, *supra* note 65.

[77] *See* Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 503-04 (1993); *see also* James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 758-59 (2002).

[78] *See* Angela Ly & Eric Latimer, *Housing First Impact on Costs and Associated Cost Offsets: A Review of the Literature*, 60 CANADIAN J. PSYCHIATRY 475 (2015).

[79] *See, e.g.*, GREGORY A. SHINN, RETHINK HOMELESSNESS, THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA 30 (2014). This study found that over $20,000 could be saved in providing some form of affordable housing to individuals experiencing homelessness, rather than using expenditures on the regulation of homelessness itself.

interactions centered around private property, influencing how neighbors perceive their rights and responsibilities toward one another. During crises, state responses to property issues highlight the normative frameworks surrounding private property, illustrating the various roles that the state plays at multiple levels in supporting the resilience of property rights for owners, investors, citizens, cities, neighborhoods, and markets.[80] Ultimately, examining state responses to affordable housing helps us understand how complex, multi-tiered actions reinforce both individual and collective interests, as well as the resilience of the state itself.

RPT emphasizes the importance of understanding the implications of state responses to complex property issues by considering both the state's role in distributing resilience resources among competing stakeholders—such as those seeking housing, taxpayers, property owners, neighbors, landlords, lenders, and institutions in healthcare, labor markets, and finance—and the state's own need for self-preservation and resilience. Recognizing that "the state" is not a monolithic entity but rather a composite of various actors, agencies, and institutions operating at multiple levels (global, federal, state/regional, and local), RPT highlights that the resilience resources states utilize to sustain themselves—such as maintaining political legitimacy and fostering economic growth—are distributed across different areas of state authority and power. Different state actors and agencies possess varying capabilities and levels of hierarchical resilience, allowing them to tap into distinct resources to tackle issues (for example, the size of a tax base or the physical assets within their control). Additionally, states must navigate ideological constraints that either validate or challenge their use of these resilience assets.

In summary, addressing complex social problems effectively requires a flexible, iterative approach that values diverse perspectives and allows for thorough exploration before arriving at solutions. RPT provides a nuanced framework for analyzing how states manage their resilience in relation to property challenges,

[80] *See* Lorna Fox O'Mahony & Marc L. Roark, *Property as an Asset of Resilience: Rethinking Ownership, Communities and Exclusion Through the Register of Resilience*, 36 INT'L J. SEMIOTICS L. 1477, 1506 (2023).

taking into account the diverse roles of state actors, private owners, the resources available to each of them, and the ideological contexts that influence their decisions.

II. THE HISTORY OF THE BELOW MARKET RATE PROGRAM AND FUTURE CONGRESSIONAL ADJUSTMENTS

In the 1960s, Congress began a shift towards privately owned affordable housing, funding several new programs that provided public subsidies to build subsidized housing.[81] These programs incentivized private participation through a combination of favorable financing and rental subsidies, with the promise that developers would own a significant asset at the end of the subsidized housing service. This turn to privately owned/publicly subsidized housing caved to the idea that the local housing authority was the problem rather than looking to the cost-structure for building and maintaining the housing as authorized by Congress. Of these new programs, the Section 221(d)(3) Below Market Interest Rate Program and Section 236 Subsidy Program were most prominent.

The Below Market Interest Rate Program ("BMIR Program"), known widely as 221(d)(3) subsidization, was implemented under the National Housing Act of 1961.[82] Under the program, private developers would construct and maintain subsidized housing through below-market interest reductions. Like housing programs before it, Congress designed these programs against a backdrop of public perception that those using subsidized housing programs were part of the "undeserving poor," whom the public wanted to remove from the streets without providing an unfair or unearned advantage.[83] The goal to build livable but not luxurious housing once again resulted in a law that undermined the quality of the

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[81] *A Brief Historical Overview of Affordable Rental Housing*, NAT'L LOW INCOME HOUS. COAL. (2015), https://nlihc.org/sites/default/files/Sec1.03_Historical-Overview_2015.pdf [https://perma.cc/KF5Y-JC25].

[82] Pub. L. No. 87–70, 75 Stat. 149 (1961).

[83] Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1074 (2017). Some arguments have proffered that any sort of system based on the reallocation of resources is destined to fail, as determining who is the most "in need" is difficult to establish in light of inherent racial and class biases. Debates continue as to whether or not class-based affirmative action is the way forward for remedying the effects of poverty.

housing. Specifically, the BMIR Program worked as follows: the developer would design and build a subsidized housing building and pay for the construction with a mortgage that it borrowed at a special very low interest rate (a 3% flat rate, as opposed to a normal mortgage which was between 6–9% at the time).[84] The mortgages were forty-year fixed mortgages; in exchange for the preferential rate, the developer agreed to maintain "affordability" for the entire period of the mortgage. Maintaining "affordability" meant that the developer agreed with HUD to accept restrictions on tenant income, allowable rents, and rates of return, as long as the project continued to be financed pursuant to the special mortgage.[85] The BMIR Program permitted the developer (or owner at the time) to repay the mortgage after twenty years with no penalty (effectively releasing the developer from the subsidized housing mandate and giving the developer the ability to privatize the units).[86] The program would be adjusted towards the end of the decade under Section 236 to account for shifts in market interest rates, but the general shape of the program remained the same.[87]

As economic conditions shifted in the 1970s, increasing pressure was placed on the state resources around affordable housing delivery. Perceiving an impending cliff if developers opted out of the BMIR Program, Congress implemented a series of legislation that delayed and then placed limits on what properties could opt out of affordable housing delivery.[88] Those delays and limits became the subject of litigation by developers against HUD around whether HUD was liable for damages, takings, or breaches of contract.

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[84] *See* SIDNEY HOMER & RICHARD SYLLA, A HISTORY OF INTEREST RATES (4th ed. 2005). In 1960, the average interest rate was slightly above 5%; by 1965, it was 6%; and in 1970, the interest rate was slightly below 7%.

[85] *See* Pub. L. No. 87–70, 75 Stat. 149 (1961).

[86] *See id.*

[87] *See* Charles L. Edson, *Affordable Housing - An Intimate History*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 193, 201-02 (2011).

[88] *See id.* Additional HUD efforts included the experimentation of allowing low-income property seekers to receive federal funding to assist in the renting of individual units in the private market. Despite efforts, the mid-1970s saw concerns and "furious lobbying" to Congress that led to the implementation of the Section 8 Program.

A. The Initial Legislation and Implementation

In the early 1960s, Congress introduced a new kind of plan to build affordable housing, this time owned by private owners—a program that would be the test-case for what would eventually become Section 8 housing, or as it's known today, Housing Choice Vouchers.[89] The Below Market Interest Rate program would provide developers with access to lending underwritten by HUD in exchange for their promise to provide affordable housing for the next forty years (known as the Section 221 program).[90] Later Congress would adjust the program under a new subsidy program to reach the same ends, compensating lenders the difference between market interest rates and the contracted regulatory rate designed to induce developers to participate in the program (known as the Section 236 program).[91] The plan also provided that the owners would receive subsidized rentals in the form of an upfront subsidy that would account for the next forty years of rental income—or 70% of the adjusted rental value.[92] They could also opt out of the program after twenty years of affordable housing delivery by repaying the mortgage and repaying the subsidies they received and didn't use.[93] In return, the owners agreed to maintain affordable housing during this period; to keep rental rates in line with HUD's determined value of the property; charging only 30% of the adjusted income for the tenant (receiving the remainder from HUD); to take a fixed distribution on equity from the enterprise; and to only exit affordable housing at the soonest twenty years after they started.[94]

From the time it was created, the BMIR Program had significant problems. First, the BMIR Program structure disincentivized capital improvements. Subsidy rental payments under the BMIR Program were limited to a one-time lump sum

[89] *A Brief Historical Overview of Affordable Rental Housing*, NAT'L LOW INCOME HOUS. COAL. (2015), https://nlihc.org/sites/default/files/Sec1.03_Historical-Overview_2015.pdf [https://perma.cc/M547-4E74].

[90] *Project-Based Rental Assistance*, NAT'L LOW INCOME HOUS. COAL. (2015), https://nlihc.org/sites/default/files/Sec4.08_Project-Based-Rental-Assistance_2015.pdf [https://perma.cc/K3ZJ-UFAV].

[91] *See id.*

[92] *See* Pub. L. No. 87–70, 75 Stat. 149 (1961).

[93] *See id.*

[94] *See id.*

payment by the government once the development was built, rather than as an ongoing, adjustable subsidy like future programs would utilize. The lump sum payment was meant to reimburse the developer upfront for the rent they would have gotten on the market for the lifetime of the mortgage. The payment was determined based on expected rental rates for each unit at the time that the building was completed (unadjusted for inflation or other market features that normally lead to increasing rents each year), subtracting out the amount that the government expected the tenants to pay the developer each month.

For a building completed in 1965, if the unit could have been rented on the market for $100 per month[95] but the government expected the low-income tenant would only be able to pay $75/month, then it would pay the developer, upon construction of the unit, $12,000 ($25 per month * twelve months * forty years). The government would not pay anything additional for that unit during the mortgage (at least twenty years), while still expecting the developer (and subsequent owners who did not receive any of the lump sum) to deliver subsidized housing to all tenants.

The units were assessed for value only at the point in time in which they were put into service, and there was no formal inspection process in place to ensure that the apartments were maintained. While the program may have intended for the subsidy to be transferrable to a future owner, the realities of the building finance and upkeep meant that there was very little subsidy remaining by the time the building would be transferred. If an owner, for example, went into receivership, there would be no remaining subsidy to transfer when the building ownership changed. That meant that new owners took on the problems of poorly constructed buildings and the reduced income from previously subsidized tenants, with fewer public resources to correct construction deficiencies.

A well-known problem was that developers often made the economically beneficial choice to let the properties fall into

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[95] *See Historical Census of Housing Tables*, CENSUS.GOV, https://www2.census.gov/programs-surveys/decennial/tables/time-series/census-housing-tables/grossrents.pdf [https://perma.cc/NR9D-3G9Y] (last visited Apr. 16, 2026). In 1970, the average rental rate in New Haven, CT, was $127/month; by 1990, that average rental rate had increased to $598/month. *Id.*

disrepair, sometimes pushing the point of habitability because nobody was checking on their maintenance, rents were locked, and there was no additional federal funding coming in to pay for the repairs. For example, Deane Earl Ross testified during a hearing of the Subcommittee on Housing and Community Development of the Committee on Banking, Finance, and Urban Affairs, in the House of Representatives, that owners of properties in low-value areas had little incentive to invest the limited returns they received on physical needs of the property.[96] Another member in the hearing noted that properties built under the BMIR Program were in "imminent danger of sliding into disrepair."[97] Several witnesses acknowledged that the problem was tied to the limits that the program placed on the owner's ability to capture value from rentals. In a moment of retrospective honesty, the Committee reflected that programs like the BMIR Program were "self-defeating."[98]

Additionally, many of these developers simply ran out of money. After years of service, the lump sum dried up, and they had no more resources to maintain the buildings. If the property was sold prior to the expiration of the mortgage, the new owner would receive none of the subsidy (if there was any money left from the original subsidy in the first place) and would be forced to continue the subsidized housing mandate without the benefit of the original owner's subsidy. This left any subsequent owner with even less money for repairs. The subsidies (which were often split between developer fees and management fees) were then paid out as a lump sum on the front end, rather than on an ongoing basis during the lifetime of the affordability period, reducing the funds available to cover the costs of necessary repairs. This reduced the

[96] *Declining Supply of Low and Moderate Income Rental Housing: Hearing Before the Subcomm. on Hous. & Urb. Affs. of the S. Comm. on Banking, Hous., & Urb. Affs.*, 100th Cong. 118-19 (1987); *see also* Jill Khadduri & Charles Wilkins, *Designing Subsidized Rental Housing Programs: What Have We Learned?, in* REVISITING RENTAL HOUSING: POLICIES PROGRAMS, AND PRIORITIES 161, 169 (Nicolas P. Retsinas & Eric S. Belsky eds., 2008) (noting that developers/owners of properties in low-value, high-poverty areas, where they did not expect to get any continuing tenancy after the 40-year period, had no incentive to fix or maintain the properties, let alone improve them).

[97] *Declining Supply of Low and Moderate Income Rental Housing: Hearing Before the Subcomm. on Hous. & Urb. Affs. of the S. Comm. on Banking, Hous., & Urb. Affs.*, 100th Cong. 133 (1987).

[98] *Id.* at 136.

incentive for making those repairs, as improved conditions would not result in increased revenue.

Therefore, the structure of the BMIR Program placed financial constraints on owners that limited their ability to financially maintain the property and killed any incentive to capitalize future improvements or repairs.[99] Although Congress intended under the BMIR Program that the source for capital improvements would be the owner, local housing authorities were increasingly called on to provide funding to help maintain these units on behalf of tenants.[100] The financial strain on owners was exacerbated by other market challenges, especially raging inflation and the utility crisis of the 1970s.[101] By the 1980s, while properties were reaching a threshold of wear and tear, local housing authorities also lacked the funds to pay for the repairs due to cuts by the Reagan Administration and Congressional budget cuts. [102]

For housing that was located in low-rent markets where the specter of paying off the mortgage and redeveloping the property

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[99] Khadduri & Wilkins, *supra* note 96, at 161.

[100] *Id.*

[101] One critique of programs like 221(d)(3) was the money Congress allocated to these programs did not anticipate problems like the housing industry faced in the 1970s: "No matter how the problems of conventional public housing were approached, the key to maintenance, improvement, and longevity was money, more money by far than the Congress had provided for the program in the past." EUGENE J. MEEHAN, THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING 102 (1979).

[102] Marvin Siflinger stated to the subcommittee on Housing, Banking, and Urban Affairs that "states simply do not have the resources and cannot be expected to be able to deal with both production of new housing and preservation of existing units." *Declining Supply of Low and Moderate Income Rental Housing: Hearing Before the Subcomm. on Hous. & Urb. Affs. of the S. Comm. on Banking, Hous., & Urb. Affs.*, 100th Cong. 43 (1987) (statement of Marvin Siflinger, Exec. Dir. of Mass. Hous. Fin. Agency). In his testimony, Mr. Siflinger advocated for increased private side rentals that would "cover reasonable operating costs." *Id.* at 44. For a discussion of the Reagan policy that limited expenditures on housing development, see Charles E. Connerly, *What Should Be Done with the Public Housing Program?*, J. AM. PLAN. ASS'N, 142, 146 (2007); PAUL PIERSON, DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER AND THE POLITICS OF RETRENCHMENT (1994); THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING 102 (1979); KATHLEEN FLANAGAN, HOUSING, NEOLIBERALISM AND THE ARCHIVE: REINTERPRETING THE RISE AND FALL OF PUBLIC HOUSING (2020); RAQUEL ROLNIK, URBAN WARFARE: HOUSING UNDER THE EMPIRE OF FINANCE (2015); Mary McLeod, *Architecture and Politics in the Reagan Era: From Postmodernism to Deconstructivism*, ASSEMBLAGE, Feb. 1989, at 22-59 (1989).

was not an economically pragmatic option, the owners typically sought to simply continue to serve low-income populations for as long as they could maintain the building under the prevailing financial conditions.

Second, the economics of the BMIR Program exacerbated the same issues of poor material choice and design seen in other public housing programs. The BMIR lending program put maximum limits on how much developers could borrow on a per-unit basis for the construction of the property and how much they could spend per unit, resulting in the same problems that plagued earlier subsidized housing developments. The per-unit remuneration caused cheaper material choices and a lack of development in community space and resources. Contractors and developers faced increasing construction costs and often ran out of money without the ability to make adjustments, such as changes in the number of units. Again, amenities such as communal space and other extra uses of space were cut to meet budget demands. Developers, who were unwilling to reduce the amount of money they earned in profit, were incentivized to have contractors use cheaper materials to keep costs low to maximize their individual profits. Likewise, the contractors building affordable housing would often use less costly materials because they were not tasked with future upkeep.[103]

Use of low-grade materials, combined with years of neglect and failed structural systems, compounded the costs of unit upkeep and decreased the livability of subsidized housing units in the 1980s.[104] In one example from Chicago's public housing's developments (developed under a federal program with the same per-unit funding model as BMIR), the hot water in some units could not be turned off in the bathrooms, which contributed to moisture problems and mold in units.[105] The per-unit remuneration also resulted in developers often "overstating achievable occupancy rates, understating expected operating expenses, and understating the costs of the initial lease-up of

[103] *See* SUSAN J. POPKIN ET AL., THE HIDDEN WAR: CRIME AND THE TRAGEDY OF PUBLIC HOUSING IN CHICAGO 11 (2000); Khadduri & Wilkins, *supra* note 96, at 170.

[104] POPKIN ET AL., *supra* note 103, at 12-13.

[105] *Id.* at 11.

units."[106] Because the properties were financed with FHA mortgage insurance or direct loans from HUD, default risk was transferred from lender to government, severely weakening the incentives for the private-mortgage lender to critically assess the viability of the project during the underwriting process.[107]

The focus on remuneration on a per-unit basis meant that developments were often aesthetically "grim and institutional."[108] There was no incentive in BMIR to make the properties aesthetically pleasing or to make developments feel more like a "neighborhood" rather than a "project" unless developers saw the potential of opting out of affordable housing and into market rate rentals. As the cost limitations impacted the design and construction of the project, subsidized housing began to look more like troubled public housing projects built under prior programs, like Pruitt-Igoe—where community elevators were sacrificed to reduce costs and certain planned elements, like park space and communal outdoor space, were eliminated altogether for gravel lots. Normally, owners are incentivized, at least in part, to improve buildings because tenants want improved spaces and the tenants will leave if apartment quality decreases. In the BMIR Program, tenants did not have the option to leave because subsidized housing was their only choice,[109] and project-based vouchers required them to live at specific properties. Moreover, tenants were discouraged from just walking away from a tenancy since that meant foregoing their spot as a subsidized tenant and waitlists for subsidized housing historically take years to successfully navigate.

The resulting inability or refusal of owners to perform upkeep was well known, as evidenced by the Honorable Marcy Kaptur's observation, "what troubled me, as we drove through those projects this morning, was the tremendous amount of deferred maintenance I saw."[110]

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[106] Khadduri & Wilkins, *supra* note 96, at 168.

[107] *Id.*

[108] POPKIN ET AL., *supra* note 103, at 11.

[109] Khadduri & Wilkins, *supra* note 96, at 176.

[110] *Rental Housing Affordability for Low- and Moderate-Income People: Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the Comm. on Banking, Fin. & Urb. Affs.*, 100th Cong. 6–7 (1987) (statement of Rep. Marcy Kaptur).

B. The Emergency Act, The Low-Income Housing Preservation Act, and HOPE 1996

In 1987, due to the public failing of many BMIR Program properties and their funding structures, Congress passed the Emergency Low-Income Housing Preservation Act of 1987, which implemented a two-year "mark-to-market" program to encourage owners of properties in the BMIR Program to continue to offer subsidized housing options.[111]

While this act was meant to fix the BMIR Program, it merely put a Band-Aid on the program, keeping in service many buildings that should have been decommissioned and forcing unwilling landlords to stay in the market via a two-year moratorium on prepayment of subsidized mortgages. Landlords who were unable to exit the BMIR Program as they had planned were given access to new financial incentives under the 1987 Act. However, these additional cash influxes did not provide enough money to make the buildings still operating under the BMIR Program economically sustainable, particularly for properties that required significant maintenance improvements like Church Street South.

The extra money simply was not enough to solve the structural problems in the buildings created from years of substandard maintenance and investment. The additional funds allocated by Congress were exhausted before eligible parties were able to get the subsidies to which they were entitled, and Congress did not allocate any more. Statements made in 1987 during a hearing conducted by the Subcommittee on Housing and Urban Affairs of the Senate Banking, Housing, and Urban Affairs Committee clearly demonstrate an overall consensus amongst those in the housing industry and those charged with regulating subsidized housing in cities that the BMIR Program was a failure. Representatives referred to the BMIR Program as "self-defeating" and characterized BMIR properties as in "imminent danger of sliding into disrepair."[112]

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[111] *See generally* U.S. DEP'T OF HOUS. & URB. DEV., MAJOR HOUSING AND URBAN DEVELOPMENT LEGISLATION ENACTED SINCE 1932 (2024).

[112] *Declining Supply of Low and Moderate Income Rental Housing: Hearing Before the Subcomm. on Hous. and Urb. Affs. of the S. Comm. on Banking, Hous., & Urb. Affs.*, 100th Cong. 6-7 (1987); *see also Rental Housing Affordability for Low- and Moderate-Income People: Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the Comm. on*

1. The Emergency Act

Prior to the maturity dates for the twenty-year opt out, Congress passed new legislation that created different remedies for developers seeking to opt out of the affordable housing mandate. In 1987, Congress passed the Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA").[113] That act temporarily barred owners from prepaying their mortgages and thereby opting out of affordable housing delivery required under the terms of their mortgage.[114] The law, referred to as Title II, then set out new criteria for developers to opt out of the program, including obtaining HUD's approval to opt out by satisfying a variety of criteria. Among those criteria was that the developer had to provide impacted tenants at least one-year's notice of termination intended of any Housing Assistance Program ("HAP").[115] Administratively, developers were required to file a notice with HUD of their intent to change or eliminate the restrictions on the development. Upon receipt of notice, HUD then would provide the developer with available options that included the terms of prepayment should the developer elect to pre-pay; a series of incentives designed to entice the developer to continue providing affordable housing under a new contract; and options for selling the property to another qualified purchaser who would continue to deliver affordable housing through the development.

Upon receipt of these options, the developer then would file a plan of action with HUD, describing the proposed changes they intended, any proposed changes in ownership, any cooperative agreements with state or local authorities, the anticipated impact on tenants, and the anticipated impact the proposal would have on the availability of affordable housing in the relevant area.[116] HUD then was required to notify the developer within sixty days if

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Banking, Fin. & Urb. Affs., 100th Cong. 6–7 (1987) (providing statements describing the state of housing conditions in BMIR housing developments); Khadduri & Wilkins, *supra* note 96, at 169 (developers/owners of properties in low-value, high-poverty areas, where they did not expect to get any continuing tenancy after the 40-year period, had no incentive to fix or maintain the properties, let alone improve them).

[113] *See generally* U.S. DEP'T OF HOUS. & URB. DEV., MAJOR HOUSING AND URBAN DEVELOPMENT LEGISLATION ENACTED SINCE 1932 (2024).

[114] *See id.*

[115] *See id.*

[116] *See* 24 C.F.R. § 248.203 et seq. (2025).

there were deficiencies in the plan of action and to suggest ways the plan could be amended to meet the stated requirements.[117] Within 180 days of the plan's submission, HUD was required to notify the developer if the plan was approved, or, if not, to describe the reasons why the plan approval was withheld and what the owner could do to obtain approval.[118] After that, the owner/developer was given a reasonable time to revise the plan in accordance with HUD's directives.[119]

If a developer sought prepayment, one limitation was that the Secretary of HUD had to issue a written finding that such a payment (and therefore the withdrawal of the housing from the local affordable housing stock) would not have an adverse effect on the supply of affordable housing in the relevant market. One HUD analyst testified that "prepaying the mortgage was very difficult to achieve [under Title II] because it was very hard to prove that a prepayment would not negatively affect the supply of affordable housing."[120]

In exchange for agreeing to deliver affordable housing, developers could instead receive incentives. That agreement included not only the requirement that the housing remain low-income oriented housing, but also that the developer would ensure that expenditures were made for maintenance and operation of the development; that current tenants would not be displaced except for good cause; that the rental levels would not increase beyond either 30% of a tenant's adjusted income or market rate, whichever is lower; that any rental increases would be phased in; and that any newly available apartments would be subject to the HUD-Approved Rates, and let to HUD-Approved tenants. In exchange, developers could then receive an increase in permissible distributions or other measures designed to increase the rate of return on investment; a change in the method for calculating equity held in the property; increased access to residual receipts account or excess replacement reserves; insurance for a second mortgage; limited increase in rentals; and financing of capital improvements.

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117 *Id.* § 248.215.
118 *Id.* § 248.219.
119 *Id.*
120 *See* Cienega Gardens v. United States, 67 Fed. Cl. 434, 441-42 (2005).

The Emergency Act was only intended to be effective for two years, but in 1989 Congress extended the Emergency Act for several more months until it could complete the permanent legislative fix.

2. The Low-Income Housing Reservation and Resident Homeownership Act of 1990.

In 1990, Congress passed new legislation intended to address the affordable housing shortfall and potential problems of Section 221 and 236 developers exercising twenty-year opt outs. The Low-Income Housing Preservation and Resident Home Ownership Act of 1990 ("LIHPRHO") changed the terms of buyout options that were available under the Emergency Act passed three years earlier.[121] Like the Emergency Act, the LIHPRHO prefaced individual developer's ability to prepay their mortgage obligation upon a showing that doing so would not materially increase economic hardship on current tenants and that the current supply of affordable housing options within the community was sufficient.[122] Unlike the Emergency Act, the LIHPRHO did not allow prepayment under a plan approved by a state agency. Likewise, the LIHPRHO provided that mortgages may be prepaid if the Secretary of HUD had approved a plan of action based on certain incentives, but those incentives remained unfunded after fifteen months of the Secretary's approval.[123] Likewise, a mortgage may be prepaid if the Secretary had previously approved the development to be sold but there remained no qualified buyers, or if HUD failed to provide the necessary assistance for the sale to be completed.[124]

In addition to the changed parameters for prepaying the mortgage, if developers opted to pursue incentives, Title VI required developers to continue to deliver affordable housing for the remaining useful life of the development, rather than the additional twenty years as originally agreed under the Section 221 and 236 programs.[125] Moreover, the law limited applications for

[121] 12 U.S.C. §§ 4101-4125.
[122] *See id.*
[123] *See id.*
[124] *See id.*
[125] *See* 12 U.S.C. §§ 4101-4125.

review of the useful life of a development to fifty years after the approval of a plan by the Secretary, effectively extending the affordable housing obligation to seventy years from the time the development was constructed.[126] In exchange, the new provisions removed any limits on equity distributions or limits on the allowable means to calculate the equity of a property.[127] The new law provided that owners could specifically gain access to the additional preservation equity through a second mortgage on the development.[128]

If a developer chose to pursue the prepayment options, then both HUD and the developer would choose appraisers to provide opinions on the preservation value of the property.[129] If the two appraisers could not agree on the preservation value, and the developer and HUD could not come to an agreement, then HUD and the developer would select a third appraiser whose opinion would be binding. If the developer chose to sell the property to a qualified buyer, the process required a number of approvals, evaluations, and steps to complete. The first step was the appraisal process, from which the secretary would determine the number of aggregate preservation rents, and if those rents were too costly, the owner was required to sell the property to priority or qualified purchasers. During the first year, sales of properties were limited to "qualified buyers" or resident homeownership groups, a non-profit organization, or a state or local agency that agreed to retain the restrictions on the property. The sale price was further limited by the preservation value determined at

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] The statute sets forth the following requirements for appraisals of preservation value of eligible low-income housing:

> (1) [F]or purposes of extending the low-income affordability restrictions and receiving incentives under section 4109 of this title, the fair market value of the property based on the highest and best use of the property as residential rental housing; and (2) for purposes of transferring the property under section 4110 or 4111 of this title, the fair market value of the housing based on the highest and best use of the property.

Id. § 4103.

appraisal. If no qualified buyers made an offer during the first year, then the developer could sell to any entity or individual, so long as they agreed to retain the restrictions on the property. In any case, the sale value was limited to the value determined by the appraisers.

Owners of properties who were eligible for prepayment prior to January 1, 1993, and who filed a notice to repay prior to January 1, 1991, could elect between pursuing repayment options or incentives under the Emergency Act or the LIHPRHO. Developments that were not eligible for prepayment until after January 1, 1993 were limited to pursuing options under the LIHPRHO. The general consensus was that the Emergency Act provided more flexibility and more favorable terms than the LIHPRHO.

3. Housing Opportunity Program Extension ("HOPE") Act of 1996

Finally, in March 28, 1996, Congress passed the Housing Opportunity Program Extension Act of 1996, commonly known as HOPE.[130] HOPE embedded the right of developers to prepay their mortgages, so long as they guaranteed affordable rents for sixty days following prepayment.[131] While courts interpreted the HOPE legislation as preempting the limits on prepayment under Title II of the Emergency Act or Title VI of the LIHPRHO, many HUD local offices continued to implement requirements imposed by the Emergency Act or the LIHPRHO.[132] Namely, many HUD offices continued to issue preservation letters, mandating preservation of affordable housing status for certain renters for up to three years after prepayment, as well as obligations to pay 50% of the relocation costs of impacted tenants. Additionally, those letters advised developers that HUD would continue to require a one-year notice prior to termination of affordable rentals, and that HUD expected that existing Housing Assistance Program Voucher Contracts would be fulfilled for their duration.

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[130] Housing Opportunity Program Extension Act of 1996, 12 U.S.C. 1707, 1715z-20 and 1721.

[131] *Id.*

[132] *See, e.g.*, Thetford Props. IV Ltd. P'ship v. U.S. Dep't of Hous. & Urban Dev., 907 F.2d 445, 447 (4th Cir. 1990).

The first cases filed against HUD came on the heels of the Emergency Act in 1987-1998.[133] These cases would continue to evolve until the most recent decisions in 2020 and 2023.[134] Later challenges to the Emergency Act and the LIHPRHO were based on changes made to the BMIR Program and other affordable housing initiatives that developers claimed deprived them of economic expectations when they entered the affordable housing program including claims for delays, loss of economic value, and other damages.

C. Litigation around the Emergency Act and LIHPRHO Delays

As cases emerged between developers and HUD around delays and limits in the adjustments to the BMIR Program, they revolved around three inter-related claims. Developers claimed the federal government breached its contract with developers when it delayed or hindered prepayment rights under the deed of trust. Second, they claimed that delays or hindrance with prepayment rights were an interference with an economic right, which required finding either a per se taking or a regulatory taking had taken place. Finally, developers claimed that the new law itself (LIHPRHO) contemplated damages to developers if there was a regulatory delay in implementing either the incentives or approval for prepayment that the law afforded.

Courts addressing these claims used a series of test plaintiffs to evaluate the merits of claims raised by developers. Those cases have largely gravitated between two different eras of BMIR litigation. The first era, circa 1995–2008 involved a series of test plaintiffs largely known as the Cienega Gardens and Chancellor Manor Plaintiffs.[135] During this first era, courts tested the merits

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[133] *See, e.g.*, Thetford Props. IV Ltd. P'ship v. U.S. Dep't of Hous. & Urban Dev., 907 F.2d 445, 447 (4th Cir. 1990) (challenging the Emergency Act for delay and potential hindrance of prepayment options). In another decision challenging the Emergency Act, rural tenants of subsidized housing challenged HUD's acceptance of a borrower's application to prepay for violating the Emergency Act. *See generally* Lifgren v. Yeutter, 767 F. Supp. 1473 (D. Minn. 1991).

[134] *See* Sonoma Apartment Assocs. v. United States, 150 Fed. Cl. 226 (2020); Anaheim Gardens v. United States, 167 Fed. Cl. 355 (2023).

[135] *See* CCA Assocs. v. United States, 667 F.3d 1239, 1250 (Fed. Cir. 2011). The *CCA* case waited in the wings as many details of law were ironed out by the various *Cienega Gardens* cases, as well as *Independence Park*.

of remedies available under the various acts, defenses of the government, and how legal principles should be applied in this affordable housing setting. By the end of the first era, courts had rejected the idea that developers could state a contract claim, but only in very limited factual circumstances. Moreover, the courts, while warm to the idea that a regulatory taking could have occurred under the legislation, adopted an economic analysis that would make that taking very unlikely. The second era of cases more specifically tested limits applied under the *Cienega Gardens* cases, namely reconsidering whether contract claims should be available to developers and the extent to which those takings claims might actually be enforceable even under the strict limits laid out in the *Cienega Gardens* cases.[136]

Initial claims raised by developers around the changes in the BMIR Program evolved around breach of contract rights created by HUD to induce developers to participate in affordable housing—whether that breach constituted a taking under the Fifth Amendment either as a per se taking or a regulatory taking, and whether the plaintiffs were entitled to administrative remedies due to failure to follow the administrative processes outlined in the later acts. These cases were largely decided in the Cienega test plaintiff cases.[137] The litigants in these cases all contracted with HUD between 1967 and 1973 to provide

[136] *See* Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003).

[137] The *Cienega Gardens v. United States* case was a consolidated dispute involving two sets of affordable housing providers: five developments with common ownership partnerships generally known as the Cienega Gardens Plaintiffs, and three developments with common ownership partnerships generally known as the Chancellor Manor Plaintiffs. The Cienega Gardens Plaintiffs were five related developers: Cienega Gardens, Del Amo Gardens, Las Lomos Gardens, Blossom Hill Apartments, and Skyline View Gardens. The five developments were unified by a plurality of common interest holders who had financial stakes in the developments. Between all the general partners, they were among the largest providers of affordable housing in Southern California.

The Chancellor Manor Plaintiffs comprised three developments: Chancellor Manor, Oak Grove Towers Association, and Gateway Investors. The partnerships all shared a principal investor in Antonio Bernardi, who operated under the group Sentinel Management Group. Like Cienega Gardens group, Chancellor Manor employed a buy and hold strategy in real estate investment, where it acquired properties with the intention of holding them long enough to accrue long term appreciation. Based on their strategy, they intended to exercise the prepayment rights after 20 years. *See Cienega Gardens*, 67 Fed. Cl. at 434, 446, 452.

affordable housing under either the original BMIR Program (Section 221) or the amended program (Section 236).[138] As a part of the program, each of the development partnerships agreed to limit equitable distributions to 6% of original equity investment in the property as determined by HUD's market evaluation of the property value.[139] At the same time, each partnership executed three separate documents. First, they executed a lending agreement with the private lender that agreed to advance value under the HUD underwriting and endorsement. They then executed a deed of trust, granting the lender the right to foreclose on the property for a breach of conditions, such as nonpayment or other breaches. The deed of trust was endorsed by HUD and provided in a rider that developers could prepay the mortgage after twenty years without penalty, removing the conditions on the property. The rider also referenced the third document executed by developers—the regulatory agreement that bound the developers to adhere to HUD policies around tenant selection, rental values and increases, and other rules of the program. The regulatory agreement did not include any provision relating to prepayment of the mortgage.

After Congress passed the Emergency Act, a two-year moratorium was implemented on prepayment of mortgage obligations from a variety of federal legislation designed to

[138] Of the Cienega Gardens Plaintiffs, one of the developments (Del Amo Gardens) originated under section 221(d)(3) of the housing act, while four of the developments originated under section 236. Each of the partnerships entered into agreements with HUD between July 1, 1970, and August 1, 1973. All three of the Chancellor Manor Partnerships entered into regulatory agreements with HUD under Section 236 between November 1, 1971, and June 7, 1973. *See id.* at 447-51.

[139] The cap on equity distributions was designed to be a co-insurance program to ensure that developers maintained sufficient reserves for maintenance of the property for the duration of the program. For the Cienega Gardens Partnership and the Del Amo Gardens Partnership the cap on annual distribution was virtually similar ($18,258 for the Cienega Gardens Partnership originally valuing equity at $304,300 and $18,288 for the Del Amo Gardens Partnership originally valuing the equity at $304,805). The Las Lomas Gardens Partnership was limited to $12,113 annual distribution with an original equity valuation of $201,887. The Blossom Hill Apartments Partnership was limited to an annual distribution of $26,196 with an original equity valuation of $436,601; while the Skyline View Gardens Partnership was limited to $20,388 of annual distributions with an original equity valuation of $339,200. No information was provided by the court for the market value equity in the Chancellor Manor plaintiff developments. *See id.* at 448-51.

facilitate affordable housing. At the end of the two-year period, however, developers could assert rights to prepayment depending on when their original prepayment right matured. Under the Emergency Act's Title II, developers whose right to prepayment matured before January 1, 1993 could apply for prepayment under the new criteria laid out by the Emergency Act. Developers intending to prepay under the Emergency Act had to file a notice to do so by January 1, 1991, in addition to submitting an approved plan to the secretary of HUD as described in the previous section. For developments that did not meet the prepayment cut-off date of January 1, 1993, their only option was to seek prepayment or incentives under Title VI of the LIHPRHO.[140]

In 1994, the Cienega Gardens Plaintiffs filed suit against HUD alleging both breach of contract and takings claims for deprivation of an economic interest. Initially, the trial court found the government liable for breach of contract and awarded damages in the amount of $3,061,107. That initial judgment was reversed by the Federal Court of Appeals (*Cienega IV*), which found that the plaintiffs lacked privity with the government sufficient to find a breach of contract remedy.[141] The dissent in *Cienega IV* noted that the structure of the agreements were designed to make HUD the true beneficiary of the agreements.[142] The fact that HUD produced the forms adopted by lenders, the endorsement by HUD on the Deed of Trust, and the regulatory agreement created a single document that demonstrated sufficient

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[140] The 20 year mark for each development to prepay its mortgage obligation and opt out of the affordability requirement was different based on the origin of the note: Cienega Gardens Development reached its 20 year mark on December 8, 1991; the Del Amo Gardens development reached its 20 year mark on March 27, 1992; the Las Lomas Gardens Development reached its 20 year mark on July 15, 1991; the Blossom Hill Apartments Development reached its 20 year maturity date on October 31, 1994; and the Skylines Gardens Development reached its 20 year maturity date for prepayment of the mortgage on March 15, 1994. *See id.*

[141] Cienega Gardens v. United States (*Cienega IV*), 194 F.3d 1231, 1241 (Fed. Cir. 1996).

[142] *Id.* at 1250 (Archer, J., dissenting). Judge Archer in the dissenting opinion noted that "these transactions were consummated under the provisions of regulations in effect as of specific dates" meaning that the time agreements were entered into were relevant as to the prepayment of mortgages for owners within the permitted twenty-year window. *Id.*

privity.[143] Nevertheless, subsequent decisions following the circuit court's reversal found similarly that the government lacked privity since the regulatory agreements did not provide for developer's rights to prepay and that the only agreement providing that right came from the deed of trust with the lender.[144] Later, the Court of Federal Claims also found that the takings claim was not ripe since the plaintiff developers did not apply for prepayment under either the Emergency Act or the LIHPRHO.[145] The Circuit Court later reversed the Court of Federal Claims again, finding that the developer claims were sufficiently ripe and stating that the owners' claims of futility were even more convincing than the court faced in either *Palazzolo* or *Suitum* since HUD lacked the discretion to vary its requirements under the statute.[146] The court also affirmed the

[143] In addition to the dissent, HUD previously argued in unrelated matters that it in fact was in a contract with developers during the BMIR Program. In *U.S. v. David*, HUD brought suit against developers to enforce terms of the regulatory agreement through the deed of trust default provisions. There HUD argued that "[t]he mortgage instruments support the United States' construction of the language of the regulatory agreements. First, the regulatory agreement is expressly incorporated into the mortgage by reference. The rules of construction require the two documents be examined together to ascertain the parties' objective intent." HUD went on to argue that "[t]he mortgagor signs a [regulatory] agreement which states that it is entered into '[i]n return for [HUD's] endorsement for mortgage insurance . . . . The regulatory agreement is the *quid pro quo* for HUD's endorsement of the [mortgage] note for insurance.'" Chancellor Manor v. United States, 51 Fed. Cl. 137, 154 (2001), *aff'd in part, rev'd in part*, 331 F.3d 891 (Fed. Cir. 2003).

[144] *See e.g.*, Martinez v. United States, 281 F.3d 1376 (Fed. Cir. 2002) (finding no contract claim from participation in the BMIR Program); Alexander Inv. v. United States, 51 Fed. Cl. 102 (2001); Chancellor Manor v. United States, 51 Fed. Cl. 137 (2001) (rejecting the developer claims that LIHPRHO constituted an anticipatory breach); Indep. Park Apartments v. United States, 61 Fed. Cl. 692 (2004). Both the Chancellor Manor and Independence Park developments were part of the initial test plaintiff's case in *Cienega IV*.

[145] Cienega Gardens v. United States, 46 Fed. Cl. 506, 509 (2000). The developers alleged that the reason they did not apply for prepayment was that they believed in good faith that they were not eligible under the Emergency Act or LIHPRHO.

[146] The court said, "We conclude that [the] Owners present an even more compelling case of futility than in *Suitum, Palazzolo,* and the other land use cases cited above. Here, HUD lacks the 'high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer.' The prerequisites for HUD to grant a prepayment request are set forth by statute, and there is no allegation that HUD has any discretion to depart from these statutory requirements. Rather, section 4108 sets forth strict numerical criteria that must be met before HUD may exercise any discretion it has to approve prepayment requests."

lower court's rejection of the per se taking, and instead remanded the case to determine whether a regulatory taking occurred under the *Penn Central* line of cases.

On remand, the Court of Federal Claims again rejected the plaintiffs' takings claim under a regulatory takings analysis. Relying on a previous decision in *Alexander*, the court found that the developers lacked a vested right and therefore did not have a compensable taking.[147] Importantly, the court, leaning on *Alexander*, found that in the absence of an enforceable contract claim against the government, developers could not articulate a claim for deprivation of an economic right. Once again, the Federal Circuit Court reversed the Court of Federal Claims, overruling the *Alexander* decision and finding that both the Emergency Act and the LIHPRHO constituted a regulatory taking and interfered with a contract right created by the government, the lender, and the developer. The court reinstated the original contract remedy and then remanded the action to the Court of Federal Claims to determine the proper remedy due for just compensation under the Fifth Amendment.[148]

Prior to the next hearing in the *Cienega* line of decisions, the Tenth Circuit writing in a separate decision found that the parties had intended to create a contract between HUD and developers under the BMIR Program. In *Aspenwood Development Co. v. Martinez*, the Tenth Circuit embraced the dissent from *Cienega IV* five years earlier and articulated the same single contract theory for the extension of privity—binding HUD to allow the prepayment option under the existing contracts. Reinstating the finding that an economic right was created by contract, and that a taking question was ripe for review, the Court of Federal Claims took up the taking question again. In *Cienega IX*, the Court of Federal Claims found that a temporary taking occurred against both the Cienega Gardens plaintiffs and the Chancellor Gardens plaintiffs. In getting to the takings analysis, the court applied the *Penn Central* analysis for regulatory takings, looking to the character of the government action, the economic impact of the

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Cienega Gardens v. United States, 265 F.3d 1237, 1246 (Fed. Cir. 2001) (first citing Palazzolo v. Rhode Island, 533 U.S. 606, 620; and then citing 12 U.S.C § 4108 (1994)).

[147] *See* Cienega Gardens v. United States, 331 F.3d 1319, 1323 (Fed. Cir. 2003).

[148] *Id.* at 1353-54.

action, and the interference with investment backed expectations of the parties.

To the government action, the court looked to both the purpose of the statute and the actions of the government enforcing those ends. The court began by noting that both the Emergency Act and the Low-Income Housing Preservation and Resident Homeownership Act ("LIHPRHA") were designed to extend the availability of affordable housing by keeping existing low-income providers in the program. Observing that the government had cancelled its existing Section 8 building program because the costs were too high, the court noted that the Emergency Act and the LIHPRHA were designed to prevent affordable housing providers from exiting the program.[149] Pointing to delays that HUD implemented when owners did seemingly qualify for prepayment, and even delays implemented when after the adoption of HOPE that owners had an unconditioned right to prepayment, the court observed that the character of government action qualified as a taking.[150] Noting that the developers all established sufficient investment backed expectations based on their plans to prepay as quickly as possible, the court turned to the question of economic impact. The court identified three usual tests for assessing economic impact of legislation in a takings analysis: the difference in the current state of return against what the returns would have been had there not been a taking; the extent and limits of the developer's recoupment of capital; and the value taken from the property against the value remaining.[151]

Rejecting the return on equity approach, the court said that the approach better identifies the economic impact of a temporary taking than a comparison of fair market values. Citing *Kimball Laundry Co. v. United States*, the court observed that measuring the fair market value change might demonstrate no economic harm at all, as property values may not change during the limited period of the taking.[152] Rather, the return on equity approach takes into account the lost value over time due to the taking.

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[149] *See generally* Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003).
[150] *See id.*
[151] Cienega Gardens v. United States, 503 F.3d 1266, 1277 (Fed. Cir. 2007).
[152] *Id.* at 1281 (citing Kimball Laundry Co. v. United States, 338 U.S. 1 (1949)).

Following *Cienega X*, the appellate court took up a discreet challenge by HUD to a decision by developers in Los Angeles known as *Independence Park v. HUD*. The appeal came from a decision of the Court of Federal Claims in 2004 that was based on *Cienega VIII*. In the lower court decision, the Court of Federal Claims found that a temporary regulatory taking occurred when Congress adopted the Emergency Act and LIHPRHO.[153] In the appeal, the court then considered the effect of Los Angeles's Rent Stabilization Ordinance on the calculation of just compensation for a temporary taking.[154] Developers raised procedural hurdles to the introduction of the Rent Stabilization Ordinance including whether *Cienega VIII* barred the government from raising the ordinance as a defense, and whether the National Housing Act preempted the Rent Stabilization Ordinance.[155] Finding that the government was not barred nor was the act preempted, the appellate court found that the Rent Stabilization Ordinance should have been included in the calculation of just compensation by the Federal Court of Claims because even in the absence of the Emergency Act and LIHPRHO, under the Rent Stabilization Ordinance owners would not have been free to raise their rentals to market rates.[156] Finally, while the court recognized that the just compensation award should account for the Rent Control Ordinance, the court also emphasized that the developer plaintiff's execution of use agreements under the Emergency Act or

[153] *See* Indep. Park Apartments v. United States, 449 F.3d 1235, 1237-38 (Fed. Cir. 2006).

[154] *See id.* The federal circuit established a methodology of analysis within *Independence Park* to address takings claims. In short, a private owner that enters into an agreement may be entitled to redress in the form of compensation for the entirety of a signed use agreement if a taking is found to have occurred whilst still under the allotted time frame of the contract.

[155] *Id.* at 1242. The court further explored the steps necessary to address the compensation owed once a taking was found to have occurred in light of the decision in *Cienega VIII*, ELIHPA, and LIHPRHA. "In order to determine the amount taken, we must compare the rights the plaintiffs had before the enactment of that legislation with the rights they had afterwards." *Id.*

[156] *Id.* at 1247-48 ("In the present case, the enactment of ELIHPA and LIHPRHA took the plaintiffs' prepayment rights, as we held in *Cienega VIII*, and thereby deprived the plaintiffs of any benefit that they might have realized from prepayment of their mortgages in the final 20 years of their mortgages. The use agreements were designed to reduce the financial burden imposed by the statutory prohibition against mortgage prepayment.").

LIHPRHA did not constitute settlements by the developers so to preclude takings claims.

In the final chapter of the Cienega Gardens cases, the Court of Appeals for the Federal Circuit overruled the Court of Federal Claims' analysis that a taking could be compensated.[157] First, the Court of Appeals for the Federal Circuit said the claims court's analysis did not account for the property as a whole when it chose to consider the annual differences in equity.[158] Pointing to *Penn Central* and *Sierra-Tahoe*, the court noted that regulatory takings must take into account the loss in relation to the entire interest in the property, not in isolation.[159] A wholistic approach would then require the court to compare the amount taken with the amount that remains. Making the denominator of comparison the whole value of the property equity, rather than a single year's equitable return, renders the loss less serious.[160] Second, the appellate court also noted that the claims court failed to account for offsetting benefits, such as the option to enter into use agreements or to sell to other affordable housing providers.[161] Third, the appellate court noted that the claims court failed to properly account for the duration of the legislation in determining the temporary nature of the taking.[162] Notably, the court distinguished between litigants who did not enter into use agreements (whose time period should be measured by prepayment date and the enactment of HOPE) and those that did enter into use agreements (whose time period should be measured by the prepayment date and the date of the use agreement).[163] Finally, the court expressed skepticism that the developers' investment backed expectations analysis by the claims court was fully considered.[164] Notably, the court pointed to the fact that HUD reserved the right to change the regulations in its regulatory agreement with developers during the applicable periods and whether the investors claims of reliance were

[157] Cienega Gardens v. United States, 503 F.3d 1266, 1277 (Fed. Cir. 2007).
[158] *Id.* at 1277.
[159] *Id.* at 1280.
[160] *Id.* at 1281.
[161] *Id.* at 1278, 1285.
[162] *Id.* at 1288.
[163] *Id.*
[164] *Id.* at 1288-89.

reasonable.[165] The court noted that evidence should be based on expectations by the industry as a whole, not just the subjective expectations of developers.

As the *Cienega* BMIR claims came to a close, the primary authority was fairly resolute that neither contract claims or takings claims were justified under the Emergency Act or LIHPRHA. But also, during this time, cracks were beginning to emerge that would manifest themselves in future cases. In fact, just two days after *Cienega X*, the Court of Appeals for the Federal Circuit again raised the question of whether developers had a contractual remedy. Namely, the appellate court, after having spent nearly a decade reaffirming that there was not sufficient contractual privity to recognize an enforceable breach, began reconsidering that question.[166] Moreover, after *Cienega* seemingly closed the door on developers proving a regulatory taking by focusing on the differential value of the property rather than the loss of economic opportunity, courts began to find new room for a taking.

In September 2007, the appellate court issued a new opinion in a case titled *City Line Joint Venture v. U.S.*[167] In that case, the court considered whether the enactment of LIHPRHA was a "public" and "general" act that applied the sovereign acts doctrine. Importantly, the court accepted the government's admission that privity existed between the government and City Line Developers when the original lender assigned the mortgage note to HUD after City Line defaulted on payments.[168] Noting that the finding of contractual privity constitutes a waiver of sovereign immunity for contract liabilities, the court noted that the Emergency Act and

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[165] *Id.* at 1291.

[166] *See* City Line Joint Venture v. United States, 503 F.3d 1319 (Fed. Cir. 2007).

[167] *Id.* at 1320-22. The case centered around a "multi-family rental housing project in Maryland" in which HUD provided low-mortgage insurance for low-interest mortgages that were maintained for the specified forty-year time frame. *Id.* at 1320. These arrangements were deemed a "scheme of restrictions" for private developers "on their investment in, use, and sale of low-income housing projects." *Id.* at 1321. Within these agreements were the provisions of being able to prepay the mortgage after twenty years. Plaintiffs brought suit claiming that the "enactment of LIHPRHA and HUD's enforcement of this act was an unlawful denial of City Line's contractual right to prepay its mortgage after twenty years and exit the program." *Id.* at 1320.

[168] *See id.* at 1319.

LIHPRHA were legislation aimed at nullifying contract rights created under the BMIR Program.[169]

Four years later, the appellate court had the chance to re-engage with both the contracts question and the takings question. Reviewing the trial court's finding and reliance on *Cienega IV*'s decision that no privity existed between HUD and developers under the BMIR Program, the court acknowledged that "it is certainly possible that the three agreements should be interpreted together" to form a single agreement.[170] Relying on the Tenth Circuit opinion in *Aspenwood* and the dissent in *Cienega IV*, the court noted that these approaches were more consistent with contract interpretation found in the Restatement "rule that 'all writings that are part of the same transaction are interpreted together.'"[171] Nevertheless, the court reaffirmed the trial court decision that the parties lacked privity.[172] On the question of takings, the appellate court set out to distinguish between the holding in *Cienega VIII* that a regulatory taking could be proved, but that the measure of economic impact limited by *Cienega X* made that conclusion unlikely. The court comparing the two noted:

> Ultimately, the difference between the *Cienega X* and *Cienega VIII* methodology is the difference between an 18% and 81% economic impact, a substantially different result stemming solely from our change in the economic analysis between the two cases. While the plaintiff stipulated to the 18% economic impact, CCA continued to dispute the propriety of the *Cienega X* methodology.[173]

Applying that analysis, the court observed that the *Cienega X* methodology makes it "virtually impossible" for any developer to state an effective case for a taking.[174] As an example of the

[169] *Id.*
[170] CCA Assocs. v. United States, 667 F.3d 1239, 1250 (Fed. Cir. 2011).
[171] *Id.*
[172] *Id.*
[173] *Id.* at 1246.
[174] *See id.* ("Rather than consider the impact the regulation had on the property during the time it was in effect, such as the amount of money the plaintiffs actually lost in rents during that time period, *Cienega X* requires that the impact be measured against the total value over the remaining life of the property.").

arguments presented in this Article, the history of the BMIR Program provides a cast of actors that embody different stakeholders, which can help illustrate what courts and Congress did as they altered the program, and addressed the disputes that arose between developers and HUD.

The State. The state was present from the start of the BMIR Program in multiple forms. First, the role of BMIR in addressing national housing shortages that emerged after a lower-than-expected public housing delivery in the 1950s and again in the 1980s as Congress contemplated the potential impacts on affordable housing with developers withdrawing from the program. Second, distinctive from the federal state's interests in housing policy, HUD as an agency of the state to deliver housing had its own priorities that were revealed in the course of the program's development. Finally, local interests as the sites where affordable housing delivery occurred also had interests in ensuring the success and continuity of affordable housing delivery. Amongst those interests included the increase of housing stock that reduced pressure on other city resources, and the addition of a new taxable property that could generate future city revenue.

Developers. Developers of properties that opted into the program were interested both as parties who delivered affordable housing in the community, and as property owners with a longer-term investment beyond the affordable housing mandate. To this end, two different types of developers emerged in the BMIR Program. The first were developers who were organized primarily for the purpose of delivering affordable housing within communities. Sometimes these developers were consortiums of non-profits and community development actors who saw the BMIR Program as an engine to further city goals. The second were developers who "played the long game" of delivering affordable housing for a period with the expectation that they could opt out and convert to market-based rentals. Often the former acquired land in cheaper, less prosperous city regions, while the latter acquired land for the development in more stable regions that showed a consistent likelihood of a return on investment. Both types of developers were also market value recipients of subsidies for the delivery of affordable housing.

Residents. Residents of the affordable housing communities were important stakeholders in the BMIR Program as recipients of the benefits. One saga of the BMIR story was the inevitable litigations that arose between residents, HUD, and developers when developers did opt out of affordable housing delivery.

Neighbors. Neighboring property owners and merchants were interested in the BMIR Program. Neighbors sometimes wondered out loud if large-scale affordable housing would negatively impact their own property values, while nearby merchants saw the increase in housing density as an opportunity to expand their customer base.

Lenders and Financial institutions. Finally, the financial institutions that carried the notes and mortgages on the developments were interested in the developments' success, whether as an affordable housing unit or as a marketable concern. The lender's interests often involved the capacity of developers to maintain the buildings so that the collateral value was not lost as security.

Taking into account these various stakeholders, the rest of this Article considers how litigation distorts various interests by channeling large-scale conflicts through the private lens.

III. PROBLEM SOLVING AND CASE CONFLICTS

What are we to make of how courts dealt with developers following the adoption of the Emergency Act and LIHPRHA? I want to position my insights through RPT as a methodological approach to thinking about difficult problems. Resilient Property Theory, developed in *Squatting and the State: Resilient Property in the Age of Crisis*, and other writings, draws on several methodological approaches to avoid framing problems through binary lenses.

Applying RPT insights to the BMIR Program and subsequent congressional legislation and litigation, the BMIR Program illustrates the challenges of solving public problems through private approaches. Those choices can be revealed by seeing how courts scaled burdens and benefits in the breakdown of the program. I want to make three broad points about how the courts addressed these claims. First, the cases illustrate how individual actors scaffold their resilience claims to different types of resilience. As Congress used its powers to allocate material resources in the BMIR Program, they did so within a framework for how they perceived housing to be carried out. In turn, the government benefitted from construction of affordable housing, while owners and developers benefited by acquiring assets on more affordable and subsidized terms by the government. But that scaled resilience was also impacted by various limits that ultimately became a resilience deficit for both the state and owners. The failure to keep up with other affordable housing programs placed more pressure on maintaining this housing within the affordable housing eco-system. Owners' desires to exit the program were in part due to perceived gains from converting property to market-rate rentals and in part due to perceptions of affordable housing and fears that those perceptions will harm their economic asset.

Second, these cases also reveal how the public/private nature of benefits and burdens are scaled on a rights and resilience framework when the state is involved. Notably, as the court navigated the two primary challenges by developers—privity and takings—they did so by evaluating the rights of the state and the rights of developers in light of the changes. Those rights became sources of resilience for both actors. Importantly, in contrast to claims by the government and the owners, residents who could not translate their claims to a rights framework received little resilience.

Finally, the cases demonstrate how courts, while sometimes making gestures to the structural nature of the problem, largely only dealt with them individually, raising the question whether courts were the right place to address these concerns in the first place. Considering the role of the actor and the state as nodes in the legal allocation of burdens and benefits, litigation then imposes a scaling effect on the relationship that distorts how public obligations are approached. The cases illuminate the blurring of the private/public divide in both the question of burdens for delivering public services and the benefits received by those services.

A. Scaling State and Individual Resilience to Public Problems

The BMIR Program and responses from courts and Congress reveal how public problems are scaled across different expectations of resilience. At the heart of those responses was what role public initiatives play in allocating individual resilience. While different actors had different expectations of resilience from the program, those resilience claims overlapped somewhat. It may be helpful to think about what types of resilience claims the public program purported to provide.

For the state, resilience could be found on a few levels. On the one hand, the state sought resilience in the material realm by both marshalling private lending power of financial institutions to build housing infrastructure, while at the same time increasing the number of safely constructive housing units available within U.S. cities.[175] The Housing Acts of 1949 allocated, from federal revenue sources, $1 billion for slum clearance and another $700 million for public housing construction.[176] In the following years, the public housing program intended by the 1949 act would fall short of its goal for number of units constructed.[177] While the 1949 Housing Act authorized 810,000 units of affordable housing, by 1954 only 164,110 units had been constructed and a mere 40,685 had been contracted to be built in the coming years.[178] In 1954, Congress passed a new Housing Act which increased financial support for public housing and slum clearance programs, though it did so with a lingering question of whether private resources were better used to combat the affordable housing challenge.[179] President Eisenhower set a less ambitious goal for federal

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[175] Lawrence J. Vale & Yonah Freemark, *From Public Housing to Public-Private Housing: 75 Years of American Social Experimentation*, 78 J. AM. PLAN. ASS'N 379, 379 (2012).

[176] Omnibus Housing Act of 1954, CQ ALMANAC (1954), http://library.cqpress.com/cqalmanac/cqal54-1357795 [https://perma.cc/S6T2-73GE].

[177] *Id.* Projected housing booms were prophesized in order to compensate for the increase in families and family sizes, and the advancement of mass production technology made home manufacturing officials feel confident in the projected goal.

[178] *Id.*

[179] *Id.* The pressures of previous housing program failures caused more and more officials to vocalize their concerns, and question whether the efforts to addressing housing issues were better left out of the hands of appropriation committees.

construction of 135,000 units of affordable housing in each of the next four years, or 540,000 additional units of housing by 1958.[180] By the end of the decade, the public housing stock had increased to nearly half a million, not quite reaching Eisenhower's goal.[181] When President Eisenhower signed the 1954 act into law, he said "the act constituted a major advance towards meeting America's housing needs[,]" though he also noted that the housing program should be continued "until the needs can be met by private industry."[182] The BMIR Program was the first step towards turning the affordable housing needs over to private interests.[183]

Affordable housing programs also met a larger national concern about American cities and urban blight that had been in the public consciousness since before Jacob Riis's publication, *How the Other Half Lives: Studies Among the Tenements of New York*.[184] Housing programs sponsored by congressional legislation set basic standards of habitability for construction, with an aim of avoiding overpacking, improper conditions, and the spread of communicable diseases that were rampant in crowded tenement housing in the early twentieth century.[185] The aftermath of World War II raised the American consciousness of the state of its cities on two vectors. First, returning servicemen having fought in the war, now found themselves needing safe, habitable shelter, placing new pressures on the housing stock.[186] Second, those

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180 *Id.* President Eisenhower maintained the importance of establishing safe and healthy housing to contribute to the increase of safe and healthy citizens.

181 *Id.*

182 *Id.*

183 U.S. DEP'T OF HOUS. & URB. DEV., MAJOR LEGISLATION ON HOUSING AND URBAN DEVELOPMENT ENACTED SINCE 1932 (2024). The Housing Act of 1961 created the Below Market Interest Rate Program ("BMIR") to cater to low-income housing populations.

184 *See generally* JACOB A. RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK (1890). This book served as the first of its kind with raw photojournalism of the desolate living conditions low-income individuals were subjected to within New York City. Further explored within the work were stories of sweatshops and child labor, factors that were integral foundations to the systemic poverty of the city at the time.

185 U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 183.

186 *See* Prentiss A. Dantzler & Jason D. Rivera, *Constructing Identities of Deservedness: Public Housing and Post-WWII Economic Planning Efforts*, 39 MINN. J.L. & INEQ. 443, 451, 464-65 (2021). Once more the implication of the undeserving vs. the deserving poor become apparent in the public attitudes of how returning veterans should be treated upon returning home from WWII. Policymakers utilized the narratives of horrific war, and how the soldiers subjected to it were deserving of

returning found American cities to be in a different state than their European counterparts.[187] In the late nineteenth century, Susan Fenimore Cooper first observed the state of American cities as having nothing to commend to future generations the greatness of the American dream.[188] Observing that in places like Albany, New York, no structure could lay a claim to being founded before the previous generation, unlike the European cities where cathedrals, bridges, and roads gave evidence to the greatness of those societies.[189] As Jacob Riis would illustrate thirty years later, conditions had only gotten worst.[190] The twentieth century's beginnings were rife with struggles, with nearly half of that time spent in either the great depression or recovering from it. So as World War II came to an end, and soldiers returned home, the comparisons that Susan Fenimore Cooper observed seventy-five years before were front and center.[191] The experiences of returning troops from World War II raised new perspectives on issues like race, sexual relations, the role of the state to address social problems, and others.[192]

Just as World War II rallied the nation together for a collective fight against Nazi Germany and Imperialist Japan, the end of the war shifted that national conscious back to the American city as a national problem. This spotlight would continue to focus national attention on American cities through the 1960s, as school desegregation, civil rights, and fair access all gravitated around the implementation of a housing policy. The federal state, as well as the local state, both had resilience assets

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affordable housing options when they returned home. *See also* Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1074-79 (2017). The argument of how issues of class differences can be solved by the subjective opinions of policy is apparent in the manner in which veteran efforts were utilized to push policy.

187 *See* Dantzler & Rivera, *supra* note 186, at 450-51.

188 *See generally* Susan Fenimore Cooper, *Village Improvement Societies*, PUTNAM'S MAG., Sep. 1869, at 359.

189 *Id.* at 359-66. Despite having a general fascination with the advancement of mankind in reference to its relationship with nature, Cooper realized the advancement of American villages was significantly outpacing its European counterparts, but was far from perfect.

190 RIIS, *supra* note 184.

191 *See generally* Cooper, *supra* note 188.

192 *See* Dantzler & Rivera, *supra* note 186, at 450.

on the line as housing policy shifted and changed between 1949 and 1972.

Facing these material challenges to the landscape of cities, and rhetorical legitimacy concerns about how the state was responding to city conditions, the federal government exercised its hierarchical powers to privatize urban renewal programs nationwide through the BMIR Program. This exercise of authority was responsive to two critiques that the state was facing in the post-World War II period. On the one hand, seeds of doubt were sown into the earliest federal housing programs, questioning first whether the state should be engaged in housing provision, and then questioning the financial expenditures committed to the program.[193] The seeds of the "meddling state paradigm" of the Reagan-Bush years were sown early in the emergence of public housing programs.[194] Drawing on fears that public housing represented the emergence of socialism, conservative stakeholders held their ground, only permitting the "bare minimum of public housing, that minimum clearly necessary to blunt the sharpest edge of dissatisfaction."[195] Thus budgetary concerns often became the rod that beat back public housing from being fully realized. The second concern was what public housing provision would mean for the private construction industry. Questions about whether the industry actors could be remobilized to provide large-scale housing were prescient. But also, what public housing represented was a sea change for how developers would be paid—a bargain that was less advantageous than the private market.[196] As stated by Thompson, "representatives of private housing interests were the chief lobbyists against public housing at every step of the way: in Congress, in the state legislatures, at city halls, in election campaigns, through newspaper ads, letter writing campaigns, political contributions, and private lobbying."[197]

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[193] CQ ALMANAC, *supra* note 176.

[194] Peter Marcuse, *Interpreting "Public Housing" History*, 12 J. ARCHITECTURAL & PLAN. RSCH. 240, 241 (1995).

[195] *Id.* at 243.

[196] *See id.* at 243-44. Construction itself was advertised as benefit of housing programs, whereby more and more job opportunities arose with each housing development project, helping all classes in either the providing employment, or housing itself.

[197] *Id.* at 243.

The BMIR Program exemplifies an act in which the state combined all three levels of scale (rhetorical, material, and hierarchal), to tackle what it perceived to be interlocking problems—city blight, government legitimacy, preservation of private markets, and housing need. The BMIR Program in the 1960s sought to marshal private actors into the affordable housing fight by providing below-market interest rate financing towards the construction of large-scale affordable housing units.[198] In 1960, the average interest rate was slightly above 5%; by 1965, it was 6%; and in 1970, the interest rate was slightly below 7%.[199] The federal strategy to lure developers into the program by providing a significant cost-savings through better-than-market terms served as key inducements.[200] Another form of resilience for developers was that they would be paid upfront for the subsidized rentals they would incur. In the beginning, this asset meant that developers could collect the subsidized portions of the rentals in advance, taking advantage of the high market interest rates by depositing those sums into savings. Finally, developers could opt out of affordable housing delivery after twenty years by prepaying the forty-year mortgage.[201] As a result of this program, more than 544,000 units of housing were built, nearly double the existing public housing stock as it stood in 1960.[202] The Federal government was able to construct large numbers of affordable housing stock at a fraction of the cost, while also relieving some of the burden that local housing authorities were already experiencing around upkeep, maintenance, and tenant poverty concentration. In doing so, the state created new property interests that had to be addressed as the program changed.

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198 *See* NAT'L LOW INCOME HOUS. COAL., PROJECT-BASED RENTAL ASSISTANCE (2015).

199 SIDNEY HOMER & RICHARD SYLLA, A HISTORY OF INTEREST RATES (4th ed. 2005).

200 *See* NAT'L LOW INCOME HOUS. COAL., *supra* note 198.

201 *Id.*

202 *See* Charles L. Edson, *Affordable Housing—An Intimate History*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 193, 200 (2011). Despite the amount units built under the program, the fluctuation of inflation revealed the flaws within the system. Rent became equivalent the cost to amortize a 1% loan, which was simply not sustainable for tenants.

B. Scaling State and Individual Resilience to Private Burdens

As the state faced growing challenges around affordable housing, more and more pressure was placed on private developers to undertake public burdens. The conflict between developers and HUD pitted the expectations of private property owners against the state. Importantly, the affordable housing problem was one that was structural on several levels. First, it implicated the structure of housing finance objectives and how those objectives were furthered by the ownership interests of developers. The BMIR Program was a series of inducements to encourage private property owners to shoulder some of the burdens of affordable housing. The state facilitated the creation of an interest in private property and compensated owners for diminished returns through subsidy programs. In return, the owners promised to deliver affordable housing for a minimum of twenty years and potentially up to forty years.[203] In that sense, the structure of the program induced a quid-pro-quo value. But the program of that quid pro quo, rather than being static, seemed to be a moving target. Developers likely identified the quid-pro-quo nature of the program in both their arguments that they had a contract with HUD for the delivery of affordable housing, and in their arguments that their investment backed expectations had been thwarted by the changes in the program. Both of these claims failed for what I will suggest are hierarchical dimensions of state power. In the first dimension is a contractual relationship where the expectations of the state are the only real expectations that are enforced in the bargain. The second hierarchical dimension is how public burdens translate to private obligations.

The essential elements of the aforementioned were reduced to whether the state waived its claims of immunity by being a party to a contract with developers.[204] The regulatory agreement created a public private partnership ("PPPs") between state and private actors to deliver public functions.[205] PPPs emerge out of a private

[203] NAT'L LOW INCOME HOUS. COAL., *supra* note 198.

[204] *See* Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages*, 58 OHIO ST. L.J. 175, 177 (1997).

[205] Eduardo Engel, Ronald Fischer & Alexander Galetovic, *The Basic Public Finance of Public-Private Partnerships*, 11 J. EUR. ECON. ASS'N 83, 84-85 (2013); Jean-Etienne

firm's desire to "respond to pressure from the anti-globalization movement by proactively accommodating oppositional claims," and in turn seeking to "stabilize hegemonic capitalist worldviews and reproduce a corporate-friendly governance system."[206] Said another way, PPPs privatize traditional public domains by tapping into anti-statist instincts, while finding market space constructed by the state to solve public problems. When breakdowns occur between states and their private parties, the issue turns on who should bear the burden or costs of the breakdown.[207] For courts, this is a structural question of whether the sovereign state waived its claims to immunity by entering a contract with private actors.[208]

The dispute between HUD and Cienega Gardens developments raised several distinct issues of reliance, expectation, and bargained-for agreements. The investors specifically claimed that they structured their investments in the property to prepay the mortgage quickly.[209] They also argued that they chose the locations and designs of the properties to be able to take advantage of market-value rentals as quickly as possible under the program. The shifting sands of the Emergency Act and later the LIHPRHA caused developers to change gears, raising the question of who should bear the cost burden of the change in the program. At various times during the litigation, the court rejected contract claims on the basis that developers lacked privity with HUD since HUD was not a party to the deed of trust. In doing so, the court placed the burden on developers during negotiations to project that the program would change before they could exercise their prepayment rights—something Congress itself did not foresee.

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de Bettignies & Thomas W. Ross, *The Economics of Public-Private Partnerships*, 30 CAN. PUB. POL'Y 135, 139 (2004).

206 Marco Schäferhoff, Sabine Campe & Christopher Kaan, *Transnational Public-Private Partnerships in International Relations: Making Sense of Concepts, Research Frameworks, and Results,* 11 INT'L STUD. REV. 451 (2009).

207 *E.g.*, de Bettignies & Ross, *supra* note 205, at 139.

208 *See* Sabatino, *supra* note 204, at 177. A distinctive issue arises whether private contractors also gain the benefit of the sovereign's immunity claims when performing a public function.

209 William W. Wade, *Federal Circuit's Economic Failings Undo the* Penn Central *Test*, 40 ENV'T L. REP. 10914, 10919 (2010).

The real question that this problem poses is whether Congress should have foreseen the need to adjust the program, or at least should the state bear the costs when change is necessary. As I noted above, the seeds of program change were sown in the breakdown of public housing and the aftermath of global economic crises. Choices Congress made to underfund public housing and retrench funding in the 70s and 80s, as well as choices to forestall future expenditures for housing construction, led to shortages that presented themselves as more dire if developers exercised their prepayment rights. The Emergency Act and the LIHPRHA both were designed to not only delay invocation of those rights, but also to potentially make it more difficult for developers to exercise those rights at all. Unlike Congress, Developers were not in a position to shape the conditions that led to housing shortages prompting the congressional change. By finding that the government and developers lacked privity, courts validated sovereign immunity claims except for the most savvy and capable negotiators.

Lacking a realistic view, the court in hewing to a strict view of privity-based contract agreement ignored the fact that the bargaining power between these actors and the state reflect different scales of knowledge and resources to respond to contextual factors surrounding them, including the various organizational and financial resources of each side, the strength of local markets, and the real estate cycle present in those local markets.[210] For the state, the economics of public-private partnerships are most attractive at startup, where the state recognizes that it foregoes future revenue in exchange for cost-effective program launches.[211] Having the power of mobilizing resources under strict adherence to state requirements gives the state an advantage in requiring ubiquity in negotiation. State contracts thus don't vary from place to place, but rather the state operates on a take-it-or-leave-it basis.[212] On the other side of the equation are private actors that bring a range of different skills,

[210] Carol E. Heim, *Introduction: Public and Private Provision of Urban Public Goods*, 39 SOC. SCI. HIST. 361, 361 (2015).

[211] Engel, Fischer & Galetovic, *supra* note 205, at 84-85; *see also* de Bettignies & Ross, *supra* note 205, at 139.

[212] *See* de Bettignies & Ross, *supra* note 205, at 145.

resources, and contexts to the table when negotiating with public agencies. In the housing sector, those actors range from non-profit agencies that seek to operate housing initiatives for the public good and private actors who expect to make a profit at the end of the transaction.[213] Private developers are often more keenly attuned to market values, while nonprofit actors are more focused on financial availability.

Under the Emergency Act and the LIHPRHA, Congress evidently expressed a preference that housing would continue to carry out its affordability objective. One way Congress implemented this objective was by requiring owners to stipulate that prepaying the mortgage and converting the property to market-rate rentals would not adversely affect the affordable housing supply in the community.[214] Where developers could not certify that a conversion would not affect affordable housing supply, they could attempt to identify a qualified buyer who would continue to operate the development as an affordable housing operation.[215] The reality facing developers was that prepayment was likely a fiction—either due to a lack of qualified buyers or because the terms that made acquisition possible required the developer to forego expected equity returns that attracted them to the program to begin with.[216] In short, lacking a contractual right to exit, developers also struggled to fit their expectations into the new paradigm that Congress provided. In the world of contract, a variety of doctrines would be relevant to bring the state's own malfeasance into view of the dispute.

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[213] *See id.*

[214] *See generally* 12 U.S.C. §§ 4101-4125.

[215] *See* Shelden P. Winkelman, *Low-Income Housing Preservation and Resident Homeownership Act of 1990*, 73 MICH. BAR J. 1160, 1161-62 (1994) ("It is generally felt that it would require an extremely unique set of facts and circumstances to lead to HUD's granting permission for prepayment; that is, all areas arguably need low-income housing. . . . Therefore, the option of prepayment is probably a fiction.").

[216] James Tahash, Former Division Director of the Planning and procedures Division of the Office of Multifamily Housing Management at HUD, stated, "[F]or the vast majority of owners of low-income housing, prepayment was not an option because they could not meet the statutory criteria." Brief for Appellants, Cienega Gardens v. United States, No. 00-5104 (Fed. Cir. Sep. 8, 2000). The later argument was made by *Cienega Gardens* plaintiffs, noting they did not desire to sell the development due to the inability to return the equity value they bargained for. *See* Cienega Gardens v. United States, 503 F.3d 1266, 1275 n.9 (2007).

First, the court could have applied the composite document rule to find that the state was actually a party to the contract—that privity in fact existed. The composite document rule seeks to ascertain the intent of the parties to form a contract where no single document can identify that intent.[217] Rather, the doctrine looks across multiple documents, none of which satisfy the ordinary formalities for an enforceable agreement, to find that all documents should be viewed as one.[218] An important consideration is whether there is something that binds the multiple documents together as an enforceable unit. In this context, the agreement between the state and the developers was comprised of three documents: a lending agreement by a third-party financier, a deed of trust between the financier and developer, endorsed by HUD, and a regulatory agreement between HUD and the developer that laid out the terms of the rental program.[219] Regulations implemented by Congress required that all three documents be present for the developer to participate in the BMIR Program.[220] Finally, HUD, the government agency overseeing the program, was the drafting party on all three documents, which were standard government-endorsed forms. The court could have easily looked to the legislation or the endorsement as the joining link between the parties to establish that all three documents were in fact one legally binding contract.

Second, the court could have viewed the state as a third-party creditor beneficiary to the agreement, opening the realistic view that creditors are different from goodwill donees. Samuel Williston recognizes this distinction when he observes that the creditor beneficiary is "not wholly without interest to pay his claim."[221] Raising this equitable stake of proportionality, Williston

[217] Drawing on formation of Security Agreements under Article 9, the Composite Document Rule recognizes that where the parties can prove that they intended to create a security interest, across multiple documents that are connected to one another, a court can conclude the existence of a security agreement. *See* Bank of Am. v. Outboard Marine Corp. (*In re* Outboard Marine Corp.), 300 B.R. 308, 323-24 (Bankr. N.D. Ill. 2003).

[218] *Id.*

[219] *See, e.g.*, *Reply Brief of Appellants Chancellor Manor et al.,* Chancellor Manor v. United States, No. 02-5066 (Fed. Cir. Sep. 30, 2002) (noting the regulatory contract requirements for BMIR developers).

[220] *Id.*

[221] 4 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 362 (1920).

recognizes that the contours of the third-party beneficiary may be different depending on the stakes of the dispute for the different parties.[222] The state's stakes involved the threat of housing disruption and loss of legitimacy, which, when channeled through the frame of contract disputes, seemingly reaffirmed private skepticism of public engagement in housing solutions.

Third, the structure of these disputes raises questions about who bears the burdens of public choices. While the takings analysis has largely been driven by whether the state *should* have the power to interfere with private property rights, a more significant question is who bears the costs of public choices. Private property is frequently imbricated in social problems, whether those problems are limits on local land use for public welfare, or whether an owner can maximize their economic opportunity in land. However, property theories tend to frame property problems through normative frames that are rooted in and driven by justifying the institution of private property, thereby defending property's power.[223] Despite this, the issues at stake for individuals and for states in addressing affordable housing reach beyond the putatively apolitical transactional business of creating and enforcing claims.[224] The courts in the BMIR cases, applying the *Penn Central* analysis, focused on the nature of the economic harm—whether that harm should be measured by lost opportunity costs (ranging upwards of 90%) or whether the harm should be measured on the basis of a change in equity value due to the program changes.[225] As described below, neither approach was a straightforward analysis of the economic impact that changes in the program presented.

First, on the one hand, courts saw the BMIR Program as providing two distinctive assets to developers—one real and one imaginary. The real asset was the increasing equity in the realty

[222] *See id.*

[223] O'MAHONY & ROARK, *supra* note 18, at 212.

[224] MIGUEL A. MARTÍNEZ, SQUATTERS IN THE CAPITALIST CITY: HOUSING, JUSTICE, AND URBAN POLITICS 97 (Ray Forrest ed., 2020) (noting that exploring socio-spatial relations dictates critical perspectives that implicate cross-disciplinary tools).

[225] *See* Cienega Gardens v. United States, 331 F.3d 1319, 1325 (Fed. Cir. 2003); *see also* CCA Assocs. v. United States, 667 F.3d 1239, 1242 (Fed. Cir. 2011); Chancellor Manor v. United States, 51 Fed. Cl. 137, 140 (2001); Indep. Park Apartments v. United States, 61 Fed. Cl. 692, 697 (2004).

that was subsidized by the program. The imaginary asset was the market rentals that owners were deprived of by accepting subsidized rentals. The structural nature of the subsidized payouts failed to account for inflationary increases or economic crises that would impact, among other things, the residential rental market. Properties funded under the BMIR Program received forty years of advanced subsidies for participating in the program. In 1970, the average market rate rental was $107.00. Forty years of subsidized rentals on a single unit would amount to $2996.00. For reference, the Cienega Gardens development had 180 units, meaning that the developer, on average, could expect subsidies amounting to $539,280.00. In return, developments were restricted from making distributions of more than 6% of the equity in the property on an annual basis, as a means of preserving a surplus for future repairs. But along the way, several factors changed the residential rental market. The OPEC energy embargo significantly raised the cost of energy delivery on landlords in the 1970s.[226] Relatedly, a currency crisis emerged, causing a shift in values and starting a cycle of inflationary market conditions.[227] By 1980, the average market rental price had more than doubled, and would nearly double again by 1990.[228] Yet, despite the surge in rental market prices, BMIR landlords were locked into subsidies created by their initial investment.

Second, even where the equity value may have seen an increase over time, many BMIR properties suffered from the same flaws as public housing in that their construction was dictated by a per-unit finance model.[229] This model often meant that developers were logically incentivized to create a higher number of smaller units to maximize the available financing for the project. It also encouraged developers, particularly those in lower-income geographies, to use materials that were cheaper and to cut corners where possible to save costs. This often meant that common amenities and public-facing aesthetics were cut from plans to

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[226] *See* O'MAHONY & ROARK, *supra* note 8, at 179.

[227] *Id.*

[228] *See Historical Census of Housing Tables: Gross Rents*, CENSUS.GOV (Oct. 8, 2021), https://www.census.gov/data/tables/time-series/dec/coh-grossrents.html [https://perma.cc/7XJL-REBG].

[229] *See* Charles L. Edson, *Affordable Housing—An Intimate History*, 20 J. AFFORDABLE HOUS. CMTY DEV. L. 193 (2011).

ensure that developer fees were paid to the maximum allowed amount. More and more, the presence of affordable housing developments in local communities, that were built with material deficiencies and populated by the poorest in their regions, saw similar conditions emerge as their public housing counterparts: crime elevated and communities deteriorated. As one economist notes, the attitudes towards public housing dramatically changed from a high between 1950 and 1960 to a steep decline from 1960 to 1970.[230] She notes that one explanation for the shift in economic impacts in the 1970s could be due to "the changing nature of public housing, with regard to both its physical and tenant characteristics" as well as the "long-run deterioration of buildings and the increased presence of single-parent [families] and chronically poor households . . . may have increased the disseminates associated with public housing."[231] Like the contract claims described above, these contexts were structural problems that were unaccountable in the discrete litigation claims developers brought against the state.

By the 1980s, developments where these kinds of cost-saving measures were deployed, often located in the same geographies as their public housing developments, were suffering from similar conditions as public housing units that had remained in service long past their effective economic lives.[232] Congress, facing the structural problems created by the BMIR law and by previous housing programs, believed that if BMIR developers exited at the twenty-year mark, American cities would face an impenetrable housing crisis.[233] As the Emergency Act and the LIHPRHA were passed and implemented, the structural resilience that was allocated increasingly placed higher burdens on the private interests participating.[234] For Congress and the Federal Housing

[230] Katharine L. Shester, *The Local Economic Effects of Public Housing in the United States, 1940–1970*, 73 J. ECON. HIST. 978, 1012 (2013).

[231] *Id.*

[232] *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1971).

[233] *See id.*

[234] *See id.*

Administration bodies, those expectations were isolated around the bargain to deliver housing for land equity.[235]

C. Resilient Property Theory in Structural Solutions and Litigation

The conflict that arose between developers and the government over the BMIR Program was essentially around conflicts of collective values and entitlements. Melamed and Calabresi defined the entitlement as the presentment of two or more conflicting interests that the state must decide who to favor.[236] Particularly challenging then is when the state itself is a claimant of an entitlement. At its core, this conflict presents two distinctive types of resilience by entitlement claimants—structural and individual.[237] Structural resilience is where the actor relies on the persistence of the institution in its current form for its own resilience.[238] For example, those who rely on the property system's stability draw on the structure of private property and its persistence for their own resilience. Individual resilience, on the other hand, arises when the individual stakes claim to resilience independent of the structural commitments to the institution. Owners of property possess individual resilience, not because the structure of the private property system favors their interests, but because they claim their interests in private property privilege puts them in conflicts. As Martha McClusky writes, "the expansion of public power for substantive human provisioning and protection [risks] unsettling the liberal narrative that law functions to facilitate private interests," including property owners.[239]

Increasingly, since the 1970s, the growth of neoliberal thought has shifted world economic and property systems towards

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[235] *See id.*

[236] *See id.*

[237] *See generally* O'MAHONY & ROARK, *supra* note 18, at 5; *see also* M.L. Roark & L. Fox O'Mahony, *Real Property Transactions in the Network Society: Platform Real Estate, Housing Hactivism, and the Re-Scaling of Public and Private Power*, 46 J. CONSUMER POL'Y 445, 453 (2023).

[238] Martha T. McCluskey, *Restructuring the Constitution for Human Resilience*, *in* LAW, VULNERABILITY, AND THE RESPONSIVE STATE (Martha Albertson Fineman & Laura Spitz eds., 2023).

[239] *Id.* at 15.

the appearance of individual resilience over structural resilience.[240] The proliferation of regulatory takings cases has placed an outsized emphasis on individual property disputes as the dominant lens to understand the social or collective role of property.[241] Lorna Fox O'Mahony writes, "it can hardly be surprising that, through conceptionalist or doctrinal lenses, and relying on litigation as our empirical source, property's organizing concepts are geared to over-represent property insiders, who are likely to enjoy particular privilege in accessing justice through legal advice and litigation."[242] Despite the emergence of this train of thought, one way to understand the BMIR housing history is as a limitation of individual resilience and an affirmation of the function of structural resilience. To this end, Resilient Property Theory offers an approach for understanding and aligning structural resilience in the face of individual demands. This, in part, begins with whether the problem is framed as an individual problem or a collective problem.

Property problems are often characterized as either purely private disputes, (i.e., landlord versus tenant; private owner versus private owner(s); or private owner versus intruder) or public intrusions on private interests (i.e., zoning regulations limiting a private owner's use of property; criminal acts that interfere with individuals use of property; or the exercise of eminent domain to compel the taking of property from a private actor).[243] The construction of dichotomies or binaries (e.g., private law/public law, property/sovereignty) is itself a function of the neoliberal worldview, which seeks to position private power, embodied in "the market," as the source of "individual freedom and wealth maximisation."[244] They were embedded in the approaches and methodologies of liberal property theory and scholarship from the late nineteenth century and through much of

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240 *E.g.*, Laura S. Underkuffler, *Property, Sovereignty, and the Public Trust*, 18 THEORETICAL INQUIRIES L. 329 (2017).

241 *Id.*

242 Lorna Fox O'Mahony, *Property Outsiders and the Hidden Politics of Doctrinalism*, 67 CURRENT LEGAL PROBS. 409, 427 (2014).

243 Roger Pilon, *Property Rights and the Constitution*, *in* CATO HANDBOOK FOR POLICYMAKERS 173, 176 (8th ed. 2017).

244 O'Connell, *supra* note 38, at 535.

the twentieth century's "ownership society" period.[245] These shifts presumptively reoriented property rhetorically above the state, setting the stage for a shift in how the state allocated resources for broad-scale social problems, like housing.[246]

When the state positions itself as a private actor, how should the law treat the state? For much of the twentieth century, transactional private property law interacted with active liberal states performing two key roles in housing delivery: public sector housing providers, allocating housing to households based on need,[247] and as funders of housing construction through public capital allocations.[248] In the 1930s, the U.S. government instituted several housing reforms designed to shore up American housing conditions against the financial collapse of the Great Depression. The Federal Housing Act of 1934 created the Federal Housing Administration ("FHA") to register and insure mortgages, giving creditors security in the event of a default.[249] In 1938, the U.S. government created the Federal National Mortgage Association ("Fannie Mae") to buy mortgages from creditors and therefore increase their liquidity to create more new mortgages.[250] The Wagner-Steagall Housing Act in 1937 was the first broad-scale affordable housing intervention by the federal government to enable the construction of publicly owned housing to be let to low-income tenants at below-market rates.[251]

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[245] Raquel Rolnik, *Late Neoliberalism: The Financialization of Homeownership and Housing Rights*, 37 INT'L J. URB. & REG'L RSCH. 1058, 1059 (2013).

[246] *See id.*

[247] *See id.*

[248] Rolnik, *supra* note 102, at 24. Rolnik described the transformation of governments in the wake of the financial crisis since the 1970s from housing providers to housing "'facilitators, whose mission was to make way for and support the expansion of private markets." *Id.* In this period, the World Bank was instrumental in encouraging states "to adopt policies that enable housing markets to work . . . and [to] avoid distorting [them]." *Id.* According to Rolnik, the role of the states henceforth became to "create the conditions, institutions and regulatory models that would promote housing financial systems capable of enabling home purchase." *Id.*

[249] *Id.* at 40.

[250] Fannie Mae was a government sponsored enterprise, designed to facilitate lenders reinvesting their assets into more lending, therefore increasing the number of lenders in the mortgage market. *About Fannie Mae and Freddie Mac*, FED. HOUS. FIN. AGENCY, https://www.fhfa.gov/about-fannie-mae-freddie-mac [https://perma.cc/YA7X-PVFY] (last visited Oct. 15, 2023).

[251] Richard M. Flanagan, *The Housing Act of 1954: The Sea Change in National Urban Policy*, 33 URB. AFFS. REV. 265, 265-66, 268 (1997); Tad DeHaven & Chris

These measures emerged out of the Great Depression—the United States' first major financial crisis of the twentieth century.[252] State investments in private homeownership and public housing were complimentary strategies to reduce housing precarity in financially uncertain times.[253] These commitments were sustained through the 1940s in a dual-mode strategy: Congress often included provisions relating to Fannie Mae, providing financing for homeownership, while, in parallel, making provisions to fund public housing.[254] These dual commitments were decoupled in 1954, when Congress passed the Charter Act alongside the 1954 Housing Act.[255] The Charter Act designated Fannie Mae as a quasi-private entity; it became a wholly privatized operation in 1968, when the federal government sold its shares in Fannie Mae to relieve the federal debt that Fannie Mae had incurred.[256] Fannie Mae became a publicly traded company, subject and accountable to private shareholders, rather than the

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Edwards, *Department of Housing and Urban Development Timeline*, DOWNSIZING THE FED. GOV'T, https://www.downsizinggovernment.org/hud/timeline# [https://perma.cc/SP3V-3LSL].

[252] Gary Richardson, *The Great Depression*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-depression [https://perma.cc/NWG5-PYUF].

[253] *See* Rolnik, *supra* note 102, at 40.

[254] For example, the 1949 Housing Act which authorized Title I funds for slum clearance and the development of large-scale public housing also included provisions to increase authorized limits for the FHA mortgage insurance. Adam Hayes, *National Housing Act: Overview, Impact, Criticisms*, INVESTOPEDIA (June 30, 2022), https://www.investopedia.com/terms/n/national-housing-act.asp [https://perma.cc/BV2R-MFUG].

[255] After 1954, federal support for public housing became bifurcated from general support measures regarding housing. *See* U.S. DEP'T OF HOUS. & URB. DEV., MAJOR LEGISLATION ON HOUSING AND URBAN DEVELOPMENT ENACTED SINCE 1932, at 3 (2024). After 1954, Federal Public Housing was increasingly integrated under desegregation orders. Richard Rothstein, *We Can End Racial Segregation in America*, JACOBIN (July 22, 2019), https://jacobin.com/2019/07/desegregation-color-of-law-public-housing [https://perma.cc/5R58-2JVC]. While the shift in public housing from a largely working-class white population to a largely African American (and extremely financially poor population) during this time has been noted in several places, what also happened was the bifurcation of public housing provision into other areas—namely elder housing, which became a primary category for federal housing provisions. DeHaven & Edwards, *supra* note 251.

[256] Kate Pickert, *A Brief History of Fannie Mae and Freddie Mac*, TIME (July 14, 2008), https://time.com/archive/6904451/a-brief-history-of-fannie-mae-and-freddie-mac/ [https://perma.cc/AGW2-8FPX].

public interest.[257] U.S. housing policy was bifurcated into public and private, paving the way for the eventual rollback of public housing provision as a priority for federal housing investment.

By the 1960s the federal government was getting out of the business of public housing provision and moving into housing finance. The planned expansion of the homeownership sector, aimed to draw in low-income borrowers, was poised to create a new wave of housing opportunities.[258] The state was further distanced from the provision of housing when, in 1970, the federal government authorized the creation of the Federal Loan Mortgage Corporation ("Freddie Mac"), a second government-sponsored enterprise designed to further grow the secondary market for mortgages, increase lending in the homeownership sector and create competition for Fannie Mae.[259] As liberalism evolved towards neoliberalism, and states scaled up, scaled down, and scaled back,[260] the exercise of public power was increasingly characterized as "oppressive, inefficient and [to] be restrained and limited at all costs" *except* in matters deemed to fall within the scope of state action; for example, state enforcement of anti-trespass laws typically falls into the category of preserving private power, even though it's the public power of the state that is deployed to carry out such action.[261] Indeed, the paradox of neoliberalism for private property theorists is that, while its dominant narrative is one of state withdrawal (or forbearance/restraint), in fact, the power exercised by the state in the *defense* of private property rights has expanded—albeit in ways that are deemed to be "outside" the realm of "private" property law.[262]

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[257] *Id.*

[258] *See* ASSETS FOR THE POOR: THE BENEFITS OF SPREADING ASSET OWNERSHIP (Thomas M. Shapiro & Edward N. Wolff eds., 2001); Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450 (codified as amended at 12 U.S.C. §§ 1452-1459) (providing a wide-ranging collection of essays advancing the wealth-creating opportunities of asset ownership for poorer Americans).

[259] *See* OFF. OF INSPECTOR GEN., FED. HOUS. FIN. AGENCY, A BRIEF HISTORY OF THE HOUSING GOVERNMENT-SPONSORED ENTERPRISES 1, 3 (n.d.).

[260] HARVEY, *supra* note 38, at 22, 87.

[261] *Id.* at 21; *see also* O'Connell, *supra* note 38, at 535.

[262] *See* O'MAHONY & ROARK, *supra* note 18, at 5; *see also* Roark & O'Mahony, *supra* note 237, at 453.

The degree to which state actors and agencies perceive their role in the housing market, between facilitating private individuals to self-provide and the state's role in delivering a public service, inevitably shape responses to the pressures of affordable housing need. Much of the public apparatus for building affordable housing has positioned the state as an instigator of tax-credit financing for private developers in exchange for allocating units in developments as affordable housing.[263] In this sense, affordable housing is rooted in both the public and the private realms, as it relates both to the ability of the state to allocate resources through tax credits and to incentivize private owners to participate in these initiatives.[264]

When states allocate resources to support individuals in accessing housing (for example, subsidies or direct provision of public housing), in a context of rhetorical narratives that characterize individuals as responsible for their own impecuniosity, through laziness, poor choices, or other failures of responsible citizenship, they risk criticism over how the state spends public resources, excessive taxation, or characterizations of state action as encouraging dependency and irresponsible citizenship.[265] Yet, this is not a simple policy calculation for (local) state actors and agencies to make. Narrative frameworks invoking state withdrawal from housing provisions are countered by the interlocking nature of the state's own stake in housing delivery and other challenges that state actors are both responsible for and which produce costs for the state, especially at the local level.[266]

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[263] Desiree Fields, *Contesting the Financialization of Urban Space: Community Organizations and the Struggle to Preserve Affordable Rental Housing in New York City*, 37 J. URB. AFFS. 144, 146 (2015).

[264] *Id.*

[265] *See* Lorna Fox O'Mahony & Marc L. Roark, *Property as an Asset of Resilience: Rethinking Ownership, Communities and Exclusion Through the Register of Resilience*, 36 INT'L J. SEMIOTICS L. 1477, 1506 (2023) [hereinafter O'Mahony & Roark, *Property as an Asset of Resilience*].

[266] In a 1965 editorial on Health and Housing, one author noted that "20 per cent of the average American city's residential area is slums, yet 33 per cent of the total population live[s] [there], 35 per cent of the city's fires occur [there], 50 per cent of the disease occurs [there], 45 per cent of the major crimes occur [there], 60 per cent of the tuberculosis cases originate [there], 55 per cent of juvenile delinquency occurs [there], 50 per cent of arrests are made [there]; they cost the taxpayer 45 per cent of all city service expenditure." Eric W. Mood, *Health and Housing Programs in Large Cities*, 56 AM. J. PUB. HEALTH 1540 (1966).

For example, public health outcomes are dependent on the quality and permanence of housing.[267] Educational and economic outcomes also have been directly tied to where a person lives.[268] Ameliorating the consequences of housing precarity may produce cost offsets while providing greater stability for participants in those programs.[269] For example, studies have shown that states may spend more money policing and regulating homelessness due to a lack of affordable housing. [270]

State responses to affordable housing challenges have direct implications for people, individually and collectively, for economic and social institutions, for narrative discourse,[271] and also for the state itself.[272] The real-time effects play out in markets and social relations that crystallize around private property, including the way neighbors perceive their entitlements and the obligations they owe each other.[273] States' responses to property problems in moments of crises bring the normative landscapes of private property into sharper relief, revealing the roles that the state—across its multiple levels—performs in shoring up the resilience of private property rights of owners, investors, citizens, cities, neighborhoods, markets, and others.[274] Finally, state responses to

[267] James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 758-59 (2002).

[268] Roark, *supra* note 7, at 16-18.

[269] *See* Angela Ly & Eric Latimer, *Housing First Impact on Costs and Associated Cost Offsets: A Review of the Literature*, 60 CANADIAN J. PSYCHIATRY 475, 486 (2015).

[270] *See, e.g.*, GREGORY A. SHINN, RETHINK HOMELESSNESS, THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA 8 (2014) (finding that providing safe, affordable housing to homeless individuals costs the city on average $21,014 per person less than policing and regulating homelessness).

[271] As Basolo explained: "The complexity of city policy making and the realities of limited resources often require elected officials to make a choice in their support for different types of policies." Victoria Basolo, *City Spending on Economic Development Versus Affordable Housing: Does Inter-City Competition or Local Politics Drive Decisions?*, 22 J. URB. AFFS. 317, 322-23 (2000).

[272] Erikson argued that neoliberal states use their "public" powers—for example, criminalization—to shore up their legitimacy in the face of political, economic and ideological uncertainty. RICHARD V. ERICSON, CRIME IN AN INSECURE WORLD 30 (2007).

[273] *See* O'Mahony & Roark, *Property as an Asset of Resilience*, *supra* note 265, at 1506.

[274] Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1657-58 (2009). Despite the harms caused by widespread economic or property crises, one benefit is the manner in which it accelerates how society addresses its current viewpoint of property, and the sociological implications surrounding it.

affordable housing enable us to better understand how complex, multi-level state actions shore up both individual and aggregated interests and the resilience of the state itself.

As the federal government took a step back in providing resources for public housing and leaned more on private landlords and developers to fill the affordable housing gap, the active role of the state receded from view—at the federal level at least.[275] At the same time, local or city-level state actors inevitably continued to face conflicting pressures to respond to housing need. On the one hand, affordable housing is rooted in the growing costs of housing, primarily in urban areas, due in part to cities' rent-seeking in exchange for higher tax revenue.[276] It implicates city budgets, which primarily rely on the property tax system and state and federal allocations to solve local problems (at least problems that require expenditures).[277] Solutions to affordable housing needs often require cities to allocate either physical resources (land or buildings) or financial resources (vouchers or other housing allowances).[278] For example, individuals in cities who believe they are paying too much in taxes to support affordable housing goals may find state or federal officials receptive to calls to limit the city's ability to collect more tax revenue by framing the question as a conflict between property rights of owners and public revenue spending by cities.[279] However, unlike the federal government, which governs from a distance and is better equipped to look away from the material realities of local housing crises, city officials live and work in the places that carry the costs of affordable housing shortfalls.

RPT recognizes that, in examining the implications of state responses to complex property problems, it is important to focus on *both* the state's role in allocation of the resources of resilience to competing stakeholders (for example, those seeking housing,

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Crises bring to light potential structural and foundational issues inherent within the property system, which can aid in the reform of property concerns that are interconnected with many aspects of everyday life.

[275] *See id.*

[276] Stephen B. Kinnaird, *Public Housing: Abandon HOPE, But Not Privatization*, 103 YALE L.J. 961, 982-83 (1994).

[277] *See id.*

[278] *Id.* at 983.

[279] *See* Kinnaird, *supra* note 276, at 982-83.

tax-payers, owners, neighbors, landlords, lenders, and healthcare, labor, market, and financial institutions) and the state's own self-regarding resilience needs.[280] Just as "the state" is not a single actor but a composite apparatus of actors, agencies and institutions scaled across multiple levels (global, federal, state/regional, city/local), the assets of resilience that states deploy to maintain their own resilience (for example, maintaining political legitimacy and achieving economic accumulation) are scaled across different loci of state authority and power.[281] Differently situated state actors and agencies with different powers to act have different stores of hierarchical resilience[282] and can access different types of resources with which to address problems (e.g., the size of a tax base, or the physical resources that the state can control within its hierarchical power-base).[283] Finally, states validate or challenge their deployment of these assets of resilience in a context of ideological constraints.[284]

Resilient Property Theory offers a new approach and methodology to tackle property law's wicked problems by offering structural methods for understanding state responses to property problems. While other private property theories may look away from the state as a primary actor in property problems or characterize the state as a neutral arbiter of competing claims, RPT demonstrates how states' own vulnerabilities frame their responses to property problems, as state actors and agencies seek to accumulate and preserve their own resilience, while allocating resilience to other stakeholders. This need is foregrounded when states act to shore up their authority and legitimacy in the face of

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[280] Roark & O'Mahony, *supra* note 237, at 453 (observing the challenges of local state actors and agencies as policies developed at national or regional level are deployed); *see also* O'Mahony & Roark, *Scaling Property Law*, *supra* note 61.

[281] *See* Roark & Fox O'Mahony, *supra* note 237, at 453.

[282] In Chapter 9 of *Squatting and the State*, we highlight tensions that emerged between multiple levels of two federal systems in responding to housing challenges—Barcelona, Spain and New York, United States—In both systems, local actors responded to local housing challenges that were shaped by legal powers to act or not act at the local level. *See* O'MAHONY & ROARK, *supra* note 35, at 339-79.

[283] *See* O'Mahony & Roark, *Scaling Property Law*, *supra* note 61; Marc L. Roark, *Scaling Commercial Law in Indian Country*, 8 TEX. A&M L. REV. 89, 117-18 (2020) (describing how tribal relationships to resources are scaled across geographies in the United States).

[284] O'MAHONY & ROARK, *supra* note 18, at 360.

conflict or crises. Crucially, this insight helps us to recognize that states—particularly in periods of property crises—are not neutral arbiters between competing claims. It repositions the (multilevel) state as a central institution for property theory, reminding us that when states act on behalf of individuals (e.g., owners, squatters, market actors, community members) and institutions (e.g., markets, the institution of private property, society), they do so against the backdrop of their own self-regarding need for resilience.[285] As nation-states navigate new landscapes of statehood and sovereignty, against the backdrops of globalization,[286] political polarization, and partisan antagonism,[287] it is vital that property scholarship incorporates a realistic model of the vulnerable, resilience-seeking, multilevel state, if it is to contribute to progress in tackling the pressing property problems of our time. RPT focuses attention on the implications of the state's own resilience needs as a vulnerable social institution and on the impact of state resilience (or state fragility) for state responses to property problems.

The financial securitization of housing in the last forty years has revealed how matrices of collective interests in housing shape the mechanisms that facilitate housing and the rights and interests of landlords and tenants, lenders and borrowers, owners, neighbors, home-seekers, and the state itself.[288] By restricting access to lending in certain neighborhoods, practices of redlining raised the cost of homeownership for low-income borrowers.[289] Neighborhoods may enforce covenants that restrict whether property may be "rented" by an owner, on the assumption that

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[285] *E.g.*, Roark & O'Mahony, *supra* note 237, at 453.

[286] *See generally* ULRICH BECK, POWER IN THE GLOBAL AGE: A NEW GLOBAL POLITICAL ECONOMY 125-65 (Kathleen Cross trans., 2005) (describing distinctive strategies employed by states to preserve power, including economic strategies, preventative strategies, and globalization strategies among other).

[287] PEW RSCH. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE, AND EVERYDAY LIFE 6-7 (2014).

[288] *See generally* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016); *see also* ULRICH BECK, POWER IN THE GLOBAL AGE 125-65 (Kathleen Cross trans., 2005).

[289] Erik J. Martin, *What is Redlining? The History of Racism in U.S. Real Estate*, BANKRATE (Apr. 5, 2024), https://www.bankrate.com/real-estate/what-is-redlining/ [https://perma.cc/MZH8-8LDW].

rental properties decrease neighborhood value or attract tenants that do not "fit" the neighborhood culture.[290] Landlords who let affordable housing arguably also have a stake in how affordable housing challenges are addressed. Affordable housing policies have implications for the profit they receive in rental income, the security of their property assets, and their relationships with neighboring owners.[291] Landlords profit from housing flows from two sources: equity in the value of the property and monthly rental returns for leasing the property.[292] Property owners who privilege monthly rental returns as a primary source for value are incentivized to spend less on maintaining the property.[293] Matthew Desmond's seminal book, *Evicted*, revealed the malpractices of landlords seeking to avoid property maintenance costs in the face of habitability standards that harm renters as a strategy to preserve monthly value.[294] This sector can be described as gap-rental housing: where the market is dependent on the lack of other affordable housing options.[295] Section 8 landlords often rely on monthly rentals, though they are incentivized to maintain basic standards by the Section 8 criteria.[296] One irony of Section 8 housing is that while residents are portrayed as unworthy recipients of state housing vouchers, landlords who receive up to 125% of market value are rarely portrayed as recipients of government handouts.[297] Through the national narrative lens,

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[290] *See* Andrea J. Boyack, *American Dream in Flux: The Endangered Right to Lease a Home*, 49 REAL PROP. TR. & EST. L.J. 203, 212 (2014) (observing that courts typically uphold these agreements under a theory of freedom of contract principles, rather than viewing them as restraints on alienation).

[291] *See generally* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

[292] *See* Jayne Thompson, *How Do Landlords Make Money?*, WEEK& (Nov. 30, 2013, at 11:31 CT), https://www.weekand.com/home-garden/article/landlords-make-money-18020410.php [https://perma.cc/E2WA-GEE3].

[293] Roark, *supra* note 7, at 16-17.

[294] *See generally* DESMOND, *supra* note 291.

[295] Roark, *supra* note 7, at 31; *see also* NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 3-7 (2023).

[296] Jeff Hamann, *Section 8 Inspections: The Rules and Requirements Landlords Need to Know in 2026*, JANOVER, https://www.multifamily.loans/apartment-finance-blog/section-8-inspections-the-rules-and-requirements-landlords-need-to-know/ [https://perma.cc/LY32-BVZQ] (last visited Apr. 20, 2026).

[297] *See generally* VALE, *supra* note 4 (observing the recurring theme of regulating housing by whether the poor are worthy or not); TERESA GOWAN, HOBOS, HUSTLERS, AND BACKSLIDERS: HOMELESS IN SAN FRANCISCO 28 (2010) (noting the tendency to

owner/landlords are rhetorically defined as performing a laudable public service, while Section 8 renters are characterized as morally deficient because they need housing assistance.[298]

The effects of neoliberalism on property/state relations reach across four key areas present in the BMIR cases.[299] First, the retrenchment of the state's financial backing of housing programs has increased individuals' reliance on private capital to underwrite construction and development to meet housing market needs.[300] The heightened alignment between state interests and private capital in the housing sphere is signalled through the increased use of incentives and subsidies, which are granted to landlords and developers to encourage the investment of private capital in the housing market.[301] Second, some states adopted

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treat unhoused and underhoused persons as unworthy poor); DESMOND, *supra* note 291 (observing how landlords are able to take advantage of subsidies with impunity, while tenants suffer stigma).

[298] GOWAN, *supra* note 297, at 28.

[299] *See supra* notes 174-180 and accompanying text partially excerpted from O'MAHONY & ROARK, *supra* note 18, at 167-169. Quotations are omitted for readability.

[300] O'MAHONY & ROARK, *supra* note 18, at 167.

[301] For a description of how financialization has impacted housing policies in rental housing, publicly supported housing, and housing ownership across a plurality of western states, see Manuel B. Aalbers, *Financial Geography II: Financial Geographies of Housing and Real Estate*, 43 PROGRESS HUM. GEOGRAPHY 376, 376-79 (2018) (contextualizing the role of financialization across many sectors of housing). Financialization involves the creation of products for access to capital based on more than just the base value of the asset secured. *See* Rachel Weber, *Selling City Futures: The Financialization of Urban Redevelopment Policy*, 86 ECON. GEOGRAPHY 251, 258 (2010). Weber explains how developers and city governments coordinated to financialize public assets towards public housing delivery:

public-private partnership models of service delivery, exporting the risks and responsibilities for maintaining infrastructure to private markets.[302] Third, and related to the transfer of risk from

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> [A] developer who wants to undertake a project in a designated TIF district will apply for funding from the local government or redevelopment agency. If the city is supportive of the project, it will grant a portion of the project's development costs as a "TIF allocation," a commitment of future property taxes generated within the district. However, developers require the funds to start construction immediately, so municipalities fund projects upfront by pledging future property tax revenues as security for current borrowing. To pay for these development expenditures, municipalities often float revenue bonds, which are secured by a dedicated stream of property taxes generated by and around the new development instead of by the sponsoring government's full faith and credit. These bonds are sold through negotiated sales and allow municipalities to avoid state-imposed constitutional and statutory debt limitations and voter referenda (Sbragia 1996). In this way, cities obtain capital by turning the rights to their own heterogeneous property tax base into standardized, tradable assets—often without the knowledge of the individual property owners paying their tax bills.

Id.
Teresa and Fields have highlighted how financialization has impacted American housing markets, emphasizing the role of global capital in shaping the view of housing as investment. Benjamin F. Teresa, *Managing Fictitious Capital: The Legal Geography of Investment and Political Struggle in Rental Housing in New York City*, 48 ENV'T & PLAN. A 465, 466-67 (2016) (calling this form of financialization the pursuit of "fictitious capital"); Desiree Fields, *Contesting the Financialization of Urban Space: Community Organizations and the Struggle to Preserve Affordable Rental Housing in New York City*, 37 J. URB. AFFS. 144, 144-59 (2015) (describing the challenges for urban community groups in affordable housing as urban land and housing have become central sites for global capital flows). Likewise, Stuart Lowe has described the process of global capital's infusion into housing as a "financialisation of the 'everyday'" leaking from commercial markets to the residential home market and the welfare system. Stuart Lowe, *Housing and Mortgage Markets in the Everyday: How Globalisation Came Home*, *in* SOCIAL POLICY IN AN ERA OF COMPETITION: FROM GLOBAL TO LOCAL PERSPECTIVES 69, 70-72 (Dan Horsfall & John Hudson eds., 2017).

[302] *See, e.g.*, RORY HEARNE, PUBLIC PRIVATE PARTNERSHIPS IN IRELAND: FAILED EXPERIMENT OR THE WAY FORWARD FOR THE STATE? 161 (2011) (noting that the driving market principle validating PPPs was the transfer of risk to the private sector); RORY HEARNE, ORIGINS, DEVELOPMENT AND OUTCOMES OF PUBLIC PRIVATE PARTNERSHIPS IN IRELAND: THE CASE OF PPPS IN SOCIAL HOUSING REGENERATION 24 (2018) (noting that Irish officials believed that private financial markets could oversee the quality of construction better than public bodies because each had a financial incentive to deliver a project on terms). PPPs typically follow one of three models for implementation relating to risk and responsibility: "Design, Build, and Finance (DBF)"; "Design, Build,

the state to the private market, global financial markets have subsumed the erstwhile public function of facilitating housing delivery, including providing globalized private capital backing for what were traditionally state-backed housing programs.[303] Finally, at the local level, the scaling-back of national or state-level resources dedicated to municipal programs (like housing), caused a fundamental shift in the state's relationship to land ownership as a public resource.[304] This has been accelerated through the period of "austerity" that followed the Great Recession from 2008, as housing and local government bore the brunt of public sector cuts.[305]

Finance, and Maintain (DBFM)"; and "Design, Build, Finance, Maintain, and Concession-type PPPs (PPP Informal Advisory Group, 2001)". *Id.* at 11; *see also* Dominique Custos & John Reitz, *Public Private Partnerships*, 58 AM. J. COMPAR. L. 555, 555-56 (2010) (observing the development of PPPs in the American Housing context). Housing delivery became a paradigmatic example of the development and entrenchment of the private sphere into the delivery of public goods. Jason Hackworth observed that Public Private Partnerships have been naturalized under neoliberalism in the USA, as Raquel Rolnik has shown in the developing world. JASON HACKWORTH, THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM 26 (2007); ROLNIK, *supra* note 102. Amy Starecheski described the conflict between squatters in New York's Lower East Side as a showdown, "putting public private partnerships on trial." AMY STARECHESKI, OURS TO LOSE: WHEN SQUATTERS BECAME HOMEOWNERS IN NEW YORK CITY 96 (2016).

303 For example, in the United States, tax credits granted through private developers were deployed to leverage global capital resources into U.S. housing initiatives backed by HUD, and supported by local, state, and federal sponsored programs. *See* HACKWORTH, *supra* note 302, at 52 (noting that cities restructuring housing following retrenchment has increased the city's exposure to "global institutions and forces–[namely] the real estate market most abstractly, bond-rating agencies and banks more concretely"); Fields, *supra* note 263, at 144 (describing the challenges for urban community groups in affordable housing as urban land and housing have become central sites for "global capital flows").

304 *See, e.g.*, Norman Ginsburg, *The Privatization of Council Housing*, 25 CRITICAL SOC. POL'Y 115, 115-18 (2005); Kinnaird, *supra* note 276, at 961; Michelle Norris & Rory Hearne, *Privatizing Public Housing Redevelopment: Grassroots Resistance, Co-Operation and Devastation in Three Dublin Neighbourhoods*, 57 CITIES 40, 40 (2016); Ray Forrest & Alan Murie, *From Privatization to Commodification: Tenure Conversion and New Zones of Transition in the City*, 19 INT'L J. URB. & REG'L RSCH. 407, 407 (1995).

305 *See* Rolnik, *supra* note 102, at 118.

CONCLUSION

Resilient Property Theory recognizes the role of actors within networks of meaning. Actors and networks exist in webs of relationships amongst heterogeneous elements that engage with human institutions, ideas, law, and the state. Networks are formed based on shared interests that are brought together by geography, shared characteristics, or a common purpose. As we observed in *Squatting and the State*, the institution of private property, land, and other resources is itself a network where housing, finance, and rhetorical conceptions of home become relevant nodes.[306]

As structural problems are more closely aligned with associations and collective value making, litigation itself disrupts the original composition of a property network, asserting individualism over networked responsibility,[307] particularly when institutions are so closely aligned with collective value-making resources. Litigation around collective action circulates around two types of interests within the network of affordable housing delivery. On the one hand, the BMIR cases reflected the state's structural commitments to affordable housing program delivery through private actors. The cases themselves emerge from a bargain between the state and private developers to marshal resources towards affordable housing delivery and represent commitments the state made to preserving affordable housing resources.[308] In the second sense, the developer/owners asserted claims for compensation where the original bargain was changed. Importantly, the litigation then raised three crucial questions about how individual claims are aligned within structural programs.[309]

First, the litigation raised the question of whether the state's structural nature insulates it from claims that would disrupt its

[306] O'MAHONY & ROARK, *supra* note 8, at 342-43.

[307] *Id.*

[308] *See* Cienega Gardens v. United States, 331 F.3d 1319, 1325 (Fed. Cir. 2003); *see also* CCA Assocs. v. United States, 667 F.3d 1239, 1242 (Fed. Cir. 2011); Chancellor Manor v. United States, 51 Fed. Cl. 137, 140 (2001); Indep. Park Apartments v. United States, 61 Fed. Cl. 692, 697 (2004).

[309] *See Cienega Gardens*, 331 F.3d at 1325; *see also CCA Assocs.*, 667 F.3d at 1242; *Chancellor Manor*, 51 Fed. Cl. at 140; *Indep. Park Apartments*, 61 Fed. Cl. at 697.

goals or aims. Raising claims around the sovereign immunity of the state and whether the state had bound itself through contract to the bargain potentially limited the structural powers the state has to carry out its objectives. If the state is only bound when it chooses to be bound, then the litigation concluded that the state is only bound when it expressly agreed to be bound by a contract.[310] The fact that HUD was the author of all documents that formed the transaction did not change the fact that HUD was not a party to the deed of trust where the relevant promise was contained. Thus, inferences of intent that might be imposed on other actors are not relevant to the state. Insulated by law, the state could deny the very promises it used to induce developers to carry out state objectives.[311]

The second structural question the litigation raised was the question of what it means to take on a collective act and who bears the burdens of doing so. The law around takings assumes that the state cannot impose a significant public burden on individuals without some form of compensation. While individual actors may be expected to bear some burden, if the burden is too disproportionate, the individual actor may be due compensation from the state. At various times, different aspects of this balance have been distorted by courts that over-emphasized individual harm. For example, *Lucas*'s investment-backed expectations prong of analysis over emphasized the role of expected investment to the economic harm of the person bearing the responsibility without regard to the state's preexisting interests in restraining owner activity.[312]

The litigation raised the third and final question in the terms of quantum. That is, how does the financial burden imposed on developers get divided between public benefit and private opportunity? Should private developers have reasonably expected that the ability to opt-out of affordable housing was an unconditional promise? Or should the benefits gained by developers be accounted for as compensation for limits placed on

[310] *See Cienega Gardens*, 331 F.3d at 1325; *see also CCA Assocs.*, 667 F.3d at 1242; *Chancellor Manor*, 51 Fed. Cl. at 140; *Indep. Park Apartments*, 61 Fed. Cl. at 697.

[311] *See Cienega Gardens*, 331 F.3d at 1325; *see also CCA Assocs.*, 667 F.3d at 1242; *Chancellor Manor*, 51 Fed. Cl. at 140; *Indep. Park Apartments*, 61 Fed. Cl. at 697.

[312] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 634 (2001).

developers after the program changed? These questions are not easily answered when framed just between the rights of developers and the state. Rather, widening the lens of the problem enables us to understand not only how the BMIR Program contributed to affordable housing delivery, but also to city development and developers' economic opportunity.