

---

---

Article

## Improving Consumer Protection: Lessons from the 2008 Recession

Martha Coakley<sup>†</sup> & Alicia Daniel<sup>††</sup>

### INTRODUCTION

In 2007, a home foreclosure crisis began which would ultimately drive the U.S. economy into the largest recession since the Great Depression of the 1930s. State attorneys general (AGs) saw the devastating effects of foreclosure on communities and individual homeowners and stood at the forefront of addressing this crisis. The AGs investigated ways to hold large banks and investment giants accountable for their roles in the economic downturn, and these AGs achieved important successes for their respective states and for the nation as a whole. On the federal level, the Dodd-Frank Act and other measures were enacted to regulate financial institutions, whose recklessness had, in large part, caused the foreclosure crisis and the resulting recession.<sup>1</sup> Supporters of strong federal regulation argue that such regulation is necessary to ensure basic consumer protections. On the other hand, opponents argue that such laws are nothing more than unnecessary constraints on financial institutions.<sup>2</sup> These opponents, unfortunately, seem to have swiftly forgotten the lessons of the 2008 financial meltdown. By discussing the foreclosure crisis and subsequent crash from the perspective of a state attorney general—a perspective that one of this Article’s authors

---

<sup>†</sup> Former Massachusetts Attorney General. Thanks to Peace Ibe, second-year student at Boston University School of Law and integral member of our authorship team, for her invaluable research and writing contributions. Copyright © 2019 by Martha Coakley.

<sup>††</sup> Associate, Foley Hoag LLP. Copyright © 2019 by Alicia Daniel.

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2. See Ben Protess & Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html>.

personally held during the crisis—this Article hopes to fight back against this political and economic amnesia.

This Article examines the steps U.S. attorneys general took to achieve and maintain effective consumer financial protections. Part I briefly summarizes the foreclosure crisis and the factors that contributed to the economic downturn. Part II outlines states' legal action and legislative solutions in response to the foreclosure crisis, highlighting the nationwide state-federal settlement. Part III examines the Massachusetts HomeCorps program, a multi-faceted initiative designed to prevent unnecessary foreclosures. Finally, Part IV considers the current state of consumer financial protection, including post-crisis federal regulation and the possible weakening of those laws under the current administration. Part V discusses the need for consumer safeguards and the necessary relationship between the federal government and state AGs to maintain the safeguards.

### I. A BRIEF OVERVIEW OF THE FORECLOSURE CRISIS

Across the country, more than 5 million people lost their homes to foreclosure during the crisis.<sup>3</sup> Generally, American federal housing policy comprises Freddie Mac and Fannie Mae (government-sponsored entities), the Federal Housing Administration, and mortgage tax deductions.<sup>4</sup> By supporting this policy, the federal government allowed homeowners and buyers to have better access to credit and loan products. During the early to mid-2000s, high-risk mortgages became available to high-risk borrowers.<sup>5</sup> Beginning in 1998, the federal government steadily chipped away at financial regulations, allowing even lenders insured by the Federal Deposit Insurance Corporation (FDIC) to engage in unsustainable, high-stakes gambling for the sake of short-term profit.<sup>6</sup> As a result, the number of subprime loans—that is, loans available to borrowers with poor credit scores<sup>7</sup>—

---

3. MASS. OFFICE ATTORNEY GEN., REBUILDING THE COMMONWEALTH: RECOVERING FROM THE FORECLOSURE CRISIS AND SETTING THE FOUNDATION FOR FUTURE SUCCESS 5 (Apr. 2014), <https://www.mass.gov/files/documents/2016/08/oz/homecorps-report.pdf>.

4. N. ERIC WEISS & KATIE JONES, CONG. RESEARCH SERV., AN OVERVIEW OF THE HOUSING FINANCE SYSTEM IN THE UNITED STATES 1 (2017), <https://fas.org/sgp/crs/misc/R42995.pdf>.

5. Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011), <https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#1ef34a3bf92f>.

6. *Id.*

7. See Jeff Cox, *Big Banks Have Found a New Way to Stay in the Subprime*

nearly doubled from 2003 to 2005.<sup>8</sup> Consumers' access to credit dramatically increased, including that of homebuyers who were previously unable to obtain mortgages (often because of faulty credit history or lack of a down payment).<sup>9</sup>

Unmonitored and unregulated companies issued a tremendous amount of risky debt, knowing that if the housing market did not continue to climb, the mortgages they issued would surely end in default. Almost immediately, the inevitable happened. Home prices stalled in 2005, then dropped the following year.<sup>10</sup> Owners stopped making mortgage payments due to increased interest and because they now owed more on these mortgages than their properties were worth.<sup>11</sup> Lenders' and investors' mortgage loss rates skyrocketed.<sup>12</sup> Freddie Mac and Fannie Mae, who had issued debt to fund purchases of these high-risk mortgages, suffered losses due to the failing mortgages.<sup>13</sup> The federal government seized these two entities in the summer of 2008 and placed them into a conservatorship that the Federal Housing Finance Agency (FHFA) ran.<sup>14</sup>

The foreclosure crisis affected the entire U.S. economy. It lowered construction rates, affected consumer interests, and paralyzed financial firm lending.<sup>15</sup> Ultimately, the crisis spiraled into the 2008 global financial meltdown. State AGs first tried to fight the crisis within their own state bounds, which proved largely ineffective against national and international financial institutions. Therefore, AGs started to work together to begin an intensive investigation and ultimately negotiate the largest joint state-federal settlement in history.

---

*Lending Business*, CNBC (Apr. 10, 2018), <https://www.cnn.com/2018/04/10/big-banks-have-found-a-new-way-to-stay-in-the-subprime-lending-business.html>.

8. Christopher Mayer et al., *The Rise in Mortgage Defaults*, 23 J. ECON. PERSP. 27, 36 (2009).

9. *Id.* at 48.

10. Denning, *supra* note 5.

11. *Id.*

12. *Id.*

13. *Id.*

14. MARTIN NEIL BAILY ET AL., INST. ON BUS. & POLICY AT BROOKINGS, THE OBSTACLES OF THE FINANCIAL CRISIS (2008), [https://www.brookings.edu/wp-content/uploads/2016/06/11\\_origins\\_crisis\\_baily\\_litan.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/11_origins_crisis_baily_litan.pdf); Neil Irwin & Zachary A. Goldfarb, *U.S. Seizes Control of Mortgage Giants*, WASH. POST (Sept. 8, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090700259.html>.

15. John V. Duca, *Subprime Mortgage Crisis*, FED. RES. BANK (Nov. 22, 2013), [https://www.federalreservehistory.org/essays/subprime\\_mortgage\\_crisis](https://www.federalreservehistory.org/essays/subprime_mortgage_crisis).

## II. ATTORNEYS' GENERAL EFFORTS IN HOLDING LENDERS ACCOUNTABLE FOR THE FORECLOSURE CRISIS

State AGs were among the first responders to the burgeoning foreclosure crisis, and Massachusetts was on the front lines. In 2007, the Massachusetts Attorney General's Office (MA Office) released a summary report describing the newly enacted consumer protection regulations governing mortgage lenders and brokers entitled *The American Dream Shattered: The Dream of Homeownership and the Reality of Predatory Lending*.<sup>16</sup> The report included a summary of statewide hearings addressing proposed mortgage regulations from September of that year.<sup>17</sup> It also included an analysis of resident and business concerns in Massachusetts, as well as local, state, and federal officials considering remedies to address the foreclosure crisis.<sup>18</sup> Also in 2007, the MA Office enacted emergency regulations which barred "foreclosure rescue schemes"<sup>19</sup>—scams that targeted individuals whose homes were facing potential foreclosure, preying on desperate homeowners and stealing any home equity they had.<sup>20</sup> The report and the emergency regulations stressed the need for stronger consumer protections to make the mortgage-lending marketplace more transparent and fair.<sup>21</sup>

In February 2008, the Massachusetts Superior Court issued the first order in the nation to prohibit a lender (in this case, Fremont Investment & Loan and Fremont General Corporation) from foreclosing on certain "[p]resumptively [u]nfair" mortgage loans because the loans posed an unacceptable risk of default and foreclosure.<sup>22</sup> Fremont was issuing mortgages to borrowers

---

16. MASS. OFFICE ATTORNEY GEN., *THE AMERICAN DREAM SHATTERED: THE DREAM OF HOMEOWNERSHIP AND THE REALITY OF PREDATORY LENDING* (2007), <https://archives.lib.state.ma.us/bitstream/handle/2452/113761/ocn769685807.pdf?sequence=1&isAllowed=y>.

17. *Id.* at 15–22.

18. *Id.*

19. *Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the Comm. on Fin. Serv.*, 111th Cong. 7 (2009) (statement of Martha Coakley, Att'y Gen. of the Commonwealth of Massachusetts).

20. See STEVE TRIPOLI & ELIZABETH RENUART, NAT'L CONSUMER LAW CTR., *DREAMS FORECLOSED: THE RAMPANT THEFT OF AMERICANS' HOMES THROUGH EQUITY-STRIPPING FORECLOSURE "RESCUE" SCAMS* (2005), [https://www.nclc.org/images/pdf/foreclosure\\_mortgage/scam/report-foreclosure-rescue-scams-2005.pdf](https://www.nclc.org/images/pdf/foreclosure_mortgage/scam/report-foreclosure-rescue-scams-2005.pdf).

21. *Id.*

22. See *Commonwealth v. Fremont Inv. & Loan*, No. 07-4373-BLS1, 2008

whose incomes could not support their mortgage payments, luring them in with a low introductory rate and then dramatically increasing their monthly payments after a few years.<sup>23</sup> Massachusetts alleged that these subprime mortgage loans violated several state laws and were predatory because borrowers were unlikely to be able to repay the loans.<sup>24</sup> The court performed a groundbreaking analysis of the risky mortgages that Fremont and others lenders were issuing that contributed to the foreclosure crisis. The order described the factors that entrapped homeowners and led to innumerable foreclosures: low introductory rates, which quickly became significantly higher; the use of the introductory rates (not the permanent rates) to determine whether borrowers' incomes qualified them for the loans; and the borrowers' inability to refinance their mortgages because of prepayment penalties or high loan-to-value ratios on their homes.<sup>25</sup> Where these conditions were present, the court recognized that borrowers were effectively trapped in mortgages which Fremont should have known they could not afford.<sup>26</sup> Fremont was required to obtain approval from the attorney general or, if the attorney general did not grant approval, from the court, before foreclosing upon mortgages.<sup>27</sup> The Supreme Judicial Court upheld this decision in December of 2008.<sup>28</sup> The superior court's analysis, as well as its apparent determination that the state enforcement in this area was not preempted by federal law, set the stage for state AGs to become more active participants in holding lenders accountable for the foreclosure crisis.

After the Fremont decisions, the MA Office sent letters to four major lenders, Bank of America, J.P. Morgan Chase, Wells Fargo, and Ally, calling upon them to cease foreclosures in light of revelations regarding widespread foreclosure fraud in Massachusetts.<sup>29</sup> When these lenders refused to address the MA Office's consumer protection concerns, Massachusetts was the first

---

WL 517279, at \*1 (Mass. Super. Ct. Feb. 26, 2008), *aff'd*, 847 N.E.2d 548 (Mass. 2008).

23. *Id.*

24. MASS. GEN. LAWS ch. 183C, § 4 (2008).

25. *See Fremont*, 2008 WL 517279, at \*1–17.

26. Finding Massachusetts was likely to succeed on the merits of its claim, the court granted the Commonwealth's motion for a preliminary injunction. *Id.* at \*16–17. The restriction remained in place pending final adjudication or further order of the court. *Id.* at \*16.

27. *See id.* at \*1.

28. *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548, 562 (Mass. 2008).

29. *See Diana Olick, First Major State Lawsuit Filed Over "Robo-Signing,"*

state to take them to court for fraudulent foreclosure documentation processing.<sup>30</sup> Of course, Massachusetts was not the only place where these lenders were illegally foreclosing. These abuses affected homeowners across the country.<sup>31</sup> State AGs faced an insurmountable task in waging separate battles against various lending giants in an effort to get relief for their constituents.<sup>32</sup> However, states working together in a multi-state investigation would have much more clout. Beginning in October 2010, Iowa Attorney General Tom Miller led a coalition of state AGs in talks with numerous lenders that were accused of foreclosure fraud.<sup>33</sup> These negotiations aimed to resolve allegations that five of the country's largest banks committed unlawful foreclosures, including the robo-signing of documents.<sup>34</sup>

The Justice Department and the Department of Housing and Urban Development joined the state AGs, forging a unique state and federal partnership to vindicate consumers.<sup>35</sup> After over a year of negotiations, the states finally reached an agreement with the lenders to hold the lenders accountable for their role in the foreclosure crisis and subsequent meltdown, as well as to provide meaningful relief for American homeowners.<sup>36</sup> The terms of the settlement—which was approved by the U.S. District Court for the District of Columbia on April 4, 2012<sup>37</sup>—required five major financial institutions (Bank of America, J.P.

---

CNBC (Dec. 1, 2011), <https://www.cnbc.com/id/45511868>; Jon Prior, *Coakley Promises Large Penalties for Robo-Signing*, HOUSINGWIRE (Dec. 1, 2011), <https://www.housingwire.com/articles/coakley-promises-large-penalties-robo-signing>.

30. Olick, *supra* note 29.

31. Jeremiah S. Buckley, *State Attorneys General Are the New Bank Regulators*, AM. BANKER (Feb. 1, 2012), <https://www.americanbanker.com/opinion/state-attorneys-general-are-the-new-bank-regulators>.

32. *Id.*

33. Jon Prior, *Mortgage Servicers Sign \$26 Billion Foreclosure Settlement*, HOUSINGWIRE (Feb. 9, 2012), <https://www.housingwire.com/articles/mortgage-servicers-sign-26-billion-foreclosure-settlement>.

34. *Cf.* Carole Fleck, *\$25 Billion Deal Reached to Aid Distressed Homeowners*, AARP (Feb. 8, 2012), <https://www.aarp.org/money/credit-loans-debt/info-02-2012/robo-signed-foreclosures.html> (discussing the settlement). Robo-signing is “a term used by consumer advocates to describe the signing of foreclosure or bankruptcy by individuals with no knowledge of the facts underlying such documents.” Julia Kagan, *Robo-Signer*, INVESTOPEDIA (Feb. 25, 2018), <https://www.investopedia.com/terms/r/robo-signer.asp>.

35. Prior, *supra* note 33.

36. *Id.*

37. *National Mortgage Settlement*, U.S. DEPT JUST., <https://www.justice.gov/ust/national-mortgage-settlement> (last updated Jan. 18, 2017).

Morgan Chase, Citi, Wells Fargo, and Ally) to provide cash payments to states, and included other obligations such as injunctive relief going forward.<sup>38</sup> The \$25 billion settlement was the largest joint federal-state civil settlement in history.<sup>39</sup> The settlement's structure included billions of dollars in direct payments to homeowners, payments to state and federal governments, and various new homeowner protections.<sup>40</sup> The agreement established new mortgage loan servicing and foreclosure standards, which created new consumer protections.<sup>41</sup> The standards of the agreement were focused on the need for transparency.<sup>42</sup>

As Illinois Attorney General Lisa Madigan indicated, “[w]hile the settlement [was] a big step forward in our efforts, it [was] not the end.”<sup>43</sup> The national settlement was a starting point for many AGs who, in their respective states, used the settlements for consumer relief. In Massachusetts, this innovative attitude led to founding the HomeCorps program, which is described in the next Part.

### III. NATIONAL SETTLEMENT GIVES RISE TO MASSACHUSETTS’ HOMECORPS PROGRAM

More than 45,000 people in Massachusetts lost their homes to foreclosure during the crisis.<sup>44</sup> The national mortgage settlement guaranteed Massachusetts residents \$318 million in assistance, \$44.5 million of which was paid directly to the state.<sup>45</sup> Using the remaining funds from the national state-federal mortgage foreclosure settlement, the Massachusetts Attorney General’s Office launched HomeCorps, a statewide foreclosure

---

38. Joseph A. Smith Jr., *A Review and Assessment of the National Mortgage Settlement by Its Monitor*, 21 N.C. BANKING INST. 29, 31–32 (2017) (discussing the obligations the Servicers agreed to in exchange for a release from liability).

39. *Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses*, U.S. DEP’T JUST. (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest>.

40. *Id.*

41. *Id.*

42. *Id.*

43. Madigan, *Federal Government & State Attorneys General Secure \$25 Billion Settlement with Nation’s Five Largest Banks*, ILL. ATT’Y GEN. (Feb. 9, 2012), [http://www.illinoisattorneygeneral.gov/pressroom/2012\\_02/20120209.html](http://www.illinoisattorneygeneral.gov/pressroom/2012_02/20120209.html).

44. MASS. OFFICE ATTORNEY GEN., *supra* note 3, at 7.

45. *Id.* at 18.

prevention and borrower support initiative.<sup>46</sup> The goal of HomeCorps was to mitigate current and future impacts of the foreclosure crisis by providing relief to individual borrowers in Massachusetts who were facing foreclosure.<sup>47</sup> HomeCorps also set the foundation for future economic and consumer success.<sup>48</sup>

Another element of HomeCorps was the HomeCorps Grant Funding Initiative, a system of grant programs collectively worth more than \$26 million.<sup>49</sup> This initiative provided funds to organizations and programs that supported housing recovery efforts.<sup>50</sup> The grants were devoted to providing legal representation for distressed borrowers, supporting foreclosed residents looking for new places to live, and identifying and responding to neighborhoods with high foreclosure rates and abandoned homes.<sup>51</sup> Through the Abandoned Housing Initiative, the MA Office, with Massachusetts cities and towns, encouraged willing delinquent owners to repair their homes and obtain security.<sup>52</sup> The MA Office worked with the relevant courts to eliminate the health and safety risks the abandoned homes posed by bringing the properties up to sanitary code.<sup>53</sup>

In 2011, State Senator Karen Spilka, State Representative Steven Walsh, and Attorney General Martha Coakley filed Massachusetts House Bill 4323: *An Act Preventing Unlawful and Unnecessary Foreclosures*.<sup>54</sup> This bill mandated loan modifications to certain high-risk home mortgages when such modifications were in the financial interest of the borrower and the lender.<sup>55</sup> It provided the parties an opportunity to modify these loans so that the borrower could afford the monthly payments and the lender would not have to foreclose on the home and sell it at a loss.<sup>56</sup> The bill also required that foreclosing entities provide documentation of the chain of mortgage assignments back to the original mortgagee, proving their legal right to foreclose.<sup>57</sup>

---

46. *Id.* at 19.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 32.

53. *Id.*

54. 2012 Mass. Acts 973.

55. *Id.*

56. *Id.*

57. *Massachusetts House Bill 4323: An Act Preventing Unlawful and Unnecessary Foreclosures*, SALTER MCGOWAN SYLVIA & LEONDARD, <https://www>

Then-governor Deval Patrick signed the bill into law on August 3, 2012.<sup>58</sup> The new law paired well with HomeCorps' goal of mitigating future impacts of the foreclosure crisis by providing advocacy to distressed borrowers in Massachusetts facing foreclosure.<sup>59</sup> To achieve this goal, HomeCorps increased the number of loan modification specialists to ensure distressed borrowers receive adequate support.<sup>60</sup>

Following the launch of HomeCorps, Massachusetts' foreclosure rates largely stayed below national averages and, as a general matter, the Massachusetts housing market began recovering quicker than most other states at the time.<sup>61</sup> By 2014, HomeCorps recovered more than \$850 million from seventeen national banks and lenders, which was provided to Massachusetts homeowners and investors and used in efforts to further consumer protection from foreclosure fraud and to keep residents in their homes.<sup>62</sup>

The efforts to strengthen consumer protections continued after the state-federal settlement. Many state AGs launched their own initiatives and steadfastly prosecuted mortgage fraud cases.<sup>63</sup> Meanwhile, federal legislators were busy enacting laws geared towards consumer protection to keep borrowers from abusive lending and mortgage practices, as described in the next Part.

#### IV. THE CURRENT STATE OF CONSUMER PROTECTION

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).<sup>64</sup> This law placed regulations on the financial industry and was enacted as a means to "promote the long-term sustainability of the U.S. financial system."<sup>65</sup> To achieve this goal, Dodd-Frank created sev-

---

.smsllaw.com/massachusetts-house-bill-4323-an-act-preventing-unnecessary-and-unlawful-foreclosures (last visited Apr. 16, 2019).

58. H.R. 4323, 2012 Leg., 207th Sess. (Mass. 2012).

59. MASS. OFFICE ATTORNEY GEN., *supra* note 3, at 24.

60. *Id.* at 19.

61. *Id.* at 7.

62. *Id.*

63. Buckley, *supra* note 31.

64. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

65. Mary Jo White, *Statement on the Anniversary of the Dodd-Frank Act*, SEC (July 16, 2015), <https://www.sec.gov/news/statement/statement-on-the-anniversary-of-the-dodd-frank-act.html>.

eral agencies and councils. Among these agencies was the Consumer and Financial Protection Bureau (CFPB).<sup>66</sup>

The CFPB was established to protect consumers from financial institutions' illegal and harmful practices.<sup>67</sup> Before the CFPB was created, several agencies shared the responsibility of enforcing federal consumer financial protection laws.<sup>68</sup> The various agencies in place prior to Dodd-Frank and during the financial crisis included the Federal Reserve Board of Governors; the Federal Deposit Insurance Corporation; the Office of the Comptroller of the Currency; the Office of Thrift Supervision; the National Credit Union Administration; the Federal Trade Commission; and the Department of Housing and Urban Development.<sup>69</sup> Each of these agencies focused on regulating a particular type of institution, but none were solely devoted to consumer protection.<sup>70</sup>

After the crisis, these agencies were individually inadequate to repair the economy and protect consumers, which led to Dodd-Frank and the CFPB.<sup>71</sup> The CFPB's creation consolidated responsibility for consumer protection to a single enforcer. In a blog post summarizing the CFPB's mission, Senator Elizabeth Warren (at the time, Assistant to the President and Special Advisor to the Treasury Secretary)<sup>72</sup> noted the need for the consumer bureau on the basis that "people ought to be able to read their credit card and mortgage contracts and know the deal."<sup>73</sup>

---

66. Daniel Bush, *What Is the Consumer Financial Protection Bureau, Anyway?*, PBS NEWS HOUR (Nov. 27, 2017), <https://www.pbs.org/newshour/economy/making-sense/what-is-the-consumer-financial-protection-bureau-anyway>.

67. *Id.*

68. CFPB, BUILDING THE CFPB: A PROGRESS REPORT 9 (July 18, 2011), [https://files.consumerfinance.gov/f/2011/07/Report\\_BuildingTheCfpb1.pdf](https://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf).

69. BAIRD WEBEL, CONG. RESEARCH SERV., THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: BACKGROUND AND SUMMARY 11 (Apr. 21, 2017), <https://fas.org/sgp/crs/misc/R41350.pdf>.

70. CFPB, *supra* note 68, at 8.

71. Martin Neil Bailey et al., *The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 20, 29–30 (2017) (stating that the creation of the CFPB consolidated the oversight of seven different agencies, "leaving fewer gaps in the regulatory infrastructure").

72. Jackie Calmes & Sewell Chan, *Obama Picks Warren to Set Up Consumer Bureau*, N.Y. TIMES (Sept. 17, 2010), <https://www.nytimes.com/2010/09/18/us/politics/18warren.html>.

73. Elizabeth Warren, *Fighting to Protect Consumers*, WHITEHOUSE.GOV (Sept. 17, 2010), <https://obamawhitehouse.archives.gov/blog/2010/09/17/fighting-protect-consumers>.

Senator Warren and President Obama intended for the CFPB to “level[] the playing field” between consumers and the consumer credit market.<sup>74</sup>

In its efforts to achieve this goal and hold financial institutions accountable, the CFPB has handled over 1 million consumer complaints and has created an efficient platform for consumers to file their complaints.<sup>75</sup> The CFPB has recovered over 12 billion dollars in consumer relief by enforcing federal consumer financial laws and holding financial service providers answerable for their actions.<sup>76</sup> For example, the CFPB fined Wells Fargo \$100 million (the largest penalty the CFPB has ever imposed) “for the widespread illegal practice of secretly opening unauthorized deposit and credit card accounts,”<sup>77</sup> and sued Citi-Bank subsidiaries for failing to provide full disclosure to consumers applying for foreclosure relief.<sup>78</sup>

Critics have fervently scrutinized the CFPB, despite the results the agency has achieved on behalf of consumers.<sup>79</sup> Scholars have examined the agency’s broad authority and discretion, its immunity from congressional oversight and presidential influence, and its protection from judicial interference.<sup>80</sup> Many have argued that these factors demonstrate the agency’s unconstitutionality, meaning that the agency lacks the authority to take

---

74. *Id.*

75. Gretchen Morgenson, *The Watchdog Protecting Consumers May Be Too Effective*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/business/consumer-financial-protection-bureau-gretchen-morgenson.html>.

76. CFPB, <https://www.consumerfinance.gov> (last updated June 4, 2018).

77. *Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CFPB (Sept. 8, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts>.

78. *Enforcement Actions*, CFPB, <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/> (last visited Apr. 16, 2019).

79. Jackie Wattles & Matt Egan, *Why Wall Street and Republicans Hate the CFPB*, CNN MONEY (Nov. 27, 2017), <https://money.cnn.com/2017/11/25/news/wall-street-elizabeth-warren-consumer-financial-protection-bureau/index.html>.

80. See, e.g., William Simpson, *Above Reproach: How the Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances*, 36 REV. BANKING & FIN. L. 343, 345 (2016) (examining the agency’s “self-funding structure . . . coupled with its unique independent status exempt from much executive and congressional oversight”).

enforcement actions. This debate has been the subject of frequent litigation in which defendants counterclaim, questioning the constitutionality of the CFPB.<sup>81</sup>

In *PHH Corp. v. Consumer Financial Protection Bureau*, the D.C. Circuit concluded that the federal statute providing the CFPB Director with a five-year term in office, subject to removal by the President only for “inefficiency, neglect of duty, or malfeasance in office,” is consistent with Article II of the Constitution.<sup>82</sup>

Article II mandates that the President of the United States “take Care that the Laws be faithfully executed.”<sup>83</sup> In discussing the reasons that Congress initially established the CFPB, the court found the power vested in the CFPB analogous to the powers vested in the independent Federal Trade Commission.<sup>84</sup> The court relied on an earlier Supreme Court case, *Humphrey’s Executor v. United States*,<sup>85</sup> to validate the design and structure of independent agencies, including the unique structure of the CFPB.<sup>86</sup>

Nevertheless, the current administration has dissolved many of the rules enacted after the financial crisis, including making significant changes to the CFPB structure.<sup>87</sup> Senator Warren noted in an interview that, “[o]n the 10th anniversary of an enormous financial crash, Congress should not be passing

---

81. Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99, 104–22 (2013) (discussing the structure and constitutionality of the Consumer Financial Protection Bureau).

82. *PHH Corp. v. CFPB*, 881 F.3d 75, 80 (D.C. Cir. 2018).

83. U.S. CONST. art. II, § 3.

84. *PHH Corp.*, 881 F.3d at 92–94 (“Congress validly decided that the CFPB needed a measure of independence and chose a constitutionally acceptable means to protect it. . . . [T]he CFPB’s function is remarkably similar to that of the FTC, a consumer protection agency that has operated for more than a century with the identical for-cause protection, approved by a unanimous Supreme Court.”).

85. 295 U.S. 602 (1935).

86. *PHH Corp.*, 881 F.3d at 78. However, a New York court reached a conflicting result when it ruled the CFPB unconstitutional in 2018. *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018).

87. See Robert O’Harrow, Jr. et al., *How Trump Appointees Curbed a Consumer Protection Agency Loathed by the GOP*, WASH. POST (Dec. 4, 2018), [https://www.washingtonpost.com/investigations/how-trump-appointees-curbed-a-consumer-protection-agency-loathed-by-the-gop/2018/12/04/3cb6cd56-de20-11e8-aa33-53bad9a881e8\\_story.html?utm\\_term=.42e738cde2f2](https://www.washingtonpost.com/investigations/how-trump-appointees-curbed-a-consumer-protection-agency-loathed-by-the-gop/2018/12/04/3cb6cd56-de20-11e8-aa33-53bad9a881e8_story.html?utm_term=.42e738cde2f2) (“One year after Mulvaney’s arrival, he and his political aides have constrained the agency from within . . . Mulvaney and a team of political appointees used the levers of government to hinder career employees and roll back oversight of private industry.”).

laws to roll back regulations on Wall Street banks.”<sup>88</sup> Yet this is exactly what Congress and the executive branch have been doing. In May 2018, Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act (the Act).<sup>89</sup> The Act authorizes federal regulators to narrow or eliminate many of the regulations Dodd Frank created for banks, including liquidity risk-management standards and supervisory requirements.<sup>90</sup> In November 2017, President Trump appointed a former congressman and director of the federal Office of Management and Budget, Mick Mulvaney, as acting director of the CFPB.<sup>91</sup> Mulvaney conducted various efforts to change the structure of the CFPB, including changing the agency’s name to the Bureau of Consumer Financial Protection (BCFP).<sup>92</sup> In June 2018, he fired the BCFP’s entire twenty-five-member Consumer Advisory Board<sup>93</sup> pursuant to the restructured agency’s reformed mission of “regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations.”<sup>94</sup>

88. Erica Werner & Damian Paletta, *10 Years After Financial Crisis, Senate Prepares to Roll Back Banking Rules*, WASH. POST (Mar. 4, 2018), [https://www.washingtonpost.com/business/economy/10-years-after-financial-crisis-senate-prepares-to-roll-back-banking-rules/2018/03/04/e6115438-1e37-11e8-9de1-147dd2df3829\\_story.html](https://www.washingtonpost.com/business/economy/10-years-after-financial-crisis-senate-prepares-to-roll-back-banking-rules/2018/03/04/e6115438-1e37-11e8-9de1-147dd2df3829_story.html).

89. Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong. (2018) (enacted), <https://www.congress.gov/bill/115th-congress/senate-bill/2155>.

90. Samuel R. Woodall III et al., “*Economic Growth, Regulatory Relief, and Consumer Protection Act*” Is Enacted, PROGRAM ON CORP. COMPLIANCE & ENFORCEMENT N.Y.U. (June 5, 2018), [https://wp.nyu.edu/compliance\\_enforcement/2018/06/05/economic-growth-regulatory-relief-and-consumer-protection-act-is-enacted](https://wp.nyu.edu/compliance_enforcement/2018/06/05/economic-growth-regulatory-relief-and-consumer-protection-act-is-enacted).

91. *Court Decision Leaves White House’s Mulvaney in Place as Acting Head of CFPB*, CNBC (Nov. 28, 2017), <https://www.cnn.com/2017/11/28/court-decision-leaves-white-houses-mulvaney-in-place-as-acting-head-of-cfpb.html>; *Mulvaney, Mick*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M001182> (last visited Apr. 15, 2019).

92. See O’Harrow, *supra* note 87 (“Mulvaney adopted a new seal that changed the agency’s name. The new name, Bureau for Consumer Financial Protection, scrambled a widely used acronym that the agency had spent tens of millions of dollars to promote.”); Emily Stewart, *Mick Mulvaney Changed the CFPB’s Sign to BCFP*, VOX (June 11, 2018), <https://www.vox.com/policy-and-politics/2018/6/11/17451292/mick-mulvaney-cfpb-bcfp>.

93. *Acting Director Mulvaney Fires Members of Advisory Board of Consumer Financial Protection Bureau, Endangering Financial Well-Being of American Families*, NAT’L CONSUMER L. CTR. (June 6, 2018), <https://www.nclc.org/media-center/mulvaney-fires-members-of-advisory-board.html>.

94. *Bureau of Consumer Financial Protection Issues Statement on the Implementation of the Economic Growth, Regulatory Relief, and Consumer Protection Act Amendments to the Home Mortgage Disclosure Act*, CFPB (July 5, 2018), <https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer>

## V. WHAT AMERICANS NEED NOW

Now, ten years after the height of the 2008 financial crisis, the United States is benefitting from the longest bull market in its history.<sup>95</sup> Banks are profitable again, and the housing and stock markets are reaching record highs.<sup>96</sup> Yet experts acknowledge that in many respects, the 2008 crash's damage is permanent, and some worry that the economy may be headed for another foreclosure crisis as banks begin eyeing new ways to grant risky mortgages.<sup>97</sup> As increases in the cost of rent far outpace the growth of wages,<sup>98</sup> more people consider taking out unwise mortgages as an alternative to renting, and banks are

---

-financial-protection-issues-statement-implementation-economic-growth  
-regulatory-relief-and-consumer-protection-act-amendments-home-mortgage  
-disclosure-act; see O'Harrow, *supra* note 87 ("On Dec. 21 [2017] . . . career employees took note of a subtle but significant change to language describing the agency's mission in news releases. In addition to protecting consumers, the bureau was now 'regularly identifying and addressing outdated, unnecessary or unduly burdensome regulations,' the new language said.").

95. Matt Egan, *Market Milestone: This Is the Longest Bull Run in History*, CNN BUS. (Aug. 22, 2018), <https://money.cnn.com/2018/08/22/investing/bull-market-longest-stocks/index.html>.

96. N.Y. Times Editorial Bd., *Inviting the Next Financial Crisis*, N.Y. TIMES (Aug. 25, 2018), <https://www.nytimes.com/2018/08/25/opinion/economy-financial-crisis.html> ("The housing market, once crippled by foreclosures, has sprung back to life . . . Banks, once dependent on taxpayer dollars to keep their doors open, are raking in profits."); Adam Shell, *S&P 500 Hits Record High as Earnings Eclipse Trade War Fears*, USA TODAY (Aug. 21, 2018), <https://www.usatoday.com/story/money/2018/08/21/stocks-hit-record-highs/922315002> ("The Standard & Poor's 500 stock index, a broad gauge of the U.S. stock market, hit a fresh all-time high . . . [This] period of rising stock prices . . . puts the large-company stock index on track Wednesday to eclipse the 1990's bull market as the longest in history.").

97. N.Y. Times Editorial Bd., *supra* note 96 ("The per capita gross domestic product of the United States is about \$70,000 smaller over the average person's lifetime than it would have been had the economy stayed on the trajectory it had been before the crisis . . . [T]he economy is 'unlikely to regain' that lost ground, a stunning acknowledgment of the permanent and significant costs of avoidable financial crises."); Jorge Newbery, *Are We Headed for Another Foreclosure Crisis?*, FORBES (Dec. 8, 2017), <https://www.forbes.com/sites/forbesrealestatecouncil/2017/12/08/are-we-headed-for-another-foreclosure-crisis/#40aa32875ecf> ("Ten years later [after the Great Recession and the burst of the U.S. housing bubble], low- or no-down-payment mortgages may be making a comeback. . . [T]hey may herald a worrisome trend that could lead to a repeat of our last housing crisis.").

98. THE PEW CHARITABLE TRS., *AMERICAN FAMILIES FACE A GROWING RENT BURDEN* 4 (Apr. 19, 2018), <https://www.pewtrusts.org/en/research-and-analysis/reports/2018/04/american-families-face-a-growing-rent-burden> (noting "a rapid increase in rental market prices that has outpaced household incomes for many families").

scrambling to let them.<sup>99</sup> More federal safeguards are disappearing by the day, leaving state AGs increasingly alone on the front lines of consumer protection. Dodd-Frank gave state AGs the power to enforce federal consumer protection regulations, strongly resembling the CFPB's power.<sup>100</sup> The law acknowledged what the experience of recovering from the 2008 meltdown had taught: that both federal regulators and state AGs are more effective when they are able to coordinate.<sup>101</sup> However, as federal regulators grow ever more passive regarding consumer protection, state AGs are once again left to hold companies accountable without support from the federal government. This is especially concerning given that only a handful of enforcement actions have ever been brought by state AGs under Dodd-Frank, and fewer still have been a cooperative effort between states.<sup>102</sup> There is a growing enforcement gap, leaving consumers exposed to abuse and the economy vulnerable to lenders' illegal and destructive practices.

To be sure, state AGs are powerful warriors in the fight against financial disasters. The history of the national state-federal mortgage settlement shows that AGs can, and do, win meaningful victories for consumers.<sup>103</sup> Moreover, residents of states with protective regulations were better off than those in more permissive states following the 2008 crash.<sup>104</sup> However, both then and now, state AGs are, by their very nature, unable to fully

---

99. See Newbery, *supra* note 97 (“Several private banks are now offering various zero-down mortgage programs or down payment assistance programs for higher-risk borrowers.”).

100. See Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 128–36 (2013) (describing “the concurrent-enforcement powers enjoyed by SAGs [state attorneys general] under the Dodd-Frank Act”).

101. See *supra* Part II.

102. See AM. BAR ASS'N, STATE REGULATORS' DODD-FRANK ENFORCEMENT AUTHORITY: INITIAL SUITS AND THEIR IMPLICATIONS 2–4, [http://apps.americanbar.org/buslaw/committees/CL310000pub/newsletter/201510/fa\\_4.pdf](http://apps.americanbar.org/buslaw/committees/CL310000pub/newsletter/201510/fa_4.pdf) (cataloguing Dodd-Frank state attorneys general cases among seven states, including two cooperative efforts).

103. See *supra* Part II.

104. See Dan Freed, *Florida, Nevada Can't Win for Losing on Mortgage Crisis*, THE STREET (Aug. 6, 2014), <https://www.thestreet.com/story/12832469/1/florida-nevada-cant-win-for-losing-on-mortgage-crisis.html>.

protect their constituents from the dangers of financial meltdown in a globalized economy.<sup>105</sup> As discussed above, they are well-positioned to fight predatory lending and other abuses that take place on a local level.<sup>106</sup> When they have the ability and political will, AGs can work alone or together to battle Dodd-Frank violations taking place in their jurisdictions.<sup>107</sup> And as the mortgage settlement shows, AGs can also be effective on a national scale when they work together across state lines.<sup>108</sup>

Through inter-state cooperation, state AGs can mount excellent *responses* to financial crises. However, even the best responses cannot restore Americans to the position they would be in if these crises did not occur in the first place. The real goal is effective *prevention* rather than response, and it is one that AGs are simply not equipped to accomplish on their own or even together. No amount of coalition-building between AGs or negotiations with financial institutions can achieve what the United States needs: comprehensive, effective consumer protection.

Constitutionally,<sup>109</sup> and as a matter of sheer practicality, the federal government must be involved in regulating inter-state financial institutions and protecting consumers across the

---

105. See Totten, *supra* note 100, at 123–25 (noting the roadblock in “federal agencies . . . preempt[ing] state laws aimed at the abusive lending practiced federal regulators refused to address,” including the federal government blocking state anti-predatory lending laws and enforcement actions).

106. See CAROLYN CARTER, NAT’L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 10–11 (Mar. 2018), <http://www.nclc.org/images/pdf/udap/udap-report.pdf> (“UDAP [Unfair and Deceptive Acts and Practices] statutes bring consumer justice to the state, local, and individual level. They enable state agencies [such as the Attorney General] to protect their citizens by responding quickly to emerging frauds.”).

107. See Totten, *supra* note 100, at 145–49 (“Title X [of the Dodd-Frank Act] authorizes a state attorney general to bring a civil action . . . . The forum provision in section 1042(a)(1) also has implications for bringing multi-state actions to enforce federal consumer financial law. While subject to criticism, these actions have been a powerful tool in the hands of state attorneys general.”).

108. See Prior, *supra* note 33 (“The 16-month robo-signing saga ends with a \$26 billion settlement. Nearly all 50 states agreed to a deal with [mortgage servicers] Bank of America (BAC), JPMorgan Chase (JPM), Wells Fargo (WFC), Ally Financial (GJM), and Citigroup (C).”).

109. See U.S. CONST. art. I, § 8, cl. 3 (“[The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States.”); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (“The Commerce Clause also limits the power of [a state] . . . to adopt regulations that discriminate against interstate commerce.”).

United States.<sup>110</sup> Recovering from the crisis required a systemic, national response.<sup>111</sup> Ensuring that such a preventable catastrophe does not reoccur will require more coordinated oversight, not less. Much has changed since 2008, but the tendency of large corporations to focus singularly on profits, without considering consumer well-being or the overall health of the economy, has not.<sup>112</sup> In many respects, this drive seems to be stronger than it has ever been before.<sup>113</sup> There is an ever-present risk that big companies will once again grind the economy into the ground to make a quick buck. Americans deserve holistic state *and* federal oversight that will protect them from the danger of repeating the most disastrous financial meltdowns in U.S. history, and they should demand no less.

### CONCLUSION

The current administration's objective to dissolve many post-crisis laws, especially those that have proved favorable for

---

110. For instance, the federal government's response to the Great Depression assisted in the financial recovery and contributed numerous economic policy innovations which remain critical even today, including the Securities Act of 1933, the Securities Exchange Act of 1934, and the Social Security Act of 1935. Ellen Terrell, *The New Deal at 80+*, LIBR. CONGRESS, BUS. REFERENCE SERVICES (May 2009), <https://www.loc.gov/rr/business/businesshistory/March/newdeal.html>; *The Great Depression and the New Deal (1929 to 1941)*, U.S. EMBASSY & CONSULATE KOREA, <https://kr.usembassy.gov/education-culture/infopedia-usa/history/great-depression-new-deal-1929-1941>.

111. See generally *Chart Book: The Legacy of the Great Recession*, CTR. ON BUDGET & POLY PRIORITIES (Feb. 12, 2019), <https://www.cbpp.org/research/economy/chart-book-the-legacy-of-the-great-recession> (noting "the course of the economy following that recession [from December 2007 to June 2009] against the background of how deep a hole the recession created—and how much deeper that hole would have been without the financial stabilization and fiscal stimulus policies enacted in late 2008 and early 2009"); Martin Wolf, *How Barack Obama Rescued the U.S. Economy*, FIN. TIMES (Jan. 10, 2017), <https://www.ft.com/content/b5b764cc-d657-11e6-944b-e7eb37a6aa8e> (noting that in the wake of the Great Recession, "[t]he Obama administration implemented a number of important fiscal measures. . . . The administration also restored the financial sector faster than expected and carried out a highly successful rescue of the car industry").

112. See Rebecca M. Henderson, *What Would It Take to Get Businesses to Focus Less on Shareholder Value?*, HARV. BUS. REV. (Aug. 21, 2018), <https://hbr.org/2018/08/what-would-it-take-to-get-businesses-to-focus-less-on-shareholder-value> ("Most public companies maximize shareholder value most of the time because they're afraid they will be fired if they don't and they believe they will get rich if they do. As long as firms are running scared of activist investors and CEO pay is tightly linked to the value of the firm, managers are going to seek to maximize the firm's stock price.").

113. N.Y. Times Editorial Bd., *supra* note 96.

consumers, is ill-advised. Reviving the economy from the economic crisis required transparent policy making and institutional accountability. Dismantling these policies will destroy the foundation upon which the United States has restored and maintained a healthy economy. In the years following the crisis, state AGs led efforts to address consumer protection, especially in financial services. Although the circumstances today are different than those of ten years ago, similar action remains necessary. Consumers must know the resources available for their protection and how to access those resources. In addition, consumers should look to their leaders to take groundbreaking legal action and implement legislative solutions aimed at consumer protection, and expect that more protections can be implemented and enforced by a federal bureau—regardless of its title.