Subprime: Why a Free and Democratic Society Needs Law

Subprime: Why a Free and Democratic Society Needs Law*

*Joseph William Singer***

TABLE OF CONTENTS

*No Title of Nobility shall be granted by the United States.****
-United States Constitution

*Where there is no Law, there is no Freedom.*****
-John Locke

Sherlock Holmes and Dr. Watson go on a camping trip. They set up their tent, have a modest repast, and go to sleep. In the middle of the night, Holmes wakes Watson up and asks him, "What do you see?" Watson looks up and sees the night sky and tells Holmes so. "What does it mean?" Holmes asks. Pondering this deep question, Watson answers, "It means the

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*** U.S. CONST. art. I, § 9, cl. 8.

**** JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ¶ 57, at 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (italics in original).

universe is vast and mysterious and our knowledge limited. It means that we understand only what we can observe and that—" Holmes interrupts him. "No, you idiot," he says. "It means someone has stolen our tent."[1]

Sometimes it is important to state the obvious, to confront truths so fundamental we have forgotten to see them. The subprime crisis has forced us to remember things that we have taken for granted. The truth is that markets function because we have the rule of law, and liberty is possible only if we have a robust regulatory state. Markets are defined by a legal framework that sets minimum standards for social and economic relationships. And because we live in a free and democratic society (or aspire to do so), our regulations must be compatible with the norms, ideals, and values that democracies represent. This means that the question is not whether to regulate the free market but what legal framework best promotes the values of a free and democratic society that treats each person with equal concern and respect.

It is hard to remember these basic truths because most Americans are stuck in a paradigm that treats markets and regulations as opposed to one another. Alan Greenspan, for example, has long argued that markets work well without regulation and that previous attempts to regulate have failed.[2] When Greenspan testified before Congress on October 23, 2008, Representative Henry Waxman asked if this was the reason Greenspan had refused to act to "prevent irresponsible lending practices that led to the subprime crisis" even though Greenspan had had the authority to do so.[3] Greenspan admitted that there was a "flaw" in the model that he had long used to define "how the world works," and appeared to understand that free markets have limitations and that regulations might be necessary to prevent catastrophic market failures.[4]

But libertarians like Greenspan are not the only ones who contrast markets and regulations. Even a liberal economist like Joseph Stiglitz frames the issue this way. In writing about the subprime crisis, for example, Stiglitz wrote that "markets do not work well on their own," that "[g]overnment

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[1] This joke won second place in an online contest to find the funniest joke. *See* Geoff Anandappa, *In second place*, LAUGHLAB.CO.UK, http://www.richardwiseman.com/LaughLab/second.html (last visited Nov. 6, 2011).

[2] *See Greenspan Admits "Flaw" to Congress, Predicts More Economic Problems* (PBS television broadcast Oct. 23, 2008), *available at* http://www.pbs.org/newshour/bb/business/july-dec08/crisishearing_10-23.html; *see also The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 46 (2008) (colloquy between Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Reform, and Alan Greenspan, former Chairman, Federal Reserve Board), *available at* http://www.youtube.com/watch?v=Dqe0VqIOrFQ (last visited Nov. 2, 2011).

[3] *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Gov't Reform*, *supra* note 2.

[4] *See id.*

needs to play a role . . . in regulating markets," and that "[e]conomies need a balance between the role of markets and the role of government."[5]

Framing the issue as the correct balance between "the free market" and "government regulation" distorts our understanding of both concepts. It wrongly suggests both that markets can exist without a legal framework and that all regulations interfere with liberty. Greenspan's worldview was flawed not because markets can be imperfect and not because government regulations sometimes succeed in ameliorating those imperfections. It was flawed because markets cannot exist without regulation in the first place. The freedoms markets enable to flourish exist because regulations make markets possible. The free market is in fact a regulatory structure that requires detailed laws to set the rules of the game. As the foreign minister of Czechoslovakia, Jiri Dienstbier, commented in 1990, "[i]t was easier to make a revolution than to write 600 to 800 laws to create a market economy."[6] Markets are enabled by law; without law, one cannot have a market.

The notion that markets and regulations are antithetical is a deeply incoherent idea. Yet, it is a pervasive assumption made by many people, including scholars and decision makers. Moreover, the idea that markets and regulation are opposites is a remarkably tenacious one. The legal realists demolished this myth a century ago in their scholarly works,[7] and the Great Depression convinced nearly everyone that government regulation was necessary to enable markets to work well. It was apparent when the subprime crisis hit that some kind of government response was both inevitable and necessary. Nevertheless, although we have not fully emerged from the crisis in 2011, we hear calls against regulation yet again.[8] The idea that regulation interferes with the free market is like a phoenix that cannot die. It keeps getting reborn. Why is that?

The answer has to do with the way Americans conceptualize what it means to be free. Regulatory laws prevent us from doing things we might want to do and thus, in a real sense, deprive us of liberty. But a moment's

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[5] JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY xii (2010).

[6] William Echikson, *Euphoria Dies Down in Czechoslovakia—Many Find Revolution is Easier Than Reform*, WALL ST. J., Sept. 18, 1990, at A26.

[7] *See, e.g.*, Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) [hereinafter "Hale, *Bargaining*"]; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) [hereinafter "Hale, *Coercion*"]; Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); *see generally* Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988).

[8] Republican Whip Eric Cantor criticized the new financial regulation law by arguing that "[t]his legislation is a clear attack on capital formation in America . . . . It purports to prevent the next financial crisis, but it does so by vastly expanding the power of the same regulators who failed to prevent the last one." Representative John Boehner said that the financial regulation law was like "killing an ant with a nuclear weapon." *See* David M. Herszenhorn, *Finance Overhaul Approved by House*, N.Y. TIMES, July 1, 2010, at B1.

thought will make it clear that libertarian hero John Locke was correct when he explained that "*where there is no Law, there is no Freedom.*"[9] Another word for regulation is "the rule of law." Market enthusiasts sometimes forget the benefits of law; in their enthusiasm for liberty, they take law for granted. The deeper truth is that laws designed to allow us to live together in harmony do not take away our liberty; they are what makes us free. This does not mean, of course, that all laws are good; some indeed take away our "freedom." Nor does it mean that liberals and libertarians agree on which laws are necessary to promote freedom. What it does mean is that promoting freedom requires a strategy other than "removing government regulation." It requires adopting appropriate regulations that promote the way of life that allows us to enjoy the liberties we cherish. That means we must define those liberties and choose the contours of our way of life in order to distinguish regulations that promote freedom from those that deny it.

All of this requires nuanced thinking.[10] But it appears that many Americans are stuck in a paradigm that teaches us to trust "the free market" and to fear "intrusive government regulation." At the same time, most people are in favor of "the rule of law" and agree that a free society needs law. The problem of course is that law and regulation are the same thing; you cannot be in favor of law and against regulation. If free markets need law to exist, then they are not possible without regulation—a surprisingly difficult thing for many Americans to understand. My purpose in this article is to explain this truth in a new way and to suggest a new framework for thinking about the relationship between regulation and the market.

In Part I, I will argue that both markets and private property emerged out of a long struggle against feudalism in both England and the United States. This historical process redistributed property rights from lords to tenants, ensured widespread distribution of property, and regulated property and contractual relationships to outlaw relations of servitude. From this historical process, I extrapolate an anti-feudal principle at the core of American property law. This principle holds that neither the free market nor private property is possible unless we regulate the terms of contractual arrangements to ensure that human relationships comport with minimum standards compatible with the norms of a free and democratic society.

In Part II, I will argue that this core anti-feudal principle illustrates the fundamental truth that social and economic relationships in a free and democratic society are subject to minimum standards regulations designed to protect the dignity and liberty of each person. For example, despite our deep libertarian streak and our often-professed suspicion of "government regulation," every state has laws that protect consumers by setting minimum standards for market relationships. We tend to talk like "small-government"

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[9] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ¶ 57, at 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[10] *See* SUSAN NEIMAN, MORAL CLARITY: A GUIDE FOR GROWN-UP IDEALISTS (2008).

libertarians, but we legislate like liberals. Minimum standards regulations exist not because we do not value freedom, but precisely because we do value it. Such laws represent collective political choices about the basic protections we have the right to expect when we enter market transactions. They illustrate the way a free and democratic society uses law to define the liberties that it recognizes.

In Part III, I explain that regulation is necessary to define and defend property rights. Laws clarify ownership, facilitate transfer, and prevent harmful externalities. Such regulations do not interfere with freedom; they promote it by enabling our private property system to work well while protecting the freedom of owners to enjoy what they own in a context of safety and security compatible with the rights of others. These regulations play an especially important role in the subprime context.

In Part IV, I conclude by observing that laws promote both freedom and democracy by outlawing social and economic relationships that are "subprime" because they fall below the minimum standards acceptable for human relationships in a free and democratic society. This realization should inform our response to the subprime crisis, as well as other issues of public policy, by framing those issues in a more productive manner.

I. The Legal Framework of a Free and Democratic Society

Both markets and private property emerged out of a long struggle against feudalism in both England and the United States. This historical process redistributed property rights from lords to tenants, promoted widespread distribution of property, and regulated property and contractual relationships to outlaw relations of servitude. This resulted in an anti-feudal principle that is at the heart of American property law, as well as the American conception of "the free market." Regulation is not a liberal idea invented in the 1960s to interfere with our free market economy. It is what enabled the free market to emerge in the first place. The anti-feudal principle prohibits arrangements akin to feudalism that assign different statuses to individuals and subject people to the arbitrary power of others. It also prohibits the existence of castes and, over time, came to mean the abolition of slavery and the protection of equal rights of access to the marketplace without regard to race, sex, religion, or disability. Both libertarians and liberals share a vision of the free market as embedded in a larger political conception of a free and democratic society. Markets only achieve their underlying values if laws are adopted and enforced that promote equal opportunity to participate in economic life. Market-enabling laws promote a wide distribution of property and regulate the terms of contractual arrangements to ensure that human relationships comport with minimum standards compatible with the norms defining a free and democratic society.

A. From Feudalism to Democracy

Edward the Confessor was far from the worst king in English history, but he did commit the unpardonable sin of dying without an heir and being less than clear about whom he wished to succeed him.[11] William the Conqueror, also known as the Bastard, claimed that Edward had promised him the crown, but on his deathbed Edward named Harold to succeed him. After Harold was crowned, William crossed the English Channel from Normandy to seize the crown from him. After beating Harold's army and killing him and his brothers at the Battle of Hastings, William was crowned king on Christmas day of 1066. Shortly afterwards, William built the White Tower, a structure that still sits in the middle of the Tower of London. With that base of operations, he methodically conquered England.

Within a few years, William had dispossessed almost all the English lords and replaced them with his trusted men. In so doing, William claimed ownership of all of England and parceled out rights to pieces of it to his lords in return for obligations to provide him with knights to defend the realm from enemies foreign and domestic or to provide him religious services to protect the kingdom and his own soul. Those lords, in turn, subinfeudated by making arrangements with tenants who would provide the services the lords needed in return for access to land. Those sublords, or vassals, found tenants of their own, and so on. At the bottom of the feudal ladder were the peasants who lived on and worked the land. And below the bottom were the serfs ("villeins")—euphemistically called "unfree"—who were essentially slaves.[12]

The feudal system was complex, varied throughout England, and changed over time. In important respects, however, it was far different from the social and legal environment that we associate with "the free market" and is, or should be, anathema to libertarians and liberals alike. There was nothing like full ownership of land in this system. Rather, everyone was tied to everyone else by personal relationships of allegiance and loyalty. Tenants pledged fealty to lords, agreeing not only to carry out specific obligations but, in general, to do the lord's bidding.[13] There were customary limits on what the lords could demand of tenants, but a tenant was not independent; he was the lord's man. Nor could tenants easily move from place to place; initially, they could not sell their land without the lord's consent. They could

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[11] For accounts of this history, see FRANK BARLOW, THE FEUDAL KINGDOM OF ENGLAND, 1042–1216, at 44–60 (5th ed. 1999); DAVID CARPENTER, THE STRUGGLE FOR MASTERY: BRITAIN, 1066–1284, at 61–75 (2003); RICHARD HUSCROFT, RULING ENGLAND, 1042–1217, at 3–18 (2005); EDMUND KING, MEDIEVAL ENGLAND FROM HASTINGS TO BOSWORTH 10–35 (2009); *see also* IAN MORTIMER, THE TIME TRAVELER'S GUIDE TO MEDIEVAL ENGLAND: A HANDBOOK FOR VISITORS TO THE FOURTEENTH CENTURY 36–59 (2008) (explaining social relationships in the 1300s).

[12] *See* CARPENTER, *supra* note 11, at 84–87, 392–430 (describing structures of society in early feudal practice in England).

[13] *Id.* at 84–85, 403–06 (describing the practice of fealty).

not change jobs or move to another city. Tenants were tied not only to their lord, but to his place. And women were especially limited; they were bound to a father, a brother, a husband, or a religious order. Just as a man was tied to a lord, a woman was tied to a man with power over her destiny.[14] Rather than being a society in which citizens of equal status entered contracts with each other, feudal England was a society in which each person's station in life was set by her status—a society defined by lords, commoners, serfs; by bishops, priests, monks; by wives, sisters, daughters.[15]

What we did not see in this system was widespread "ownership" of property held by persons of equal status who were free to do what they liked with their own land and to sell it, mortgage it, lease it, or give it away on terms chosen by them. In feudal England, political and governmental power combined with property rights so that landlords not only controlled their property but also governed those on their land. Lords had the power of life and death over the peasants who lived on their land; through control of manorial courts, they had the power to govern those they allowed to live on their land. This power was backed up by the religious sanction of church officials and by the military power of the sword.

Over time, through both political struggles and legal changes, the political power of the lords over the Crown increased; the council of lords became Parliament, for example, and King John was forced to sign the Magna Carta. But, at the same time, in the field of property law, the power of the lords gradually diminished.[16] With the development of the common law under Henry II, the royal courts took authority away from the lords' courts and began to protect the property rights of the lords' tenants.[17] Unfreedom gave way to rights and protection from lordly tyranny. Importantly, over time, the courts began to regulate property rights so as to push power downwards from the lords to the tenants who lived on the land, making it more and more true that each Englishman was the lord of his own castle. The central royal courts took jurisdiction over all property rights and increasingly protected tenants from arbitrary displacement by the lords. As peasants gained greater control of their own land, they also gained greater freedom. Peasants gained both property and freedom *not* by deregulation; *they gained independence by regulatory limitation on the powers of landlords and redistribution of property rights from lords to tenants.*

Nor is this only an English story. Feudalism had an early foothold in America in both New York and New Jersey.[18] In the early 1660s, King

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[14] On the role of women in this period, see *id.* at 415–22; MORTIMER, *supra* note 11, at 54–59.

[15] *See* MORTIMER, *supra* note 11, at 39–59 (describing medieval social hierarchies).

[16] For an excellent history, see A.W.B. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986).

[17] HUSCROFT, *supra* note 11, at 176–87; KING, *supra* note 11, at 68–72.

[18] *See generally* BRENDAN MCCONVILLE, THESE DARING DISTURBERS OF THE PUBLIC PEACE: THE STRUGGLE FOR PROPERTY AND POWER IN EARLY NEW JERSEY (1999); CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865 (2001).

Charles II sent Richard Nicolls to conquer New York from the Dutch. After he succeeded in wresting control of the area from the Dutch, Nicolls followed the King's instructions to settle the New Jersey area as soon as possible. Nicolls complied by giving deeds to several groups of religious dissenters from Massachusetts and Long Island who settled in the town of Elizabeth in the north and Monmouth County in central Jersey by the coast. Their deeds gave them title to the land but included obligations to pay feudal rents within seven years. The King then gave New Jersey to his brother James, the Duke of York, who promptly gave New Jersey to two men, George Carteret and John Berkeley, to be the new Lords Proprietor of the Jerseys. They appointed Carteret's cousin Philip to become the first Governor of New Jersey. Philip Carteret arrived with a small coterie of soldiers, introduced himself to his new subjects, and let them know that they were now bound to a lord and owed him both fealty and rent.

The New Jersey settlers refused to submit to these lords. They argued that, because they had title to their land, they held the land free of any obligation to a lord and that it would violate their property rights to impose a lord on them against their will. Some of them also argued that they had title because of deals they made with the Lenni Lenape Indians who lived in the area. Others argued that they owned their land because they had mixed their labor with the land and built homes and villages. They therefore had three potential sources of title (prior deeds, treaties with the Indians, and their own labor), and they steadfastly held that the claims of the lords to subservience and rent could not be imposed on them against their will.[19]

Obviously, neither Governor Carteret nor Lords Berkeley and Carteret thought this reaction appropriate. Yet the settlers persisted. They had title to their land, held it free of rents to any lord, and were capable of governing their own towns themselves. They were equal before God and the King and would not submit to arbitrary taxation or governance by the lords. The lords resisted the claims of the freeholders and the result was a low-level civil war that lasted more than a hundred years and which ended only a few years before Independence. The heirs of the lords (called the proprietors) continued to seek feudal rents, and the heirs of the freeholders continued to resist by both nonviolent and violent means until the freeholders eventually prevailed.

Feudalism was outlawed in New Jersey, and land ownership was held in fee simple free of obligations to any lord. Ownership was dispersed among many people rather than concentrated in the hands of two families, and land was freely bought and sold. And after the Revolution, the government was chosen democratically by these freeholders rather than appointed by the Crown or inherited from a lord. One might say every man was lord of his own castle, but it is more accurate to say that there was no such thing as a

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[19] These arguments encapsulate a complicated history. For a summary, see McConville, *supra* note 18, at 12–27.

lord anymore. The capital of Monmouth County is called Freehold and the county government, to this day, is called the Board of Chosen Freeholders. The freehold movement in New Jersey represents one of the centers where the American conception of property was born, as well as the American conceptions of both liberty and democracy.[20]

Why does this history matter? It matters because it teaches us something of fundamental importance about the nature of both property and liberty. The limited government valorized by libertarians demands the separation of property ownership from political power. Owners control their own property but they do not have the power of life and death over those they allow to come onto their land; they do not *govern* their tenants or their guests. To have a free society requires both a widespread distribution of property (rather than one or two lords) and the abolition of unequal statuses.

This means that we need laws that abolish certain kinds of contracts and property arrangements. If anyone tries to set up a feudal arrangement, the law will not recognize it. In order to create private property and the free market, we need laws that promote widespread distribution of property ownership, and we need to prohibit the enforcement of contracts that establish differences of status or that tie people to the land through master-servant relationships. We need to abolish indentured servitude; we need people who are free and independent rather than vassals who pledge loyalty to lords. A free market society bans feudal arrangements.

Notice the implications of this. Because liberals support "regulations" more quickly than libertarians, it is sometimes thought that they are enemies of "the free market." However, liberals strongly favor the freedoms that markets represent, including freedom from arbitrary power of a lord and freedom to choose how to live one's life. Conversely, libertarians support more regulation than they may realize. Our regulatory prohibition of feudalism shows that private property and the free market are possible only if we limit freedom of contract. Libertarians seek small government, free markets, and the protection of property rights, but we can get to the world the libertarians value only if we redistribute property rights from lords to commoners, ensure that each person has the opportunity to become an owner, and regulate the terms of contracts and property rights to prevent feudal relationships from being established. Freedom is not possible without regulation and markets cannot exist without law. The free market is not based on a lack of government regulation but on a regulatory principle that abolishes feudalism and promotes individual choice *within the bounds of law*. The anti-feudal principle at the heart of American property and contract law establishes a baseline for market relationships that is enforced through a combination of statutes, common law, and constitutional law. The "free market" is not a libertarian idea and "regulation" is not a liberal idea.

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[20] *See id.*; *see also* EDWIN P. TANNER, THE PROVINCE OF NEW JERSEY, 1664–1738 (1967).

Over time, the notion of equality embedded in the anti-feudal principle became institutionalized and expanded. It is evident in the Declaration of Independence's affirmation that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[21] It was enshrined in the Constitution in 1789 in Article I, Section 9, clause 8, where the people of the United States ensured that "no Title of Nobility shall be granted by the United States."[22] More than a simple prohibition against Congress giving titles of Duke and Lord, the Title of Nobility Clause represents the heart of the Constitution, because it evidences the deep break between the new, egalitarian American system of freehold property and the old, hierarchical, status-based English system of feudalism.

The principle of equal status was extended to dramatic effect with the Civil War, the Thirteenth Amendment, and the abolition of slavery. It was extended further in the Married Women's Property Acts of the mid-nineteenth century, which freed married women from their prior disabilities and gave them rights to hold their own property, to sue and be sued, and to enter enforceable contracts without the consent of their husbands.[23] It was embedded a hundred years later in the civil rights laws of the 1960s, which affirmed that access to the marketplace (including public accommodations, employment, and housing) cannot be conditioned on one's race, religion, or sex, and extended again in 1988 and 1990 to persons with disabilities.[24] Both the free market and private property exist because we enacted laws that redistributed property rights, regulated the allowable terms of contracts, and prohibited the recognition of unequal statuses based on class, caste, sex, religion, or race.

B. The Anti-Feudal Principle in American Property Law

The anti-feudal principle is not an archaic relic. It shapes our property law today. For example, it explains why we do not specifically enforce labor contracts. If you want to quit your job, we may force you to pay damages for breach of contract, but courts do not order you to continue working for your employer.[25] If you do not pay your debts, courts may issue orders attaching your wages, but we do not put you in debtor's prison until you pay off your debts.[26] Our law refuses to do these things, not because we do not value liberty or because we are not in favor of "the free market," but be-

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[21] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[22] U.S. CONST. art. I, § 9, cl. 8.

[23] JOSEPH WILLIAM SINGER, PROPERTY § 9.2.2 (3d ed. 2010).

[24] *Id.* § 2.6 (discussing public accommodations law), §§ 12.1–12.8 (discussing fair housing law).

[25] RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981).

[26] John B. Mitchell & Kelly Kunsch, *Access to Justice: Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. SOC. JUST. 439, 444–46 (2005) (describing the abolition of debtor's prison).

cause liberty demands the abolition of feudalism and indentured servitude. We regulate the kinds of market relationships and property arrangements that can be established to ensure that we have independent persons free to follow their own paths in their own homes and businesses, subject to legitimate regulations established by law.

We have landlords and tenants, to be sure, but we do not grant landlords the status of *lord.* Landlords are entitled to get rent from their tenants, but tenants do not owe their landlords service or fealty. Tenants are free to move and to control their own homes.[27] For example, when you rent an apartment, one of the rights you get is the right to invite friends and family over to visit. You do not have to ask your landlord's permission to have guests. The landlord has no power to stop a tenant from receiving visitors; a clause to that effect in a lease is void.[28] In a free and democratic society (one that has rejected feudalism), landlords may not isolate their tenants or deprive them of the freedom to exercise those liberties essential to establishing a home.

The New Jersey Supreme Court implemented this principle when it held that a farm owner could not exclude a doctor and lawyer who wished to visit and provide services to migrant farmworkers living in barracks on his land. Chief Justice Joseph Weintraub explained the basis of this ruling in the abolition of feudalism. "Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises."[29] Tenants are neither serfs nor servants, and owners in a free and democratic society have no right to treat them as such. The owner "may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens."[30] Nor may the parties contract to the contrary. "These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties."[31] The right of the tenant to have a home and to receive guests prevails over the freedom of the parties to use the institution of contract to establish property relationships that deny tenants core liberties.

The anti-feudal principle is the source of claims to control one's own property free of intrusive interference by neighbors as well as landlords. Consider that, shortly after 9/11, Justice Clarence Thomas's father-in-law,

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[27] This does not mean that tenants do not have obligations to landlords such as the duty not to commit waste or cause a nuisance to neighbors. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES § 11.2.2.3 (5th ed. 2010).

[28] *See* State v. Shack, 277 A.2d 369, 374 (N.J. 1971); SINGER, *supra* note 23, § 2.2.2. Of course, the *scope* of the tenant's rights is indeed in contention. Landlords have, with some frequency, sought to exclude unmarried couples from their property. *See, e.g.*, McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998), *vacated and remanded*, 593 N.W.2d 545 (1999).

[29] *Shack*, 277 A.2d at 372.

[30] *Id.* at 374.

[31] *Id.* at 374–75.

Donald Lamp, placed an American flag on his condominium balcony.[32] The condominium association asked him to take it down; it had promulgated an aesthetic rule against any decorations such as flags, wind chimes, or banners on the balconies. Lamp refused to take down his flag. The controversy garnered national attention and the condominium association backed down. Responding to this kind of dispute, Congress passed a law called the *Freedom to Display the American Flag Act of 2005* prohibiting enforcement of any condominium covenant or rule that interferes with the ability of any condo owner or possessor to fly the American flag.[33]

When this law was being debated, I had two very smart libertarians in my property class. When I asked the students in my class what they thought about the issue, one of the libertarians said that the association was right. By buying a condominium, Lamp agreed to abide by rules of the association; he simply did not own the right to fly the flag on the balcony. If he wanted to reserve such a right, he should have bought a single-family home. Freedom of contract gave the majority the power to promulgate the rule and Lamp had promised to abide by such rules. The federal statute would thus interfere with freedom of contract and take property rights away from the neighbors and the association itself. The other outspoken libertarian in the class became livid with anger. "An American wants to fly the American flag from the balcony of his home after the United States is attacked by foreign enemies and you want the sheriff to come to force him to take it down, and you call yourself a libertarian?" According to this latter view, owners are lords of their own castles in America and the neighbors have no right to intrude on such fundamental rights of owners. The federal law, in this view, restored liberty and protected the property rights of owners from interference by others.

My point here is not to establish which position is correct. It is to point out that we cannot decide whether the Freedom to Display the American Flag Act was legitimate by asking whether it constituted a regulatory interference with the free market. Nor should we understand the case to represent a conflict between freedom of contract and property rights. After all, there are property claims on both sides of the dispute; Donald Lamp asserted a right to fly the American flag on his own property while the neighbors asserted the right to enforce restrictive covenants attached to the owner's rights in the property. While one side argued for the freedom to adopt rules that limit the right to fly the flag, the other side argued for the right to be free to use his property as he saw fit. Both sides in this dispute want to be free from "lordly power" and to be masters of their own property. The question

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[32] *Apartment Dweller, Managers Clash Over Flag Display*, ASSOCIATED PRESS, June 6, 2004, *available at* http://www.firstamendmentcenter.org/news.aspx?id=13469; *see also* Tony Mauro, *An Unwelcome Mat for Free Speech*, USA TODAY, Aug. 18, 2004, at 13A; Eric Olson, *Father-in-Law of High Court Justice Defies Rule, Flies Flag*, ST. LOUIS POST-DISPATCH, May 29, 2004, at 6.

[33] Freedom to Display the American Flag § 3, 4 U.S.C. § 5 (2006).

is what that means in this case. Rather than frame the issue by asking *whether* we should interfere with the free market or impinge on property rights, we should focus on *how* to define the appropriate contours for property rights in a free and democratic society.

The anti-feudal principle mandates that a free and democratic society must have widely dispersed ownership of property rather than concentrating it in the hands of the few. The subprime crisis brought to our attention the question of how important it is to give all Americans the chance to own their own homes. Those opposed to big government often point to federal policies designed to promote homeownership by low-income families as a major cause of the subprime crisis.[34] The hypothesis does not withstand scrutiny.[35] Federal regulations adopted after World War II promoted widespread home ownership and those laws worked well for many years.[36] It was only after the substantial deregulation of the banking sector that the subprime mortgage market emerged.[37] And many nonprofit community development corporations promote housing for low-income families and these programs face very few defaults.[38] If one wants to promote housing for all Americans, we know how to do this in a manner that works. The subprime market spread ownership in a manner designed to fail. Regulatory laws designed to prevent this from happening again not only would avoid the negative externalities of a subprime market but would also protect the civil rights of all Americans to fair treatment in the marketplace.

Moreover, while it is true that rental arrangements may be preferable to ownership for some people, it is important to remember that tenants are subject to disadvantages under existing law relative to owners. For example, in most jurisdictions, tenants can be evicted at the end of the lease term for any nondiscriminatory reason. That means that tenants are far more at the mercy of their landlords than homeowners are at the mercy of their banks. Rent-paying tenants can be evicted at the end of the lease term at will by the landlord; they therefore have less security in their homes than homeowners do.[39] Responding to the subprime crisis by telling millions of families that

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[34] *See* Robert Gordon, *Did Liberals Cause the Sub-Prime Crisis?*, THE AMERICAN PROSPECT (Apr. 7, 2008), http://prospect.org/cs/articles?article=did_liberals_cause_the_subprime_crisis.

[35] *Id.*

[36] Of course, this period also witnessed widespread racial discrimination in the housing market, promoted not only by private actors but also by both the federal and many state governments. The civil rights laws of the 1960s sought to extend property rights to previously excluded racial groups.

[37] *See* BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS 48–51 (2010); STIGLITZ, *supra* note 5, at 10–11.

[38] *See, e.g.*, David Abromowitz & Janneke Ratcliffe, *Homeownership Done Right: What Experience and Research Teaches Us*, CENTER FOR AMERICAN PROGRESS (Apr. 1, 2010), http://www.americanprogress.org/issues/2010/04/homeownership_right.html.

[39] Congress did pass a temporary statute giving rent-paying tenants three extra months before they can be evicted from property when the owner loses title to foreclosure. *See* Protecting Tenants at Foreclosure Act of 2009 §§ 701–04, 12 U.S.C. §§ 5201, 5220, 42 U.S.C. § 1437 (West 2011). And Massachusetts passed a law prohibiting eviction of such tenants

they must give up hope that they might participate in the American dream of owning their own homes would make many more people vulnerable to displacement against their will.

The distribution of homeownership is of crucial importance because concentration of ownership is one of the features of feudalism. Remember the history of New Jersey. A free and democratic society must have more than two owners, and that means the law must redistribute property rights from lords to peasants; Lords Berkeley and Carteret must give way to a community of freeholders. Libertarians, as much as liberals, should endorse redistribution to promote both liberty and property. Even libertarian hero Robert Nozick acknowledges that someone who comes to own the only water hole in the land is obligated to share the water with others when a drought comes.[40] Although libertarians and liberals disagree about how much equality we need to have in order to have sufficient opportunity for each person to participate in social and economic life, they do agree on the core principle of equal opportunity and widespread distribution of property.[41]

Libertarians as much as liberals should also accept that we need to regulate the terms of contracts and the packages of property rights that people create to ensure that they are compatible with the values of a free and democratic society. Remember the interview Senator Rand Paul gave with Rachel Maddow the day after he won the Republican primary for Senate in the state of Kentucky.[42] Although difficult to pin down, he did opine that the federal Public Accommodations Law of 1964 was either problematic at best or unconstitutional at worst because it interfered with property rights by telling restaurant owners that they could not exclude people from their private property because of race. Senator Paul also suggested that the public accommodations law infringed on free speech rights when it prohibited restaurants from posting "Whites Only" signs. But Senator Paul was fundamentally wrong when he suggested that civil rights laws interfere with property rights and freedom of speech. Just as we abolished feudalism, we have abolished both slavery and racial segregation. This means not only that the government cannot discriminate on the basis of race but that the private realm of the market cannot distribute property and opportunity on the basis of race.[43]

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until title passes from the bank that bought the property at foreclosure to a third party. *See* MASS. GEN. LAWS ANN. ch. 186A, §§ 1–6 (West 2010).

[40] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 180 (1974) ("Thus a person may not appropriate the only water hole in a desert and charge what he will.").

[41] For an explanation of how much law reform we would have to undertake if we took the principle of equal opportunity seriously, see generally BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS (2005).

[42] Adam Nagourney & Carl Hulse, *Tea Party Pick Causes Uproar on Civil Rights*, N.Y. TIMES, May 20, 2010, at A1.

[43] Of course, there are limits to this principle. Individuals are entitled, for example, to exercise their autonomy and associational freedom by giving gifts to specific individuals or limited groups; a prime example is the United Negro College Fund. This means that the principles of equal racial access must be defined by law and may be limited by competing principles and norms.

Our views as a nation have changed over time, but since the 1960s it is a fundamental principle that access to the marketplace cannot be conditioned on race.[44] Your ability to enter the free market will not be limited because of your ancestry, your caste, or the color of your skin.

The federal public accommodations law does not interfere with either property rights or liberty because the right to exclude a customer from a restaurant based on race is not a property right that a free and democratic society can recognize. Nor does it infringe on free speech to prohibit an owner from posting a "Whites Only" sign. Allowing restaurants to proclaim their disinclination to serve customers because of race would perpetuate segregated eating establishments and allow racial segregation in the marketplace to persist. Just as we would not recognize feudal relations in America, we do not allow privately-created discriminatory barriers to the free market. Such property rights are incompatible with the norms governing a free and democratic society. Because we are not free in a democracy to establish either feudalism or a racial caste society, laws prohibiting those practices do not deprive us of freedom; rather, they promote it.

While Rand Paul and other libertarians see the civil rights laws of the 1960s as a regulatory intervention that takes away both property rights and liberty, a direct line can be drawn between these laws and the anti-feudal principle at the core of property law. Just as the free market that libertarians identify as a source of freedom demands that property rights not be concentrated among a small group of people, it also demands that the right to enter the marketplace not be denied to people based on race.

II. Consumer Protection Law

A. The American Demand for Law

Despite our deep libertarian streak, we Americans are far more liberal than you might think. When it comes to government regulation, it appears that we talk like libertarians and legislate like liberals. Although Americans profess to be skeptical of "government regulation" and think government should be smaller, we demand laws that protect consumers by setting minimum standards for market relationships. This is evident in the myriad regulatory laws passed by both the state and federal governments. Every state has a consumer protection law that prohibits unfair and deceptive acts and practices by businesses.[45] These laws arguably "interfere with the free mar-

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[44] *See generally* Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 Ala. C.R.-C.L. L. Rev. 91 (2011).

[45] *See* Ala. Code §§ 8-19-1 to -15 (2011); Alaska Stat. §§ 45.50.471–561 (2010); Ariz. Rev. Stat. Ann. §§ 44-1521 to -1534 (2010); Ark. Code Ann. §§ 4-88-101 to -804 (2010); Cal. Bus. & Prof. Code §§ 17200–17210, 17500–17509 (West 2010); Colo. Rev. Stat. Ann. §§ 6-1-101 to -115 (West 2010); Conn. Gen. Stat. Ann. §§ 42-110a to -110q (West 2010); Del. Code Ann. tit. 6, §§ 2511–2527, 2531–2536 (West 2010); D.C. Code §§ 28-3901 to -3913 (2010); Fla. Stat. Ann. §§ 501.201–501.213 (West 2010); Ga. Code

ket" by regulating the terms and conditions of contracts substantively. If Americans are so opposed to "government regulation," why do such laws exist in every state? Why do the American people demand such laws?

The answer is that, for the most part, Americans have a different conception of both "liberty" and "the free market" than the one trumpeted by many libertarians. Americans seek not only the freedom to deal on mutually-chosen terms, but also freedom from fear of being cheated or treated badly.[46] They seek safety when they enter the marketplace; they seek products that work as promised and that will not injure them.[47] They seek safe workplaces.[48] They want insurance companies to have enough money to pay valid claims when due and to ensure that they actually do pay those claims rather than delay in bad faith.[49] They want their bank accounts protected.[50] They want their buildings to be safe and their electricians to be licensed so that houses do not burn down because of incompetent contractors.[51] They want marriages regulated so that they are not left destitute upon divorce or

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ANN. §§ 10-1-370 to -375 (West 2010); HAW. REV. STAT. §§ 480-2 to -24, 481A-1 to -5 (West 2010); IDAHO CODE ANN. §§ 48-601 to -619 (West 2011); 815 ILL. COMP. STAT. ANN. 505/1 (West 2010); IND. CODE ANN. §§ 24-5-0.5-1 to -12 (West 2010); IOWA CODE ANN. § 714.16 (West 2010); KAN. STAT. ANN. §§ 50-623 to -642 (West 2009); KY. REV. STAT. ANN. §§ 367.110–360 (West 2010); LA. REV. STAT. ANN. §§ 51:1401–51:1427 (2010); ME. REV. STAT. ANN. tit. 5, §§ 205-A-214 (2009); ME. REV. STAT. ANN. tit. 10, §§ 1211–1216 (2009); MD. CODE ANN., COM. LAW § 13-101 to -105 (West 2010); MASS. GEN. LAWS ANN. ch. 93A, §§ 1–11 (West 2010); MICH. COMP. LAWS ANN. §§ 445.901–922 (West 2010); MINN. STAT. ANN. §§ 325D.43–48, §§ 325F.68–70 (West 2009); MISS. CODE ANN. §§ 75-24-1 to -27 (West 2010); MO. ANN. STAT. §§ 407.010 to .1500 (West 2009); MONT. CODE ANN. §§ 30-14-101 to -143 (2009); NEB. REV. STAT. §§ 59-1601 to -1623; 87-301 to -306 (2009); NEV. REV. STAT. ANN. §§ 598.0903–0999 (West 2009); N.H. REV. STAT. ANN. §§ 358-A:1–358-a:13 (2010); N.J. STAT. ANN. §§ 56:8-1 to -195 (West 2010); N.M. STAT. ANN. §§ 57-12-1 to -26 (West 2010); N.Y. GEN. BUS. LAW §§ 349–350-f (McKinney 2010); N.C. GEN. STAT. ANN. §§ 75-1 to -42 (West 2009); N.D. CENT. CODE ANN. §§ 51-15-01 to -11 (West 2009); OHIO REV. CODE ANN. §§ 1345.01–99 (West 2009); OKLA. STAT. ANN. tit. 78, §§ 51–55 (West 2010); OKLA. STAT. ANN. tit. 15, §§ 751–765 (West 2010); OR. REV. STAT. ANN. §§ 646.605–656 (West 2009); 73 PA. CONS. STAT. ANN. §§ 201-1 to -9 (West 2009); R.I. GEN. LAWS ANN. §§ 6-13.1-1 to -28 (West 2009); S.C. CODE ANN. §§ 39-5-10 to -170; 37-1-101 to -109 (2009); S.D. CODIFIED LAWS §§ 37-24-1 to -35 (2009); TENN. CODE ANN. §§ 47-18-101 to -130 (West 2010); TEX. BUS. & COM. CODE ANN. §§ 17.41–63 (West 2009); UTAH CODE ANN. §§ 13-11-1 to -23 (West 2009); VT. STAT. ANN. tit. 9, §§ 2451–2466 (West 2011); VA. CODE ANN. §§ 59.1-196 to -207 (West 2010); WASH. REV. CODE ANN. §§ 19.86.010–920 (West 2010); W. VA. CODE ANN. §§ 46A-1-101 to -108 (West 2010); WIS. STAT. ANN. §§ 100.18–60 (West 2010); WYO. STAT. ANN. §§ 40-12-101 to -114 (West 2010); *see also* AM. BAR ASS'N, ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS 375–598 (2009) (providing a full survey of consumer protection laws in the 50 states and Washington, D.C.).

[46] *See, e.g.*, IDAHO CODE ANN. §§ 48-601 to -619 (West 2011) (Idaho Consumer Protection Act).

[47] *See, e.g.*, *id.* § 48-603 (prohibiting companies from representing products to be safe when they are not); *id.* §§ 39-1601 to -1607 (regulating safety in food establishments).

[48] *See, e.g.*, *id.* §§ 44-1401 to -1407 (making employers liable for harms to workers caused by unsafe workplace conditions).

[49] *See, e.g.*, *id.* § 41-1402 (regulating insurance companies).

[50] *See, e.g.*, § 26-601 (regulating bank reserves).

[51] *See, e.g.*, *id.* §§ 39-4101 to -4029 (regulating building construction).

the death of a spouse.[52] They want land use regulated by zoning and environmental laws so that they have clean water and air and can live in a suitable environment.[53] They want access to the marketplace without regard to race, sex, religion, or disability.[54]

Laws like this exist in every state—including those one might consider to be the most libertarian in orientation.[55] We want freedom of choice in the marketplace, but we also want to choose the contexts within which those choices are made. We want freedom from fear. Regulatory laws that set minimum standards for market relations provide that for us. Americans may have a fierce libertarian streak, but Americans also demand law—and a lot of it. This is not because we want protection from our own stupidity or irrationality, and it is not because we do not care about liberty. *We demand law because we want to take certain things for granted.* When we enter a retail store, we want to know that we can leave; the storeowner is not our lord and has no dominion over us just because we are on her land. She cannot detain us without cause (such as a reasonable belief we were stealing her goods). When we buy a product, we want to know it will perform as advertised and be safe. When we buy services, we want our providers to know what they are doing. When sellers get us to buy things, we want to know that we are not being taken for a ride or treated differently because of our race. Regulatory laws free us from having to bargain about all these things every time we enter the market, leaving us free to bargain about other things.

Consumer protections laws that set minimum standards for market relationships do not take away our freedom or interfere with the free market. Rather, they ensure that we get what we want in the marketplace. While it is true that laws that establish mandatory terms for contracts may deprive some of the ability to contract for different terms, consumer protection laws ensure that market transactions accord with the legitimate expectations of most persons. Such laws not only save us from the transaction costs of having to bargain for basic protections but also represent a politically adopted framework for fair market relationships. Mandatory rules are sometimes based on court interpretation of constitutional provisions and sometimes on court interpretation of the common law; at other times, they are defined by statutes or administrative rules. We use a variety of law-making procedures to engage in collective choices about the minimum standards we want to govern economic relationships. Such laws allow us to take many things for granted by freeing us from the need to have to bargain about basic protections when

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[52] *See, e.g.*, *id.* §§ 32-701 to -715 (regulating separate and community property on divorce).

[53] *See, e.g.*, *id.* §§ 39-3601 to -3639 (Idaho Water Quality Act), §§ 67-6501 to -6538 (Idaho zoning enabling statute).

[54] *See, e.g.*, *id.* § 18-7301 (prohibiting discrimination in employment and public accommodations).

[55] *See supra* notes 45–54.

we enter the marketplace. If we look at what we do, rather than what we say, it is apparent that Americans are fiercely supportive of government regulation—not because we do not value freedom but because we do value it.

B. Regulations as Minimum Standards

Arguments for "regulation" face an inevitable critique: Don't they increase the cost of providing goods and services, hurting all consumers and especially the poor? This argument is worth considering, but when someone asks it, you should hang onto your wallet. The question suggests that *all* regulations backfire by hurting those they are meant to protect. If this were true, it would suggest that we should deregulate entirely. I have explained why this would be not only impossible but also contrary to the idea of having a free market and private property in the first place. But the argument is equally wrong if we focus on the claim that new regulations (added to those we already have) increase the cost of providing goods and services and thus hurt those they were intended to protect.[56] Here is why.

It is true that the cost of housing would very likely be cheaper if we repealed building codes. Some providers would try to sell shoddy housing and it is likely some buyers with high tolerance for risk would purchase such housing in order to save money. But the lack of regulation would mean that we could not be sure that our homes were safe to live in. We want building codes because they ensure (or make it more likely) that when we buy a house we will not be moving into a firetrap or face injury from a collapsing stairwell. We want freedom from the need to bargain about these things when we buy a home; we want to take it for granted that the building was constructed according to certain minimum standards. Of course, such regulations make housing more expensive, but to most citizens (those who supported passage of building code laws) the benefits outweigh the costs.[57]

It is true that building code legislation may have the effect of pricing the poorest Americans out of the housing market. They could afford hous-

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[56] I am putting to one side a standard argument that sellers cannot pass on the added costs of new regulations if consumers refuse to pay higher prices for the goods. Limits on demand for goods may indeed inhibit the ability to pass on such costs. *See, e.g.*, Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987) (explaining why regulations may help consumers). My focus here is on how to justify regulations even if part or all of the cost *is* passed on to customers. And indeed, assuming there is a market for regulated products (i.e., sufficient demand to make providing the products profitable), then it is a truism that regulation may increase the cost of providing the product beyond what customers would have demanded or sellers would have provided in the absence of the regulatory requirement.

[57] While some regulations merely set default terms that can be renegotiated by the parties, others represent judgments by lawmaking bodies (whether courts or legislatures) that certain minimum standards are required to ensure that each person is treated with respect and dignity. Such mandatory regulations do deprive individuals of the freedom to enter alternative arrangements, but they represent democratically adopted judgments that certain rights are too fundamental to be bargained away.

ing if it were legal to sell a shack. But the way to help the poor is not to make housing unsafe for the rest of us. The way to help the poor is to increase their incomes so that they can afford minimally decent housing. If our laws have not made it possible for individuals to earn enough to live on, that is the fault not of those individuals but of our laws. A democracy values each person equally; we each have the right to pursue happiness. That means that property must be distributed and regulated so that each person can participate in our markets. To demand that we remove regulations that protect all of us to make products affordable by the poorest persons is to make the tail wag the dog. We want regulations that set minimum standards for market and property relationships, and we help the poor not by making the rest of us vulnerable to unsafe housing but by enabling the poor to raise their incomes or to obtain needed services in other ways.

Consumer protection laws have played a significant role in the subprime crisis. We have seen litigation seeking to protect the rights of consumers in the market for housing finance. And some courts have interpreted consumer protection statutes to apply in such cases. For example, the Supreme Judicial Court of the Commonwealth of Massachusetts found it to be an "unfair act" violative of the state consumer protection act to sell subprime mortgages to borrowers whose income was not sufficient to pay it back once the higher interest rate kicked in.[58] Combined with 100% financing or a high prepayment penalty, such borrowers could not possibly pay the higher rates unless the market value of the property went up. If the value did not rise, the bank would foreclose, leaving the borrower worse off financially than if she had not taken out the mortgage. Although a libertarian might have no problem with such a contract, the court did, interpreting the statutory prohibition on unfair practices to cover such arrangements.

The justices speculated that a bank would not make such a loan on the hope that the borrower's income would rise, and it was equally risky to make the loan based on the hoped-for rise in property values, especially when the loan was made at a time when it was apparent that the housing bubble was teetering on the brink of bursting. If such a loan was so risky, the bank was in fact seeking to empty the borrower's pockets, rather than to finance the purchase of a house.[59] Many adjustable rate mortgages functioned just this way, effectively making the arrangement a pretend sale, designed only to strip the borrowers of their equity. As economist Joseph Stiglitz explains: "There was no point of putting someone in a home for a few months and then tossing him out after having stripped him of his life savings. But that was what the banks were doing."[60]

Similarly, one court found that marketing subprime mortgages to a largely African American neighborhood might constitute a form of race dis-

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[58] Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548, 551 (Mass. 2008).
[59] *Id.* at 558–59.
[60] STIGLITZ, *supra* note 5, at 11.

crimination called "reverse redlining."[61] If the result of the mortgages was massive default, the effect would be to deprive African Americans of their homes, empty out the neighborhood, reduce housing values generally in the area, and depress the local economy. Intentionally targeting such an area deprives people of property because of their race and arguably violates the Fair Housing Act.[62]

Consumer protection and antidiscrimination laws designed to outlaw unfair practices neither interfere with "the free market" nor infringe on property rights. Nor do regulations inevitably backfire by hurting those they are intended to protect. Rather, by establishing minimum standards for market relationships, consumer protection laws help us get what we want by freeing us from the burden of bargaining for things we would like to take for granted. If those regulations increase the cost of housing or other products so that the poor cannot afford them, then we must address those concerns in ways other than "removing intrusive regulations." We must ensure that each person has the realistic opportunity to participate in social and economic life, and that all of us are able to expect that market and property transactions will accord with minimum standards compatible with our justified expectations and deepest values.

III. Private Property and the Rule of Law

In various ways, I have been arguing that regulation (otherwise known as "the rule of law") is necessary to define and defend property rights. The usual opposition of "markets" and "regulations" focuses on the extent to which laws limit freedom of contract by setting some of the basic terms of market transactions. This way of framing the issue suggests that regulations take away freedom. But if we focus on the laws needed to establish private property, it becomes evident that many "regulations" can be defended on the ground that they "protect property rights." In the subprime area, for example, the laws requiring a writing to transfer interests in real property, along with the recording system, are in place to ensure that property rights are clear.[63] Such regulations do not interfere with property rights; they facilitate their existence and promote their transferability in the marketplace. The laws prohibiting fraud are in place to protect people from having their property taken under false pretenses, effectively protecting them from a kind of theft. The laws regulating financial institutions and the mortgage market not only protect basic property rights but also seek to avoid the negative externalities of property arrangements. The subprime crisis, more than anything else in recent history, shows that property rights do not affect only those who are party to the transaction that created them. The subprime mar-

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[61] M & T Mortg. Corp. v. Foy, 858 N.Y.S.2d 567, 567 (N.Y. Sup. Ct. 2008).

[62] 42 U.S.C. §§ 3601–19, 3631 (2006).

[63] Singer, *supra* note 23, §§ 11.3.2, 11.4.5 (explaining the Statute of Frauds and state recording statutes).

ket created toxic assets that wrecked the world economy, and regulations are essential to avoid a repetition of this disaster. Such regulations do not interfere with freedom; they promote it by enabling our private property system to work well while protecting the freedom of owners to enjoy what they own.

A. Robo-Signing, Fraud, and Equity Stripping

Both property and freedom require regulations that enable real estate markets to exist. Myriad laws are needed for this to be so. For example, the free market means that you are both free to contract and free *not* to contract. The only way one can be free not to contract is if one has alternatives.[64] This is one reason why we must promote widespread ownership of land and equal opportunity to participate in economic life. Those without property are at the mercy of those with property and people must have some place where they are entitled to be.[65] It is also why we need rules distinguishing when a contract has actually been made and rules interpreting what the promises actually mean.

The Statute of Frauds requires most contracts regarding land to be in writing. This is a regulatory law that limits our freedom to make binding agreements orally. Recording statutes also regulate the real estate market by penalizing owners who fail to record their transactions.[66] However, by reducing disputes about the ownership of property and by creating public notice of who owns what, these laws enable property rights to be both clear and secure; thus, both create real estate markets and promote freedom. Land transactions cannot happen unless we have a system that provides clear rules about ownership and cheap ways to prove title. These laws arguably lower transaction costs, clarify property ownership, promote alienability, and protect us from false claims that one has sold one's land when one had no intention of doing so. Rather than interfering with the free market, these regulations are part of its infrastructure.

This is why the robo-signing controversy is of such importance. In their rush to securitize subprime mortgages, banks failed to adhere to traditional rules requiring clear, written records of all mortgage transactions. When borrowers defaulted and mortgage servicers began to foreclose on the properties, courts began to seek clear evidence that the bank bringing the foreclosure action owned the mortgage and had the right to foreclose. Because the paper trail had not been kept properly, banks sometimes created fraudulent documents either to recreate that paper trail or to serve as affidavits that the bank had lost the records and could not find them after a search.

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[64] *See* Hale, *Bargaining*, *supra* note 7; Hale, *Coercion*, *supra* note 7.

[65] *See generally* Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

[66] SINGER, *supra* note 23, § 11.4.5 (explaining the operation of recording statutes).

This led some banks to hire workers who would sign thousands of foreclosure documents without actually checking to ensure that the claims were accurate. This "robo-signing" practice not only violated ethical and legal standards for real estate transactions but also constituted a fraud on the court.[67]

Some banks claim that the failure to comply with writing requirements in the securitization and transfer of subprime mortgages was a mere technical failure, but the truth is that these formalities are designed to ensure that the real estate market works well and that only those entitled to foreclose on land have the power to do so.[68] When the banks argue that borrowers who do not pay their mortgages deserve to lose their homes, they are making an argument based on fairness, but to make this argument stick they have to justify why they failed to follow the rules in formalizing their property interests. Lenders have sometimes sought to hold consumers to the exact terms of their agreements while seeking mercy for having failed to follow the rules themselves. While lenders chafe at the cost of proving they have the right to foreclose, these laws are the price we pay for having a well-functioning private property system in the first place.

Similarly, laws against fraud may seem to be regulations that interfere with contractual freedom. The practice of "caveat emptor" would induce buyers to look out for themselves and bargain for any warranties they like while consumer protection and fraud laws deprive us of such freedoms. For that reason, some libertarians opposed to "government regulation" might happily live with adjustable-rate subprime mortgages.[69] After all, if a bank wants to loan money to someone who wants to borrow it, why stop her from doing what she wants? Why does it matter that the borrower cannot afford the payments when the higher interest rate kicks in? Shouldn't people of low or moderate income have the same freedom to contract as the rich? The borrower may have thought she could refinance when the higher rates began and took the chance that she could not do so; she may have assumed the fair market value of the property would continue to rise so that she could sell the property at a profit while paying off her debt, or she may have assumed that

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[67] *Times Topics: Foreclosures*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/f/foreclosures/index.html?scp=3&sq=robo-signing&st=cse (last updated June 27, 2011); *see also* Eric Dash, *Wells Fargo to Amend About 55,000 Foreclosures*, N.Y. TIMES, Oct. 28, 2010, at B-4.

[68] *See, e.g.*, Wells Fargo Bank, N.A. v. Ford, 15 A.3d 327 (N.J. Super. Ct. App. Div. 2011) (concluding bank not allowed to foreclose when it failed to produce authenticated writings proving it was assigned the mortgage and thus had the right to foreclose); Bank of N.Y. v. Raftogianis, 13 A.3d 435 (N.J. Super. Ct. Ch. Div. 2010) (explaining bank must have physical possession of the note at the time of foreclosure to prove its right to foreclose); Deutsche Bank Nat'l Trust Co. v. McRae, 894 N.Y.S.2d 720 (Sup. Ct. 2010) (holding bank cannot foreclose if it cannot prove ownership of the mortgage); *see also* Abigail Field, *Court: Busted Securitization Prevents Foreclosure*, DAILY FINANCE (Apr. 1, 2011), http://www.dailyfinance.com/story/real-estate/court-busted-securitization-prevents-foreclosure/19900530.

[69] *See, e.g.*, JEFFREY A. MIRON, LIBERTARIANISM FROM A TO Z 43–44 (2010) (suggesting that consumer protection laws should be repealed).

foreclosure would pay off the remaining debt while giving her the excess gleaned from the foreclosure sale. Why should the result differ if things turn out badly? Suppose the borrower cannot afford the payments and the housing bubble collapses, reducing the value of the property and putting the borrower in a worse financial position than she would have been in had she not made the deal. Isn't it better to have owned and lost than never to have owned at all? She took a chance on the deal and must face the consequences. Any law stopping the parties from making such a deal or protecting them from the consequences of it interferes with their freedom. As Alan Schwartz argues, such laws prevent individuals from "do[ing] the best they can for themselves, given their circumstances."[70]

But it is not so clear that a libertarian should support enforcement of subprime mortgages. Many libertarians are strong supporters of laws against fraud.[71] That is because a fraudulently induced contract is not a free contract; it does not represent a meeting of the minds. It is arguably a form of theft where one says "look there" as she picks your pocket. Freedom of contract entails freedom not to contract and fraud vitiates any agreement. That makes subprime mortgage contracts very problematic.

Imagine buying a car. You take it for a test drive and like it a lot. The dealer sits down with you in the office to finalize the deal. The car is taken away to be washed. You haggle and agree to buy at a certain price. You sign the papers and you hand the money over to the dealer. You get the keys to the car and walk around the building to where the car is located and get inside to drive it home, but then you discover the car will not start. You look under the hood and discover the car has no engine. The dealer laughs at you as he counts your money. You are furious. This is not the car you drove earlier. Yes it is, says the buyer, we just took the engine out. You can buy it for an extra $800. That's outrageous, you say. I already paid for the car. But the contract says you take the car "as is" (didn't you read that part?) and at the moment you signed, the car engine had already been removed. You should have checked the car before you signed.

Should a libertarian favor court enforcement of the deal? Perhaps yes on the principle of "let the buyer beware." You signed without making a final inspection. But a libertarian approach might just as easily counsel enforcing the deal the buyer thought she was getting, i.e., a car with an engine. For the same reason, a libertarian may favor protecting borrowers from deals they were misled into accepting. If the bank orally assured the borrower that she could refinance before the higher interest rate kicked in, and then the bank sold the loan and the new bank refuses to grant a new mortgage, a

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[70] Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107, 108 (1986).

[71] *See, e.g.*, DAVID BOAZ, LIBERTARIANISM: A PRIMER 75 (1997) ("Justice therefore forbids murder, rape, assault, robbery, kidnapping, and fraud. (Why fraud? Is fraud really an initiation of force? Yes, because fraud is a form of theft. If I promise to sell you a Heineken for a dollar, but I actually give you Bud Light, I have stolen your dollar.)").

libertarian might well view the original lender as a perpetrator of fraud.[72] Borrowers who were misled into signing subprime mortgage contracts arguably are seeking legal relief, not because they want paternalistic protection from their own mistakes, but because they want the government to protect them from thieves who stole their money while their backs were turned. They are not begging for welfare but asking that their property rights be protected.

Of course, defining what conduct constitutes fraud is not an easy thing. It requires an exercise of moral judgment. The common law traditionally requires a false statement, known to be false when made, and intended to induce reliance in the other party.[73] But in recent years, fraud has been expanded sometimes to cover failure to speak when withholding information one is sure the buyer would want to know about the property being purchased. For example, the law in many states now requires home owners to reveal the presence of latent defects of which the owner is aware (such as termites) that a reasonable buyer would want to know about.[74] And the federal securities laws deem it to be fraudulent to omit material information from any corporate communication that would leave investors with a false impression about the condition of the company.[75]

The libertarian model seeks to promote freedom by limiting "government regulation." But markets only operate because of background contract, tort, and property laws that define the infrastructure of markets.[76] Libertarian calls for the government to keep out of it and let "the market" fix itself appeal to the notion that regulation takes freedom away. But the very same free market approach long championed by Greenspan could just as legitimately counsel for "regulations" designed to protect the legitimate expectations of subprime borrowers who may have been misled into borrowing more money than they could afford. If they were the victims of fraudulent conduct, then a regulatory response might be understood as protecting their property rights, rather than as a deprivation of their contractual freedom. Similarly, as I argued earlier, if the goal of subprime mortgage lenders was to "put [ ] someone in a home for a few months and then toss [ ] him

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[72] The law's disapproval of fraud is so strong that in most states it constitutes an exception to the Statute of Frauds. A buyer may be able to rescind a real estate contract if the seller made false oral statements about the conditions of the premises. SINGER, *supra* note 23, § 11.3.3.1.

[73] RESTATEMENT (SECOND) OF TORTS § 525 (1977).

[74] SINGER, *supra* note 23, § 11.3.3.1.

[75] Rule 10b-5 makes it unlawful "to make any untrue statement of a material fact, or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ." 17 C.F.R. § 240.10b-5 (2011).

[76] *See, e.g.*, Joseph William Singer, *Corporate Responsibility in a Free and Democratic Society*, 58 CASE W. RES. L. REV. 1031, 1038 (2008) (noting that the common law imposes duties of "attentiveness" on market actors).

out after having stripped him of his life savings,"[77] then regulations outlawing subprime mortgages might well be justified as a protection of private property rather than as an interference with it. It is not necessarily true that it is better to have owned and lost than never to have owned at all.

B. Externalities and Toxic Assets

I am a property law professor and it is difficult from year to year to teach doctrines like "repugnant to the fee," adverse possession, privity of estate, fee simple subject to executory limitation, alternative contingent remainders, and implied reciprocal negative servitudes, not to mention the unborn widow and the fertile octogenarian. Not only are some of these rules technical and archaic, but they are contrary to American instincts. They regulate the kinds of property rights we are allowed to create and thus interfere with freedom of contract. Students are bewildered, not only by the technical and irrational nature of some of these rules, but by their fundamental opposition to the basic notion that people should be free to make whatever agreements they like.

The subprime crisis provides a vivid example of the reasons why we regulate the packages of property rights you are allowed to create. Subprime mortgages entailed adjustable interest rates sold to people who could not afford the higher interest rates. The mortgages were diced into thousands of pieces, transferred to trusts, securitized, sold to investors, rated triple-A by rating agencies that had serious conflicts of interest and appeared not to know what they were doing, and managed by mortgage servicers whose contractual rights and obligations made it impossible for borrowers to renegotiate with lenders if the need arose.[78] These packages of property rights had the minor side effect of wrecking the world economy. More than that, they disaggregated property rights in a manner that made it impossible for the holders of the various interests to bargain to reassemble them and create a full fee simple. Not only did they create a major recession; these "toxic assets" were structured in a manner that has made it difficult to use market mechanisms to negotiate our way out of the hole we dug.[79]

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[77] Joseph Stiglitz argues that this process was characteristic of subprime mortgages. STIGLITZ, *supra* note 5, at 11.

[78] For helpful explanations of what led to the crisis, see MCLEAN & NOCERA, *supra* note 37; RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010); ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT (2008); STIGLITZ, *supra* note 11; MATT TAIBBI, GRIFTOPIA: BUBBLE MACHINES, VAMPIRE SQUIDS, AND THE LONG CON THAT IS BREAKING AMERICA (2010).

[79] *See generally* Lucian A. Bebchuk, *Buying Troubled Assets*, 26 YALE J. ON REG. 343 (2009) (discussing troubled assets generally and the unique features of markets for sales of those assets); Linus Wilson, *The Put Problem with Buying Toxic Assets*, 20 APPLIED FIN. ECON. 31 (2010) (describing one of the primary challenges associated with attempts to resell toxic assets); Paul Krugman, *Despair over Financial Policy*, N.Y. TIMES (March 21, 2009 7:12 AM), http://krugman.blogs.nytimes.com/2009/03/21/despair-over-financial-policy (arguing that the fundamental differences between toxic assets and normal assets made the Obama administra-

In other words, these property rights concerned not only the parties to the contract but also the rights and interests of third parties—indeed the entire world. Property rights have externalities and some kinds of property rights impose huge costs on the community at large that outweigh any benefits to the contracting parties. Similarly, the decision of a single restaurant owner not to serve a customer because of her race is not an act that affects the two parties alone. If the law recognized the owner's right to use her property in this way, and if many people shared the owner's racist instincts, then the society would be characterized by racially segregated businesses and opportunity would be limited based on race. Consider, for example, that after South Africa abolished apartheid, private discriminatory decisions by landlords, employers, and public accommodations could have perpetuated segregated facilities; that is why something like a public accommodations law was needed to ensure that apartheid would not persist through the exercise of common law property rights.[80] Without public accommodations laws, "deregulation" would promote the freedom of some and curtail the freedom of others. The systemic effects of the decisions of many owners may justify laws that prohibit the creation or exercise of certain types of property rights. Such laws do not interfere with either liberty or the free market. Rather, they both protect property rights and establish a suitable and fair environment in which nondiscriminatory real estate markets can flourish.

IV. The Subprime Principle

Freedom requires regulation and free markets work only because they are structured by law. Libertarian ideals can only be achieved by a robust regulatory state. Conversely, liberal ideals of freedom and equality can only be achieved by a free economy that ensures equal opportunity to pursue happiness. Despite the current polarized state of political discourse, Americans agree upon a lot more than one might think. Surprisingly, Americans are also a lot more liberal than common wisdom recognizes. When it comes to government regulation, I have argued that Americans talk like libertarians and legislate like liberals. Of course, this leaves a very wide range of possible disagreement between the two camps. But if the subprime crisis teaches us anything, it is that free markets require law to work properly. Such laws do not infringe on liberty; law makes liberty possible. The laws of property in particular have profound effects on both civil rights and civil liberties, and those freedoms can be protected and promoted only by suitable regulations.

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tion response insufficient); *see also* Tom Petruno, *Mozilo Knew Hazardous Waste When He Saw It*, L.A. Times (June 4, 2009 5:12 PM), http://latimesblogs.latimes.com/money_co/2009/06/the-use-of-toxic-to-describe-high-risk-mortgages-has-been-de-rigueur-for-the-last-two-years-now-it-looks-like-countrywide.html (describing the origin of the term "toxic assets").

[80] *See generally* Joseph William Singer, *Property and Equality: Public Accommodations and the Constitution in South Africa and the United States*, 12 S. Afr. J. Pub. L. 53 (1997).

Liberty entails not only freedom from unwarranted government restrictions on how we live but also adequate government restraints that enable us to live peaceably with others in a setting of mutual concern and respect.

Laws promote both freedom and democracy by outlawing social and economic relationships that are "subprime" and fall below the minimum standards of a free and democratic society. We regulate the terms of contracts and the rights associated with property in order to ensure that we can retain adequate independence and freedom while remaining secure from undue interference by others. Of course, we obtain security only by limiting freedom of action; that means that liberty cannot be furthered by eliminating government "regulation." We have outlawed feudalism, slavery, patriarchy, apartheid, and discriminatory denial of access to the market. These laws limit the contracts we can enter and the property rights we can create but they do not take away our freedom; they define what it means to live in a free society that treats each person with dignity. And we have demanded and promulgated myriad consumer protection and other regulatory laws to ensure that we can enter the marketplace protected by a set of rules that allows us to bargain from a position of safety and security.

We demand laws that allow us take certain things for granted, to free us from having to bargain for them over and over. We seek law not because we are irrational or weak or because we do not value liberty but because we demand to be treated like human beings and we seek to be treated by others as they would want to be treated. We seek a legal infrastructure that frees us to pursue our dreams in safety and harmony, and because we have no titles of nobility in America we enforce laws that deny us the power to treat other people unfairly. We should not demand liberties for ourselves that we would deny to others.

The subprime crisis is an occasion to remember that the American ideals of equality and liberty require laws that regulate market transactions to ensure that we are free from unfair practices and that our economic system is not periodically threatened by the negligent creation of toxic assets. Such regulations do not take away our liberty; they promote liberty. Such regulations do not treat us unequally by giving special protection to the weak; they ensure that we enter the marketplace on equal terms and that we can expect the same treatment that others would want for themselves and their family members. Those who oppose all "government interference in the market" are Dr. Watsons who cannot see the obvious. Markets cannot function without law. It is time we acknowledged the regulations we too often take for granted. If we do that, we can debate what those laws should be, rather than focusing on a false debate about whether they should exist at all.