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## Lending Discrimination, the Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.

Aleatra P. Williams

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LENDING DISCRIMINATION, THE  
FORECLOSURE CRISIS AND THE PERPETUATION  
OF RACIAL AND ETHNIC DISPARITIES IN  
HOMEOWNERSHIP IN THE U.S.

ALEATRA P. WILLIAMS\*

ABSTRACT

*For decades the agencies charged with minding the 'fair credit and lending' shop turned a blind eye to those (lenders) who pilfered minority homeownership (and consequently minority wealth) by extending mortgage lending products that were, in many cases, unequal to similarly situated non-minority counterparts. Since the 1950s, when the federal government endorsed homeownership policies for minorities, and the 1960s, when anti-discriminatory lending laws were enacted, access to fair mortgage credit has been unattainable. Unbridled lending discrimination culminated in massive foreclosures for a disproportionate number of minority homeowners during the Housing and Foreclosure Crisis. Lenders disparately foreclosed upon upper class, middle class and lower class minority homeowners. The effect of these foreclosures widened homeownership gaps between whites and minorities. Foreclosures were more prevalent for minority homeowners regardless of economic class. Lending discrimination, and subsequent forfeiture of homes, undoubtedly altered the perception of the American Dream, and resulted in losses of generational wealth for minorities, furthered racial segregation and prolonged the stagnancy of the real estate market. Unquestionably then, lending discrimination is not a minority problem, but is an American problem. Therefore, agencies with jurisdiction to enforce lending and credit laws must, first, duly enforce these laws and, second, create civil or criminal mechanisms that effectively and finally eliminate unfair lending.*

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\* Associate Professor of Law, Charleston School of Law; University of California, Berkeley (LL.M.), University of Oklahoma (J.D.), Purdue University (B.A.). My gratitude goes to my beloved father, Clarence Williams, for his unwavering support, love and above all, his example. I also wish to thank Adrienne Barry (Charleston 2014) for her dedication and assistance in researching this Article and instrumental help with early edits, and Rebecca Wolfe (Charleston 2016) for her amazing diligence and invaluable assistance with editing this Article.

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## INTRODUCTION

The American Dream is dead—for some.<sup>1</sup> The American Dream is that which brings forth a “better, richer and happier life.”<sup>2</sup> According to Merriam Webster, the American Dream is defined as “an American social ideal that stresses egalitarianism” and “material prosperity.”<sup>3</sup> It undoubtedly entails homeownership and denotes personal growth and progression into a brighter future.<sup>4</sup> Although Thomas Jefferson hailed that “all men were created equal,”<sup>5</sup> when it comes to the mortgage lending process, minority borrowers are subjected to more systemic discrimination and pay higher prices than their counterparts.<sup>6</sup>

Foreclosures have deferred homeownership dreams for millions of Americans.<sup>7</sup> Because of the housing and foreclosure crisis, a disproportionate number of African Americans and Latinos lost their homes via mortgage foreclosure than any other racial group.<sup>8</sup> These homeowners in particular have seen the American Dream slip right through their fingers and become unattainable for many more years to come, if at all.

It is unfathomable that lending discrimination persists in the 21st century. Despite the pharaonic efforts of the Civil Rights movement during the 1960s and other political efforts to increase minority homeownership and eradicate discrimination, there is resounding evidence that supports that it does, indeed, rampantly persist. Discrimination based on race and ethnicity has become the stubborn stain that has proven difficult to remove. The recent

<sup>1</sup> See, e.g., V. Dion Haynes, Peyton Craighill & Scott Clement, *For More People, The American Dream Doesn't Include a Home of Their Own*, WASH. POST (Mar. 1, 2014), [http://www.washingtonpost.com/realestate/for-more-people-the-american-dream-doesn't-include-a-home-of-their-own/2014/03/01/0c88002c-97e5-11e3-8461-8a24c7bf0653\\_story.html](http://www.washingtonpost.com/realestate/for-more-people-the-american-dream-doesn't-include-a-home-of-their-own/2014/03/01/0c88002c-97e5-11e3-8461-8a24c7bf0653_story.html), archived at <http://perma.cc/C9KB-V3GH>.

<sup>2</sup> JOHN TRUSLOW ADAMS, *THE EPIC OF AMERICA* 214–15 (1931) (describing the American Dream as “that dream of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement”).

<sup>3</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/american%20dream> (last visited Mar. 26, 2015), archived at <http://perma.cc/U2ZM-JFU6>.

<sup>4</sup> Jon Meacham, *Keeping the Dream Alive*, TIME, Jun. 12, 2012, at 1, 3 (describing the American Dream as “steady personal and national progress”).

<sup>5</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>6</sup> See *infra* Part III.

<sup>7</sup> See generally Paul H. Ojeda, Albert Jacques & Paule C. Takash, *The End of the American Dream for Blacks and Latinos*, WCVI.ORG (June 2009), available at <http://perma.cc/CK4T-HQRG>; Barbara Arnwine, *Threat to American Dream of Home Ownership Especially Devastating for Minority Communities*, TRICEEDNEYWIRE.COM, <http://perma.cc/GQN5-P53W>.

<sup>8</sup> Alex Kellogg, *Racial Gap in Homeownership Widens in U.S. Slump*, NPR (Mar. 20, 2014).

crisis revealed enduring systematic discrimination in mortgage lending, which had widely gone unchecked for many years. Even with multi-million dollar settlements with major lenders in recent years, the question remains whether the consequences were steep enough for the harms caused.

Discrimination, especially on such a large scale, has many concomitant consequences. The ripple effects of methodical lending biases are greater wealth loss for minorities<sup>9</sup> and widened gaps in home ownership in the U.S. between minorities and non-minorities.<sup>10</sup> As the U.S. struggles to regain its bearing after the Great Recession, a greater recession is likely to endure for minorities.<sup>11</sup> The foreclosure and housing crisis shows no sign of abating for many minorities, and the fallout will likely persist for a long time.

Unfortunately, an unexpected consequence is that the symbolism of the American Dream encompassing homeownership is fading. Those who have experienced discrimination during the crisis are distrustful of, or worse, apathetic towards, the housing market.<sup>12</sup> Without increased participation by minority groups, particularly African Americans, who as a group have some of the lowest rates of home ownership,<sup>13</sup> the housing market will not improve to the greatest extent possible. Accordingly, if the housing market serves as a predictor of how the national economy will recover, then an underperforming housing market suggests that the national economy will likewise sluggishly recover.

More than fifty years ago Dr. Martin Luther King, Jr. urged this nation to dream of a place where “one day this nation will rise up and live out the true meaning of its creed: ‘We hold these truths to be self-evident, that all men are created equal,’” and that all Americans “will one day live in a nation where they will not be judged by the color of their skin but by the content

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<sup>9</sup> Dorothy Brown, *How Home Ownership Keeps Blacks Poorer than Whites*, FORBES.COM (Dec. 10, 2012, 12:28 PM), <http://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites>, archived at <http://perma.cc/ZGS9-VG4N> (stating that the housing crisis resulted in \$198 billion loss in generational wealth in minority communities); Ingrid Beckles, *Don't Blame Minority Homeowners for the Housing Crisis*, BLACK ENTERPRISE (Nov. 3, 2011), available at <http://perma.cc/6BRS-2CTK>.

<sup>10</sup> See *infra* Part IV.

<sup>11</sup> See *infra* Part VIII.

<sup>12</sup> See, e.g., Haynes et al., *supra* note 1.

<sup>13</sup> African Americans are the lowest group of homeowners. They have a 2013 homeownership rate of approximately 43.1%. See Press Release, U.S. Dep't of Commerce, Residential Vacancies and Homeownership in the Fourth Quarter 2013, 9 tbl.7 (Jan. 31, 2014), available at <http://perma.cc/G839-WBT7> [hereinafter U.S. CENSUS BUREAU NEWS]. Caucasians have the largest homeownership rate of approximately 73.4%. *Id.* Latinos have a 2013 homeownership rate of 46.1% while all other combined minorities (other than Latino and African American) have a homeownership rate of 55.1%. *Id.*

of their character.”<sup>14</sup> With the advent of the Consumer Financial Protection Bureau<sup>15</sup> and other consumer protection advocacy groups born out of the foreclosure crisis, it is the hope that lending discrimination will, finally, be an abomination of the past. Lending discrimination not only hurts the borrower—it has unintentional and pervasive consequences for the borrower’s community, city and nation. Thus, for the benefit of all, lending discrimination must be stamped out.

This Article examines lending discrimination in the U.S. and the legal and social ramifications of such discrimination, mainly the widening gaps in economic wealth between racial and ethnic minorities and whites and the effect on the housing market, which, in turn, affects the national economy. The Article reviews historical aspects of lending discrimination in the U.S. from 1900 onward in Part I. Part II outlines the lending discrimination laws that provide guidance on the acceptable and unacceptable conduct before, during, and after the mortgage lending process. In Part III, the Article takes a critical look at foreclosure numbers by race and ethnicity during the housing market crisis. Part IV examines the role of homeownership in creating economic parity. The gaps in homeownership rates based on race and ethnicity along with efforts to bridge these gaps are detailed in Part V. This Part also explores the effect of homeownership on economic wealth and how there has been a more drastic decline for minorities since 2005. The effect of foreclosures against minorities is discussed in Part VI. Part VII links the number of foreclosures to lending discrimination during the housing and foreclosure crisis. Part VIII exposes the patent and latent effects of lending discrimination from this recent crisis. In Part IX, the Article analyzes the legislative and regulatory reform efforts in light of the conclusive and prolific evidence of recent lending discrimination. The possibility of using criminal sanctions as a remedy for lending discrimination is analyzed in Part X. Finally, the Article concludes that despite U.S. policies to increase minority homeownership (or because of them), the housing market and foreclosure debacle, fueled by lending discrimination, further exacerbated disparities in homeownership between Caucasians and minorities. In some cases, homeownership rates are worse than those that existed nearly twenty-five years ago. For these groups, the American Dream has become too elusive. Further, lending discrimination has trajectorial effects on entire communities. In these communities, homeownership has become a lugubrious experience causing some to erase homeownership from the definition of the American

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<sup>14</sup> Rev. Martin Luther King, Jr., I Have a Dream, Speech at the Lincoln Memorial, Washington, D.C. (Aug. 28, 1963) (transcript available at <http://perma.cc/6YWH-5RYL>).

<sup>15</sup> See *infra* Part IX.A.

Dream. Fair lending laws must consistently be enforced either civilly or criminally so that lending discrimination is exterminated once and for all.

## I. HISTORICAL LENDING DISCRIMINATION

### A. *The Policy and Practice of Mortgage Discrimination*

#### 1. *Redlining*

Before 1968, mortgagees could consider race as a factor when offering mortgages.<sup>16</sup> In fact, the U.S. government openly endorsed considering racial factors when considering whether to insure mortgages under the Fair Housing Administration until the 1950s.<sup>17</sup> In the first two-thirds of the 20th Century, if a borrower was a minority or lived in a minority neighborhood, his application would likely be denied.<sup>18</sup> Lenders believed that loans to these borrowers or in these areas would create an unacceptable risk of default.<sup>19</sup> The practice of blanket denial is known as redlining.<sup>20</sup>

Sociologist John McKnight popularized the term “redlining” in the 1960s.<sup>21</sup> McKnight discussed the lender practice of literally marking red lines around areas where lenders would not be willing to make loans.<sup>22</sup> The practice of redlining actually existed in the 1930s. Congress created the Home Owners’ Loan Corporation, a government sponsored corporation, as a part of the New Deal in response to President Franklin Roosevelt’s insistence that Congress enact legislation that “(1) protect[ed] the small home owner from foreclosure; (2) relieve[d] him of part ‘of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power’; and (3) declare[d] that it was a national policy to protect home ownership.”<sup>23</sup> Redlining occurred when the Home Owners’

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<sup>16</sup> Derek S. Hyra, Gregory D. Squires, Robert N. Renner, & David S. Kirk, *Metropolitan Segregation and the Subprime Lending Crisis*, 23 HOUSING POLICY DEBATE 177, 180 (2013).

<sup>17</sup> FED. HOUSING ADMIN., UNDERWRITING MANUAL 978–980 (1938); see also CHRISTY ROGERS & JOHN A. POWELL, WHERE CREDIT IS DUE: BRINGING EQUITY TO CREDIT AND HOUSING AFTER THE MARKET MELTDOWN 144 (2013).

<sup>18</sup> Hyra et al., *supra* note 16, at 180.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (quoting Benjamin Howell, *Exploiting Race and Space: Consequential Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 107 (2006)).

<sup>21</sup> GARY GIROUX, BUSINESS SCANDALS, CORRUPTION, AND REFORM: AN ENCYCLOPEDIA 487 (2013). Redlining refers to the fact that African American areas were encoded in red so that lenders could avoid lending or limit lending to those areas. ROGERS & POWELL, *supra* note 17.

<sup>22</sup> ROGERS & POWELL, *supra* note 17.

<sup>23</sup> C. LOWELL HARRISS, HISTORY AND POLICIES OF THE HOME OWNERS’ LOAN CORPORATION 9 (1951), available at <http://perma.cc/69ST-AQ2V>.



Loan Corporation used color-coded maps to delineate areas to which it would lend.<sup>24</sup> Thus, beginning in the 1930s, a national homeownership program became an implement of spatial exclusion and inequality which, at the same time, sustained and perpetuated homeownership disparity and economic inequality for minorities.<sup>25</sup>

## 2. Reverse Redlining

Reverse redlining occurs when a lender particularly targets minority consumers, charging them more than would be charged to a similarly situated non-minority consumer.<sup>26</sup> Before the prohibition of such discrimination, the practice of redlining mostly affected African Americans in predominantly African American communities.<sup>27</sup> The result of reverse redlining left the door open for other, often more predatory, lenders to service those areas excluded from the prime mortgage market.<sup>28</sup> Predatory lenders distributed their products and further depressed minority communities, which created continuous cycles of poverty and debt, instead of cycles of wealth.<sup>29</sup> Again, the ramifications of such practices are still being felt today, despite the mechanisms in place that prohibit such behaviors.

## 3. Predatory Lending

Predatory lending is broad and includes:

a syndrome of abusive loan terms or practices that involve one or more of the following five problems: (1) loans structured to result in seriously disproportionate net harm to borrowers; (2) harmful rent seeking; (3) loans involving fraud or deceptive practices; (4) other forms of lack of transparency in loans that are not actionable as fraud; and (5) loans that require borrowers to waive meaningful legal redress.<sup>30</sup>

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<sup>24</sup> Howell, *supra* note 20, at 107–08; *see also* UNDERWRITING MANUAL, *supra* note 17.

<sup>25</sup> *See* Kenneth T. Jackson, *Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 J. URBAN HISTORY 419, 430 (1980).

<sup>26</sup> Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES (June 6, 2009).

<sup>27</sup> Bill Dedman, *The Color of Money*, ATLANTA J.-CONST., May 1, 1988; Barbara Ehrenreich & Dedrick Muhammad, *The Recession's Racial Divide*, N.Y. TIMES, Sept. 13, 2009.

<sup>28</sup> Gregory D. Squires, *Predatory Lending: Redlining in Reverse*, 139 SHELTERFORCE ONLINE (Jan./Feb. 2005), <http://www.shelterforce.com/online/issues/139/redlining.html>, archived at <http://perma.cc/D8GP-AT9M>.

<sup>29</sup> *Id.*

<sup>30</sup> Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1260 (2002).

Predatory lending is typically comprised of one or more of the following actions: (1) interest rates significantly higher (the number of percentage points varies but usually falls within 5–8 percent) than Treasury securities of comparable maturities; (2) long prepayment penalty periods, especially those lasting three years or more; (3) balloon payments; (4) excessively high points or fees; (5) lending based on borrowers' asset values rather than abilities to repay; (6) frequent refinancing (“flipping”) without financial benefit for borrowers; (7) steering customers who qualify for lower-cost credit into higher-cost loans; (8) insufficient disclosure of the costs or risks associated with a loan; (9) inflated appraisals or income figures.<sup>31</sup>

Mortgages are divided into two classes: prime and subprime.<sup>32</sup> Subprime mortgages contain higher interest rates and fees.<sup>33</sup> They are intended to open the door to homeownership for individuals with marginal creditworthiness.<sup>34</sup> Borrowers paid higher rates because the risks for default were considered much greater.<sup>35</sup> With subprime mortgages, borrowers also pay higher upfront and continuing costs than borrowers with prime mortgages.<sup>36</sup> As it was historically, a large majority of African American and Latino borrowers were the main recipients of subprime mortgages,<sup>37</sup> showing an imbalance in mortgage lending markets.

It was widely reported that subprime mortgages caused the housing market bubble to burst.<sup>38</sup> Many argued that, in an effort to fulfill a minority mortgage quota, lenders lowered their lending standards.<sup>39</sup> These lower lending standards created higher cost mortgages that borrowers could not afford.<sup>40</sup>

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<sup>31</sup> *Id.* For a more complete list of predatory lending practices, see generally Patricia Sturdevant & William J. Brennan, Jr., *A Catalogue of Predatory Mortgage Lending Practices*, 5 CONSUMER ADVOC. 36 (Nov./Dec. 1999).

<sup>32</sup> Rajdeep Sengupta & William R. Emmons, *What is Subprime Lending?*, FED. RES. BANK OF ST. LOUIS (2007), available at <http://perma.cc/8YVA-TA7V>.

<sup>33</sup> *Id.*

<sup>34</sup> Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, 88 FED. RES. BANK OF ST. LOUIS REV. 31, 31 (Jan./Feb. 2006).

<sup>35</sup> *Id.* at 31–32 (stating that subprime mortgages are “simultaneously viewed as having great promise and great peril”).

<sup>36</sup> *Id.* at 32. Upfront costs are application, appraisal, and origination fees. *Id.* Continuing costs are mortgage insurance, principle, interest and late payments, and property taxes. *Id.*

<sup>37</sup> Gregory D. Squires, Derek S. Hyra & Robert N. Renner, *Segregation and the Subprime Lending Crisis*, Presented at 2009 Federal Reserve System Community Affairs Research Conference, Washington, D.C., at 3 (Apr. 16, 2009), available at <http://perma.cc/D29W-ECVW>.

<sup>38</sup> Thayer Watkins, *The Nature and Origins of the Subprime Mortgage Crisis*, SAN JOSE ST. U. DEP'T. ECON., <http://www.sjsu.edu/faculty/watkins/subprime.htm> (last visited Mar. 26, 2015), archived at <http://perma.cc/N42C-2QUS>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

Over time, lenders were originating these mortgages without regard to the affordability of the mortgages and passed the risk of these mortgages onto unsuspecting or irresponsible third party investors.<sup>41</sup>

The above is only partially true. It is an accurate assessment that lenders placed some borrowers into subprime mortgages when they should not have received these mortgages. However, the rationale behind this statement is different than asserted. The reason that the borrowers should not have received subprime mortgages was not because they could not afford the mortgages, but because some of them were qualified for and should have received lower cost or prime mortgages.<sup>42</sup> Although lenders during the foreclosure crisis did not actually draw red lines around minority neighborhoods and forbid lending in certain areas, that is, reverse redlining, they effectively imagined such circles when determining fees and interest rates, which is just as reprehensible. Had these lenders not discriminated against certain borrowers, many of these borrowers likely could have afforded and kept their homes. The gamble of discriminating in loan originations came at a hefty cost for these borrowers. Furthermore, the economic consequences will likely be felt for generations.

### *B. All Things Being Equal Yet Unequal*

More than forty years have elapsed since the enactment of the Fair Housing Act and many minorities are still under the scourge of lending discrimination when purchasing a home.<sup>43</sup> The disturbing fact is that federal agencies possessed knowledge that lenders engaged in lending discrimination before 2005 when lenders increased originations of subprime mortgages.<sup>44</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> See *infra* Part VII. For example, Asst. U.S. Attorney General Thomas Perez, in his 2012 report to Congress, highlighted a story of an eighty-year-old African-American resident in the Baltimore area. She had a 714 credit score and good credit file. However, she received a subprime loan and did not realize that she could have qualified for a prime loan. She did not realize that she had a subprime loan that came with an adjustable interest rate. She discovered she had a subprime loan only after her interest rate jumped two years later. THOMAS E. PEREZ, U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S 2012 ANNUAL REPORT TO CONGRESS (2013), <http://www.justice.gov/crt/about/hce/documents/ecoareport2012.pdf>, archived at <http://perma.cc/7TYS-MUR6>.

<sup>43</sup> See, e.g., Debbie Gruenstein Bocian, Wen Li & Keith S. Ernst, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, CTR. FOR RESPONSIBLE LENDING 1, 11 (June 18, 2010), <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>, archived at <http://perma.cc/8TU7-ESRS>.

<sup>44</sup> Most of the offending subprime mortgages originated between 2005 and 2008. *Id.* at 7–8 (noting that an estimated 7.9% of African Americans and 7.7% of Latinos who purchased or refinanced their homes between 2005 and 2008 lost their homes by foreclosure between 2007 and 2009).

In 2000, the U.S. Department of Housing and Urban Development (HUD) instituted several studies that researched whether minority communities, compared with other similarly situated non-minority communities, received a disproportionately larger share of subprime mortgages.<sup>45</sup> HUD commissioned studies in Atlanta, New York, Boston, and Baltimore.<sup>46</sup> “[E]ven after controlling for the community’s income level, African American areas had a higher proportion of subprime loans. The evidence from these cities suggests lenders were inappropriately targeting minority neighborhoods or subprime lenders were serving areas that prime lenders neglected.”<sup>47</sup>

In 2002, HUD conducted studies in Los Angeles and Chicago.<sup>48</sup> Posing as prospective homebuyers, individuals with equal financial backgrounds sought information related to the mortgage lending process.<sup>49</sup> The studies in Los Angeles and Chicago showed that the “posers” were treated equally most of the time, but when there was a disparity, the person of color was treated less fairly.<sup>50</sup> While the laws that prohibit discrimination have been in place for over forty years, lending discrimination is still an issue. However, plaintiffs have had a difficult time substantiating lending discrimination in court.

## II. LENDING DISCRIMINATION LAWS

Lending discrimination may occur at any phase in the mortgage lending process. The lending phases are: (1) advertisement and outreach by lending institutions;<sup>51</sup> (2) responses to pre-application inquiry from prospective borrowers;<sup>52</sup> (3) approval or denial of loan applications;<sup>53</sup> (4) determination of terms and conditions of mortgage loans;<sup>54</sup> and (5) loan administration.<sup>55</sup>

### A. *The Fair Housing Act*

Title VIII of the Civil Rights Act of 1968 (Fair Housing Act)<sup>56</sup> prohibits lending discrimination. Under the Fair Housing Act, it is unlawful to refuse to

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<sup>45</sup> Squires et al., *supra* note 37, at 7.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 7–8.

<sup>48</sup> MARGERY AUSTIN TURNER ET AL., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS (Apr. 2002), *available at* <http://perma.cc/TW7J-9FBC>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Fair Housing Act, 42 U.S.C. §§ 3601–3631 (1968).

grant a residential mortgage loan or provide information regarding mortgage loans, impose different terms or conditions on a loan, discriminate in appraisals, refuse to purchase a loan, or set different terms or conditions for purchasing a loan based on an applicant's race, color, national origin, religion, sex, familial status or disability.<sup>57</sup>

As previously stated, it is generally believed that subprime lending was one of the major factors in creating the real estate market breakdown.<sup>58</sup> Racial minorities received different terms and higher fees, such as subprime or high cost mortgages, than similarly situated Caucasians. In 2006, an estimated 53.7% of African American and 46.6% of Latino recipients received subprime mortgage loans, whereas only 17.7% of Caucasian mortgage recipients received subprime mortgage loans.<sup>59</sup> Additionally, in areas where the borrowing community was at least 80% minority, approximately 47% of borrowers had subprime mortgages according to census tracts.<sup>60</sup> On the other hand, in a predominantly Caucasian community, only 22% of borrowers had high cost mortgage loans.<sup>61</sup> The data show dissimilarities based on which communities' borrowers obtain high cost mortgages and which are more likely offered prime mortgages.<sup>62</sup> Hence, there appears to be a stratified lending system in which the location of the borrower plays an important role in dictating mortgage terms.

Both the U.S. Department of Justice (DOJ) and HUD have the right to pursue discrimination claims under the Fair Housing Act.<sup>63</sup> An individual also has a private right of action under the Fair Housing Act; however, he must establish a prima facie case of discrimination.<sup>64</sup> To establish a prima facie case of disparate impact, a plaintiff must show that the defendant had outwardly biased practices or policies that had a significantly adverse or disproportionate effect on members of a protected class when implemented.<sup>65</sup>

Disparate treatment can be proved in many ways. A plaintiff can show overt evidence of disparate treatment, comparative evidence of disparate

<sup>57</sup> 42 U.S.C. § 3604 (a)–(e) (2012).

<sup>58</sup> Hyra et al., *supra* note 16, at 177 (“Unsustainable high-cost lending was a major contributor to one of the worst financial crises in U.S. History.”).

<sup>59</sup> Squires et al., *supra* note 37, at 3.

<sup>60</sup> Hyra et al., *supra* note 16, at 178.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 187, 190.

<sup>63</sup> U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING ACT ENFORCEMENT, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/enforcement](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/enforcement) (last visited Mar. 26, 2015), *archived at* <http://perma.cc/Q3RH-D9NP>; U.S. DEP'T OF JUSTICE, FAIR HOUSING ACT, [http://www.justice.gov/crt/about/hce/housing\\_coverage.php](http://www.justice.gov/crt/about/hce/housing_coverage.php) (last visited Mar. 26, 2015), *archived at* <http://perma.cc/GP7R-C6EU>.

<sup>64</sup> *See* Tex. Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 252–55 (1981).

<sup>65</sup> McCullough v. Town of Milan, No. 12–4574–CV., 2014 WL 1189868, at \*2 (N.Y. 2014).

treatment, or evidence of disparate impact.<sup>66</sup> Overt lending discrimination is found when a plaintiff produces evidence that the lender explicitly discriminated using the prohibited factors.<sup>67</sup> This type of discrimination may exist even if the lender does not act upon the discrimination, but expresses a discriminatory preference.<sup>68</sup> To establish a prima facie case of overt disparate treatment, a plaintiff must show that the lender possessed animus against a particular protected group, which was a significant factor in the lender's adverse decision.<sup>69</sup>

Disparate treatment occurs when a lender treats a credit applicant differently on the basis of one of the prohibited factors. Showing that, beyond the difference in treatment, the treatment was motivated by prejudice or by conscious intention to discriminate against a person is not required. Different treatment is considered by courts to be intentional discrimination because the difference in treatment on a prohibited basis has no credible, nondiscriminatory explanation.<sup>70</sup>

An example of disparate treatment is redlining because “a lender provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area in which the credit seeker resides ... or in which the residential property to be mortgaged is located.”<sup>71</sup>

### *B. The Equal Credit Opportunity Act*

In addition to the Fair Housing Act, Congress enacted the Equal Credit Opportunity Act (ECOA).<sup>72</sup> The ECOA was amended in 1976 and prohibits discrimination based on sex, national origin, race, color, religion, and age,

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<sup>66</sup> *Id.*; see also *Munoz v. Int'l Home Capital Corp.*, No. C 03-01099, 2004 WL 3086907, at \*4 (N.D. Cal. 2004); *Barkley v. Olympia Mortg. Co.*, 2007 WL 2437810, at \*14 (E.D.N.Y. 2007).

<sup>67</sup> FED. RESERVE BD., FEDERAL FAIR LENDING REGULATIONS AND STATUTES OVERVIEW, available at <http://perma.cc/A4E9-DDK5>. The Federal Reserve Board provided the following age discrimination example: “A lender offers a credit card with a limit of up to \$750 for applicants age 21–30 and \$1,500 for applicants over 30.” *Id.*

<sup>68</sup> *Id.* Again, the Federal Reserve Board provided an example of expressly overt disparate treatment. If a mortgage lender said, “[w]e do not like to make home mortgages to Native Americans, but the law says that we may not discriminate and we have to comply with the law.” *Id.*

<sup>69</sup> *McCullough*, 2014 WL 1189868, at \*1.

<sup>70</sup> FED. RESERVE BD., *supra* note 67, at 2.

<sup>71</sup> *Id.* It is important to note that redlining violates both the Fair Housing Act and ECOA.

<sup>72</sup> 15 U.S.C. § 1691 (a)–(e) (1992).

inter alia.<sup>73</sup> The ECOA bars discrimination based on the prohibited factors related to any feature of a transaction that involves the extension of credit, whether residential or commercial.<sup>74</sup>

Under both the Fair Housing Act and the ECOA, a mortgage lender may not put off or redirect applicants upon inquiring about or applying for credit;<sup>75</sup> alter an applicant's terms of credit, such as the interest rate, type of loan, or amount of credit extended;<sup>76</sup> use dissimilar criteria in determining to extend credit;<sup>77</sup> use different standards in evaluating an applicant's collateral;<sup>78</sup> or treat a mortgagor disparately in relation to servicing a loan or pursuing default remedies.<sup>79</sup> Furthermore, a mortgage lender may not verbally or in writing express a preference or "indicate that it will treat applicants differently" based on the prohibited factors.<sup>80</sup>

In addition to the characteristics of the applicant, a mortgage lender may not discriminate in the extension of credit based on the characteristics of any "person associated with an applicant, prospective applicant, or borrower (for example, a co-applicant, spouse, business partner, or live-in aide)",<sup>81</sup> or make a decision to discriminate based on the location of the neighborhood or area where the property to be financed is located.<sup>82</sup> The prohibited actions are non-exhaustive and unlimited. A court may find evidence of discrimination upon finding that the mortgage lender disparately treated applicants or borrowers based on any of the prohibited factors.<sup>83</sup>

### III. U.S. HOMEOWNERSHIP BY RACE AND ETHNICITY

#### A. *The Data*

##### 1. *Early–Mid 20th Century (1900–1970)*

For the past century, overall U.S. homeownership rates have erratically jumped upwards and downwards. Prior to 1950, a great majority of

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<sup>73</sup> Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (1976). Other prohibited factors included marital status and consideration that any part of the applicant's income was derived from public assistance. CONSUMER COMPLIANCE HANDBOOK, FAIR LENDING OVERVIEW 1 (Jan. 2006), available at <http://perma.cc/9X42-FHH6>.

<sup>74</sup> CONSUMER COMPLIANCE HANDBOOK, *supra* note 73.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Frederic S. Schwartz, *The Fair Housing Act and 'Discriminatory Effect': A New Perspective*, 11 NOVA L. REV. 71 (1987).

Americans rented their homes rather than purchased them.<sup>84</sup> However, during the first forty years of the 20th Century, homeownership rates slightly increased until the threat of war in 1940.<sup>85</sup> By 1950, the homeownership rate had significantly increased to more than half of all Americans.<sup>86</sup> The uptick in homeownership rates again grew in both 1960 and 1970 to 61.9% and 62.9% respectively.<sup>87</sup>

The total population and racial diversity also increased in the U.S. during this period. Between 1900 and 1970, the U.S. population increased from 76 million to 203.2 million.<sup>88</sup> One out of eight Americans was of a race other than Caucasian in 1900.<sup>89</sup> By comparison, in 2000, one out of four Americans was a race other than Caucasian.<sup>90</sup>

The data on homeownership by race and ethnicity is not readily available for the early 20th Century, especially for non-Caucasian and non-African American homeowners. However, less than 1% of the population in the early 20th Century was a race other than Caucasian or African American.<sup>91</sup> The available data also reveal that less than 20% of all African Americans owned their homes during this period.<sup>92</sup>

By 1930, the number of African American homeowners had grown to 28% compared to 43.6% nationally.<sup>93</sup> In the 1930s, it was reported that more than two-thirds of African Americans earned less than the minimum income, \$1,500 a year, to finance a home along with all other necessities.<sup>94</sup> However, the advent of African American Building & Loans somewhat helped to increase the number of African American homeowners.<sup>95</sup> The gap

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<sup>84</sup> FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY, CENSUS 2000 SPECIAL REPORTS 115 (2002). The following is the percentage of homeownership rates by decade from 1900–1970: 46.5% in 1900, 45.9% in 1910, 45.6% in 1920, 47.8% in 1930, 43.6% in 1940, 55% in 1950, 61.9% in 1960, and 62.9% in 1970. U.S. CENSUS BUREAU, *Historical Census of Housing Tables* (Oct. 31, 2011), <http://www.census.gov/hhes/www/housing/census/historic/owner.html>, archived at <http://perma.cc/FQQ2-UFRS>.

<sup>85</sup> *Historical Census of Housing Tables*, *supra* note 84.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> HOBBS & STOOPS, *supra* note 84, at 11.

<sup>89</sup> *Id.* at 76.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> David L. Moran, *Homeownership is Colorblind: The Role of African American Savings and Loans in Home Finance, 1880–1980*, 8 BUS. & ECON. HISTORY ON-LINE 2 (2010), available at <http://perma.cc/3ZAV-746W>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (referring to a 1931 federal study on homeownership).

<sup>95</sup> *Id.* at 3.



in homeownership rates between non-Hispanic Caucasians and African Americans based on the available data was roughly 20%.<sup>96</sup>

The federal government created a few agencies that helped increase homeownership from 1934 through the 1970s. In 1934, Congress created the Federal Housing Administration,<sup>97</sup> and the Veterans' Administration in 1944.<sup>98</sup> However, nationally sanctioned acts of discrimination and other policies of discrimination did not benefit minorities until the Civil Rights Act of 1968, which prohibited discrimination based on race and ethnicity in the leasing and/or sale of real property.<sup>99</sup>

## 2. Late 20th Century (1980–1999)

The late 20th Century saw homeownership rate gains for all Americans. In 1980 the homeownership rate was 64.4%.<sup>100</sup> In 1990 during the start of a recession until 1991,<sup>101</sup> the national homeownership rate fell slightly to 64.2%.<sup>102</sup> In 1995, the rate improved to 64.7%.<sup>103</sup> The 20th Century ended with 66.8% of Americans owning their homes.<sup>104</sup>

Considering homeowners' races or ethnicities, Caucasians had a homeownership rate of 70% between 1996 and 1999.<sup>105</sup> African Americans had a homeownership rates right at 40%.<sup>106</sup> Latinos' homeownership rates from 1996 improved almost 3% by 1999.<sup>107</sup> Asians were the only minority group to have more than 50% homeownership rate between 1996 and 1999.<sup>108</sup>

<sup>96</sup> *Id.* at 8.

<sup>97</sup> Robert M. Couch, *The Great Recession's Most Unfortunate Victim: Homeownership*, JOINT CTR. FOR HOUS. STUDIES OF HARVARD U. 11 (Nov. 1, 2013), available at <http://perma.cc/TDX2-5H9S>.

<sup>98</sup> *Id.*

<sup>99</sup> FAIR HOUSING ACT, *supra* note 56. Although the GI Bill of Rights protected servicemen from discrimination after World War II, federal or state laws offered no protections against discrimination to the general public. Moran, *supra* note 92.

<sup>100</sup> *Historical Census of Housing Tables*, *supra* note 84.

<sup>101</sup> ROBERT N. IRELAND, A NEW KEYNESIAN PERSPECTIVE ON THE GREAT RECESSION, NAT. BUREAU OF ECON. RESEARCH (2010).

<sup>102</sup> *Historical Census of Housing Tables*, *supra* note 84.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.* (stating the Caucasians' homeownership rates from 1996–1999 was: 71.7% (1996), 72% (1997), 72.6% (1998) and 73.2% (1999)).

<sup>106</sup> *See id.* (reporting that African Americans' homeownership rates from 1996–1999 was: 44.1% (1996), 44.8% (1997), 45.6% (1998) and 46.3% (1999)).

<sup>107</sup> *See id.* (stating that Latinos' homeownership rates from 1996–1999 was: 42.8% (1996), 43.3% (1997), 44.7% (1998), and 45.5% (1999)).

<sup>108</sup> *See id.* (reporting that Asians grouped with Pacific Islanders in the report had homeownership rates of: 50.8% (1996), 52.8% (1997), 52.6% (1998), and 53.1% (1999)).

The homeownership gaps between Caucasians and other minority groups were considerable. The gap between Caucasians' and African Americans' homeownership rates was approximately 27.2%.<sup>109</sup> With Latinos, the difference in homeownership rates was around 28.3%.<sup>110</sup> The gap between Caucasians and Asians was smaller at approximately 20.1%.<sup>111</sup>

### 3. *Early 21st Century (2000–2005)*

By 2000, more than two-thirds of Americans owned homes.<sup>112</sup> The homeownership rate increased each following year until it reached its peak, 69%, in 2004.<sup>113</sup> After reaching historic heights, the real estate market crash resulted in a downward turn in homeownership across all racial groups beginning in the last quarter of 2005.<sup>114</sup>

Examining homeownership rates based on race and ethnicity, as expected, Caucasians continued to represent the largest group of homeowners. For Caucasians, their highest rate of homeownership, 76.2%, was in the 4th quarter of 2004.<sup>115</sup> African Americans also achieved their highest rate of homeownership between 2000 and 2005. In the second quarter of 2004, African Americans' homeownership rate reached a historic high of 49.7%.<sup>116</sup> During the fourth quarter of 2005, the peak homeownership rate for Latinos was 50%.<sup>117</sup> Asian Americans' homeownership rate, the largest percentage of all minority homeowners, maxed out at 60.1% in 2006.<sup>118</sup>

Comparing the highest level of ownership rates between Caucasians and minority groups, which these groups achieved before the real estate market decline in 2004 and 2005, one can still see a great disparity in homeownership rates. For African Americans, though, that gulf in homeownership rate was the largest at 26.5%.<sup>119</sup> The difference in homeownership rates for Latinos and Caucasians was 26.2%.<sup>120</sup> Asian Americans had the closest

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<sup>109</sup> *See id.* The average homeownership rate for Caucasians from 1996–1999 was 72.4% while the average homeownership rate for African Americans was 45.2%. *Id.*

<sup>110</sup> *See id.* The average homeownership rate for Latinos from 1996–1999 was 44.1%. *Id.*

<sup>111</sup> *See id.* The average homeownership rate for Asians from 1996–1999 was 53.2%. *Id.*

<sup>112</sup> *See id.* Approximately 67.4% of Americans owned homes. *Id.*

<sup>113</sup> *See id.* The homeownership rates for 2001–2004 were 67.8% (2001), 67.9% (2002), 67.9% (2003), and 68.3% (2004). *Id.*

<sup>114</sup> *See The State of the Nation's Housing 2013*, JOINT CTR. FOR HOUS. STUDIES OF HARVARD U., at 17 (2013), available at <http://perma.cc/5XSL-KFPM>.

<sup>115</sup> *See* U.S. CENSUS BUREAU NEWS, *supra* note 13.

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

homeownership rate to Caucasians, being within 16.1% of the Caucasian homeownership rate.<sup>121</sup> Between 2000 and 2005, housing gaps between minorities and non-minorities were narrowing.<sup>122</sup> However, the Great Recession would reverse these gains.

#### 4. *The Great Recession (2006–2009)*

The number of homeowners precipitously fell consistently each year after 2006 by 1.2 million.<sup>123</sup> In 2007, the total homeownership rate in the U.S. was 68.1%, a drop of nearly 1% since 2004.<sup>124</sup> The homeownership rate dropped to 67.4% by 2009.<sup>125</sup>

Reviewing the data available on ownership based on race and ethnicity, Caucasian homeownership rates dropped from 72.6% in 2006 to 71.4% in 2009.<sup>126</sup> This represents an overall 1.2% decline in homeownership. African American homeownership rates dropped from 47.9% in 2006 to 46.2% in 2009,<sup>127</sup> a 1.7% plunge in homeownership. Latinos experienced a similar decrease from 49.7% in 2006 to 48.4% in 2009.<sup>128</sup> This is a 1.3% decline. Likewise, Asians also witnessed declines in homeownership rates from 60.8%, a record high, to 59.3%, a 1.5% decrease.<sup>129</sup> Comparatively, the group with the smallest percentage of homeownership, African Americans, had the greatest dive in homeownership rates.

#### 5. *Housing Market “Recovery” Period (2010–2013)*

U.S. homeownership rates reached record lows between 2010 and 2013. In 2010, the American homeownership rate was 66.9%.<sup>130</sup> The homeownership rate dropped to 66.3% in 2011.<sup>131</sup> Between 2011 and 2012, homeownership fell by 0.7% down to approximately 65.5%.<sup>132</sup> Similarly, the

<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD U., *supra* note 114.

<sup>124</sup> *See id.* at 36.

<sup>125</sup> *See id.*

<sup>126</sup> *See* U.S. CENSUS BUREAU NEWS, *supra* note 13. The homeownership rates for Caucasians during 2006–2009 were: 72.6% (2006), 72% (2007), 71.7% (2008), and 71.4% (2009). *Id.*

<sup>127</sup> *See id.* The 2006–2009 homeownership rates for African Americans were: 47.9% (2006), 47.2% (2007), 47.4% (2008), and 46.2% (2009). *Id.*

<sup>128</sup> *See id.* Latino 2006–2009 homeownership rates were: 49.7% (2006), 49.7% (2007), 49.1% (2008), and 48.4% (2009). *Id.*

<sup>129</sup> *See id.* The homeownership rates for Asians during 2006–2009 were: 60.8% (2006), 60% (2007), 59.5% (2008), and 59.3% (2009). *Id.*

<sup>130</sup> *See id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See id.* at 5.

housing market declined further during the first quarter of 2013 down to 65%.<sup>133</sup> The U.S. Census Bureau reported that the homeownership rate had plummeted to only 65.1% in 2013.<sup>134</sup> Needless to say, the decline in homeownership evidences a slower climb out of the real estate market crisis than previously heralded.<sup>135</sup>

Although there is an overall decline in homeownership, minority homeownership has dropped more substantially. Caucasian homeownership rates are at 73.5%, a decade low.<sup>136</sup> Conversely, African American homeownership has declined to 43.9%, which is its lowest rate since 1995.<sup>137</sup> Latino homeownership rates are 46%.<sup>138</sup>

Amidst the narrative that the housing and mortgage market is rebounding,<sup>139</sup> homeownership rates remain depressed for all races<sup>140</sup> approximately five years after the so-called end of the “housing and market crisis”.<sup>141</sup> Comparing the homeownership data based on race and ethnicity from 2010 to 2013, one can see a sizeable gulf in homeownership rates growing between certain minority groups and Caucasians.<sup>142</sup>

The 2010–2013 homeownership rates for Caucasians were 74.5% in 2010, 73.8% in 2011, 73.6% in 2012, and 73.4% in 2013.<sup>143</sup> African American homeownership rates for the same time period were 45.4% in 2010, 44.9% in 2011, 43.9% in 2012, and 43.1% in 2013.<sup>144</sup> For Latinos, homeownership rates from 2010 to 2013 were 47.5% in 2010, 46.9% in 2011, 46.1% in 2012, and 46% in 2013.<sup>145</sup>

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<sup>133</sup> See JOINT CTR. FOR HOUS. STUDIES OF HARVARD U., *supra* note 114.

<sup>134</sup> See Callis & Kresin, U.S. CENSUS BUREAU, BULLETIN ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE FOURTH QUARTER 2013, Table 4SA (2013), *available at* <http://perma.cc/T398-MAXN>. Homeownership rates for the U.S. have not been this low since 1994 when the rate was 64%. See also U.S. CENSUS BUREAU NEWS, *supra* note 13, at 6.

<sup>135</sup> Christopher Matthews, *After 8 Years, the Real Estate Market is Finally Looking Normal Again*, FORTUNE.COM (Mar. 31, 2014), <http://fortune.com/2014/03/31/after-8-years-the-real-estate-market-is-finally-looking-normal-again/>, *archived at* <http://perma.cc/F9L4-TYHH> (noting that an alignment between the supply and demand is a sign of a normal real estate market).

<sup>136</sup> See U.S. CENSUS BUREAU NEWS, *supra* note 13, at 9.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> See Matthews, *supra* note 135.

<sup>140</sup> See U.S. CENSUS BUREAU NEWS, *supra* note 13, at 9.

<sup>141</sup> Many argue that the housing crisis existed in the U.S. only from 2006–2009. If this is true, then it follows that the crisis is over and the real estate market’s recovery began in 2010. See Matthews, *supra* note 135.

<sup>142</sup> See U.S. CENSUS BUREAU NEWS, *supra* note 13, at 9

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

The decline in homeownership numbers for minorities is particularly conspicuous in 2012. According to the Census Bureau's Annual Social and Economic Supplement, only 44% of African Americans, 57% of Asians, and 46% of Latinos owned their own homes, compared to 73% of Caucasians.<sup>146</sup> Homeownership gaps that had somewhat narrowed from the mid-1980s through the mid-2000s, widened again from 2007 onward, especially for African Americans.<sup>147</sup> The Pew Research Center published a report that the gap between African Americans and Caucasians in 2012 is similar to the status quo of 1976.<sup>148</sup> For Latinos, the Latino homeownership gap scantily narrowed with Caucasians in 2012.<sup>149</sup> When compared with the 78% Caucasian homeownership rate, Asians had the narrowest homeownership gap.<sup>150</sup> Since experiencing peak homeownership rates in 2004 through 2012, Caucasian homeownership rates fell only 2.7% while homeownership rates for African Americans and Latinos dropped by 5.8% and 3.3%, respectively.<sup>151</sup>

The disparity in homeownership rates begs two questions: (1) what is the effect of these homeownership gaps; and (2) if differences in homeownership rates are revelatory, then what solutions are available to narrow the gaps? To answer both questions, one must first critically examine the pervasive problem of lending discrimination. Once it is determined that lending discrimination exists, it is incumbent on relevant actors not to fall into the capacious web of politics and policy statements, but to find concrete solutions that provide minorities with the ability to equitably retain or attain homeownership. The perpetuation of economic gaps between minorities and the majority engenders a policy of segregation<sup>152</sup> and could ultimately prevent minorities from joining the middle class.<sup>153</sup> The federal government has

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<sup>146</sup> See *King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RESEARCH CTR. (Aug. 22, 2013), available at <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#black-home>, archived at <http://perma.cc/EMY5-ZWU6>.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* (noting that after 1976, the gap between African American and Caucasian homeownership rates fluctuated greatly as African American homeownership rose, only to return in 2012 to a nearly 40 year high).

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See JOINT CTR. FOR HOUS. STUDIES OF HARVARD U., *supra* note 114, at 17.

<sup>152</sup> See Charles L. Nier, III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 131 (2008) (quoting then-Senator Barack Obama, Remarks at the Constitution Center: A More Perfect Union (Mar. 8, 2008)).

<sup>153</sup> See Sen. Tom Harkin, Chairperson, Saving the American Dream: The Past, Present and Uncertain Future of America's Middle Class (Sept. 1, 2011), <http://www.harkin.senate.gov/documents/pdf/4e5fa704f2533.pdf>, archived at <http://perma.cc/63RT-AXHA> (stating that "a strong middle class is the cornerstone of a strong America").

taken bigger steps in establishing economic reform.<sup>154</sup> However, a problematic concern regarding these reformative efforts is that past efforts to bridge homeownership gaps have proven unsuccessful. Perhaps it is important to reexamine these ineffective efforts within the historical and current landscape of lending discrimination in the U.S.

#### IV. HOMEOWNERSHIP: A STEP TOWARD BRIDGING THE ECONOMIC WEALTH GAP

All racial or ethnic groups took a financial hit because of the housing industry meltdown. This is particularly devastating because a home is most Americans' largest asset.<sup>155</sup> When one owns a home, he is building his own personal net wealth.<sup>156</sup>

For the most part, home losses, and thus personal net worth losses, were staggering for all races and ethnicities during the mortgage and foreclosure crisis. The effects of lending discrimination magnified these losses for African Americans and Latinos. More African Americans and Latinos, who represent a smaller percentage of total homeowners, lost their homes or became upside down in their mortgages than any other racial groups during the crisis as a result.<sup>157</sup>

When comparing net worth along racial and ethnic lines, two things are evident. First, minorities have lower net worth than Caucasians generally. Pertaining to personal net worth, Caucasians' average net worth at the height of the housing market, in 2005, was approximately \$134,992.<sup>158</sup> In 2009, at the height of the foreclosure crisis, this group's net worth fell 16%, down to \$113,149.<sup>159</sup> Comparatively, African Americans' average net worth was only \$12,124 in 2005.<sup>160</sup> By 2009, however, this groups' average net worth dwindled by 53% to \$5,677.<sup>161</sup> Similarly, Latinos' median net worth

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<sup>154</sup> See *infra* Part IX.

<sup>155</sup> Rick Santorum, *Wealth Creation in the New Millennium—Transforming Poverty in America*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 391 (2002) (quoting Michael L. Daven & Patricia J. Fisher, U.S. CENSUS BUREAU, *Household Net Worth & Asset Ownership 1995* vii (Feb. 2000) and stating that “[f]or most Americans, the avenue to wealth creation—from generation to generation—is through the front door of their first home”).

<sup>156</sup> See DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH & SOCIAL POLICY IN AMERICA* 8 (1999); Chomsisengphet & Pennington-Cross, *supra* note 34, at 31.

<sup>157</sup> See Bocian et al., *supra* note 43, at 3.

<sup>158</sup> See Rakesh Kochkar, Richard Fray & Paul Taylor, *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RESEARCH CTR. (Jul. 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>, archived at <http://perma.cc/YBE5-GETA>.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

dropped 66% from \$18,359 in 2005 to \$6,325 in 2009.<sup>162</sup> In contrast, Asians' average net worth was higher than Caucasians with a net worth of \$168,103 in 2005, but sharply declined by 54% to \$78,066 in 2009, falling below the average Caucasian net worth.<sup>163</sup>

Second, the importance of the home as an asset in a homeowners' portfolio is nonidentical for Caucasians and minority groups. To understand how the housing crisis translated into greater net worth losses for minority groups, one must understand the impact of homeownership on net worth for each group. According to a recent study, home equity represented 62% of the median African American owner's net wealth and 67% of the median Latino owner's net wealth.<sup>164</sup> On the other hand, home equity represents only 38% of the median Caucasian owner's net worth.<sup>165</sup> This study shows that homeownership is a critically significant asset in African American and Latinos' financial portfolios. With a higher percentage of one's net wealth being based on equity in a home, it follows that the loss of this asset more devastatingly decreases the overall net worth of these two minority groups. As a result of catastrophic home losses during the crisis, the wealth gap swelled between Caucasians and African Americans, Latinos, and Asians.<sup>166</sup>

Besides taking one's shelter, foreclosures have other wealth-depleting or limiting attributes. For instance, with a home, there is no equity to use for other wealth building ventures, such as using home equity as leverage for business or education loans, or having the ability to transfer wealth to the next generation at death. Similarly, foreclosure losses can depreciate home values to neighboring properties, leading to increased crime rates and community blight.<sup>167</sup>

Of particular note is that most foreclosures were concentrated in predominantly minority communities.<sup>168</sup> It has been estimated that African American and Latino communities have suffered such economic losses in the amount of \$94 billion and \$177 billion, respectively, between 2009 and 2012.<sup>169</sup> It was soon discovered that these losses were due to lending discrimination.

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD U., *supra* note 114, at 14.

<sup>165</sup> *See id.*

<sup>166</sup> A source recently reported that, in 2010, the median net worth of Caucasians was as much as 7.9 times higher than African Americans and 8.2 times higher than Latinos. *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD U., *supra* note 114, at 14.

<sup>167</sup> *See* Bocian et al., *supra* note 43, at 11.

<sup>168</sup> *Id.* at 3 (stating that "the indirect losses in wealth that result from foreclosures as a result of depreciation to nearby properties will disproportionately impact communities of color.").

<sup>169</sup> *See id.* at 3.

For these victims, agencies capable of enforcing the laws that were in place to prevent lending discrimination typically failed to enforce these laws or tacitly sanctioned such activities.<sup>170</sup> Likewise, homeowners had little power to curb discriminatory lending because the high standards made claims difficult to prove.<sup>171</sup> For these reasons, the American Dream of homeownership became a panoply of national policies with feckless pledges to tighten homeownership gaps between minorities and non-minorities.

#### V. EFFORTS TO BRIDGE MINORITY HOMEOWNERSHIP GAPS

It is generally accepted that

the value of homeownership is deeply ingrained in American public culture. From early laws requiring landownership for the right to vote, to nineteenth-century homestead legislation, to contemporary real estate brochures, the ownership of a home has long been presented as a crucial part of the ‘stake in society’ expected of full-fledged members of American communities.<sup>172</sup>

In many ways, homeownership as an aspect of the American Dream is a byproduct of the federal government’s stated housing policies. Arguably, the United States has had a policy encouraging homeownership since 1913. The Revenue Act of 1913 allowed homeowners to deduct mortgage interest payments.<sup>173</sup> Allowing mortgage interest deductions has been, and continues to be, touted as an incentive for or benefit of homeownership.<sup>174</sup>

The ideal of homeownership as a part of the American Dream was adopted again after World War II. On July 15, 1949, President Harry S. Truman signed into law the Housing Act of 1949.<sup>175</sup> In his statement, President Truman said:

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<sup>170</sup> See Richard Rothstein, *A Comment on Bank of America/Countrywide’s Discriminatory Mortgage Lending and Its Implications for Racial Segregation*, ECON. POL’Y INST. (2012), available at <http://www.epi.org/publication/bp335-boa-countrywide-discriminatory-lending/>, archived at <http://perma.cc/5BNZ-XQGS> (alleging that regulators entrusted to enforce lending discrimination laws “turned a blind eye, or worse,” for nearly a century).

<sup>171</sup> See *infra* Part IX.

<sup>172</sup> WILLIAM M. ROHE & HARRY L. WATSON, *CHASING THE AMERICAN DREAM: NEW PERSPECTIVES IN AFFORDABLE HOMEOWNERSHIP* vii (2007).

<sup>173</sup> See REVENUE ACT OF 1913, ch. 16, 38 Stat. 114 (1913).

<sup>174</sup> See Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 711 (1970).

<sup>175</sup> See Pres. Harry S. Truman, Statement by the President upon Signing the Housing Act of 1949 (Jul. 15, 1949), <http://www.presidency.ucsb.edu/ws/>?, archived at <http://perma.cc/XK7R-U22Z>.



[t]he Housing Act of 1949 ... establishes as a national objective the achievement as soon as feasible of a decent home and a suitable living environment for every American family, and sets forth the policies to be followed in advancing toward that goal. These policies are thoroughly consistent with American ideals and traditions.<sup>176</sup>

The Housing Act of 1949 created the Direct Single Family Housing Loan and Grants program for qualified families.<sup>177</sup> This Act did not provide housing for all Americans. Minorities were not included within the American housing acts until 1954.<sup>178</sup>

In the 1950s, President Eisenhower's Advisory Committee on Housing Policies and Programs issued a final report which noted that "too often, the opportunities of minority families to obtain adequate housing are extremely limited or non-existent. Too often, the workings of our free economy do not provide solutions that benefit minorities."<sup>179</sup> The advisory committee demanded that "changes in the attitudes of private investors"<sup>180</sup> be "bolstered by vigorous administrative practice."<sup>181</sup>

President Eisenhower signed the Housing Act of 1954 into law on August 2, 1954. The Act focused on urban renewal.<sup>182</sup> In his statement upon signing the Act into law, President Eisenhower said that the Act improved upon the 1949 Housing Act by fortifying "private mortgage credit facilities" by "reorganizing the Federal National Mortgage Association."<sup>183</sup> Furthermore, under the Act, "private financial institutions have a really good chance to mobilize their own resources to supply adequate mortgage credit ... to home owners in every part of our country."<sup>184</sup>

The principles of the 1949 and 1954 Housing Acts were incorporated into the Fair Housing Act of 1968.<sup>185</sup> Included within the Fair Housing Act was the Federal Housing Administration's Section 235 Home Owner Assistance

<sup>176</sup> *Id.*

<sup>177</sup> See 7 C.F.R. § 3550.1-50.2 (2014).

<sup>178</sup> See B.T. McGraw, *The Housing Act of 1954 and Implications for Minorities*, 16 *PHYLON* 171, 172 (1955), available at <http://www.jstor.org/stable/272718>, archived at <http://perma.cc/8EG2-WTJK> (asserting that the Housing Act of 1954 now included a purpose to help minorities obtain mortgage credit through a regional committee under the Voluntary Home Mortgage Credit Extension Program).

<sup>179</sup> *Id.* at 176.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> 68 Stat. 590 (1954).

<sup>183</sup> Pres. Dwight D. Eisenhower, Statement by the President upon Signing the Housing Act of 1954, Aug. 2, 1954, 1954 Pub. Papers 675 (1954) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9962>, archived at <http://perma.cc/V824-NUU2>.

<sup>184</sup> *Id.*

<sup>185</sup> See FAIR HOUSING ACT, *supra* note 56.

program.<sup>186</sup> Under this program, the FHA subsidized loans for low-income families by offering mortgage insurance, which places the burden of a loan on HUD, and by lowering interest rates.<sup>187</sup> HUD had a goal of “expanding homeownership and equal housing opportunities, and assuring reasonable shelter costs.”<sup>188</sup> The program also required very low down payments.<sup>189</sup> Instead of expanding homeownership, this program was an epic fail and was ultimately discontinued in the 1970s.<sup>190</sup>

Even though each of the preceding efforts was, in some way, well intentioned with hopes of perpetuating the American Dream, the programs did very little to make homeownership a reality, particularly for minorities. Moreover, some private lenders who extended credit insured by the government used these policies to make homeownership more difficult for minority groups. For example, hundreds of thousands of minorities faced steering, redlining, and other forms of discrimination when attempting to utilize these programs.<sup>191</sup>

Congress passed the Community Reinvestment Act of 1977 (CRA)<sup>192</sup> to combat redlining and discrimination.<sup>193</sup> The CRA guidelines required financial institutions “to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound opinion of such institution.”<sup>194</sup> The CRA’s purpose was to increase competition in neglected minority and low-income communities. Implicit within the mandate was to eliminate discrimination and cultivate a non-discriminatory system for credit,

<sup>186</sup> See HOUSING AND URBAN DEVELOPMENT ACT OF 1968, Pub. L. No. 90-448, § 235, 82 Stat. 476, 476-85, *repealed by* Pub. L. No. 100-242, § 401(d), 101 Stat. 1898, 1899 (1988).

<sup>187</sup> See *id.*

<sup>188</sup> Sylvia C. Martinez, *The Housing Act of 1949: Its Place in the Realization of the American Dream of Homeownership*, 11 HOUSING POL’Y DEBATE 467, 469 (2000).

<sup>189</sup> See Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1312 (1995) (revealing that some home owners were required to produce down payments as low as \$200 and interest rates were reduced as low as 1%).

<sup>190</sup> See *id.* Some of the problems included “blockbusting” whereby realtors would cause consternation by “warning” owners in majority Caucasian neighborhoods of the dangers of the neighborhood becoming entirely black. A large majority of the owners, if not all of them, sold their homes, which resulted in “white flight.” See *id.* Similarly, FHA appraisers were bribed to actively participate in fraud by overlooking severe structural defects. *Id.* By 1979, 18% of Section 235 homes were either in foreclosure or assigned to HUD. See *id.* Therefore, instead of expanding homeownership to the underserved, the Home Owners Assistance program appears to have exacerbated the problem.

<sup>191</sup> See *id.* at 1317–18.

<sup>192</sup> See COMMUNITY REINVESTMENT ACT OF 1977, Pub. L. No. 95-125, tit. VIII, 91 Stat. 1147 (codified as amended at 12 U.S.C. §§ 2901–09 (2012)).

<sup>193</sup> See Schill & Wachter, *supra* note 189, at 1318.

<sup>194</sup> 12 U.S.C. § 2901(b) (1988 & Supp. V 1993).

including home mortgages.<sup>195</sup> The Federal Reserve Board and other federal agencies routinely conduct assessments of CRA institutions.<sup>196</sup> Part of the evaluation considers whether evidence of lending discrimination or other unlawful credit practices exists.<sup>197</sup>

President William J. Clinton announced his administration's "National Homeownership Strategy" (NHS) on November 5, 1994.<sup>198</sup> President Clinton's desire, in collaboration with various governmental and private industry actors,<sup>199</sup> was to expand homeownership by 8 million new homeowners between 1995 and 2000, up to a 67.5% homeownership rate.<sup>200</sup> The NHS involved 100 detailed actions<sup>201</sup> that combined "private and public sector resources and commitments to implement three broad approaches designed to make homeownership more affordable, accessible, and available."<sup>202</sup>

Some of the noteworthy Actions were:

- Action 29: Alternative Approaches to Homebuyer Transactions.<sup>203</sup>

<sup>195</sup> Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1301 (2014) (stating that reforms, like CRA, were created to "oblige banks to foster economic equality and to refrain from discrimination against customers or neighborhoods. These reforms focused on removing barriers to credit for people of color as well as low-income communities.").

<sup>196</sup> See *Community Reinvestment Act*, FED. RESERVE BD., [http://www.federalreserve.gov/communitydev/cra\\_about.htm](http://www.federalreserve.gov/communitydev/cra_about.htm) (last visited Mar. 26, 2015), *archived at* <http://perma.cc/4J6D-UW3P>.

<sup>197</sup> The federal agencies examine whether a financial institution has violated any of the following laws: Equal Credit Opportunity Act, Fair Housing Act, Section 32 of the Home Ownership and Equity Protection Act, Real Estate Settlement Procedures Act, Truth in Lending Act and Section 5 of the Federal Trade Act. See *The Community Reinvestment Act: Hearing Before the H. Comm. on Fin. Serv.*, 110th Cong. 1-1, 1-4 (2008) (testimony of Sandra F. Braunstein, Dir. of Consumer & Cmt'y Affairs).

<sup>198</sup> See THE NATIONAL HOMEOWNERSHIP STRATEGY: PARTNERS IN THE AMERICAN DREAM, U.S. DEP'T OF HOUSING & URB. DEV., 1-1 (May 1995); see also Pres. William J. Clinton, Remarks on the National Homeownership Strategy (Jun. 5, 1995), *available at* <http://www.presidency.ucsb.edu/ws/?pid=51448>, *archived at* <http://perma.cc/BB3R-9HD5>.

<sup>199</sup> See THE NATIONAL HOMEOWNERSHIP STRATEGY: PARTNERS IN THE AMERICAN DREAM, U.S. DEP'T OF HOUSING & URB. DEV., 1-1 (May 1995). "Partners in the American Dream" of the NHS included, in part: the American Bankers Association, American Land Title Association, Fannie Mae, Federal Home Loan Bank System, Freddie Mac, Mortgage Bankers Association of America, National Association for the Advancement of Colored People, National Association of Realtors, National Bankers Association, National Council of La Raz, National Urban League, Mortgage Bankers Association of America, U.S. Department of Agriculture, U.S. Department of Veterans Affairs, and U.S. Department of Housing and Urban Development. See *id.*

<sup>200</sup> See *id.* at 1-1.

<sup>201</sup> See *id.* at 1-1 to 1-10.

<sup>202</sup> *Id.* at 1-2.

<sup>203</sup> *Id.* at 1-7.

- Action 35: Home Mortgage Loan to Value Flexibility.<sup>204</sup>
- Action 36: Subsidies to Reduce Down Payment and Mortgage Costs.<sup>205</sup>
- Action 37: IRAs & 401(k)s for Homeownership Down Payments.<sup>206</sup>
- Action 39: Mortgage Options and Homebuyer Education.<sup>207</sup>
- Action 44: Flexible Mortgage Underwriting Criteria.<sup>208</sup>
- Action 45: Public-Private Leveraging for Affordable Home Financing.<sup>209</sup>
- Action 58: Federal & State Resources for Affordable Homeownership.<sup>210</sup>
- Action 71: Access to Mortgage Lending Data.<sup>211</sup>
- Action 72: Research on Fair Lending & Insurance Issues.<sup>212</sup>

The NHS would be declared a success by 1996 due to an almost 1% increase in the national homeownership rate from 64.2% in 1994 to 65.1% in 1995.<sup>213</sup> However, many believe that such easy access to mortgages set the stage for the real estate market crash.<sup>214</sup> Additionally, the number of subprime mortgage originations exponentially increased during the tenure of the NHS, from \$35 billion in 1994 to \$140 billion in 2000.<sup>215</sup> Moreover,

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<sup>204</sup> *Id.* at 1-7.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1-8.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1-9.

<sup>212</sup> *Id.*

<sup>213</sup> HUD Announces Sharpest Rise in Homeownership Rate in at Least 30 Years; Highest in Homeownership Rate since 1981; Over 1.4 Million New Homeowners Added in 1995, U.S. DEP'T OF HOUS. & URBAN DEV. Release No. 96-11 (Feb. 8, 1996).

<sup>214</sup> See, e.g., Brian Gilmore, Adrienne Decuire et al., *The Nightmare on Main Street for African-Americans: A Call for a New National Policy Focus on Homeownership*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 262, 269 (2008); Priya S. Gupta, *The American Dream, Deferred: Contextualizing Property After the Foreclosure Crisis*, 73 MD. L. REV. 523, 537 (2014); Whitney Ross, *The Coming Federal Housing Administration (FHA) Disaster*, THE AFFORDABLE MORTG. DEPRESSION (Apr. 3, 2009, 6:53 PM), <http://theaffordablemortgagedepression.blogspot.com/2009/04/coming-federal-housing-administration.html>, archived at <http://perma.cc/3CT4-326F>.

<sup>215</sup> Elizabeth Laderman, *Subprime Mortgage Lending and the Capital Markets*, FRBSF Economic Letter, FED. RESERVE BANK OF S.F. 1 (Dec. 28, 2001), available at <http://perma.cc/UL4H-R9P5>.

the share of subprime mortgages in the total mortgage market swelled from 5% in 1994 to 13.4% in 2000.<sup>216</sup>

President George W. Bush's administration embraced a national homeownership policy called the "Ownership Society."<sup>217</sup> Through the Ownership Society, President Bush pledged to have "more people owning their own home" because it is "[a] national interest that more people own their own home."<sup>218</sup> In 2004, the national homeownership rate reached its peak rate of 69.2%.<sup>219</sup> President Bush wanted to use this policy to increase the number of minority homeowners by 5.5 million by 2010.<sup>220</sup> Although homeownership rates increased for minorities through 2006, minority rates started to decline in 2007.<sup>221</sup>

The data show that African American homeownership rates were 2% lower, at around 43%, in 2013 than they were in 1990, at 45.2%, despite these national homeownership policy incentives.<sup>222</sup> The government and private industry created a system in which fair access to mortgage credit was a mirage that lenders utilized to victimize minorities and lower classes. The U.S. spent billions of dollars on these housing programs while banks made trillions of dollars in order to "fulfill the call" of these programs.<sup>223</sup> However, arguably, these programs created a system of widespread deception

<sup>216</sup> *Id.*

<sup>217</sup> *Expanding Home Ownership, Pres. George W. Bush's Record of Achievement*, THE WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/infocus/achievement/chap7.html> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/PJQ3-M7EL>.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *See supra* Parts III.A.2–3.

<sup>222</sup> Annie-Rose Strasser, *The Housing Crisis Pushed Black Homeownership Rate Below 1990 Level*, THINKPROGRESS (Mar. 12, 2012, 10:45 AM), <http://thinkprogress.org/economy/2012/03/12/442397/black-homeownership-plummets/>, *archived at* <http://perma.cc/5T3K-HC73>.

<sup>223</sup> Adam Carasso, Gillian Reynolds & C. Eugene Steuerle, *How Much Does the Federal Government Spend to Promote Economic Mobility and For Whom?*, URBAN.ORG, available at <http://perma.cc/7ZN3-DC98> (reporting the federal government spent approximately \$312.3 billion in homeownership programs in 2006); Robin Sidel & Saabira Chaudhuri, *U.S. Bank Profits Near Record Levels*, WSJ.COM (Aug. 11, 2014, 7:55 PM), <http://www.wsj.com/articles/u-s-banking-industry-profits-racing-to-near-record-levels-1407773976>. Banks and thrifts have earned an estimated \$955.5 billion in profits between 2004 and 2014. *Id.* This, despite, deficits in 4th quarter of 2008 and 1st, 2nd and 4th quarters in 2009. In addition to these profits, banks have received billions in federal government bailouts. *See Bailed Out Banks*, CNNMONEY.COM, <http://money.cnn.com/news/specials/storysupplement/bankbailout/> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/G5KA-KSWT>. Taken together, the clear winners during the housing and foreclosure crisis, and continuing, are banks and thrifts.

and fraud perpetrated by predatory wolves dressed in sheep's clothing (lenders), which the government tolerated, or tacitly authorized by inaction, until the mortgage lending system effectively drove countless minorities out of the mortgage market completely. As a result, those affected by the foreclosure crisis will likely refashion the definition of the American Dream to exclude homeownership entirely.

#### VI. FORECLOSURE NUMBERS BY RACE AND ETHNICITY

Foreclosure has adversely marked millions of Americans. During 2007 and 2009, lenders foreclosed on an estimated 2.5 million mortgages.<sup>224</sup> The data very clearly demonstrate that African American and Latino homeowners were disproportionately affected by foreclosures in relation to their share of mortgage originations.<sup>225</sup> Of the loans originated between 2005 and 2008, an estimated 8% of both African Americans and Latinos have lost their homes to foreclosures, while only 4.5% of whites lost their homes.<sup>226</sup>

Non-Hispanic whites represented approximately 56% of families foreclosed upon between 2007 and 2009.<sup>227</sup> On the other hand, 11.6% of African American and 16.2% of Latino families were foreclosed upon during this same time.<sup>228</sup> Although more non-Hispanic whites lost their homes through foreclosure than any other racial group, the impact of loss is much greater for African Americans and Latinos, whose estimated proportion of mortgage originations were 7.8% and 11.2%, respectively.<sup>229</sup> The Center for Responsible Lending estimated that African Americans lost 240,020 homes and Latinos lost 335,950 homes between 2007 and 2009.<sup>230</sup>

Interestingly, the suspicion that most of the foreclosure disparities would be concentrated in lower income classes was disproven by the data examined by the Center for Responsible Lending.<sup>231</sup> The data show similar levels of foreclosure rate disparities on all income levels—low, moderate, middle, and high. For instance, non-Hispanic Caucasians had an approximated 74.1%, African Americans possessed about 14.8%, and Latinos accounted for around 11% of the low-income mortgage originations between

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<sup>224</sup> Bocian et al., *supra* note 43, at 1.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 2.

<sup>228</sup> *Id.* at 2.

<sup>229</sup> *Id.* at 8.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 10.

2005 and 2008.<sup>232</sup> The percentages of completed low-income foreclosures from 2007 to 2009 were as follows: non-Hispanic whites accounted for 67.1% of the foreclosures, African Americans made up 21%, and Latinos accounted for 11.9%.<sup>233</sup>

The data further revealed that the African American share of mortgage origination rates declined at the middle and high-income levels.<sup>234</sup> In contrast, non-Hispanic Caucasians and Latinos mortgage origination slightly increased.<sup>235</sup> Unexpectedly, however, the rates of completed foreclosure indicated higher disparity ratios. Regarding the middle-income level, the completed foreclosures between 2007 and 2009 were: 66.5% for non-Hispanic whites, 14.5% for African Americans, and 13.2% for Latinos.<sup>236</sup> On the high-income level, the completed foreclosures from 2007 to 2009 were: 67.3% for non-Hispanic whites, 9.9% for African Americans, and 22.8% for Latinos.<sup>237</sup>

## VII. LENDING DISCRIMINATION DURING THE FORECLOSURE CRISIS

During the housing market meltdown, foreclosure actions uncovered discriminatory practices by lenders.<sup>238</sup> There is evidence that certain lenders methodically targeted certain minority groups, causing these borrowers to pay more for loans not because of their credit scores, but because of their national origin, ethnicity, or race.<sup>239</sup> Other reprehensible conduct by lenders during the real estate market depression included steering minorities into subprime mortgages<sup>240</sup> and refusing to lend in minority communities, in other words, redlining.<sup>241</sup>

After many years of lax enforcement, city, state, and the federal government finally took action to enforce lending discrimination laws. In response to the increasing number of fair lending discrimination cases, the

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<sup>232</sup> *Id.* The rates were similar for moderate-income borrowers. The number of moderate-income mortgage originations (with completed foreclosures) by race was: Caucasians (non-Hispanic)—75.4% (66.5%), African Americans—12.3% (18%), and Latinos—12.3% (15.5%). *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* On the middle-income level, African American represented 9.8% of these mortgage originations. *Id.* Regarding high-income mortgage originations, African Americans had 6.4% of these mortgage originations. *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Examining Lending Discrimination Practices and Foreclosure Abuses: Hearing Before the S. Comm. on the Judiciary, 112th Cong. 1 (2012)* [hereinafter *Examining Lending Discrimination*] (statement of Asst. Att’y Gen. Thomas E. Perez, U.S. DEP’T OF JUSTICE).

<sup>239</sup> *Id.*; Bocian et al., *supra* note 43, at 11.

<sup>240</sup> *Examining Lending Discrimination, supra* note 238.

<sup>241</sup> *Id.*

DOJ created the Fair Lending Unit within the Civil Rights Division's Housing and Civil Enforcement Section in 2010.<sup>242</sup> In its first two years, the Fair Lending Unit filed and/or resolved sixteen lending matters, which was an increase in the average of around two cases per year from 1993 to 2008.<sup>243</sup>

In 2011, the Fair Lending Unit filed eight lawsuits based on lending related matters and procured eight settlements, totaling about \$350 million.<sup>244</sup> The largest lending discrimination settlement was with Countrywide Financial Corporation.<sup>245</sup> In *United States v. Countrywide Financial Corporation, Countrywide Home Loans and Countrywide Bank*,<sup>246</sup> the Fair Lending Unit alleged that Countrywide Financial (Countrywide) engaged in systemic acts of discrimination based on race, national origin, and marital status in residential mortgage lending in violation of the Fair Housing Act and Equal Credit Opportunity Acts.<sup>247</sup> In its complaint, the government alleged that Countrywide's home mortgage lending policies permitted it to target Hispanic and African American mortgagors by placing them in subprime mortgages, and by charging higher loan fees and costs.<sup>248</sup> It is alleged that there were over 200,000 victims of Countrywide's discriminatory lending practices.<sup>249</sup> On December 28, 2011, the court issued a consent order that settled the lawsuit for \$335 million.<sup>250</sup> As a part of the agreement, should Countrywide decide to enter into the mortgage lending market, the Fair Lending Unit must review its lending practices and policies.<sup>251</sup>

Another complaint was filed in *United States v. C & F Mortgage Corporation* on September 30, 2011.<sup>252</sup> In its complaint, the government alleged violations of both the Fair Housing Act and ECOA.<sup>253</sup> African American and Hispanic mortgagors were charged higher interest rates and given lesser discounts than their similarly situated Caucasian counterparts, resulting in

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<sup>242</sup> *Id.* Dodd-Frank required the Federal Reserve to create the Fair Lending Unit. DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT OF 2010, Pub. L. No. 111-203, § 1013, 124 Stat. 2136 (2010).

<sup>243</sup> *Examining Lending Discrimination*, *supra* note 238.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> No. Civ. 11-10540, 2011 U.S. Dist. LEXIS 150263, at \*2 (C.D. Cal. Dec. 28, 2011).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Examining Lending Discrimination*, *supra* note 238.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Recent Fair Lending Cases, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/hce/lending\\_whatnew.php](http://www.justice.gov/crt/about/hce/lending_whatnew.php) (last visited Mar. 26, 2015), *archived at* <http://perma.cc/CB6U-5SEN>.

<sup>253</sup> *Id.*



a disparate impact on these protected groups.<sup>254</sup> This lawsuit was settled. C & F was required to pay its victims \$140,000, develop policies regarding its lending policies, stay on alert for future racial disparities, and provide adequate training for its employees.<sup>255</sup>

The Eastern District of Missouri entered an agreed order in *United States v. Midwest BankCentre* on June 28, 2011.<sup>256</sup> In this case, the government contended that Midwest BankCentre (Midwest) disparately provided mortgage lending services to borrowers in predominantly African American neighborhoods than to those in predominantly Caucasian neighborhoods, in other words, redlining.<sup>257</sup> Because of the agreed order, Midwest agreed to operate a full-service branch in an African American neighborhood and invest in the African American areas it redlined.<sup>258</sup>

Additionally, the DOJ settled a lawsuit with Wells Fargo for \$175 million in 2012.<sup>259</sup> The DOJ's chief complaint was that Wells Fargo, through its mortgage brokers, charged higher fees and rates to more than 30,000 minority borrowers compared to white borrowers who posed identical credit risks from 2004 to 2009.<sup>260</sup> Likewise, the DOJ alleged that Wells Fargo encouraged at least 4,000 minority borrowers into subprime mortgages while white borrowers with similar credit risks were given regular mortgage loans.<sup>261</sup>

In 2013, the City of Los Angeles filed two lawsuits against Citicorp and Wells Fargo, alleging lending discrimination and predatory lending practices.<sup>262</sup> The City of Los Angeles alleges that both Citicorp and Wells

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Midwest was to expend "\$900,000 in a special financing program to increase the amount of credit the bank extends" in the formerly redlined African-American areas. In addition, Midwest agreed to spend \$300,000 for consumer education and credit repair programs, and \$250,000 on customer outreach and promotion of their credit products and services. *Id.*

<sup>259</sup> Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charge*, N.Y. TIMES, Jul. 12, 2012, at B3.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* Wells Fargo announced that it ceased making subprime loans in 2008. *Id.* This moratorium lasted approximately six years. Recently, Wells Fargo began issuing subprime mortgages to applicants with at least a credit score of 600, a lower approval than the prior limit of 640. Peter Rudegeair & Michelle Conlin, *Wells Fargo Edges Back into Subprime as U.S. Mortgage Market Thaws*, REUTERS.COM (Feb. 14, 2014, 3:41 AM), <http://www.reuters.com/article/2014/02/14/us-banks-subprime-insight-idUSBREA1D07820140214>, archived at <http://perma.cc/8FBY-BX73>.

<sup>262</sup> Andrew Khouri, *LA Sues Wells Fargo & Citigroup, Alleging Predatory Lending*, LATIMES.COM (Dec. 5, 2013), <http://www.latimes.com/business/money/la-fi-mo-city>

Fargo engaged in redlining and predatory lending practices that resulted in disproportionate numbers of foreclosures in minority neighborhoods, loss of \$481 million in tax revenues for the City, and an estimated \$1.2 billion in maintenance costs on foreclosed homes.<sup>263</sup> The City later filed a similar lawsuit against Bank of America.<sup>264</sup>

These cases were a first step in battling mortgage discrimination. However, the effects of lending discrimination cannot be undone. Actively targeting minority borrowers or pushing minority borrowers into subprime mortgages when they qualify for prime mortgages is, unquestionably, lending discrimination. Arguably, the effect of the subprime mortgage crisis was felt on every economic level: locally, nationally, and internationally.<sup>265</sup> However, the fallout of disparate placement in subprime mortgages is on African Americans and Latinos. Such treatment has far reaching effects and will undoubtedly perpetuate problems with the real estate market for many years to come.

## VIII. THE EFFECTS OF LENDING DISCRIMINATION

### A. Increased Disparities in Homeownership Rates

Involuntary loss of homeownership, especially by foreclosure, is likely both emotionally and financially devastating to any homeowner. Personally, a homeowner sustains loss of his or her equity and severe damage to his or her credit rating,<sup>266</sup> and possibly loss of family and community.

One of the most disturbing characteristics of the foreclosure crisis is that a large majority of its burdens were unevenly borne by African Americans and Latinos because of lending discrimination. The many victims of lending discrimination continue to suffer through the consequences of

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-attorney-lending-20131205,0,2334127.story#axzz2nmE6lbwN, archived at <http://perma.cc/9K32-466J>.

<sup>263</sup> *Id.* The City of Los Angeles alleges that Citicorp and Wells Fargo's discriminatory lending practices resulting in 200,000 foreclosures in the Los Angeles area alone. *Id.*

<sup>264</sup> Gregory J. Wilcox, *Los Angeles Files Third Mortgage-Lending Discrimination Suit, This Time Against Bank of America*, L.A. DAILY NEWS (Dec. 9, 2013), <http://www.dailynews.com/business/20131209/los-angeles-files-third-mortgage-lending-discrimination-suit-this-time-against-bank-of-america>, archived at <http://perma.cc/U2PA-KD7V>.

<sup>265</sup> Hyra et al., *supra* note 16, at 179 (stating "The U.S. subprime foreclosure crisis was associated with credit restrictions and diminished consumer confidence, which devastated the broader national and international economies.").

<sup>266</sup> According to Transunion credit reporting agency, a foreclosure causes a 200-point drop in a credit score and will result in a 7-year wait before successfully applying for a new mortgage. *What is the Impact of Foreclosure on Your Creditworthiness?*, TRANSUNION, <http://www.transunion.com/personal-credit/credit-issues-bad-credit/impact-of-foreclosure> page (last visited Mar. 26, 2015), archived at <http://perma.cc/76NR-HUS2>.

delinquency or foreclosure without adequate resolution. For example, disparate treatment by lenders caused many of these homeowners to have lower credit scores as a result of delinquencies and foreclosure.<sup>267</sup> With lower credit scores and tightened credit-lending standards,<sup>268</sup> these victims will be re-victimized because of a difficult and steep climb to homeownership in the future. Consequently, lenders are more likely to deny minority and lower-income applicants for conventional loans<sup>269</sup> and the cycle of subprime financing will begin anew with more minorities composing the largest percentage of subprime mortgages.

One of the lessons learned from the crisis is that high cost and subprime mortgages to minorities correlated to the loss of homeownership by foreclosure. There was a higher incidence of foreclosure of subprime mortgages held by minorities from 2007 through 2009.<sup>270</sup> These losses may continue in the future. According to one report, a disproportionate number of African Americans, Asians, and Latinos are not yet out of the woods in the foreclosure crisis.<sup>271</sup> Therefore, the economic consequences of lending discrimination are not yet fully known and an autopsy of the housing and foreclosure crisis is premature.

Moreover, and particularly distressing, there is statistical evidence that African Americans are less likely to become homeowners again once homeownership is terminated.<sup>272</sup> Some explanations behind this failure to return to homeownership include a combination of ability (stricter credit standards bar a return) and desire (the homeowner simply does not want homeownership). Regardless of the reasons, home loans to African Americans dropped 80% from 1.3 million in 2005 to 280,000 in 2011.<sup>273</sup> Likewise, Latinos had a 76% decline in mortgage loans from 1.9 million in 2005 to just 442,000 in 2011.<sup>274</sup> Hence, an important and large segment of the population is not participating in the housing market.

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<sup>267</sup> *Id.*

<sup>268</sup> JOINT CTR. FOR HOUS. STUDIES OF HARVARD U., *supra* note 114, at 19 (stating “[a]ccess to credit remained limited in 2012.”).

<sup>269</sup> *Id.*

<sup>270</sup> Bocian et al., *supra* note 43, at 7, 10.

<sup>271</sup> Ilyce Glink, *Foreclosure Crisis Not over for Minorities*, CBSNEWS.COM (Jun. 25, 2013, 8:04 AM), [http://www.cbsnews.com/8301-505145\\_162-57590795/foreclosure-crisis-not-over-for-minorities/](http://www.cbsnews.com/8301-505145_162-57590795/foreclosure-crisis-not-over-for-minorities/), archived at <http://perma.cc/E8R9-A9R2>.

<sup>272</sup> Donald R. Haurin & Stuart S. Rosenthal, *The Sustainability of Homeownership: Factors Affecting the Duration of Homeownership and Rental Spells*, U.S. DEP’T OF HOUSING & URBAN DEV., OFFICE OF POLICY DEP’T & RESEARCH (Dec. 2004).

<sup>273</sup> Jim Carr, *The Challenges to Homeownership in America*, CTR. FOR AM. PROGRESS (Nov. 7, 2013) (relying upon ComplianceTech’s analysis of the Home Mortgage Disclosure Act data for 2011).

<sup>274</sup> *Id.*

In a speech before the Detroit Economic Club on February 8, 1954, Albert M. Cole, Administrator of the Housing and Home Finance Agency, stated:

It is very poor business to ignore one-tenth of our population as a housing market. It is worse than bad business. We are simply not living up to the standards of a free economic and a democratic society. For the housing economy has not been a free economy for the Negro.<sup>275</sup>

Unfortunately, this statement is still relevant for minorities approximately sixty years later. There were 44.5 million African Americans, alone or in combination with one or more races, in the United States on July 1, 2012.<sup>276</sup> The projected African American population in the United States, either alone or in combination with other races, for July 1, 2060 is 77.4 million.<sup>277</sup> Therefore, barriers to homeownership, such as lending discrimination, must be eradicated so that the housing market thrives economically, and more importantly, so that it serves the needs of all segments of the population.

### *B. Furtherance of Racial Segregation*

One of the concomitant, latent effects of inequitable lending is the furtherance of racial segregation<sup>278</sup> and lack of economic diversity.<sup>279</sup> One of the first pieces of legislation that recognized racial economic parity was the Civil Rights Act of 1866 (CRA 1866).<sup>280</sup> The CRA 1866 gave all citizens, regardless of race, color, or past servitude, the same rights to purchase, hold, or convey real or personal property, among other things, as white citizens possessed.<sup>281</sup> Although minority citizens were given the same rights to property as white citizens, there was no mention of where minority citizens could hold or purchase the property. Therefore, the ingrained belief that minorities were second-class citizens fashioned a system of segregation following the CRA 1866.

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<sup>275</sup> McGraw, *supra* note 178, at 177.

<sup>276</sup> *Profile America: Facts for Features*, U.S. CENSUS BUREAU, CB14-FF.03 (2014), [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb14-ff03.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb14-ff03.html) (last visited Mar. 26, 2015), *archived at* <http://perma.cc/4LPX-AN59>.

<sup>277</sup> *Id.*

<sup>278</sup> Hyra et al., *supra* note 16, at 177.

<sup>279</sup> *See supra* Part III.B.

<sup>280</sup> THE CIVIL RIGHTS ACT OF 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) & 42 U.S.C. §§ 1981–1982 (2002)).

<sup>281</sup> *Id.*

After tacitly adopting a “separate, but equal” philosophy,<sup>282</sup> the federal government became content with its policy or acceptance of racially segregated society. The 1930’s Fair Housing Administration’s underwriting guidelines openly embraced the “separate, but equal” principle that “racial homogeneity was essential for stability and desirability of residential areas.”<sup>283</sup> State Jim Crow laws kept racial and ethnic citizens separate from white citizens in housing, jobs, and schools.<sup>284</sup> Consequently, a pattern of racial segregation emerged in most areas of the U.S.<sup>285</sup>

It became the norm for residential communities to include restrictive covenants in deeds that typically limited homeowners and their successors from selling their residences to African Americans, Asians, Jews, or Latinos.<sup>286</sup> In *Shelley v. Kraemer*, home buyers challenged a restrictive covenant that precluded sales to African Americans.<sup>287</sup> The *Shelley* Court made such covenants unenforceable.<sup>288</sup> Even though explicit restrictive covenants were

<sup>282</sup> *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (J. Harlan, dissenting).

<sup>283</sup> Robert C. Weaver, *Housing Discrimination: An Overview, A Sheltered Crisis, The State of Fair Housing in the Eighties* (Sept. 26–27, 1983) (presented for the U.S. COMM. ON CIVIL RIGHTS).

<sup>284</sup> See Richard Delgado & Juan F. Perea, *Racial Templates*, 112 MICH. L. REV. 1133, 1148–50 (2014) (discussing historical treatment of racial groups under Jim Crow laws in America).

<sup>285</sup> SEPARATE IS NOT EQUAL, SMITHSONIAN NAT’L MUSEUM OF AM. HIST., <http://americanhistory.si.edu/brown/history/1-segregated/seggregated-america.html> (last visited Mar. 26, 2015), archived at <http://perma.cc/Y9X6-4JLE>.

<sup>286</sup> The following are examples of restrictive covenants. “This property shall not be used or occupied by any person or persons except those of the Caucasian race.” *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948). Sometimes the restrictive language was very pointed. For example,

[A]s a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.

*Kraemer*, 334 U.S. at 4–5 (1948); see also *Hansberry v. Lee*, 311 U.S. 32 (1940) (dealing with a restrictive covenant that prohibited any part of a certain area in Chicago from being “sold, leased, or permitted to be occupied by any person of the colored race” unless 95% of the neighbors agreed to waive the restriction). *Id.* at 37–38.

<sup>287</sup> 334 U.S. 1 (1948).

<sup>288</sup> *Id.* at 20–21. To be effective, racial consciousness and segregation must become a part of the social psyche. Therefore, there would be no need for laws to eliminate such atrocities. However, because racial segregation existed prior to *Shelley* and persists today, court rulings have had minimal effect on eradicating racism and the lack of opportunities that spring from it, such as fair lending or homeownership in any area. See Aleatra P.

void, *Shelley* did very little for the socially accepted and implicit segregation covenants that existed.

Two landmark Supreme Court cases attempted to challenge the culture of racial segregation. The plaintiffs in *Brown v. Board of Education of Topeka, Kansas*<sup>289</sup> challenged the accepted “separate, but equal” idea in education as espoused in the *Plessy* case.<sup>290</sup> Similarly, in *Jones v. Alfred Mayer Co.*,<sup>291</sup> the Court held that the CRA 1866 prohibited even private sellers from discriminating against persons of color in home sales.<sup>292</sup>

Although the challenges to segregation, along with other civil rights legislation,<sup>293</sup> were successful in deregulating segregation, the United States’ culture of racial segregation lingered. When minorities moved into “forbidden” areas in the past, white families quickly moved out, in what has been termed “white flight.”<sup>294</sup> In short time, these areas became mainly minority areas.<sup>295</sup> The data show that many cities where white flight occurred remained highly segregated in the 21st Century.<sup>296</sup> In part, this isolation contributed to the mortgage and foreclosure crisis. Access to fair lending was not readily available in minority communities.<sup>297</sup> Many seeking a home loan either could not receive a loan or received a high cost loan.<sup>298</sup>

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Williams, *Beneath the Stains of Time: The Banality of Race, the Housing and Foreclosure Crisis, and the Financial Genocide of Minorities*, 24 B.U. PUB. INT. L. J. \_\_\_\_ (forthcoming 2015) (discussing how the historical conceptualization and construct of produced a system of socio-legally accepted racial hierarchies).

<sup>289</sup> 347 U.S. 483 (1954).

<sup>290</sup> 347 U.S. at 488.

<sup>291</sup> 392 U.S. 409 (1968).

<sup>292</sup> 392 U.S. at 413.

<sup>293</sup> See, e.g., TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e *et seq.* (2012) (eradicating all state (and local) segregation); TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968, 42 U.S.C. §§ 3601–3631 (1968).

<sup>294</sup> Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVT. L. 89, 101 (1998) (defining “white flight” as the migration of Caucasian residents in a community when African Americans moved into the community).

<sup>295</sup> *Id.*

<sup>296</sup> Erica Ho, *Where Are the Top 10 Most Segregated Cities?*, TIME.COM (Mar. 31, 2011), <http://newsfeed.time.com/2011/03/31/where-are-the-top-10-most-segregated-cities/>, archived at <http://perma.cc/3659-P9ZR>; Harrison Jacobs, Andy Kiersz & Gus Lubin, *The 25 Most Segregated Cities in America*, BUSINESSINSIDER.COM (Nov. 22, 2013 10:46 AM), <http://www.businessinsider.com/most-segregated-cities-in-america-2013-11?op=1>, archived at <http://perma.cc/BN2Q-VADE>.

<sup>297</sup> Bocian et al., *supra* note 43, at 6.

<sup>298</sup> *Id.*

Although many have speculated about or opined on the roots of the real estate market/mortgage meltdown,<sup>299</sup> many have ignored “the role of structural and contextual forces, most notably various trajectories in inequality, uneven metropolitan development, and racial segregation.”<sup>300</sup> Predominantly heterogeneous minority neighborhoods were the hardest hit by the foreclosure crisis.<sup>301</sup> “Given that segregation concentrates the effects of any economic downturn spatially ... the rise in foreclosures hit black and Hispanic neighborhoods with particular force.”<sup>302</sup>

Generally, foreclosure affects a consumer’s mobility and, of course, his or her financial security.<sup>303</sup> Segregation is furthered because the victims of the crisis most likely need to live with family members, who often live in minority concentrated areas, to get their financial bearings.<sup>304</sup> In areas in which high numbers of foreclosures occurred, neighbors are also affected.<sup>305</sup> Home values decrease greatly.<sup>306</sup> As home values decrease, equity is lost. Because minorities’ net worth is closely tied to home equity,<sup>307</sup> they are less able to purchase outside of segregated areas. Consequently, the areas will likely remain depressed and, thus, predominantly minority.<sup>308</sup>

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<sup>299</sup> See, e.g., David Streitfeld & Gretchen Morgenson, *Building Flawed American Dreams*, N.Y. TIMES, Oct. 19, 2008, at A1 (reporting that causes of the financial crisis was due to “lax regulation, financial innovation gone awry, excessive debt, raw greed” and noting the players in the crisis were: “bankers, borrowers, developers, politicians and bureaucrats.”).

<sup>300</sup> Hyra et al., *supra* note 16, at 178 (arguing that already segregated minority communities are more susceptible to subprime lending because: (1) segregated communities are “more isolated and may be less experienced with purchasing financial products”; (2) “mainstream, prime lenders might avoid segregated, low-income areas”; (3) subprime lenders most likely target segregated areas with intense “marketing strategies”; and (4) “lenders may place a higher risk-based premium for those living in low- and moderate-income, segregated areas.”).

<sup>301</sup> Patrick Bayer, Fernando Ferreira & Stephen Ross, *The Vulnerability of Minority Homeowners in the Housing Boom and Bust* (Nat’l Bureau of Econ. Research, Working Paper No. 19020, 2013).

<sup>302</sup> See Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 630 (2010); see also Richard Rothstein, *Discriminatory Mortgage Lending Intensifies Racial Segregation*, THE ECONOMIC POLICY INSTITUTE BLOG (Jan. 25, 2012, 1:24 PM), <http://www.epi.org/publication/bp335-boa-countrywide-discriminatory-lending/> (asserting that “[l]ongstanding federal inaction in the face of widespread discriminatory mortgage lending practices helped create, and since has perpetuated, racially segregated impoverished neighborhoods”).

<sup>303</sup> Bocian et al., *supra* note 43, at 3.

<sup>304</sup> Rugh & Massey, *supra* note 302, at 630–31.

<sup>305</sup> Daniel Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POLICY DEBATE 57, 57 (2006).

<sup>306</sup> *Id.* at 58.

<sup>307</sup> See *supra* Part IV.

<sup>308</sup> See generally Myron Orfield, *Segregation Is Still Wrong and Still Pervasive*, THE RACE POVERTY ENVIRONMENT, Fall 2008, at 62, available at <http://perma.cc/7W98-PYAC>.

Segregation is harmful to everyone for several reasons. First, those who are marginalized have an uphill climb in receiving academic and occupational opportunities.<sup>309</sup> Second, because poverty is more prevalent in segregated predominantly-minority areas, crime is also more likely to increase. According one scholar, “[l]ong-term racial and social isolation in neighborhoods with high percentages of single parent families also leads to the formation of gangs and other forms of ‘oppositional culture’ and a form of linguistic isolation, which limits employment opportunities later in life.”<sup>310</sup> Third, members of society remain ignorant of each other’s backgrounds and experiences, making it difficult to have a democratic political system that accurately represents the melting pot of America. Finally, the economy cannot be carried by one segment of the population. Segregated minority communities are generally impoverished. Like segregation, poverty becomes a generational condition.<sup>311</sup> As a result, economic stability becomes hard to maintain.

### *C. Slower Climb out of the Housing and Economic Crises*

Although the Great Recession officially ended in 2009,<sup>312</sup> there is plenty of evidence that the recession will continue for many years. Elizabeth Duke of the Federal Reserve Board acknowledged that “[t]he economy normally has some self-correcting mechanisms ...”,<sup>313</sup> which typically curtail a continued downward spiral of a housing market crisis. However, Duke further noted that none of the self-correcting mechanisms have worked in this recent crisis.<sup>314</sup>

Perhaps the self-correcting mechanisms, such as a drop in home prices to increase the supply and demand,<sup>315</sup> are unsuccessful because they do not exactly get to the root of the cause of the crisis. Many are discounting the fact that Caucasians, who have a high percentage of ownership with 73.4% in

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<sup>309</sup> *Id.* (noting that children from minority, low-income neighborhoods have many barriers to educational and occupational achievements).

<sup>310</sup> *Id.*

<sup>311</sup> Myron Orfield, *Urban Schooling and the Perpetuation of Job Inequality in Metropolitan Chicago*, in *URBAN LABOR MARKETS AND JOB OPPORTUNITY* 161, 162 (George E. Peterson & Wayne Vroman eds., 1992) (focusing on Chicago’s labor market to demonstrate lack of upward mobility in minority neighborhoods).

<sup>312</sup> IRELAND, *supra* note 101, at 1 (defining the “Great Recession” as occurring between the years 2007–2009).

<sup>313</sup> Elizabeth Duke, Bd. of Governors of Fed. Reserve Sys., Speech at the Federal Reserve Board Policy Forum: The Housing Market Going Forward: Lessons Learned from the Recent Crisis (Sept. 1, 2011), *available at* <http://perma.cc/SY7Q-425X>.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*



the 4th quarter of 2013,<sup>316</sup> have better access to the American Dream. On the other hand, minorities, particularly African Americans and Latinos, have been pushed out of the housing market by the meltdown.<sup>317</sup> Furthermore, it is estimated that minority populations will continue to grow and “will constitute 7 out of 10 net new household formations over the next decade.”<sup>318</sup> Therefore, the biggest gains in homeownership demands are in minority communities.<sup>319</sup> Failing to open the doors for homeownership to these groups will only serve to prolong the housing crisis.<sup>320</sup>

Hopefully, these opportunities will soon take shape to avoid this type of economic crisis in the future. It is important to learn from past mistakes so that we do not repeat them. The first step is to provide access to fair lending. The goal, of course, should include: (1) implementation of policies that reinforce homeownership for new minority homeowners; and (2) create methods that entice would-be “boomerang” minority homeowners of all communities back into the real estate market after foreclosure.

#### *D. Re-Defining the American Dream*

The American Dream has been a part of the fabric of the United States’ national identity for nearly a century.<sup>321</sup> It is aspirational. The American Dream typically includes the right and expectation to get married, have a family, and buy a home.<sup>322</sup> It involves the dogged determination that one can accomplish any set goal.<sup>323</sup> Even those on the lower rungs of the economic ladder could dream of upward mobility by pulling themselves up by their bootstraps.<sup>324</sup>

This latest downturn possibly tarnished the American Dream more than any event in history. If it is true that the future generation learns from its preceding generation, then the future generation of minorities will likely believe that the American Dream has become too elusive. Thus, to these

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<sup>316</sup> U.S. CENSUS BUREAU NEWS, *supra* note 13, at 9.

<sup>317</sup> Bocian et al., *supra* note 43, at 6.

<sup>318</sup> Carr, *supra* note 273, at 4.

<sup>319</sup> U.S. CENSUS BUREAU NEWS, *supra* note 13, at 9. African American and Latino homeownership rates are 43.1% and 45.3%, respectively. *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> ADAMS, *supra* note 2, at 214–15.

<sup>322</sup> SANDRA L. HANSON & JOHN KENNETH WHITE, *The Making and Persistence of the American Dream*, in THE AMERICAN DREAM IN THE 21ST CENTURY 8, 9–10 (2011), available at <http://perma.cc/3AVG-DF4V>.

<sup>323</sup> See JIM CULLEN, THE AMERICAN DREAM: A SHORT STORY OF AN IDEA THAT SHAPED A NATION 60 (2003).

<sup>324</sup> *Id.*

future Americans, the American Dream will remain just that—a dream—or even a myth.

United States housing policies were supposed to make the American Dream more attainable for those with limited economic opportunities. One could argue that housing policies have worked to lift lower income Caucasians firmly into the middle class since the 1930s.<sup>325</sup> However, housing policies have done very little to elevate minorities.<sup>326</sup> Moreover, the foreclosure and housing crisis has altered the definition of the American Dream. Instead of being vehicles for advancement, U.S. housing policies became means by which lenders pilfered the American Dream from some Americans who have historically struggled and who continue to fight for basic civil rights. As John Truslow Adams wrote in 1931, “[e]quality of outcome ... is not the same thing as equality of opportunity, and equality of opportunity is at the heart of the American vision.”<sup>327</sup>

Although the laws are clear as to what constitutes discrimination, federal agencies failed to “mind the store” so that these laws could be enforced. Prior to 2010, enforcement duties shared by numerous regulating agencies were a bureaucratic nightmare.<sup>328</sup> With so many “cooks in the kitchen,” things were likely to get burned. Unfortunately, it was largely certain groups of borrowers that were “burned” by lending discrimination. Even though there were complaints of discriminatory practices or policies before 2009, the agencies were slow to act or failed to act completely. It was reported that the OCC brought four formal actions under the ECOA between 1987 and July 2009, and made no referrals to the DOJ.<sup>329</sup> The Office of Thrift Supervision did not make any referrals to the DOJ during this same period.<sup>330</sup> Things changed when the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law.<sup>331</sup> The question remains whether Dodd-Frank and the subsequent regulations and actions are enough to prevent another crisis and lending discrimination in the future.

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<sup>325</sup> Structural Racialization: A Systems Approach to Understanding the Causes and Consequences of Racial Inequity, KIRWAN INSTITUTE (May 2012) at 2, *available at* <http://perma.cc/TRU7-HTWC> (pointing out the institutional racism of the Fair Housing Administration’s Underwriting policies that favored white citizens while African Americans were marginalized). The effects of these policies still reverberate today. *Id.*

<sup>326</sup> *Id.* (observing that the modern day belief is that suburbs are havens for white families, “rich with opportunity” while “racially segregated central cities are dangerously lacking in opportunity”).

<sup>327</sup> Meacham, *supra* note 4, at 6.

<sup>328</sup> Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 NW. J.L. & SOC. POL’Y 455, 473–74 (2012).

<sup>329</sup> Bocian et al., *supra* note 43, at 18.

<sup>330</sup> *Id.* This was despite the fact that the DOJ filed a complaint against Mid America Bank alleging a practice or patten of redlining in 2002. *Id.*

<sup>331</sup> *See infra* Part IX.

## IX. MECHANISMS TO ERADICATE LENDING DISCRIMINATION

President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law on July 21, 2010.<sup>332</sup> Title XIV of Dodd-Frank, the Mortgage Reform and Anti-Predatory Lending Act, modified the Truth-in-Lending Act (TILA)<sup>333</sup> “by setting forth prudent lending standards, consumer protections for both prime and subprime (high cost) mortgages, mortgage servicing guidelines, appraisal requirements, and loan modification/work-out procedures.”<sup>334</sup>

Historically, four major federal regulators and agencies oversaw mortgage lending and consumer protection.<sup>335</sup> First, the U.S. Department of Housing and Development’s (HUD) mission was, and is, to “create strong, sustainable, inclusive communities” and reinforce “the housing market to bolster the economy and protect consumers.”<sup>336</sup> HUD’s Office of Housing oversees the Fair Housing Administration.<sup>337</sup> Second, the Federal Reserve Board’s (FRB) responsibilities included regulation of “banking institutions to ensure the safety and soundness of the nation’s banking and financial systems to protect the credit rights of consumers.”<sup>338</sup> One of the FRB’s expressed functions included administration of nationwide banking and credit policies.<sup>339</sup> Third, the Federal Deposit Insurance Corporation’s (FDIC) declared mission encompassed examination and supervision of financial institutions for safety, soundness, and consumer protection.<sup>340</sup> Finally, the Office of Comptroller of the Currency (OCC) regulated and supervised all national banks and federal savings associations.<sup>341</sup> The OCC’s goal involved ensuring that the banks and the savings associations it regulated operated “in a safe and sound manner and in compliance with laws requiring fair treatment of their customers and fair access to credit and financial products.”<sup>342</sup>

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<sup>332</sup> Dodd-Frank Act, Pub. L. No. 111-203, 124 STAT. 2136 (2010).

<sup>333</sup> Truth in Lending Act § 129b, 15 U.S.C. § 1639b (2012).

<sup>334</sup> Williams, *supra* note 328, at 503.

<sup>335</sup> *Id.* at 474.

<sup>336</sup> *Id.* (quoting *Mission*, U.S. DEP’T OF HOUSING & URBAN DEV., available at <http://perma.cc/HT29-9RAF> (last visited Mar. 26, 2015)) (internal quotations omitted).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* (quoting *The Federal Reserve System Purposes & Functions*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. 1 (9th ed. 2005), archived at <http://perma.cc/EQ2U-785A>) (internal quotations omitted).

<sup>339</sup> *Id.*

<sup>340</sup> Williams, *supra* note 328, at 474 (quoting *FDIC Mission, Vision, and Values*, FED. DEPOSIT INS. CORP. (May 4, 2009), archived at <http://perma.cc/4KP2-CN5V>).

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* (quoting *About the OCC*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, archived at <http://perma.cc/7ZML-24GB>) (internal quotations omitted).

In 2010, the Dodd-Frank Act<sup>343</sup> created the Consumer Financial Protection Bureau (CFPB) to draft rules, and supervise and enforce federal consumer protection laws.<sup>344</sup> There are still collective enforcement duties among the regulatory agencies, but creation of the CFPB streamlined enforcement of ECOA and FHA by theoretically cutting out some of the bureaucratic red tape that naturally existed between regulators with overlapping responsibilities.<sup>345</sup> Although many heralded the arrival of the CFPB, critics complained that the CFPB's power was both unfettered and undefined.<sup>346</sup>

#### A. Consumer Financial Protection Bureau

The CFPB has several functions. The CFPB is imbued with the authority to create, supervise, and enforce regulations concerning consumer financial services and products.<sup>347</sup> Among other things, the CFPB is empowered to draft regulations that prohibit “unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age.”<sup>348</sup>

Additionally, the CFPB has the power to file civil actions to enforce the ECOA on its own or refer fair lending abuses to the U.S. Attorney General.<sup>349</sup> The Office of Administrative Adjudication (OAA), which is “an independent judicial office,” is housed “within the [CFPB].”<sup>350</sup> The OAA hears enforcement actions brought by the CFPB.<sup>351</sup> The OAA's administrative judges

<sup>343</sup> Dodd-Frank Act, Pub. L. No. 111-203, 124 STAT. 2136 (2010).

<sup>344</sup> Williams, *supra* note 328, at 475.

<sup>345</sup> See The Economist, *The Consumer Financial Protection Bureau: Blessing or Bureaucracy*, THE ECONOMIST (Jan. 6, 2012, 7:57 PM), available at <http://perma.cc/377J-XJDN>; Ammon Simon, *Bureaucracy Unbound? The Consumer Protection Finance Bureau*, NATIONAL REVIEW ONLINE (Mar. 7, 2012, 4:35 PM), available at <http://perma.cc/W34W-G5AA> (stating that the “CFPB lacks any significant checks and balances on its power to interpret our country's consumer-protection laws” and calling for reformation of the agency so that its biased enforcement of consumer protection laws does not stifle economic growth). *Id.*

<sup>346</sup> The Economist, *supra* note 345.

<sup>347</sup> 15 U.S.C. § 1639b(e)(1)–(2) (2012).

<sup>348</sup> 15 U.S.C. § 1639b(c)(3)(C) (2012). The CFPB must confer with the applicable prudential regulator or agency before proposing a rule or regulation. *Id.* § 1002 (24). Prudential regulators or agencies include the FDIC, OCC, FRB, and National Credit Union Administration. *Id.*

<sup>349</sup> 15 U.S.C. § 1691e(g) (2012).

<sup>350</sup> *Administrative Adjudication*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/administrativeadjudication> (last visited Mar. 26, 2015), archived at <http://perma.cc/PF54-6UMG>.

<sup>351</sup> *Id.*

follow the Rules of Practice for Adjudication Proceedings,<sup>352</sup> and publish notices on the CFPB website to provide procedural guidance.<sup>353</sup> The CFPB pursued five actions in 2012, thirteen actions in 2013, and fifteen actions as of October 2014 for its 2014 docket.<sup>354</sup>

Since its creation, the CFPB has tackled the enforcement of four major residential mortgage laws. The CFPB has amended the Equal Credit Opportunity Act,<sup>355</sup> Home Disclosure Mortgage Act (HMDA),<sup>356</sup> Real Estate Settlement Procedures Act (RESPA),<sup>357</sup> and Truth in Lending Act.<sup>358</sup> Five of the enforcement actions brought by the CFPB as of July 2014 were related to section 8 of RESPA.<sup>359</sup>

### *1. Amendment to the Equal Credit Opportunity Act (Regulation B)*

Title 15 U.S.C. § 1691b authorizes the CFPB to impose regulations that facilitate compliance and aid in carrying out the purposes of the Equal Credit Opportunity Act.<sup>360</sup> Such action by the CFPB could include any adjustments it deems appropriate and necessary to prevent the circumvention or evasion of the ECOA, as well as to facilitate compliance with the ECOA.<sup>361</sup> Effective for applicants on or after January 18, 2014, the CFPB prescribed

<sup>352</sup> Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39,058 (June 29, 2012).

<sup>353</sup> See *Administrative Adjudication*, *supra* note 350.

<sup>354</sup> *Id.*

<sup>355</sup> 15 U.S.C. § 1691(a)–(f) (1992).

<sup>356</sup> Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801–2810 (2012).

<sup>357</sup> Real Estate Settlement Procedure Act, 12 U.S.C. § 2601-617 (2012); Real Estate Settlement Procedures Act, 24 C.F.R. § 3500 (2012).

<sup>358</sup> *Truth in Lending Act*, 15 U.S.C. §§ 1601–1667 (2012).

<sup>359</sup> See, e.g., Paul Taylor et al., 2013 C.F.P.B. 0001 (2013), available at <http://perma.cc/9G38-9RHU> (resulting in a consent order with disgorgement of over \$118,000); Fidelity Mortg. Corp. and Mark Figert, 2014 CFPB 0001 (2014), available at <http://perma.cc/6EGJ-2A24> (resulting in \$54,000 civil monetary penalty to the Civil Penalty Fund); PHH Corp. et al., 2014 C.F.P.B. 0002 (2014), available at <http://perma.cc/8MR9-CAKA> (seeking a permanent injunction to prevent future violations of § 8 of RESPA, disgorgement of money, restitution to borrowers, civil penalties, and prosecution costs); 1st Alliance Lending, LLC, 2014 CFPB 0003 (2014), available at <http://perma.cc/H7ED-BFLP> (parties agreeing to a consent order of \$83,000 civil monetary penalty payable to the Civil Penalty Fund); JRHBW Realty, Inc., 2014 CFPB 0005 (2014), available at <http://perma.cc/TS4Q-6VJ9> (resulting in consent order with \$500,000 civil penalty to the Civil Penalty Fund); Stonebridge Title Serv., Inc., 2014 CFPB 0006 (2014), available at <http://perma.cc/7RH-7M9Z> (\$30,000 civil monetary penalty to the Civil Penalty Fund). The above represent the enforcement actions filed before the OAA only. The CFPB filed other actions in the Southern District Court of Florida as well. See, e.g., *infra* note 383.

<sup>360</sup> 15 U.S.C. § 1691 (2013).

<sup>361</sup> 15 U.S.C. § 1691b(a) (2013).

the “Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations under the Equal Credit Opportunity Act (Regulation B),”<sup>362</sup> known as the “ECOA Valuations Rule.”

Under the ECOA Valuations Rule, creditors must comply with two main requirements. First, creditors must disclose to applicants that they have the right to receive copies of appraisals and all written valuations within three business days.<sup>363</sup> Second, the new rule mandates that creditors automatically send free copies of home appraisal and written valuations to prospective borrowers as soon as such appraisals or valuations are finished.<sup>364</sup> Creditors must send the appraisal copies even if they decided not to extend credit or if the applicant does not fully complete the credit application process or otherwise withdraws his or her credit application.<sup>365</sup>

The former Regulation B only compelled creditors to notify applicants of their right to request a copy of appraisals and to provide copies of appraisals upon request by the applicant.<sup>366</sup> The new Regulation B is broader in scope than the former because it applies to all written valuations and not only appraisals per the old rule.

The purpose of the ECOA is to bar discrimination based on prohibited factors.<sup>367</sup> As stated earlier, discrimination can arise at any stage in the home purchase process.<sup>368</sup> There is clear evidence that inflated or deflated home appraisals played a significant role in the housing and foreclosure meltdown.<sup>369</sup> It is apparent that the CFPB is concerned with appraisers or valuers who use prohibited discriminatory factors in assessing the value of a residence in connection with an application for credit. Thus, the CFPB is further working to curtail discrimination at this stage in the lending process.

## *2. Amendment to the Home Mortgage Disclosure Act (Regulation C)*

Mortgage lenders in metropolitan areas are required to “collect, report, and disclose data about mortgage loan applications, originations, and purchases”<sup>370</sup> for new home loans, refinances, or home improvement loans

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<sup>362</sup> Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 1002.14 (2014).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* The amendments to Regulation B are available at <http://perma.cc/TD3D-75S7>.

<sup>367</sup> *See supra* Part II.B.

<sup>368</sup> *See supra* Part II.B.

<sup>369</sup> Kenneth R. Harney, *Inflated Appraisals Swelling Mortgage-Fraud Schemes*, SEATTLE TIMES, Apr. 21, 2007, available at <http://perma.cc/ULA8-LN7V>.

<sup>370</sup> 12 U.S.C. §§ 2803(h) (2012).

under the Home Mortgage Disclosure Act (HMDA)<sup>371</sup> and Regulation C.<sup>372</sup> Among other things, the data disclosed must include information related to the type of home loan, amount of the loan, location of the property, and the race, ethnicity, income, and sex of the applicant.<sup>373</sup> HMDA data collection is used to alert enforcement agencies of “possible discriminatory lending patterns and assist in the enforcement of anti-discrimination laws.”<sup>374</sup> It also aids enforcement agencies in assessing whether the financial institutions satisfy the housing needs of particular communities they service.<sup>375</sup>

The CFPB implemented new rules related to the data collected from 2014 onward.<sup>376</sup> The agency modified the definition of “[f]inancial institution” under Section 1003.2 to raise the asset-size exemption threshold to \$43 million from \$42 million, effective January 1, 2014.<sup>377</sup> Therefore, this amendment exempts all “financial institutions” with assets under \$43 million from HMDA data collection for 2014.<sup>378</sup>

The CFPB recently sent an unequivocal message to all lending institutions covered under the HMDA of the importance of accurately reporting the required data. For instance, the CFPB took action against Mortgage Master, Inc.<sup>379</sup> and Washington Federal<sup>380</sup> for inaccurately providing information under the HMDA. The CFPB required Mortgage Master, Inc. to pay \$425,000 in civil penalties.<sup>381</sup> Washington Federal had to pay \$34,000 in civil penalties.<sup>382</sup> The CFPB’s Director Richard Cordray reaffirmed the importance of the data received under the HMDA. He said, “[w]hen financial institutions report inaccurate information, it obstructs the purpose of the Home Mortgage Disclosure Act and makes it more difficult for the CFPB

<sup>371</sup> Home Mortgage Disclosure Act (Regulation C), 12 C.F.R. § 1003 (2013).

<sup>372</sup> 12 U.S.C. §§ 2801–810 (2012); *see also* Home Mortgage Disclosure (Regulation C): Adjustment to Asset-Size Exemption Threshold, 78 Fed. Reg. 79,285 (Dec. 30, 2013) (to be codified at 12 C.F.R. pt. 1003).

<sup>373</sup> 12 U.S.C. § 2803(a)(2) (2012); *see also* Stephanie Caputo, *The ABC’s of HMDA, HMDA DATA AND LENDING OPPORTUNITIES* (Summer 2005), *available at* <http://perma.cc/HWJ9-JYM7>.

<sup>374</sup> Caputo, *supra* note 373.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> 12 C.F.R. § 1003.2 (2012).

<sup>378</sup> *Id.*

<sup>379</sup> Mortgage Master, Inc., 2013 C.F.P.B. 0006 (2013), *available at* <http://perma.cc/PM9Z-U87B>.

<sup>380</sup> Washington Federal, 2013 C.F.P.B. 0005 (2013), *available at* <http://perma.cc/G3BG-BKYP>.

<sup>381</sup> Mortgage Master, Inc., 2013 C.F.P.B., at 0006.

<sup>382</sup> Washington Federal, 2013 C.F.P.B., at 0005.

to discover and stop discriminatory lending.”<sup>383</sup> Cordray continued that the Mortgage Master, Inc. and Washington Federal actions should serve as “a strong signal that no lending institution—whether bank or nonbank—should be able to mislead the public with erroneous data.”<sup>384</sup>

### 3. *Amendment to the Real Estate Settlement Procedures Act (Regulation X)*

The Real Estate Settlement Procedures Act (RESPA)<sup>385</sup> protects consumers by requiring lenders, mortgage servicers, or brokers to disclose mortgage settlement costs and barring certain uses of escrow accounts and kickbacks.<sup>386</sup> In 2010, Dodd-Frank transformed RESPA and other mortgage servicing procedures. The CFPB made both technical and substantive modifications to Regulation X, effective January 10, 2014.<sup>387</sup> These amendments included notice requirements regarding servicing transfers and added notice measures pertaining to borrowers’ error resolution services and requests for information.<sup>388</sup> Other new provisions included “escrow payments, force-placed insurance, general servicing policies, procedures, and requirements, early intervention, continuity of contact, and loss mitigation.”<sup>389</sup> Kickbacks unnecessarily increased costs of mortgagors for mortgagors during the foreclosure crisis.<sup>390</sup> The CFPB has taken steps to eradicate kickbacks by pursuing enforcement actions against lenders, mortgage brokers, and mortgage servicers.<sup>391</sup>

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<sup>383</sup> CFPB Takes Action Against Nonbank & Bank for Inaccurate Mortgage Loan Reporting, CONSUMER FIN. PROT. BUREAU (Oct. 9, 2013), available at <http://perma.cc/GE2W-N29E>.

<sup>384</sup> *Id.*

<sup>385</sup> 12 U.S.C. §§ 2601–2617 (2012).

<sup>386</sup> FED. RESERVE BD., *Regulation X: Real Estate Settlement Procedures Act*, CONSUMER COMPLIANCE HANDBOOK (Nov. 2013), available at <http://perma.cc/5XZ2-946K>.

<sup>387</sup> Real Estate Settlement Procedures Act, 12 C.F.R. § 1024 (2012).

<sup>388</sup> *Id.*

<sup>389</sup> Consumer Affairs Letter, *Regulation X: Real Estate Settlement Procedures Act*, FED. RESERVE BD., available at <http://perma.cc/NNH6-NBD9>.

<sup>390</sup> Kenneth R. Harney, *Alleged Kickbacks Paid by Home Buyers Get Attention from Federal Agency*, WASH. POST, May 31, 2013, available at <http://perma.cc/AN2J-WUV9>.

<sup>391</sup> See *Administrative Adjudication*, *supra* note 350. See also Consumer Fin. Prot. Bureau v. Genworth Mortg. Ins. Corp., 1:13 cv 21183 (S.D. Fla. 2013) (consent order resulting in \$4.5 million in civil penalty); Consumer Fin. Prot. Bureau v. Mortg. Guaranty Ins. Corp., 1:13 cv 21187 (S.D. Fla. 2013) (\$2,650,000 civil penalty); Consumer Fin. Prot. Bureau v. Radian Guaranty Inc., 1:13 cv 21188 (S.D. Fla. 2013) (\$3,750,000 civil penalty); Consumer Fin. Prot. Bureau v. United Guaranty Corp., 1:13 cv 21189 (S.D. Fla. 2013) (\$4,500,000 civil penalty).



4. *Amendment to the Truth in Lending Act (Ability-To-Repay Rule)*  
*(Regulation Z)*

One of the most significant rules by the CFPB is the amendment of Regulation Z,<sup>392</sup> which took effect on January 10, 2014.<sup>393</sup> The “Ability-to-Repay Rule” implements the Truth in Lending Act (TILA) and sections 1411–1412, 1414 of Dodd-Frank.<sup>394</sup> This rule is designed to right the wrongs of the recent mortgage crisis.<sup>395</sup> The Ability-to-Repay Rule expands the 2008 revisions of Regulation Z by the Federal Reserve Board (FRB).<sup>396</sup> The FRB’s rule prohibited lending higher-priced loans to borrowers without consideration of the consumer’s ability to repay the debt.<sup>397</sup> In addition to expanding the FRB’s rule, the CFPB amendment of Regulation Z creates and clarifies standards for Dodd-Frank’s new class of mortgages, “Qualified Mortgages” (QMs).<sup>398</sup>

The FRB’s revision only set forth standards for higher-priced mortgages, not prime mortgages.<sup>399</sup> Higher-priced mortgages were defined as:

Consumer-purpose, closed-end loans secured by a consumer’s principal dwelling and having an annual percentage rate (APR) that exceeds the average prime offer rates for a comparable transaction published by the Board by at least 1.5 percentage points for first-lien loans, or 3.5 percentage points for subordinate lien loans.<sup>400</sup>

The FRB set up four requirements for lenders related to these loans. First, lenders were compelled to take into account a consumer’s ability to repay

<sup>392</sup> Ability-to-Repay & Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6,408 (Jan. 30, 2013) (to be codified at 12 C.F.R. pt. 1026) [hereinafter Ability-to-Repay].

<sup>393</sup> *Mortgage Rules, What the New CFPB Mortgage Rules Mean for Families and Homeowners*, CONSUMER FIN. PROT. BUREAU, available at <http://perma.cc/5FW9-GVKC>.

<sup>394</sup> Ability-to-Repay, *supra* note 392, at 6,408.

<sup>395</sup> *Id.* (noting that a large number of mortgages were made without considering borrowers’ ability to repay and/or through loose underwriting standards). One of Dodd-Frank’s objectives was to standardize loan products. The hope was that consumer protection would be the byproduct of this standardization. See Tanya D. Marsh, Statement Before the House Committee on Oversight and Government Reform: Regulatory Burdens: The Impact of Dodd Frank on Community Banking (July 18, 2013), available at <http://perma.cc/UC6Q-S3AM>.

<sup>396</sup> Truth in Lending Act (Regulation Z), 73 Fed. Reg. 44,522 (2008).

<sup>397</sup> *Id.*

<sup>398</sup> Ability-to-Repay, *supra* note 392, at 6,408.

<sup>399</sup> Truth in Lending Act (Regulation Z), *supra* note 396, at 44,522.

<sup>400</sup> *Id.* at 44,522–23.

from sources other than collateral.<sup>401</sup> Second, prepayment penalties were not allowed except under certain circumstances.<sup>402</sup> Third, creditors were required to verify borrowers' income and assets.<sup>403</sup> Fourth, creditors were required to set up escrow accounts for taxes and insurance, which could be canceled one year after the loan was consummated.<sup>404</sup>

Under Dodd-Frank, QMs are mortgages underwritten to match specific federal law standards; they indicate that a creditor has taken into account reasonable underwriting factors in the extension of credit.<sup>405</sup> The CFPB's amendments set forth minimum underwriting standards with which a lender must comply. The following are the eight factors that a lender must take into account:

- (1) Current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations, alimony, and child support; (7) the monthly debt-to-income ratio or residual income; and (8) credit history.<sup>406</sup>

To further ensure responsible underwriting, the revision requires lenders to "generally use reasonably reliable third-party records to verify the information they use to evaluate the factors."<sup>407</sup>

Each mortgagor must have the ability to repay the mortgage, which means that the borrower must have a debt to income ratio of 43% or less.<sup>408</sup> The QM standard requires that a lender compute a borrower's monthly payments "based on the highest payment that will apply in the first five years of the loan" in addition to debt to income ratio requirement.<sup>409</sup> In addition, lenders cannot charge high points or fees. For example, for a loan of \$100,000, a lender cannot charge points or fees greater than 3%.<sup>410</sup> Additionally, mortgagees are prohibited from steering borrowers into higher cost mortgages.<sup>411</sup> Further, the loan cannot have features that are deemed "risky",

<sup>401</sup> *Id.* at 44,523.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> Truth in Lending Act (Regulation Z), *supra* note 396, at 44,523.

<sup>405</sup> Lisa Prevost, "Qualified" Loans, *Redefined*, N.Y. TIMES, Nov. 10, 2013, at RE10.

<sup>406</sup> Ability-to-Repay, *supra* note 392, at 6408.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 6409

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*; see also CONSUMER FINANCIAL PROTECTION BUREAU, MORTGAGE RULES: WHAT THE NEW CFPB MORTGAGE RULES MEAN FOR FAMILIES AND HOMEOWNERS, available at <http://perma.cc/9X42-FHH6>.

<sup>411</sup> Ability-to-Repay, *supra* note 392, at 6432.

such as negative amortization, interest only, stated-income loans, or loans lasting longer than thirty years.<sup>412</sup>

The CFPB clarifies that a safe harbor exists for a lender. If a lender satisfies the criteria for QMs and the loan is not a higher-priced loan as defined by the FRB 2008 modification, then there is a conclusive presumption that the lender made a reasonable determination of the borrower's ability to repay and acted in good faith.<sup>413</sup> This provides lenders with safe harbors against liability from consumers.<sup>414</sup>

Regarding subprime or higher-priced loans, a rebuttable presumption against liability may be created if a lender satisfies the QM criteria.<sup>415</sup> However, a borrower may have present grounds for rebutting the presumption.<sup>416</sup> To rebut the presumption, or show a violation regarding the subprime QM, a borrower can present evidence that "at the time the loan was originated, the [borrower's] income and debt obligations left insufficient residual income or assets to meet living expenses."<sup>417</sup> On review, the appropriate entity would take into account the borrower's "monthly payments on the loan, loan-related obligations, and any simultaneous loans of which the creditor was aware, as well as any recurring, material living expenses of which the creditor was aware."<sup>418</sup> The longer amount of time that a borrower has made timely payments without modification or accommodation, the less likely a borrower may rebut the presumption.<sup>419</sup>

It appears that the CFPB fully understands that these modifications may make lenders apprehensive to extend credit. The CFPB has stated, "[i]n light of the fragile state of the mortgage market as a result of the recent mortgage crisis, however, the Bureau is concerned that creditors may initially be reluctant to make loans that are not qualified mortgages, even though they are responsibly underwritten."<sup>420</sup> To allow lenders to somewhat temporarily bypass the standards, the CFPB created a second category of QMs. To be a QM, a lender must either: (1) satisfy the QM standards; or (2) meet the underwriting standards, making it eligible to be purchased, guaranteed, or insured by either: (a) Government Sponsored Enterprises, Fannie Mae, or Freddie Mac, while they were under federal conservatorship (or issue their own underwriting standards); or (b) HUD, Veterans Affairs, Department of

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<sup>412</sup> *Id.* at 6409.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Id.* at 6408.

<sup>416</sup> *Id.* at 6408–09.

<sup>417</sup> *Id.* at 6409.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

Agriculture, or Rural Housing Service.<sup>421</sup> This second category of QMs will only be available for seven years.<sup>422</sup>

A borrower has three years after an alleged violation to pursue a legal action against a lender.<sup>423</sup> Successful plaintiffs are entitled to damages up to all paid finance charges and fees, plus other actual damages, costs, and attorney's fees.<sup>424</sup> Performing a prohibited act would serve as a defense against foreclosure if the act constitutes a breach of the Ability-to-Repay requirement.<sup>425</sup>

Some authors have expressed concerns that the Ability-to-Repay standard is too stringent and will keep the credit market restrictive in its lending.<sup>426</sup> Of particular concern is the requirement that borrowers must have a debt to income ratio no greater than 43%, irrespective of credit score, to be deemed a "qualified mortgage."<sup>427</sup> Debts taken into account in calculating the debt to income ratio are property taxes, student loans, and points or fees associated with the home sale.<sup>428</sup> It has also been argued that the amended rules "shifted accountability for loans from borrowers to lenders."<sup>429</sup>

It has yet to be seen whether the Ability-to-Repay Rule will cause more harm than good. The real estate market is still struggling to survive and is currently on life support.<sup>430</sup> Tightened credit may prolong the need for life support or cause the whole system to crash.

The rule could possibly injure both homebuyers and some creditors.<sup>431</sup> Prospective homebuyers may be harmed if they have student loans. The Ability-to-Repay Rule now includes student loan debt in the calculation of

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 6422; *see also* Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013) (affirming that mere notice is sufficient and that a borrower must file suit within three years to invoke the rescission provision of Regulation Z).

<sup>424</sup> Ability-to-Repay, *supra* note 392, at 6416.

<sup>425</sup> *Id.*

<sup>426</sup> *See, e.g.*, Richard Satran, *Fewer Easy Mortgages Under U.S. Consumer Agency Rule*, U.S. NEWS & WORLD REPORT, Aug. 20, 2013.

<sup>427</sup> *Id.* (reporting that some mortgagors might be able to afford a mortgage with an even higher household debt ratio).

<sup>428</sup> *Id.*

<sup>429</sup> Diane Katz, *Dodd-Frank Mortgage Rules Unleash Predatory Regulators*, THE HERITAGE FOUNDATION (Dec. 16, 2013), [http://www.heritage.org/research/reports/2013/12/doddfrank-mortgage-rules-unleash-predatory-regulators#\\_ftn21](http://www.heritage.org/research/reports/2013/12/doddfrank-mortgage-rules-unleash-predatory-regulators#_ftn21), *archived at* <http://perma.cc/75AV-KJCX>.

<sup>430</sup> Satran, *supra* note 426.

<sup>431</sup> *Id.*; Katz, *supra* note 429.

debt ratio.<sup>432</sup> Additionally, verification of employment history might be problematic as a result of the crisis.<sup>433</sup> Further, homeowners might be unable to refinance their homes if their household debt is more than 43% of their income.<sup>434</sup> Also, potential homebuyers in high-priced real estate markets, like California, would have difficulty qualifying for a home loan.<sup>435</sup> The overall concern is access to affordable housing.

The new rule might be more burdensome for minorities, specifically, in three ways. First, as discussed previously, African American and Latino groups generally do not have economic parity in terms of personal net worth.<sup>436</sup> Consequently, African Americans and Latinos graduate with more student loan debt compared to Caucasian bachelor degree holders.<sup>437</sup> One report stated that 40% of Latinos, and 51% of African Americans, borrowed money for college, compared to 43% of Caucasians.<sup>438</sup> The estimation is that “27 percent of black bachelor’s degree holders had more than \$30,500 in loans, compared with 16 percent of white bachelor’s degree holders.”<sup>439</sup> Moreover, “81 percent of non-Hispanic black students and 67 percent of Hispanic students left school with higher debt compared to non-Hispanic white classmates.”<sup>440</sup> Second, the new Ability-to-Repay Rule may make it difficult for minorities, particularly African Americans and Latinos, to incur student loan debt for any degree level and attain homeownership in the future. The rule may force minorities to select which part of the American Dream

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<sup>432</sup> Student loan debt was historically excluded from the income–debt ratio, but the Ability-to-Repay Rule modified the ability to repay formula to include this debt. Satran, *supra* note 426.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> Rakesh Kochkar, Richard Fray, & Paul Taylor, *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RESEARCH CTR. (Jul. 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>, archived at <http://perma.cc/T77E-QVB8>.

<sup>437</sup> Equal Justice Works, *How Student Debts Affects Women, Minorities*, THE STUDENT LOAN RANGER (May 1, 2013, 10:00 AM), <http://www.usnews.com/education/blogs/student-loan-ranger/2013/05/01/how-student-debt-affects-women-minorities>, archived at <http://perma.cc/6HMP-L5TP>; *Minority Students Are Saddled School Loan Debt*, THE NATIONAL LAW JOURNAL, Jan. 30, 2013, <http://www.nationaljournal.com/thenextamerica/education/minority-students-are-saddled-by-school-loan-debt-20130130>, archived at <http://perma.cc/9FYF-JLTQ>.

<sup>438</sup> Isaac Juarez, *Minority Students Have More Student Loan Debt*, LOANS.ORG (Nov. 2, 2012, 3:30 PM), <http://loans.org/student/news/minorities-have-more-debt-92467>, archived at <http://perma.cc/GBQ3-UFWS>.

<sup>439</sup> Equal Justice Works, *supra* note 437.

<sup>440</sup> Juarez, *supra* note 438.

they wish to obtain—education or homeownership. Third, minority graduates with higher levels of student loan debt often earn less than their non-minority counterparts do. Many African American college graduates are underemployed, taking jobs that do not require college degrees.<sup>441</sup> The Center for Economic and Policy Research conducted a study that found that “56 percent of Black college graduates were in an occupation that didn’t require a degree in 2013.”<sup>442</sup> With lower incomes and higher debts, minority prospective homebuyers may be severely limited in how much they can borrow for a home mortgage and where they buy under the new Ability-to-Repay Rule.

Similarly, the new rules would harm lenders because they potentially make the lending process costlier. Smaller banks, in particular, may not be technologically equipped to meet the demands of these new standards. Creditors may have to “reconfigure policies and procedures, reprogram loan origination systems, and retrain personnel—thereby increasing the costs of underwriting loans.”<sup>443</sup> If smaller banks do not have the resources to comply with the new requirements, then it is quite possible that many would be driven out of the market. On the other hand, those with the resources to comply with the standards will be skittish in extending credit.<sup>444</sup>

The credit market is currently tight<sup>445</sup> and might remain so for a while. The CFPB acknowledged that rules might need tweaking in the future and promised to keep an eye on the housing market and make adjustments if necessary.<sup>446</sup> Furthermore, the rules do not prohibit lenders from offering non-qualified mortgages. Lenders have the autonomy to do so, but if they do, then the risk of liability that a consumer did not have the ability to repay the loan at origination is on the lender.

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<sup>441</sup> Taylor Gordon, *Majority of Recent Black Graduates Face Underemployment in Weak Labor Market*, ATLANTA BLACK STAR (May 21, 2014).

<sup>442</sup> *Id.*

<sup>443</sup> Katz, *supra* note 429.

<sup>444</sup> *Id.*; see also Satran, *supra* note 426 (quoting the Mortgage Bankers Association’s estimation that mortgages are at least “eight times as difficult to get now than when they were in years prior to the housing collapse”).

<sup>445</sup> Satran, *supra* note 426; Greg Robb, *Banks Keeping Mortgage Standards Tight*, MARKETWATCH (May 5, 2014, 3:30 PM), <http://www.marketwatch.com/story/banks-keeping-mortgage-standards-tight-2014-05-05>, archived at <http://perma.cc/XX89-EYGJ>; Octavio Nuiry, *How Tight Credit is Putting the Squeeze on Housing*, REALTYTRAC (Apr. 17, 2014), <http://www.realtytrac.com/content/news-and-opinion/how-tight-credit-is-putting-the-squeeze-on-housing-8039>, archived at <http://perma.cc/L4BZ-SRRA>; Margaret Chadbourn, *New U.S. Housing Regulator Hears Concerns on Tight Credit*, REUTERS.COM (Feb. 19, 2014, 11:36 PM), <http://uk.mobile.reuters.com/article/rbssFinancialServicesAndRealEstateNews/idUKL2N0LO1XA20140219>, archived at <http://perma.cc/6PZK-BRNT>.

<sup>446</sup> Satran, *supra* note 426.

*B. U.S. Department of Justice*

The DOJ is composed of multiple agencies or departments.<sup>447</sup> The Civil Rights Division of the DOJ is authorized with enforcement duties concerning both the FHA<sup>448</sup> and ECOA.<sup>449</sup> The newly created Fair Lending Unit was created in response to the rampant discriminatory lending practices during the housing and foreclosure crisis.<sup>450</sup>

The DOJ is given extensive authority to bring an action against lenders engaged in patterns or practices of unlawful discrimination.<sup>451</sup> Also, the CFPB, HUD, FRB, OCC, Office of Thrift Supervision (OTS), Federal Trade Commission (FTC), FDIC, and National Credit Unit Administration may also refer matters concerning patterns or practices of illegal discrimination<sup>452</sup> to the DOJ.<sup>453</sup> Between 2009 and 2011, the FTC and HUD referred 109 matters to the DOJ.<sup>454</sup>

Referrals must be accepted for an enforcement action by the DOJ. For a referral to be accepted, all of the following criteria must exist. First, there must be a serious pattern related to “either financial or emotional harm to members of protected classes.”<sup>455</sup> Second, court action is necessary to halt the

<sup>447</sup> *Department of Justice Agencies*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/agencies/index-list.html> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/H44R-LXRV>.

<sup>448</sup> *Civil Rights Division Housing Enforcement Section*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/hce/> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/B9Y4-42EH>.

<sup>449</sup> *Id.*

<sup>450</sup> The Fair Lending Unit was created in early 2010 with the expressed goal to make fair lending a “top priority.” U.S. DEP’T OF JUSTICE, DEP’T OF JUSTICE CIVIL RIGHTS DIV. 2011 FAIR LENDING ACCOMPLISHMENTS, <http://www.justice.gov/crt/about/hce/documents/fairlending.pdf> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/9GCB-MNAL>.

<sup>451</sup> 15 U.S.C. § 1691e(h) (2012); 42 U.S.C. § 3614(a) (2012).

<sup>452</sup> According to the DOJ, a regulatory agency “need not have overwhelming proof of an extensive pattern or practice of discrimination” before referring a matter to the DOJ. U.S. DEP’T OF JUSTICE, IDENTIFYING LENDING PRACTICES THAT MAY FORM THE BASIS OF A PATTERN OR PRACTICE REFERRAL TO THE DEPARTMENT OF JUSTICE (1996), *available at* <http://perma.cc/RFA2-TMLS>. However, before the DOJ files a lawsuit under the ECOA or FHA, “the Attorney General [must] have a reasonable belief that a pattern or practice of discrimination exists.” *Id.* See also 15 U.S.C. § 1691e(h) (2012); 42 U.S.C. § 3614 (a) (2012).

<sup>453</sup> THOMAS E. PEREZ, ASSISTANT ATTORNEY GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S 2010 ANNUAL REPORT TO CONGRESS (2011), *available at* <http://perma.cc/V8T4-UR76> [hereinafter PEREZ, 2010 ANNUAL REPORT].

<sup>454</sup> THOMAS E. PEREZ, ASSISTANT ATTORNEY GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S 2011 ANNUAL REPORT TO CONGRESS 6 (2012), *available at* <http://perma.cc/E7NM-9MAJ> [hereinafter PEREZ, 2011 ANNUAL REPORT].

<sup>455</sup> U.S. DEP’T OF JUSTICE, *supra* note 452.

practice.<sup>456</sup> Third, the “protected class members harmed by the practice cannot be fully compensated without court action.”<sup>457</sup> Fourth, damages “beyond out-of-pocket losses, are necessary to defer the lender (or others like it) from treating the cost of detection as a cost of doing business.”<sup>458</sup> Fifth, “[t]he agency believes the practice to be sufficiently common in the lending industry, or raises an important issue, so as to require its public disclosure as a deterrent to other lenders.”<sup>459</sup> Fifty-five out of 109 of the referred matters from 2009 to 2011 concerned lending discrimination based on race or national origin.<sup>460</sup>

In its 2010 Report to Congress, the Civil Rights Division reported that its main mission was “to address the wide range of discriminatory practices by lenders, brokers, and other players in the mortgage market that contributed to our nation’s housing crisis and economic meltdown.”<sup>461</sup> Regulatory agencies referred forty-nine matters of practice or patterns of discrimination to the DOJ and opened over sixty matters for investigation.<sup>462</sup> The Fair Lending Unit brought its first major discriminatory lending enforcement action in 2010 in *United States v. AIG Federal Savings Bank et al.*<sup>463</sup>

In *United States v. AIG Federal Savings Bank et al.*, the Civil Rights Division simultaneously filed and settled an action alleging that AIG Federal Savings Bank (AIG) had violated the ECOA and FHA by charging higher fees associated with wholesale loans to African Americans from July 2003 through May 2006.<sup>464</sup> The complaint also alleged that AIG failed to supervise or monitor mortgage brokers’ fees.<sup>465</sup> The settlement included provisions requiring AIG to pay \$2 million to borrowers who were harmed by the practice and “to have in place loan pricing policies, monitoring and employee training that ensure discrimination does not occur in the future.”<sup>466</sup>

The year 2011 was a banner year for enforcement actions brought by the Civil Rights Division. The Fair Lending Unit filed eight lawsuits and reached

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<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> PEREZ, 2011 ANNUAL REPORT, *supra* note 454. The referral numbers greatly increased during these years. Only thirty racial and national origin mortgage discrimination matters were referred to the DOJ from 2001 through 2008. *Id.*

<sup>461</sup> PEREZ, 2010 ANNUAL REPORT, *supra* note 453.

<sup>462</sup> *Id.* This was more referrals than had been received in more than twenty years. *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*



settlements totaling \$350 million.<sup>467</sup> The enforcement actions brought by the DOJ related to redlining, pricing discrimination, and fair lending discrimination.<sup>468</sup> The DOJ settled its landmark discrimination case, the largest lending discrimination settlement in DOJ history, *United States v. Countrywide Financial Corporation*, for \$335 million in December of 2011.<sup>469</sup> The DOJ stated, “[n]o one case can rectify the multitude of unlawful practices in the housing and lending market that contributed to the nationwide housing and foreclosure crisis, but the Division’s fair lending work represents an important piece of the Department’s comprehensive efforts to address it.”<sup>470</sup>

In 2012, the DOJ received a referral, filed, and settled a practice and pattern action against Wells Fargo, NA, alleging that Wells Fargo had steered African Americans and Latinos into subprime mortgages and charged higher fees and rates to these groups from 2004 to 2009.<sup>471</sup> Wells Fargo agreed to pay \$184.25 million in compensation to borrowers and to provide \$50 million in direct down payment assistance to communities hurt by the housing crisis and Wells Fargo’s discrimination.<sup>472</sup> Additionally, two discrimination suits were filed and settled against SunTrust Mortgage, Inc.,<sup>473</sup> and GFI Mortgage Bankers.<sup>474</sup> SunTrust agreed to pay \$21 million to their borrower victims and was required to maintain specific policies on pricing and fair lending monitoring at least for three years. GFI was compelled “to pay \$3.5 million in compensation to approximately 600 African-American and Hispanic GFI borrowers, the largest per-victim recovery in a Department of Justice pricing case, and to pay the government the maximum \$55,000 civil penalty allowed by the Fair Housing Act.”<sup>475</sup> Under the consent order, the DOJ also required GFI to create policies similar to SunTrust’s.<sup>476</sup> The DOJ finished 2012 with nine open fair lending investigations and three authorized civil actions.<sup>477</sup>

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<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> *Id.*

<sup>471</sup> THOMAS E. PEREZ, ASSISTANT ATTORNEY GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S 2012 ANNUAL REPORT TO CONGRESS 3 (2013), available at <http://perma.cc/Y4NF-Z6HB>.

<sup>472</sup> *Id.* at 2-3.

<sup>473</sup> *Id.* (consent order alleged a practice or pattern of lending discrimination by charging “at least 20,000 African American and Hispanic borrowers ... higher discretionary broker fees and retail loan markups than comparable white borrowers from 2005–2009.”).

<sup>474</sup> *Id.* (consent order claimed a practice or pattern of lending discrimination against African American and Hispanic borrowers by charging higher fees than similarly situated Caucasian borrowers from 2005–09).

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.* at 7.

*C. Federal Reserve Board*

The Board of Governors of the Federal Reserve System is “responsible for implementing various federal laws intended to protect and inform consumers in credit and other financial service transactions, ensuring that consumers receive comprehensive information and fair treatment in these transactions, and promoting economic development and community lending in historically underserved areas.”<sup>478</sup> The FRB supervises member banks. For banks with assets greater than \$10 billion, the FRB has supervisory authority to ensure compliance with the Fair Housing Act.<sup>479</sup> However, the CFPB has supervisory authority to ensure compliance with the ECOA.<sup>480</sup> For banks with less than \$10 billion in assets, the FRB has supervisory authority for compliance to both the FHA and ECOA.<sup>481</sup>

The FRB has the authority to remedy a fair lending violation on its own so long as the actions do not constitute a pattern or practice of discrimination.<sup>482</sup> To resolve these actions, the FRB may use “informal supervisory tools (such as memoranda of understanding between banks’ boards of directors and the Reserve Banks, or board resolutions) to ensure that violations are corrected. If necessary to protect consumers, however, the Board can bring public enforcement actions.”<sup>483</sup>

*D. U.S. Department of Housing & Urban Development*

The Office of Fair Housing and Equal Opportunity within HUD is responsible for overseeing and enforcing federal laws and setting “national policies that make sure all Americans have equal access to the housing of their choice.”<sup>484</sup> The laws enforced by HUD include the Fair Housing Act and Title VI of the Civil Rights Act of 1964, *inter alia*.<sup>485</sup>

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<sup>478</sup> FED. RESERVE SYS., *The Economist Consumer and Community Affairs*, <http://www.federalreserve.gov/econresdata/cafle-staff.htm> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/JK8T-24MP>.

<sup>479</sup> FED. RESERVE SYS., *Annual Report 2012*, <http://www.federalreserve.gov/publications/annual-report/2012-consumer-and-community-affairs.htm> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/96EM-66JV> [hereinafter *Reserve Annual Report 2012*].

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> *Id.*

<sup>484</sup> U.S. HOUS. & URBAN DEV., *About the Fair Housing and Equal Opportunity*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/abouttheo/abouttheo](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/abouttheo/abouttheo) (last visited Mar. 26, 2015), *archived at* <http://perma.cc/6GJR-4C46>.

<sup>485</sup> *Id.*

HUD reviews housing discrimination complaints and determines whether it will issue a charge of discrimination.<sup>486</sup> If HUD issues a charge of discrimination, it will schedule an administrative action.<sup>487</sup> At this point, either HUD or the defendant may opt to transfer the action to federal court.<sup>488</sup> Once either party elects federal court, the DOJ will pursue the matter further.<sup>489</sup>

#### X. ANOTHER REMEDY: CRIMINAL PROSECUTION AND SANCTIONS

The typical remedy for violating the FHA and the ECOA is monetary penalties under civil law. However, the victims of the violation might be too numerous to obtain full satisfaction for the harm inflicted. Pursuant to the multi-million dollar settlements, mortgagors were entitled to receive their money mortgage payments up to the date of foreclosure.<sup>490</sup> Depending on the settlement amount and number of claimants, a victim may not receive the full compensatory amount. Further, loss of equity is not taken into account. Moreover, the possibility of civil liability becomes a cost of doing business for lenders. However, those costs may have already been imposed on the victims or future consumers.

On the other hand, criminal law enforcement and sanctions have three aims: (1) keep order and protect society,<sup>491</sup> (2) deter certain types of behavior,<sup>492</sup> and (3) exact retribution from the wrongdoer on behalf of its victim.<sup>493</sup> For lending discrimination, this might serve as a great deterrent in the future, but the lending discrimination laws do not permit this remedy. For tax fraud, prosecutors consider the nature and seriousness of the fraud by taking into account numerous factors including, but not limited to: (1) the magnitude of the loss;<sup>494</sup> (2) “[w]hether the loss stems from multiple tax

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<sup>486</sup> U.S. HOUS. & URBAN DEV., *Fair Housing Enforcement Activity*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/enforcement/2010hudcharges](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/enforcement/2010hudcharges) (last visited Mar. 26, 2015), *archived at* <http://perma.cc/MCG4-US3L>.

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Joint State-Federal National Mortgage Servicing Settlements* (Jun. 26, 2014), <http://www.nationalmortgagesettlement.com/>, *archived at* <http://perma.cc/8XGJ-RZSD>.

<sup>491</sup> Paul H. Robinson, *The Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 857 (1994) (outlining the primary functions of criminal law as setting forth rules of conduct, minimum standard for liability, and assessing the seriousness of the offense when liability is warranted).

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> N.Y. DEP'T OF TAXATION & FIN., CRIMINAL INVESTIGATIONS AND PROSECUTIONS OF TAX FRAUD CASES: GUIDELINES, 3 (2013), [http://www.tax.ny.gov/pdf/enforcement/cid\\_guidelines.pdf](http://www.tax.ny.gov/pdf/enforcement/cid_guidelines.pdf), *archived at* <http://perma.cc/YB6C-7HSR>.

types”;<sup>495</sup> (3) the length of time the loss persisted or number of taxpayers involved;<sup>496</sup> (4) whether the conduct of the wrongdoer was intertwined “with other fraud or illegality”;<sup>497</sup> and (5) the reasons for the fraud and degree of corruption.<sup>498</sup>

It would not be too great of a leap to apply criminal sanctions to the mortgage lending arena. Criminal prosecution is already available in mortgage fraud cases.<sup>499</sup> Many mortgage fraud cases result in both restitution and prison sentences.<sup>500</sup>

Lenders, brokers, or anyone who discriminates during the lending process, especially to the scale as seen in the housing and foreclosure crisis, should be subjected to prison sentences. The aims of the criminal code will be accomplished. First, society will be protected by not being subject to lending discrimination. Second, criminal prosecution would send a very clear message to lenders (and others) that lending discrimination is reprehensible and will not be tolerated. Third, the victims would likewise be entitled to retribution.

The vastitude of the losses experienced because of lending discrimination is immeasurable. This type of remedy would pack a greater punch than civil damages only. Criminal prosecution pierces the ivory tower and places the reality of the losses on the rightful party, the lending discrimination perpetrator. The threat of criminal prosecution incentivizes the would-be lending discriminator to curb the discriminatory behavior before it occurs. Thus, there would be minimal need to traverse the bureaucratic red tape that currently exists for fair mortgage lending.

#### CONCLUSION

Assistant Attorney General Thomas E. Perez of the Department of Justice said:

The promise of equal opportunity represents the foundation of the American dream—from the opportunity to learn, to the opportunity to

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<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> See INTERNAL REVENUE SERV., *Examples of Financial Institution Fraud Investigations, Fiscal Year 2014* (July 10, 2014), <http://www.irs.gov/uac/Examples-of-Financial-Institution-Fraud-Investigations-Fiscal-Year-2014>, archived at <http://perma.cc/JGF7-GZD5>; see also S.C. ATTORNEY GEN., CRIMINAL PROSECUTION DIVISION, <http://www.scag.gov/criminal-prosecution-division-2/> (last visited Mar. 26, 2015), archived at <http://perma.cc/A5PN-TFWC>; TEX. ATTORNEY GEN., CRIMINAL PROSECUTION, <https://www.texasattorneygeneral.gov/criminal/prosecution.shtml> (last visited Mar. 26, 2015), archived at <http://perma.cc/7EFY-6RWK> (noting that Texas Attorney General prosecutes mortgage fraud).

<sup>500</sup> INTERNAL REVENUE SERV., *supra* note 499.

earn, to the opportunity to gain fair access to credit, to live where one chooses and move up the economic ladder—and homeownership has been its most basic building block.<sup>501</sup>

However, minorities, who have historically been the victims of mortgage discrimination, are still battling for equal opportunities for fair mortgage lending and homeownership in the 21st Century.

Although the laws that prohibit discrimination have been in place for over forty years, minorities—particularly Latinos and African Americans—are waiting to receive fair access to credit and thence homeownership in areas of their choosing. Forty years into this unalleviated battle for a basic civil right, there exists ample evidence of patterns of racial inequality, which create a legacy of economic inequality.

The mortgage lending process is multifaceted; it contains numerous stages and multiple factors are considered. Ideally, lenders look at a borrower's creditworthiness and other factors related to his or her ability to pay as opposed to skin color, ethnicity, or the area where the borrower lives.

Lending discrimination affects all people, regardless of color or creditworthiness. None are safe from the fallout of lending discrimination. Banks, homeowners, their neighbors, cities, and ultimately, the national economy are all hurt by systemic defects in the lending process. Unfair lending practices lead to foreclosures, which, in turn, lead to blight and loss of tax revenues.<sup>502</sup>

The U.S. government after many years of inaction has stepped up to address lending discrimination by filing suit against lenders who exhibited patterns of disparate treatment or whose policies have a disparate impact on a protected group. These lawsuits financially stung large banks that allegedly engaged in patterns or practices of discrimination. Hopefully, civil liability will serve as some deterrent to lenders in the future. However, in addition to civil liability, statutes should be amended to allow the Department of Justice, or other federal regulatory agencies, to pursue criminal prosecution in the most egregious cases as well. Criminal liability will serve as the ultimate deterrent, the “teeth”, and will ensure that non-discriminatory behavior drives out discriminatory behavior in the consumer credit market.<sup>503</sup>

Likewise, the new servicing rules should provide sufficient and uniform guidelines for lenders. However, the concern with these rules is that gaps in homeownership rates will grow even wider. Missing from the equation in

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<sup>501</sup> *Examining Lending Discrimination*, *supra* note 238, at 1.

<sup>502</sup> Williams, *supra* note 328, at 471.

<sup>503</sup> This is a twist on the catchphrase of Sir Thomas Gresham's economic principle, “Gresham's Law,” which states that “Bad money drives out good money.” Murray N. Rothbard, *Commodity Money in Colonial America* (excerpted from MURRAY N. ROTHBARD, *A HISTORY OF MONEY AND BANKING IN THE U.S: THE COLONIAL ERA TO WORLD WAR II* (Joseph T. Salerno, ed., 2002)), <http://archive.lewrockwell.com/rothbard/rothbard260.html> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/M7MQ-W9JL>.

this lending discrimination reformation step by the CFPB (and other regulatory agencies charged with consumer protection) is the fact that some minorities start with other economic inequalities due to lack of equal access to education or employment.<sup>504</sup> Accordingly, servicing guidelines should restrict lending discrimination by providing a mechanism for enforcement, but also take into account that the goal of fair access to affordable housing for all Americans regardless of race, ethnicity, national origin, sex, familial status, religion, or disability. This requires an acknowledgement of the persistent financial inequalities that exist separate from the housing market.

Additionally, more effort must be taken to educate the public on credit, its products, and what constitutes lending discrimination. There are many who do not understand that they are in a situation of mortgage discrimination until things go terribly wrong, such as delinquencies or foreclosures. Because discrimination may occur at any stage of the lending process, not just during the end stage, borrowers need to be more aware so that prompt action may take place.

It is for the betterment of society to eradicate all forms of discrimination, whether it is related to lending or otherwise. Hopefully, lending reformation efforts will make the lending process color blind, help heal the real estate market by opening (or re-opening) the door of homeownership to the segments of the population currently locked out, and bridge gaps in wealth accumulation among all Americans. The uphill struggle by regulators and agencies must carry on until minority homeownership rates more closely mirror those of non-minorities. It is time to break the shackles of discrimination and allow qualified borrowers to receive non-discriminatory terms in all credit transactions, including mortgage financing. Only then can we truly label the American Dream, the *American* Dream.

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<sup>504</sup> Richard Rothstein & Mark Santow, A Different Kind of Choice: Educational Inequality and the Continuing Significance of Racial Segregation, (Aug. 21, 2012) (unpublished working paper), <http://www.epi.org/publication/educational-inequality-racial-segregation-significance/>, archived at <http://perma.cc/7ZX4-TD43>; *The Racial Gap is Three Times Greater Than the Racial Income Gap: Ratios for Average Family Wealth and Income, 1983–2010*, URBAN INSTITUTE, <http://www.urban.org/changing-wealth-americans/lost-generations-interactive-race.cfm> (last visited Mar. 26, 2015), archived at <http://perma.cc/ZX78-6XCQ> (finding that wealth gaps by Caucasians grew to be six times that of African Americans and Latinos in 2010).

