

# AND STAY OUT! REDRESSING ELITISM IN THE POST-PTFA ERA

Craig T. Smith\*

*Tenants have historically endured socioeconomic and legal disadvantages in the landlord-tenant relationship. This was especially evident during the subprime mortgage foreclosure crisis, during which tenants were kicked out with as little as five days' notice. The Protecting Tenants at Foreclosure Act (PTFA) and related state legislation provided bona fide tenants with added protections, such as advance notice of eviction, and allowing tenants the right to occupy their homes until the expiration of their leases.*

*First, this Article highlights the challenges that tenants face, including socioeconomic inequity in relation to their landlords, a complete lack of bargaining power in establishing rights under their leasehold interests, a historically disfavored place in the legal system in disputes with landlords, and a lack of adequate notice and protection from being displaced from their homes during the subprime mortgage crisis.*

*Next, this Article examines potential formal and informal remedies for redressing the struggles that tenants face in the context of foreclosures. This Article urges further evaluation and consideration of the proposed Permanently Protecting Tenants at Foreclosure Act of 2017, which is under review by Congress. The bill would permanently reinstitute the Protecting Tenants at Foreclosure Act of 2009 and provide continuous protection to tenants.*

*Finally, this Article calls for the Uniform Law Commission to consider a proposed Uniform Protecting Tenants at Foreclosure Act. Such a measure would serve as a model for new state legislation offering tenants protection from summary evictions.*

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\* Craig T. Smith is an attorney at Olivetti, McCray & Withrow, LLC. The author would like to thank Senator Richard Blumenthal, Representative Keith Ellison, and all federal and state lawmakers that have promoted the understanding and acceptance of increased protections for tenants faced with foreclosures. He would also like to thank editor Rebecca Mears and her staff with the STANFORD LAW & POLICY REVIEW for the timely and thoughtful edits that improved the quality of this essay.

## INTRODUCTION

The disparity between rights of the tiered levels of real property interests was never more on display than in the subprime mortgage crisis of 2007. Defaulting homeowners were served with papers, which led many to file defenses and discovery requests. These requests ground the foreclosure machine to a halt, often for years, due to the heavily-overburdened judiciary. In several states, these homeowners—many of whom owed \$250,000; \$450,000; \$625,000; and other massive sums to their lender for the right to hold title to and occupy their homes—were given additional measures of protection to extend the multi-year process. Some states established mandatory mediation and verified complaints by lenders, which added additional layers of delays to the already plodding foreclosure process.

Meanwhile, renters were being evicted in a matter of days after receiving notice from the courts. As the foreclosure juggernaut rolled forward, countless properties were pushed into the real estate owned inventories of the nation's largest financial institutions from coast to coast, leaving a wake of displaced and desperate families behind. It took a stroke of genius from Congress—the enactment of the Protecting Tenants at Foreclosure Act of 2009—for these tenants to finally get recognition and exposure for the struggle they faced, both in the peril of losing their homes in an alarmingly short period of time, and in the prejudice that both law and society had levied against residential tenants across the nation.

## I. THE MARKET AND THE TENANT-LANDLORD POWER DISPARITY

The landlord-tenant relationship has historically proven to be an inequitable relationship between two parties. By its very nature, the landlord is in a domineering position over the tenant in a number of important ways.

*A. A Historically Flawed and Socially-Disparate Accord*

Initially, the landlord can effectively dictate lease terms to the tenant, who is left with little to no negotiating power over what ultimately will be her rights and obligations in the occupancy and use of her own dwelling. While a tenant holds a valid and legally recognized claim to her residence through a leasehold interest, the law has traditionally disfavored and provided little in the way of protection for such an interest in the face of an adverse claim by a landlord. By way of an example, whereas most defendants in a civil lawsuit are afforded twenty to thirty days to respond to a complaint—depending on the jurisdiction—some states allow a tenant sued for rent a meager three to six days to serve a response, lest he have a judgment entered against him by a summary or expedited judicial procedure.<sup>1</sup> If the tenant does manage to sneak in an

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<sup>1</sup> See, e.g., ARIZ. REV. STAT. ANN. § 33-1377 (2007) (Arizona provides a period of three to six days for an allegedly defaulting tenant to respond to the summons in a detainer action filed by a landlord); FLA. STAT. ANN. § 51.011 (West 2006); FLA. STAT. ANN. § 83.59 (West 2013) (Florida enables landlords to file a complaint for summary procedure for recovery of

answer before this tight deadline, he may face the uncommon requirement of paying the plaintiff's sought bounty—in this case, claimed rents—into the court registry in advance of an adjudication, despite the fact that the retention of rents is a common remedy for tenants where landlords fail to uphold their obligations under the lease.<sup>2</sup>

Even access to legal assistance to argue their respective positions is tilted against tenants. Most landlords can readily afford access to legal representation, and often have pleadings prepared and reviewed by the trained eye of an attorney. Conversely, tenants very rarely answer a complaint for rent or eviction with the assistance of counsel.<sup>3</sup> Despite their property rights (i.e. their ability to avoid winding up on the streets) being at stake, the courts have no obligation to appoint counsel to represent tenants.

The stigma of inferiority tied to tenants is further exacerbated by the historical interplay of divergent socioeconomic backgrounds between the two respective groups. Rental properties are commonplace housing for new college graduates,<sup>4</sup> single parents, and minorities.<sup>5</sup> More alarming, is that over three million children living in rental properties were affected by foreclosure as of 2012.<sup>6</sup> Additionally, many landlords are well-to-do out-of-state investors

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possession, allowing only five days for tenants to serve an answer). *See also Consumer Protection: Landlord and Tenant Rights*, ARK. ATTORNEY GEN. LESLIE RUTLEDGE, <https://arkansasag.gov/consumer-protection/home/column-one/what-you-should-know-about-landlord-and-tenant-rights/> (last visited Aug. 6, 2017).

<sup>2</sup> *See* FLA. STAT. ANN. § 83.60(2) (West 2013) (“Failure of the tenant to pay the rent into the registry of the court or to file a motion to determine the amount of rent to be paid into the registry within 5 days, excluding Saturdays, Sundays, and legal holidays, after the date of service of process constitutes an absolute waiver of the tenant’s defenses other than payment, and the landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon.”).

<sup>3</sup> It’s worth noting here that some states have permitted counsel to “represent” tenants in a less full capacity, commonly described as “unbundled” representation. This representation is far more limited, allowing for representation at only one stage of the case—whether that be helping early in the advisory stage, or simply showing up for the final hearing. According to Desmond and Bell, approximately two-thirds of fully represented tenants retained possession of their homes, compared to just one-third through unbundled representation. Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15 (July 22, 2015), [https://scholar.harvard.edu/files/mdesmond/files/desmondbell.arlss\\_.pdf](https://scholar.harvard.edu/files/mdesmond/files/desmondbell.arlss_.pdf).

<sup>4</sup> Dave Sorter, *College Grads Face Rude Rent Awakening*, FORBES (May 5, 2016, 5:31 PM), <https://www.forbes.com/sites/axiometrics/2016/05/05/college-grads-face-rude-rent-awakening/#146054ed7218>.

<sup>5</sup> *See* JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIV., AMERICA’S RENTAL HOUSING—MEETING CHALLENGES, BUILDING ON OPPORTUNITIES: RENTER DEMOGRAPHICS (2011), <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ahr2011-3-demographics.pdf>.

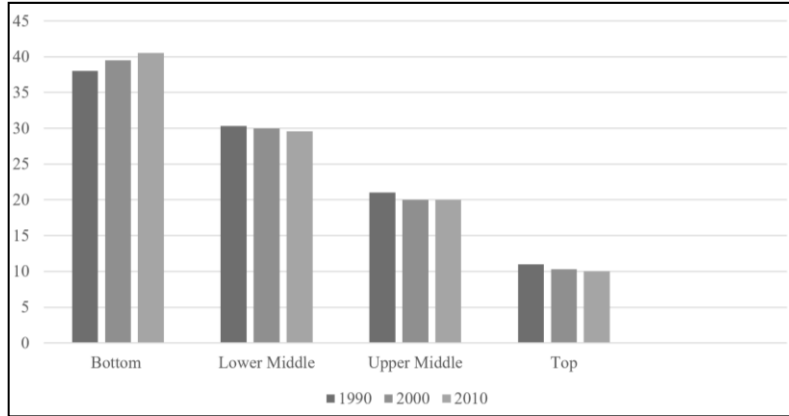
According to this study, over one-third (35%) of all renters are single persons, and an additional 16% are single parents. Further, minorities made up 81% of the 3.9 million person increase in the renting market from 2001 to 2010.

<sup>6</sup> Some regions reflected even higher percentages of children affected by foreclosure, with 45% of foreclosed units in southern New England containing children. NAT’L CTR. ON HOMELESSNESS & POVERTY, EVICTION (WITHOUT) NOTICE: RENTERS AND THE FORECLOSURE CRISIS (Dec. 2012), [https://www.nlchp.org/Eviction\\_Without\\_Notice](https://www.nlchp.org/Eviction_Without_Notice).

looking to make some extra income off of the properties they own.<sup>7</sup> Conversely, leasing has been a fall back option for those who either cannot afford the down payment for a home, or those who do not have the requisite credit to qualify for a loan.

Nationally, the number of renters increased for low-income individuals, but decreased for all other income-tiers. From 1990 through 2010, the bottom income bracket saw the greatest increase in rented households, climbing from approximately 38% to 41%. During the same time period, rented households actually decreased for all other income brackets.

TABLE 1: Percent of Rented Households by Income Bracket<sup>8</sup>



In some metropolitan areas, renting has become the most common way for single families and low-income individuals to secure housing, seemingly supplanting the American dream of home ownership. By way of an example, in Detroit—a city ravaged by foreclosures—an estimated 53% of citizens now rent rather than own.<sup>9</sup>

Regrettably, recent government-based programs aimed at assisting low-income residents have been directed at improving multi-family buildings and revitalizing mortgage lending for home buyers, rather than helping families who are struggling to pay rent.

#### B. *Americans Grappling with Increasing Poverty and Housing Costs*

Historically, “keeping a roof over one’s head” has been a phrase synonymous with achieving the bare minimum in order to survive. Low-income Americans often could barely afford to “bring home the bacon,” much

<sup>7</sup> *Absentee Landlords Investing in Cheap Rentals Out-Of-State*, NEWSWEEK (Oct. 9, 2016, 8:30 AM), <http://www.newsweek.com/absentee-landlords-investing-cheap-rentals-out-state-507449>.

<sup>8</sup> See JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIV., *supra* note 5.

<sup>9</sup> John Gallagher, *Foreclosure Crisis Makes Detroit a City of Renters, Not Homeowners*, USA TODAY (Mar. 20, 2017, 8:39 PM), <https://www.usatoday.com/story/money/nation-now/2017/03/20/foreclosure-crisis-makes-detroit-city-renters-not-homeowners/99433002/>.

less purchase luxurious, leisure, or “want-based” items. It was hard to afford even the basics, but at least shelter was obtainable. Now, however, these clichés have become outdated, as it is far less expensive to purchase smart phones and nice clothes than it is to afford to put a roof over one’s head.

Over half of poverty-stricken Americans dedicate at least half of their household income to housing costs, with a quarter of that group forking over a staggering 70% of their income for shelter. This is due in large part to the enormous increase in housing costs over the years; housing costs have risen over 70%.<sup>10</sup>

Also disconcerting is that, while housing costs continued to climb for low-income renters during the mid-2000s, investors and other more financially-sound owners thrived. Many investors purchased additional properties, hoping to take advantage of a lending market that suddenly seemed to have little regard for the income and finances of the owners to whom it was readily financing purchases. The resulting market collapse was devastating.

### *C. The Rental Market: A Kite Dancing in the Subprime Mortgage Foreclosure Storm*

If the social and income-based challenges facing renters weren’t already enough, the ensuing subprime mortgage foreclosure crisis that ravaged much of the nation in the past decade exacerbated a two-fold problem that strained the rental market. First, foreclosures put millions of American homeowners out of their homes and in search of rental properties. Then, tenants in foreclosed homes were left to search for new domiciles after being served with eviction notices and/or writs of possession from the clerk of court.

The resulting wave of scrambling and desperate would-be renters also allowed some morally-bankrupt homeowners facing foreclosure to make a quick buck off these distressed individuals. Without knowing about a homeowner’s pending foreclosure, a tenant would sign a lease, believing she had found a new home for six months or a year. Unbeknownst to the tenant, the homeowner had already been notified of a pending foreclosure, but bit his tongue while inducing the tenant to sign. Weeks or months later, the tenant would answer the door and be handed a summons and complaint informing the tenant of the landlord’s foreclosure. Even worse, in cases where tenants took possession later in the foreclosure process, said tenants were served with writs of possession or eviction by the sheriff’s office; in some instances tenants had as little as five days to vacate the premises.<sup>11</sup>

What, exactly, is the hurry to shove these hardworking Americans out of their homes in virtually a moment’s notice? While one might think it would be sensible to rent out properties and make money off them by retaining these paying occupants, the reality was completely different. Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage

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<sup>10</sup> See Desmond & Bell, *supra* note 3.

<sup>11</sup> Press Release, Office of Representative Keith Ellison, Sen. Blumenthal and Rep. Ellison Introduce the Permanently Protecting Tenants at Foreclosure Act (Feb. 13, 2017), <https://ellison.house.gov/media-center/press-releases/sen-blumenthal-and-rep-ellison-introduce-the-permanently-protecting-0>.

Corporation (Freddie Mac) initially had little interest in retaining tenants in their properties, as they could not market and re-sell their inventory with occupants residing in the property. However, Fannie Mae began allowing some hold-over renters to remain in their homes in early 2009, in the face of the enactment of the Protecting Tenants at Foreclosure Act in May 2009.<sup>12</sup>

One of the foundations of property law is that real property should be used in a way that benefits society. This principle is why the law has recognized the taking of real property in certain limited situations, such as eminent domain—where private property is taken and converted into a use that will benefit the public. This core principle also helps explain the doctrine of adverse possession—which rewards a squatter or trespasser to property with title thereto when the squatter or trespasser maintains open, hostile, continuous, and exclusive possession of property for the state-specific period of time. This doctrine is based on the concept of rewarding productive use of land, while effectively punishing property owners who sleep on their rights.

Yet, after the wave of foreclosures struck major metropolitan areas across the country in the late 2000s, there were city blocks and neighborhoods chock full of houses with “For Sale” signs; these signs were planted by banks whose real estate inventories were busting at the seams with houses to unload. Condominium buildings in south Florida eventually stood less than half full,<sup>13</sup> in disrepair and in need of maintenance; in many cases, courts appointed receivers to manage the receipt of assessments that had dried up due to foreclosed and evicted occupants.

With so much housing inventory available, the continued ouster of tenants who paid their rent on time, yet still ended up losing their housing during the foreclosure crisis, was perhaps the biggest waste of beneficial property use in American history. Although the law has traditionally favored the beneficial use of private property, it conversely stood idle and helpless to aid the plight of hard-working renters who used their properties to house and raise their families.

## II. ENACTMENT OF THE PROTECTING TENANTS AT FORECLOSURE ACT OF 2009

In May 2009, the federal government finally stepped in, and provided tenants with a much-needed lifeline with the enactment of the Protecting Tenants at Foreclosure Act of 2009 (the PTFA).<sup>14</sup> Under the PTFA, bona fide tenants<sup>15</sup> were permitted to stay in their properties for the remainder of their

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<sup>12</sup> Memorandum from James Smith, Reporter, to the Unif. Law Comm’n (May 17, 2012), [http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/6\\_2012may17\\_RREMFP\\_P\\_Cash%20for%20keys%20memo\\_Smith.pdf](http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/6_2012may17_RREMFP_P_Cash%20for%20keys%20memo_Smith.pdf).

<sup>13</sup> Lisa Rab, *South Florida’s Housing Crisis Leaves Behind Ghost Towers*, BROWARD PALM BEACH NEW TIMES (June 18, 2009, 4:00 AM), <http://www.browardpalmbeach.com/news/south-floridas-housing-crisis-leaves-behind-ghost-towers-6334196>.

<sup>14</sup> Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, § 702, 123 Stat. 1660-62 (2009).

<sup>15</sup> See *id.* at § 702(b), 123 Stat. at 1661 (“[A] lease or tenancy shall be considered bona fide only if: (1) the mortgagor, or the child, spouse, or parent of the mortgagor under the contract

lease, so long as the bank bought the property at its foreclosure sale. The term “bona fide tenant” most commonly encompasses an individual who seeks out and secures a written, arms-length lease agreement with either a property management company or a landlord with whom he has no prior relationship. The PTFA also obligated banks to tender a ninety day advance notice of intent to evict before a bona fide tenant could be removed.

The stated objective of the PTFA was to ensure that tenants facing eviction from foreclosure were afforded adequate time to find alternative housing.<sup>16</sup> However, the reality of the new federal remedy quietly made its way through the computer screens and cubicles of loan servicing offices from coast to coast—tenants finally had a modicum of bargaining power.

Despite the overly-saturated supply of houses and condominiums in their inventories, lenders and loan servicers still had investor requirements to satisfy. Tight Fannie Mae loan servicing guidelines for completing foreclosures and clearing titles still had to be met by loan servicers.<sup>17</sup> However, bona fide tenants could choose to remain in their homes for the remainder of the lease, halting the marketing and sale of any such property until the lease expired. This quandary led lenders and loan servicers to increase participation in “Cash for Keys” programs—where a lender or loan servicer pays for the homeowner or tenant in a foreclosed property to move out.<sup>18</sup> A savvy tenant could even take advantage of a desperate lender, by securing compensation for moving expenses, temporary lodging, utilities, and a cash bonus for vacating by a set date.

It is critical to note that these remedies have been almost completely bank-generated; unfortunately states have generally failed to enact any such formal remedies for tenants.<sup>19</sup>

### III. POST-PTFA TENANT PROTECTIONS

The PTFA was enacted with a sunset date of December 31, 2012 (extended to December 31, 2014 through the Dodd-Frank Act).<sup>20</sup> Whereas the federal

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is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit’s rent is reduced or subsidized due to a Federal, State, or local subsidy.”).

<sup>16</sup> THE FEDERAL RESERVE, PROTECTING TENANTS AT FORECLOSURE (Nov. 2009), <https://www.federalreserve.gov/boarddocs/supmanual/cch/200911/protect.pdf>.

<sup>17</sup> FANNIE MAE, FORECLOSURE TIME FRAMES AND COMPENSATORY FEES FOR BREACH OF SERVICING OBLIGATIONS (Aug. 31, 2010), <https://www.fanniemae.com/content/announcement/svc1012.pdf>.

<sup>18</sup> Elizabeth Weintraub, *Cash for Keys for Homeowners in Foreclosure*, THE BALANCE (June 18, 2017), <https://www.thebalance.com/cash-for-keys-1798485>.

<sup>19</sup> *Cash for Keys*, HOMEOWNERSHIP.ORG, (Oct. 29, 2014), <http://www.homeownership.org/news/cash-keys/>.

<sup>20</sup> *Protecting Tenants at Foreclosure Act*, NAT’L ASS’N OF RESIDENTIAL PROPERTY MANAGERS, <https://www.narpm.org/legislative/protecting-tenants-at-foreclosure-act/> (last visited Aug. 9, 2017).

government enacted a protection that gave credence to the plight of tenants overlooked in the foreclosure market, state legislation often lagged behind in promulgating similar protections for its citizens.

*A. Erratic State Reform Following the Expiration of the PTFA*

According to the National Low Income Housing Commission, as of June 2015, 66% of states either provided no specific advance notice, or authorized a summary eviction of ten days or less.<sup>21</sup> Nineteen states provided no specific protection to tenants facing eviction. More distressing, eight states provided for immediate eviction.

However, there are some noteworthy exceptions. California—one of the most distressed residential tenant markets in the nation<sup>22</sup>—followed Congress's lead by enacting California Civil Code section 2924.8. This law requires a property owner provide notice to tenants if foreclosure has started. This notice must inform tenants that if they are renting, they will be given a minimum of ninety days' advance notice to vacate.<sup>23</sup>

Maryland effectively adopted the PTFA in 2010 with its own sister statute which required lease terms to be honored for all bona fide tenants, unless the purchaser intends to occupy the property.<sup>24</sup> Additionally, North Carolina enacted its own version of the PTFA,<sup>25</sup> and Arizona mandated disclosure to tenants within five business days upon receipt of notice of foreclosure by the landlord.<sup>26</sup> Massachusetts refuses to oust a bona fide tenant except when a bona fide third party has purchased the property from the foreclosing owner.<sup>27</sup>

Connecticut also recently broke the mold. Connecticut required that renters receive a mandatory minimum relocation offer.<sup>28</sup> Connecticut also took a strong stand after the PTFA sunset in supporting the rights of elderly and disabled renters. In buildings with five or more dwelling units, any occupants who are at least sixty-two years old, or are disabled, are fully protected against

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<sup>21</sup> NAT'L LOW INCOME HOUSING COAL., PROTECTING TENANTS AT FORECLOSURE ACT (June 2015), [http://nlihc.org/sites/default/files/FactSheet\\_PTFA\\_2015.pdf](http://nlihc.org/sites/default/files/FactSheet_PTFA_2015.pdf).

<sup>22</sup> Ngoc Nguyen, *California: Ground Zero for America's Foreclosure Crisis*, NEW AMERICA MEDIA (July 21, 2011), <http://newamericamedia.org/2011/07/california-ground-zero-for-americas-foreclosure-crisis.php>.

<sup>23</sup> CAL. CIV. CODE § 2924.8 (West 2014).

<sup>24</sup> MD. CODE ANN., REAL PROP. § 7-105.6 (West 2010).

<sup>25</sup> Meredith Smith, *New(ish) Protections for Tenants Occupying Foreclosed Property*, ON THE CIVIL SIDE: UNC SCHOOL OF GOVERNMENT BLOG (Oct. 9, 2015, 12:25 PM), <https://civil.sog.unc.edu/newish-protections-for-tenants-occupying-foreclosed-property/>.

<sup>26</sup> *Law Makes Landlords Tell Tenants of Foreclosures*, ABC 15 ARIZONA (June 24, 2013) <http://www.abc15.com/news/state/law-makes-landlords-tell-tenants-of-foreclosures>.

<sup>27</sup> MASS. GEN. LAWS ch. 186A, § 2 (2014).

<sup>28</sup> RAPHAEL L. PODOLSKY, TENANTS IN FORECLOSED PROPERTIES—WHAT YOU NEED TO KNOW, [http://www.ctrealtors.com/mt\\_media\\_news/guestart/pdfs/Tenants\\_in\\_Foreclosure\\_Property.pdf](http://www.ctrealtors.com/mt_media_news/guestart/pdfs/Tenants_in_Foreclosure_Property.pdf) (last visited Aug. 9, 2017) (Connecticut ensures that renters receive a mandatory minimum relocation offer equal to whichever of the following three options results in the most money: double the security deposit plus interest, two months' rent, or \$2000).



removal before the expiration of their leases due to foreclosure, regardless of who acquires the property by way of foreclosure.<sup>29</sup>

On the other end of the spectrum, several jurisdictions returned to the status quo of leaving tenants scrambling for housing after being foreclosed, including, most notably, foreclosure-ravaged Florida. Rather than requiring the new owner to honor the existing lease, the Florida legislature took the opposite approach, enacting section 83.561 which declares that the foreclosure of a mortgage terminates the rental agreement.<sup>30</sup> The only bone the Florida legislature threw to tenants was the requirement that new owners provide thirty days' advance notice to tenants before owners apply to the circuit court for a writ of possession to remove tenants.<sup>31</sup>

*B. Senate Bill 325—Permanently Protecting Tenants at Foreclosure Act of 2017*

Despite some positive undertakings by states following the subprime mortgage crisis, nearly half the states still afford foreclosing banks the ability to evict tenants with only five days' advance notice.<sup>32</sup>

In response to this alarming trend, members of Congress have proposed legislation to try to extend protections to tenants in foreclosed properties. Ohio Senator Sherrod Brown and California Representative Maxine Waters proposed Senate Bill 1491 and House Resolution 2642, respectively, in 2015.<sup>33</sup> The relevant portion of the proposed legislation aimed at making the relief provided in the PTFA permanent. Although the bill ultimately failed, the issue of reviving or extending the protections of the PTFA remained a regular item of consideration in both houses.

On February 7, 2017, the issue of permanent tenant protection received an even more direct and formal promotion. Connecticut Senator Richard Blumenthal and Minnesota Representative Keith Ellison introduced proposed legislation into Congress titled the Permanently Protecting Tenants at Foreclosure Act of 2017.<sup>34</sup> Responding to the sundown of the PTFA and resulting state inaction, Representative Ellison noted “[w]hen a building owner falls into foreclosure, people who live in the property may be forced out—even if they’ve paid their rent in full and on time. It’s wrong that families face homelessness because the owner of the property where they live failed to make payments on time. The Permanently Protecting Tenants in Foreclosure Act ensures families have the time they need to find new housing.”<sup>35</sup> The proposed legislation would simply serve to repeal the sundown provision (section 704) of the PTFA, as well as restore all other sections of the act as if

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<sup>29</sup> *See id.*

<sup>30</sup> FLA. STAT. ANN. § 83.561 (West 2015).

<sup>31</sup> *Id.* at § 83.561(2).

<sup>32</sup> *See* Press Release, Office of Representative Keith Ellison, *supra* note 11.

<sup>33</sup> LINDA COUCH, NAT’L LOW INCOME HOUSING COAL., PROTECTING TENANTS AT FORECLOSURE 17-18 (2016), [http://nlihc.org/sites/default/files/2016AG\\_Chapter\\_6-5.pdf](http://nlihc.org/sites/default/files/2016AG_Chapter_6-5.pdf).

<sup>34</sup> S. 325, 115th Cong. (2017); H.R. 915, 115th Cong. (2017).

<sup>35</sup> *See* Press Release, Office of Representative Keith Ellison, *supra* note 11.

there were no sundown provision. Unfortunately this proposed legislation was submitted for consideration in both houses in 2015, but died in Congress.

#### IV. WHERE DO WE GO FROM HERE?

There are both formal and informal options to mitigate the challenges many tenants and occupants of foreclosed properties continue to face under the draconian laws of several states.

##### *A. Promotion, Understanding, and Enactment of the Permanently Protecting Tenants at Foreclosure Act of 2017*

First and foremost, the brain child of Senator Blumenthal and Representative Ellison will ideally gain attention, understanding, and forward momentum in Congress. From a functional perspective, the original version of the PTFA was largely effective in identifying and protecting true bona fide tenants from state-enabled summary eviction processes. It identified who was entitled to status as a bona fide tenant, and what the rights were of such occupants. It also identified two clear exceptions in which the law did not apply—when there was not a lease (or the lease was terminable at will) or when the new owner intended to occupy the premises as his or her primary residence. Under either of these exceptions, a ninety day notice was still required to afford a timely and fair relocation for the bona fide tenant. As such, a simple extension of the original PTFA would provide adequate and fair protection for true bona fide tenants.

Unfortunately, such legislation faces opposition from various bankers' associations. By way of an example, the Connecticut Bankers Association opposed the extension of state-enacted PTFA protections, arguing that the number of foreclosures decreased by 25% from 2014 to 2015, with the number of new foreclosures dropping to pre-2006 levels.<sup>36</sup> The Association further argued that major renovations and safety violations are significantly impeded by having to wait ninety days for the expiration of a tenant's right to occupy her residence.

These arguments, common among opponents to federal and state PTFA extensions, are both short-sighted and misplaced. First, while foreclosures have reduced in several areas of the country, foreclosures in other parts have remained active. In other words, foreclosures—even when the nation isn't languishing under a recession—still arise in different pockets of the country, and at different times. States with no protective laws on the books for tenants open these individuals up to facing summary evictions. Having a federal law that applies universally across the nation would address tenants' needs in various parts of the country that suffer from foreclosures.

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<sup>36</sup> Memorandum from Connecticut Bankers Ass'n to Members of the Banking Comm. (Feb. 25, 2016), <https://www.cga.ct.gov/2016/BAdat/Tmy/2016HB-05292-R000225-Connecticut%20Bankers%20Association-TMY.PDF>.

Further, any argument that a lender's right to preserve property is impeded through continued tenant occupancy is completely off base. Lenders have made sure—through their universal Fannie Mae/Freddie Mac forms—that they've retained the right to take action to secure and protect their collateral, even before they take title through foreclosure, and even if there are renters in the property. Additionally, under most standard lease agreements, a landlord has the power to enter the premises following advance notice to a tenant for the purpose of undertaking repairs, as well as taking steps to prevent waste and preserve the property.

B. *Creation and Adoption of a Model Protecting Tenants at Foreclosure Act by States*

Ultimately, while the concept of continued federal legislation which protects tenants is the ideal solution, educating policymakers about the need to protect tenants, and creating state-enacted legislation which protects tenants is the next best path. The promulgation of a Model or Uniform Protecting Tenants at Foreclosure Act would create a template for policymakers and states to mirror moving forward.

The Uniform Law Commission (ULC) was enacted for such purposes. Founded in 1892, the ULC consists of 350 commissioners typically appointed by state governors; these commissioners are typically comprised of legislators, attorneys, judges, and legal scholars. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.<sup>37</sup>

Organizations like the National Center on Poverty and Homelessness, the National Low Income Housing Coalition, and the Tenants Political Action Committee should demonstrate to the ULC the startling incongruity of laws relating to tenant evictions from state to state. The committee would then evaluate all current state-enacted statutes which mirror the now-defunct federal PTFA, and formulate proposed uniform legislation.

Once the proposed uniform legislation is approved by the ULC Committee of the Whole, the real work begins. The ULC commissioners must return to their home jurisdiction, present the proposed model act(s) to their state legislators, and advocate for their consideration and adoption. In the context of eviction-reform legislation, the main work lies with the ULC commissioners from Arkansas, Georgia, Kentucky, Mississippi, and Wyoming, where there is a complete absence of state legislation protecting tenants after foreclosure. While these jurisdictions present the most obvious need for overhaul, there is still a huge amount of work to be done in other jurisdictions, as only ten states had adopted some state version of the PTFA as of June 2015.<sup>38</sup>

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<sup>37</sup> Unif. Law Comm'n, *About the ULC*, [http://www.uniformlaws.org/Narrative.aspx?title=About the ULC](http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC) (last visited Aug. 9, 2017).

<sup>38</sup> See NAT'L LOW INCOME HOUSING COAL., *supra* note 21; Nguyen, *supra* note 22.

## V. CONCLUSION

While the mortgage crisis has receded, the value of the housing market has been slow to rise in many parts of the country,<sup>39</sup> leaving many homeowners under water, and keeping the potential threat of future foreclosures in play. That being said, the proposed Permanently Protecting Tenants at Foreclosure Act of 2017, along with current (and hopefully future) enacted state legislation, provides hope of permanent reform for tenants in multiple aspects. It lends credence to the continued plight of renters in foreclosed homes. It continues to empower tenants with leverage to bargain for continued occupancy or a funded relocation.

Finally, it recognizes that a renter—whether it be a single-mother and her toddler, a recent college grad looking for a job, or a blue-collar family of four near the poverty line—is not just some faceless annoyance for the sheriff's department to kick to the curb, nor some obstacle on a loan servicer's checklist to cross off. Rather, these people hold a valid legal interest in the properties in which they occupy; one that deserves the long-overdue and lasting respect it may finally receive from federal and state governments.

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<sup>39</sup> *Has the U.S. Housing Market Recovered? It Depends on Where You Are...*, K@W FINANCE (June 5, 2017), <http://knowledge.wharton.upenn.edu/article/u-s-housing-market/>.