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Will the Current Economic Crisis Fuel a Return to Racial Policies that Deny Homeownership Opportunity and Wealth?

Keywords

Property ownership, Racial policies, Homeownership opportunity, African American homeownership

WILL THE CURRENT ECONOMIC CRISIS FUEL A RETURN TO RACIAL POLICIES THAT DENY HOMEOWNERSHIP OPPORTUNITY AND WEALTH?

By: Marcia Johnson¹

Introduction

Property ownership in America has traditionally been linked to power and wealth.² French political historian Alexis de Tocqueville observed, “[T]he love of property is keener in the United States than it is anywhere else, and Americans therefore display less inclination toward doctrines that threaten, in any way, the way property is owned.”³ Property-related wealth comes in many forms, including the right to control tangible assets such as land and buildings.⁴ Homeownership today remains the single greatest source of wealth and symbol of well-being for most Americans.⁵

Owning a home facilitates access to numerous privileges and opportunities borne from government law and policy, including tax credits, increased credit options, and increased worth and wealth. Homeownership also increases the value of communities, neighborhoods, and the homes themselves. It allows for better educational opportunities, social mobility, and community stability.⁶ Therefore, it is particularly significant that government housing policies and practices have historically stifled the opportunity of African Americans to own and retain real property. The consequences of these discriminatory policies continue to be dire.

The ultimate aspiration of nearly every American family is to own a home.⁷ For many African American families this was still a near unattainable goal for more than one hundred years after the Emancipation Proclamation was signed.⁸ Government policies that excluded many African Americans from access to homeownership in the 1930s began changing in the late 1970s, leading many to anticipate an increase in African American homeownership.⁹ However, in the years between the Community Reinvestment Act (CRA) of 1977 and 1995, the rate actually dropped 2.6%.¹⁰ Still, the CRA likely opened the door for

post-1995 programs that provided easier access to credit, down payment assistance, and deferred mortgage payments. Indeed, more aggressive policies begun under Presidents Clinton’s administration provided greater opportunities, resulting in a rate increase in African American homeownership from 42% in 1995 to 47.4% by 2008.¹¹

Perhaps the greatest threat to the continued realization of the American dream is the latest economic crisis rooted in the sub-prime mortgage collapse.¹² Some blame the CRA of 1977 for creating a market that they claim provided housing loans to non-creditworthy borrowers – particularly African American families – in the low and moderate income range.¹³ However, this charge is without direct factual support as the post-CRA period saw a decline in homeownership for African Americans but a mild increase for White homeowners.¹⁴ Illegal and fraudulent practices in property appraisals and income reporting directed program benefits away from those the program was meant to aid.

Nevertheless, of the more than 3.6 million mortgage foreclosures projected to occur during the January 2007 - December 2009 period, up to 39% are sub-prime mortgages.¹⁵ Sub-prime mortgages were far more popular with African American homebuyers than any other group, particularly from 1995-to-2005.¹⁶ Although mortgage failures certainly pose an economic problem, it is not enough to have caused the collapse of 2008 or to support a return to housing policies that effectively deny homeownership opportunities to African American buyers.

Even recent government action to stunt such a return suggests that there were other sources of the collapse, beside African American homeownership, or other sub-prime mortgages. For example, in 2008, the United States government approved a \$750,000,000,000 bail-

out of financial institutions ostensibly due to the collapse in the sub-prime markets.¹⁷ Had the government instead paid every mortgagee the full amount of their initial mortgage loan, assuming a \$200,000 loan average, the government could have purchased all bad mortgage debt for \$720,000,000,000.¹⁸ 100% of foreclosures from 2007 to 2008 would be paid. If only sub-prime mortgages were covered, the government could have paid all such foreclosures from 2006 through 2008.¹⁹

It is common for markets to rise into bubbles, for the bubbles to burst, and for industries profiting from the bubbles to fail. However, it is not common for the burst to lead to the collapse of the entire global market. In the 1980s, savings and loans fell at a cost of about \$152.9 billion with taxpayers paying 82% or \$126 billion. In the early 2000s, the technology industry bubble burst.²⁰ Still, none of these industry failures caused the world market to crater.

This paper is written to examine the potential effect of the market collapse on our nation’s homeownership policies. Part I reviews America’s historical housing and homeownership policies. Part II considers the expansion of homeownership opportunities to historically non-participating communities, particularly the African American community. Part III reviews the culprits of the economic crash of 2008 and explains why sub-prime borrowers often get blamed. Part IV examines solutions to maintain America’s pro-homeownership policy, and Part V concludes that America’s homeownership policy should continue to be vigorously pursued with a goal of including African Americans who have long been excluded by government policies and sanctions from building wealth and thereby stabilizing their communities.

Part I: The History of America's Housing Policy

The American government has historically attended to the housing needs of citizens who are unable to purchase homes. Since the 1700s, the housing needs of the poor have been addressed through formal systems including the provision of "outdoor relief," "boarding out," almshouses and asylums. As people began moving away from small seaport towns²¹ and farms to cities in the 1900s,²² increased housing demand²³ caused a 20-year building boom in urban areas.²⁴ This boom turned bust during the late 1930s largely as a result of the Great Depression when many Americans could afford neither to rent nor purchase a home.²⁵ It was the Industrial Revolution that rejuvenated the development of American cities.²⁶

The late nineteenth and early twentieth centuries marked the beginning of housing development within residential subdivisions.²⁷ To assure both peaceful enjoyment of one's property and to maintain property value, developers and home buyers purportedly sought legal control mechanisms that would aid in protecting and preserving their property interests.²⁸ Developers of these subdivisions relied on restrictive covenants, equitable servitudes, negative easements and zoning ordinances to ensure separation within residential, commercial, and industrial areas.²⁹ The more sinister goal of these devices was to divide people based on economic, social, and racial lines.³⁰ Still, these new communities represented an expanded housing market driven by the growing need for homes.

The federal government sought to address the expanding need for low-cost homes through the Housing Division of the Public Works Administration (PWA), which constructed public-owned housing units.³¹ Through the PWA, the government took control of privately owned land for the public purpose of providing housing to those who could not otherwise afford it. The seizure of land during this period was later found to be a wrongful exercise of the federal

government's eminent domain power.³² As a consequence, construction under this program ended, but the government's ability to create housing opportunities flourished.³³

The United States Housing Act of 1937 (USHA)³⁴ was the first national housing program and its goal was "to provide 'a decent home in a suitable environment for every American Family...'"³⁵ In the 1940s, the federal government began providing low-interest financing through both the Federal Housing (FHA) and Veterans' Administrations (VA) in keeping with this federal housing goal. When American soldiers returned home from World War II, the nation's policy of homeownership continued to expand.³⁶ Homeownership rates increased from about 45% to 65% after World War II due to government policies that increased access to credit and introduced innovative lending products, like the thirty-year fixed mortgage to the middle class.³⁷

USHA was controversial at the time and was challenged as an unconstitutional intrusion by the government in the private market.³⁸ The United States Supreme Court found the Act within Congress' power to provide for the public's general welfare.³⁹ This decision would have a compelling impact on housing opportunities in America, as USHA authorized the federal government to pay the principal and interest on tax-exempt bonds, enabling the construction of public housing developments for low-income individuals.⁴⁰ However, USHA was not an equal housing program, and assistance within the program operated on a racially-segregated basis.⁴¹

Between 1937 and 1949, middle-income Americans began moving outside the central cities and into suburban areas, resulting in diminished homeownership opportunities in urban areas. Many of these urban areas became infested with slums and public housing. Congress reacted to this growing problem by passing the United States Housing Act of 1949,⁴² which is often touted as being the nation's first official housing policy.⁴³ The policy was designed to remedy housing shortages, eliminate substandard

housing, and provide a reasonable living environment for every American.⁴⁴ The policy had three major objectives: (1) to encourage private development in the housing market; (2) to provide governmental assistance to enable private enterprise; and (3) to fuel local governments in developing programs to help improve cities and housing.⁴⁵ The Housing Act of 1949 authorized urban redevelopment and provided for the construction of 810,000 new housing units in six years.⁴⁶

This Act had a decidedly negative impact on African Americans because it forced them to move from their homes as construction began, only to be placed on long waiting lists for public rental housing.⁴⁷ In addition, although the federal government's original plan was to revive urban communities, the government's interest in the program, as well as the available funding, decreased rapidly.⁴⁸ Consequently, many of the completed units were substandard, meeting only basic housing necessities.⁴⁹ The fact that African Americans were not permitted to benefit from government-provided low-interest loans only exacerbated the plan's negative impact. For example, racially disparate application of the FHA/VA loan programs, meant to encourage national homeownership, magnified and enforced economic and racial separation.⁵⁰ As a result, the government created a two-tiered system of affordable housing: the upper tier consisted of FHA and VA home acquisition loans while the lower tier was comprised of public housing rental programs.⁵¹

Under this two-tier system, minority and low-income families were placed in public housing rental programs, while Whites and other preferred classes were given FHA or VA home loans for homeownership.⁵² Even African Americans that met the qualifying criteria for loans were generally unsuccessful because the homes they could afford were located in neighborhoods that were predominately comprised of minorities and thus considered risky investments.⁵³ As urbanization continued to rise, fear, ignorance, and

hatred propelled political groups toward considering race and class as factors when constructing planning devices and promulgating new housing laws.⁵⁴ Deliberate policies favoring segregation successfully divided classes and races.⁵⁵ Even after laws prohibited segregation, significant racial transition within White neighborhoods often caused Whites to vacate these once segregated white areas, resulting in segregated African American neighborhoods.⁵⁶

In 1968, the United States Congress committed “to meet all of the nation’s housing needs and eliminate all of its substandard housing.”⁵⁷ Congress acknowledged that not only had Americans failed to live up to the national commitment, but that the burden of that failure was borne primarily by the poor.⁵⁸ This new housing policy made clear that it was designed to address the needs of all Americans, including the poor. The Housing Act states: “It is hereby declared to be the policy of the United States to promote the general welfare of the nation . . . to . . . remedy the unsafe and unsanitary housing conditions and the acute shortage of safe, decent and sanitary dwellings for families of low-income . . .”⁵⁹ This national policy laid the foundation for the government’s role in providing housing and housing opportunities for low-income people.⁶⁰

More than one hundred years after the Emancipation Proclamation freed slaves in America, Congress banned racial discrimination in housing practices. Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA),⁶¹ the Equal Credit Opportunities Act (ECOA), the Home Mortgage Disclosure Act (HMDA), and the Community Reinvestment Act (CRA), were all measures designed to ensure equal housing opportunities to all Americans. The FHA was a more comprehensive law addressing housing⁶² and prohibits discrimination on the basis of race, national origin, religion, sex, disability, and family status in real estate transactions.⁶³ Similarly, the 1974 ECOA prohibits discriminatory lending practices based on sex, marital status, race, religion, national origin, age, and receipt

of public assistance.⁶⁴ Discrimination is further prohibited in consumer credit transactions under the Consumer Credit Protection Act and the Federal Deposit Insurance Corporation Improvement Act.⁶⁵ Later, the HMDA was enacted to require lending institutions to publicly disclose loan information to ensure racial equality in home mortgage lending.⁶⁶

Despite all these legislative efforts to ensure equal housing opportunities, Congress found it necessary to take additional steps to encourage financial institutions to meet the credit needs of traditionally neglected communities by enacting the Community Reinvestment Act of 1977 (CRA).⁶⁷ Banks historically took consumer deposits but failed to provide access to credit, particularly for minority and low-income communities. The goal of the CRA was to ensure that financial institutions would reinvest deposits back into these communities. Under CRA, supervisory agencies were given the authority to deny banks the opportunity to merge, relocate, open a new office or close a particular branch if they failed to comply with CRA demands.⁶⁸

In 1989, the Financial Institution Reform and Recovery Enforcement Act (FIRREA) was enacted to strengthen CRA enforcement by requiring publication of CRA ratings. Banks were obligated to meet the credit needs of the communities they served but were also obligated to disclose their performance record by making available the written evaluations prepared by regulatory agencies.⁶⁹ This disclosure requirement gave community organizations the leverage to ensure that financial institutions were FIRREA compliant.

In 1994, in an effort to improve both community development and the accessibility of capital within deteriorating communities, Congress passed the Community Development Banking and Financial Institutions Act (CDBFIA).⁷⁰ This legislation established a “fund” that would aid in providing economic support to new and existing Community Development Financial Institutions (CDFIs).⁷¹ A CDFI is an institution whose primary purpose is to

promote economic development, equity investments, and loans to persons within a specified target area.⁷² CDFIs are important to increasing homeownership because they are specialized financial institutions that work in communities or markets that traditional financial institutions have not adequately served.⁷³ CDFIs include community development banks, credit unions, loan funds, venture capital funds, and micro-entrepreneurial loan funds. CDFIs provide numerous services including mortgage financing for first time home buyers, financing for needed community facilities, commercial loans and investments to start or expand small businesses, loans to rehabilitate rental housing, and financial services needed by low income households and local businesses. These institutions also provide services to ensure that credit is used effectively, such as technical assistance to small businesses and credit counseling to consumers.⁷⁴

The Home Ownership for People Everywhere (“HOPE”) programs of the 1980s and 1990s added another dimension to the federal housing policy, which previously focused on rental units. HOPE reoriented American housing policy towards homeownership.⁷⁵ Reaffirmed by Presidents Bill Clinton and George W. Bush, this expanded policy embodied the belief that enhanced homeownership serves the public interest, and justifies the use of public dollars to achieve this goal.⁷⁶

Part II: Expanding Homeownership Opportunities to African Americans and Other Historically Disenfranchised Populations

Some theorists suggest that the American policy of increasing homeownership to poorer populations and expanding mortgages was the single biggest contributor to the destruction of the global market economy.⁷⁷ Due, in part, to America’s renewed focus on homeownership, the share of Americans who owned homes rose from 64% in 1994 to 69% in 2005. These new homeowners were largely low- and moderate-income families and minorities. Over that same

time period, the homeownership rate in the lowest tenth of the income scale rose 4 %, the second lowest rose 4 %, and the rates for African Americans and Latinos rose 7 and 8 %, respectively. About 12 million new homeowners emerged, roughly half of them African Americans, Latinos, and others of mixed race. By 2005, the United States occupied the top rung in world homeownership rates.⁷⁸

Poverty, Income and Homeownership

A large part of the population remains beyond the reach of traditional finance vehicles. Almost 20 % of all children in the U.S. live in poverty.⁷⁹ Poverty has a substantial impact on the quality of education to which children have access. Although numerous programs and policies exist to ensure that all children—regardless of race or economic background—have equal educational opportunities, a substantial number of children living in poverty endure inferior student services and substandard facilities. These conditions help create a cycle of poorly housed renters who contribute less overall to the good of society than do better trained citizens. Poor families often face barriers that restrict their ability to improve their socio-economic status. For example, the ability to move to communities with better educational opportunities is not an option for many poor families. A majority of these families are renters and cannot afford rent or purchase prices in suburban or well-to-do urban neighborhoods. Statistics support this observation. According to the U.S. Census Bureau (Bureau), in 2002, about 56% of American families (owners and renter combined) could afford to purchase a modestly priced⁸⁰ home in the area in which they lived.⁸¹ Among families that were current homeowners approximately 75% could afford to purchase a modestly priced home while only 10% of those families who rented could afford to purchase such a home.⁸²

Since the late 1940s, the Bureau has surveyed and reported on the distribution of income among U.S. citizens.⁸³ According to the Bureau's

studies, family income inequality decreased by 7.4 % from 1947 to 1968,⁸⁴ But income inequality increased by 24.4 % between 1968 and 1998.⁸⁵ The income difference between households in the 95th percentile and those in the 20th percentile increased from approximately \$96,000 in 1994 to over \$127,000 in 2000.⁸⁶

From 1999 to 2000, the median household income held at \$42,100,⁸⁷ the poverty rate in fell to the lowest it had been since 1979,⁸⁸ and the number of poor persons fell.⁸⁹ African American and Latino incomes rose as poverty⁹⁰ rates for these two groups fell,⁹¹ but their income still lagged far behind that of Whites.⁹² Further, poverty rates for African American and female-headed households reached their lowest recorded level in 2000.⁹³ Nevertheless a 1989 National Research Council study reported that the standard of living for African Americans lagged far behind that of Whites⁹⁴ and showed that African American unemployment rates were more than two times that of Whites.⁹⁵ Even in 2008, the African American unemployment rate was still more than two times that of Whites.⁹⁶

All this demonstrates that while the standard of living for African Americans has improved, a substantial number of African American, Latino, and female-headed households continue to live in poverty at disturbing rates today. While the income gap between African Americans and Whites decreased in 2006, by 2007 the gap returned and, a 2007 Bureau report found that over 22% of all African American families still have incomes below the official poverty line.⁹⁷

The Impact of Poverty on Homeownership

Statistics show that a thriving home mortgage market needs to rely on untapped—increasingly poor and minority—borrowers. In 1991, the Bureau reported that 57 % of American families could not afford a median priced home in the area in which they lived.⁹⁸ African Americans and Latinos made up three-quarters of these families.⁹⁹ Four years later, the Bureau reported that 80

% of African American and Latino non-homeowner families, almost double that of White families,¹⁰⁰ could not afford a median-priced home in the area in which they lived.¹⁰¹ By 2004, Bureau reports indicate homeownership rates for Whites was 76.2 % while African Americans and Latinos had homeownership rates of 49.1 and 48.7 %, respectively.¹⁰² Overall homeownership rates in 2009 were at 67.6%.¹⁰³

True comparisons of racial and ethnic disparity in homeownership rates are more difficult because the Census Bureau changed the way it reported race in 2003.¹⁰⁴ Using current race and ethnic standards, however, we can compare 2006 to 2009 rates of homeownership. The homeownership rates for Whites (non-Latinos) were about 76 % in 2006 and about 75 % in 2009. For African Americans, the rates were about 48 % in 2006 and about 46 % in 2009, and for Latinos (of any race), the rates were about 49.5 % in 2006 and 48.7 % in 2009.¹⁰⁵

In 2002, the Pew Institute reported that the median net worth was \$88,651 for White households, \$7,932 for Latino households, and \$5,988 for African American households,¹⁰⁶ and that home equity was the key component of household wealth, accounting for two-thirds of mean net worth.¹⁰⁷ Public policy tends to support reaching out to these latter two 'untapped' communities of potential homebuyers for a number of reasons. In addition to strengthening community development, homeownership is one of the principal means by which low-income families acquire wealth. Traditionally, home purchases were thought to be good investments because they allowed homeowners to build long term assets,¹⁰⁸ while also resulting in assets that homeowners could borrow against in the short term. Policy considerations also include the recognition that neighborhood environment affects the general welfare of the nation and that homeownership has the potential to catalyze community growth, development, and stabilization.¹⁰⁹ Community stability in turn tends to

increase property values.¹¹⁰

Moreover, racial and ethnic homeownership disparity has disturbing implications for a nation that is increasingly diverse, and this disparity played an important role in the decision to increase homeownership opportunities for these communities.¹¹¹ The Bush White House initiative of 2000 included a goal to increase the number of minority homeowners by at least 5.5 million by 2010.¹¹² The initiative also included an identification of the barriers that many minorities faced when seeking to purchase a home as well as strategies to overcome the barriers. One of the most significant barriers to implementing this initiative proved to be financial.¹¹³

*Identifying the Financial Barriers*¹¹⁴

The White House identified numerous financial barriers to homeownership, including inability to make down payments, limited access to credit, poor credit histories, limited mortgage products, regulatory burdens, and lack of access to financing in general. The federal government then launched efforts to help targeted borrowers overcome these barriers.¹¹⁵ It was apparent that home loans were not unavailable per se but were unattainable for many Americans. This lack of access can be attributed to a number of things, including racial barriers that remain rooted in society.

Denying Access

“Redlining” is one method of denying people access to financing and refers to the practice of outlining in red those areas on a map to which financial institutions are unwilling to extend their credit services. These areas tend to include primarily minority and low-income borrowers. Although inequality and housing discrimination has existed for centuries in our nation,¹¹⁶ banks initiated the practice of redlining in the 1960s¹¹⁷ after race riots brought inequality to the forefront of national concern.¹¹⁸ The federal government began to pay more attention to America’s legally-sanctioned

discriminatory housing practices. The Community Reinvestment Act (CRA) is often hailed as an act against redlining.¹¹⁹ Although redlining is no longer a blatant practice, lenders continued to issue loans on a discriminatory basis by using marketing strategies that targeted borrowers based on race and adopting inequitable institutional policies.¹²⁰ Many lenders who offered prime loans neither marketed nor solicited applications from minority or low-income applicants,¹²¹ with the exception of sub-prime alternatives offered in compliance with CRA requirements.

One scholar has identified racial redlining as a barrier to African Americans’ ability to accumulate wealth because it restricts their participation in the marketplace as home sellers and buyers. Banks use racial redlining to deny access to credit so that a prospective buyer would not qualify for a home mortgage, in fact, “in a study conducted by the Federal Reserve Board, [it was reported that] ‘banks reject African Americans ‘for home loans 80% more often than equally qualified Whites.’ This rampant discrimination disadvantages Blacks and contributes to the poverty cycle.”¹²² Moreover, African-Americans who reside within identifiably African American neighborhoods were historically redlined out of the mainstream mortgage market and forced to rely instead on sub prime loans and predatory lending practices. The effect of securing loans through these more expensive markets also impacts the homebuyer’s ability to purchase homeowner’s insurance.¹²³ The FHA created two housing markets between the early 1930s and the 1960s by systematically excluding African Americans from lower priced, conventional mortgages.¹²⁴ The FHA rated loan applicants from most desirable “A” to least desirable “D”. “A” neighborhoods were principally or exclusively white, native-born professionals and “D” neighborhoods were not.¹²⁵ In 1950, the FHA only granted 5% of conventional loans to non-Whites thereby limiting low-cost mortgages to Whites. FHA-redlined neighborhoods encouraged racial

segregation and their monopoly on the mortgage market meant that any exclusion from the program constituted exclusion from the housing market.¹²⁶ The CRA is to some extent responsible for the decreased disparity between loans awarded to Whites and those awarded to minorities.¹²⁷ Although there has been some decrease, minorities are increasingly and disproportionately serviced by sub-prime lenders.¹²⁸ Even affluent African Americans are twice as likely to refinance in the sub-prime market as low-income Whites.¹²⁹ With the skyrocketing rate of immigration, home ownership in immigrant communities has risen on the priority list of many lending and governmental institutions. As immigrants buy homes at an ever-increasing rate, unscrupulous lenders will frequently target them, because they often lack a sophisticated understanding of the American mortgage system. This is especially true for non-fluent English speakers who fall prey to predatory lenders who impose exploitative loan terms and conditions.¹³⁰

Sub-prime lenders tend to target minorities, low- to moderate-income borrowers, and borrowers who live in certain communities that are considered high risk. These communities are also most likely to be affected by the hardships associated with predatory lending, such as high interest rates, unreasonable fee scales,¹³¹ loss of home equity, and even social and psychological problems.¹³² In some cases, these lenders take advantage of borrowers with excellent credit histories who may not realize their eligibility to obtain a prime market loan¹³³ and direct them instead to sub-prime loans.¹³⁴

According to current Home Mortgage Disclosure Act (HMDA) data, African Americans and Latinos are still consistently denied credit when applying for home loans and when refinancing at rates disproportional to those of Whites.¹³⁵ Discriminatory lending practices in the conventional lending market continue to expand the sub-prime mortgage market.

The road to a national policy of homeownership has been a long one

from that time in our nation's history when some were denied the opportunity because of their race. During the last decade, attempts were made to open the door of the American dream of homeownership to all people. One potential by-product of the 2008 economic crash is the reversal of homeownership encouraging policies, but such a reversal would ignore the underlying problems of the crash by placing blame on the wrong culprit. Placing the sole blame upon the homeownership policy or minority home buyers would be unfair and inaccurate.

Part III: Homeownership and the Economic Crash of 2008: Is the sub-prime borrower to blame?

The sub-prime mortgage

The sub-prime mortgage is traditionally described as a type of loan granted to individuals who have poor credit score histories (often below 600) that disqualify them from conventional mortgages.¹³⁶ Because sub-prime borrowers present a high risk for lenders, sub-prime mortgages charge interest rates above the prime lending rate.¹³⁷ Borrowers with credit scores above 650 are generally charged a significantly lower rate of interest on their loans than are charged on sub-prime loans.¹³⁸

Lower interest rates and high capital liquidity encouraged lenders to grant sub-prime loans from 2004 to 2006. More importantly, lenders sought additional profits through these higher risk loans, charging interest rates above prime to balance against heightened default risks. More than the government homeownership policy, it was the perceived potential for large profits that motivated lenders to increasingly give out sub-prime mortgage loans.

Sub-prime mortgage lending can be described as predatory.¹³⁹ Borrowers who are either financially unsophisticated or financially desperate for credit may agree to unjustified high interest rates, payments that they cannot afford, frequent refinancing arrangements, high and unfair prepayment penalties, excessively high points or origination

fees, and high broker fees. Predatory lending also involves abusive lending practices in which the terms of the loan are inadequately correlated to the riskiness of the loan.¹⁴⁰ In essence, buyers least able to afford their homes were charged more than those who are better able to – the poor paid more for their houses than the rich. Moreover, statistics show that minority buyers who qualified for conventional mortgages with better terms were often steered toward sub-prime mortgages.¹⁴¹ Research has shown that approximately half of sub-prime borrowers qualify for conventional loans but are led to accept sub-prime loans instead. These borrowers are unaware that they qualify for lower interest rates because the lenders withhold the information in order to swindle minority borrowers into accepting higher interest rates, insurance payments, and other fees associated with the process.¹⁴² These buyers were also more likely to face “creative” financing options that included adjustable rate mortgages (ARMs), interest only loans, and other products that induced the buyer into the transaction only to get a substantial increase in mortgage payments or balloon payments within a period of a few years.¹⁴³ These so-called “teaser mortgage products” provided short term success and often produced long term failure.

The interest rates tied to loans traditionally given to minorities also demonstrate the existence of discrimination. African Americans typically pay interest rates one-third of a percent higher than Whites. This amounts to approximately \$11,756 over the life of a thirty-year \$145,000 loan, and is evidence of predatory lending. If poorer African American families are paying a higher monthly mortgage than wealthier White families for equal or poorer facilities, then African Americans are at a disadvantage and will have less disposable income than their White counterparts. Additionally, African Americans in low-income communities typically live in older, more dilapidated housing. This discrimination further serves to foster

an African American underclass.¹⁴⁴

A deeper look into foreclosures

In 2007, home foreclosures reached 2.2 million, a 75 % increase from the previous year.¹⁴⁵ Many who lost or were at risk of losing their homes to foreclosures were unexpected victims. For example, foreclosures in military towns and their surrounding towns and cities are outpacing the national average four times over.¹⁴⁶ Working Americans with secure employment lost their homes to foreclosures because they were unable to make their mortgage payments, suggesting that much of these defaults were due to the structure of the mortgage—many involved adjustable rates frontloaded with teaser rates that escalated to amounts that working families could not manage.

Significantly, as bad as the mortgage crisis has been, an estimated 94% to 99% of mortgages are performing.¹⁴⁷ Moreover, it is estimated that more than 75% of sub-prime mortgages will perform.¹⁴⁸ By 2012, however, 13% of all American residential loans are projected to end in foreclosure.¹⁴⁹ This would mean that 87% of mortgage loans would be performing, but it is the profile of the 13% that compels further review.

Sub-prime lending accounts for the greatest percentage of home mortgage foreclosures.¹⁵⁰ While sub-prime mortgages represent only 14 % of the mortgage loans, they represent almost 50 % of the foreclosures. The general consensus is that low-income and minority homeowners have suffered disproportionately because they have participated in the sub-prime lending market at greater rates than White and Asian borrowers. In 2006, African American and Latino communities accounted for more than 53 and 46 % of the sub-prime home loans, respectively.¹⁵¹ By 2007, African Americans carried 34% of high priced mortgages compared with 10.6% for Whites.¹⁵² According to an analysis of loans reported under the federal Home Mortgage Disclosure Act, African Americans were 2.3 times more

likely to take out sub-prime mortgages and Latinos twice as likely.¹⁵³ In 2007, 59 % of all sub-prime loans were in tracts that were less than 30 % minority and only 17% were in tracts that were more than 70 % minority.¹⁵⁴

While creditworthiness may be one reason for the high number of sub-prime loans in minority communities, a greater reason appears to be race.¹⁵⁵ Despite the CRA's intent to address redlining by requiring banks to make loans in lower income neighborhoods, it did not require banks to actually be located in those communities. As a result, banks typically maintain offices and branches in White communities while lending institutions offering sub-prime loans are strongly visible in minority communities.¹⁵⁶ This helps to explain why minority borrowers eligible for lower cost loans obtain higher cost products instead.

A *Wall Street Journal* study found that as many as 61 % of all sub-prime borrowers in 2006 could have qualified for more conventional products based on their credit scores.¹⁵⁷ Various firms record the states and cities hardest hit by foreclosures,¹⁵⁸ and most of these states and cities are overwhelmingly White.¹⁵⁹ In other words, while a higher percentage of people of color than of Whites assume sub-prime mortgages, most sub-prime loans overall do not go to people of color.¹⁶⁰ This suggests that even though sub-prime mortgages made to minority buyers has affected the overall foreclosure numbers, something other than sub-prime lending may be responsible for the national downturn.

How sub-prime mortgages fueled the economic crisis of 2008

Since World War II, the nation's housing policy has sought to expand housing opportunities. More recently, housing policies also aimed to make mortgages available to poorer Americans.¹⁶¹ In theory, this policy recognizes that national wealth is dependent on the wealth of each of the nation's citizens, and it also sought to address the history of racial and ethnic

discrimination that affected property lending and insurance practices, such as redlining.¹⁶² The policy was steeped in good intention, but many argue that it forced lenders to abandon sound business practice in order to lend to the poor and to minorities, resulting in the housing bubble burst that brought the global economy to its knees.¹⁶³

As discussed earlier, sub-prime mortgages are characterized as risky, which means lenders are more likely to see defaults on sub-prime loans than on conventional or prime loans. However, in relation to the economic crisis of 2008, the sub-prime mortgage was merely an essential element in the ultimate collapse. In the early 1990s, a collapse of the sub-prime market may have been inconsequential as it accounted for less than 1% of all mortgage lending.¹⁶⁴ By 2005, sub-prime lending grew to 20% of all mortgage lending.¹⁶⁵

Demand for sub-prime loans increased after the dot-com bubble burst in 2001. To boost confidence in the market, the federal government lowered interest rates, encouraging people to borrow. For most Americans, homes represent their largest investment, so the credit market sought to attract more home loans. Capital flowed into the hands of borrowers who in turn bought more homes. Property values increased, but some of these values were based on aggressively unreliable appraisals that artificially inflated housing valuation and increased loan amounts. People whose homes were already mortgaged were enticed to secure second and even third liens against their home equity, relying on these escalating home valuations. In many instances, borrowers ultimately owed more than their houses were worth.

Much of this activity was fueled by an unquenchable thirst for wealth. Mortgage brokers and sub-prime lenders sought out people who would borrow at exorbitant rates and fees. Theoretically, these loans would not put brokers and lenders in grave jeopardy because risk supposedly goes down as it is spread out. Instead of the bank holding all of the risk, the government would share a

significant portion of that risk through FNMA, FHA, and others. At first, this risk-sharing plan appeared to work well, and securitization emerged as a way to increase profit while addressing growing market demands.

*Securitization*¹⁶⁶

Responding to the increasing interest of the non-depository mortgage lenders to find a source of liquidity for conventional loans, government sponsored entities (GSE) began issuing mortgage-backed securities (MSB) that passed interest to investors.¹⁶⁷ The investors, in turn, found these securities to be easily transferable on the market because the GSEs guaranteed the principal and interest income of the securities even if the mortgagors defaulted.¹⁶⁸ Private institutions soon recognized the profitability of these investments and began pooling home mortgages but specifically excluded home equity loans and sub-prime mortgages.¹⁶⁹ This created a market niche for private pooling that basically began in 1977 with Bank of America and Salomon Brothers.¹⁷⁰ Unfortunately, this securitized mortgage vehicle was based on a highly unreliable risk assessment model.¹⁷¹

Beginning in the 1990s, mortgage financing found creative ways to reach otherwise unqualified borrowers. Numerous mortgage products aimed at attracting 'untapped' borrowers included balloon mortgages, adjustable rate mortgages, interest only loans, and others. Initially, these loan products were made to prime borrowers who carried a low risk of default. However, extending securitization to higher risk sub-prime borrowers became increasingly attractive for investment banks seeking higher fees and greater profits.¹⁷² Wall Street analysts produced computer models supposedly demonstrating that risks associated with pooling sub-prime debt were comparable to risks of prime backed securities.

Initially, the models seemed accurate. Between 2001 and 2005, sub-prime defaults dropped from 10 % to 5 %. Many borrowers, however, were

warding off default by getting new housing equity loans to pay off the original debt. This created the illusion that the loans were performing and were therefore low risk. In actuality, the borrower's situation typically worsened, as new debt was generally higher than the original high-cost debt. Instead of avoiding default, the borrower was simply deferring an increased liability. Moreover, because securitized sub-prime mortgages were a relatively new phenomenon, there was little data with which to test the computer models. In other words, the combination of easy capital and an abundance of available money far exceeded the underlying goal of increasing American homeownership. The new goal was to target as many new buyers as possible to fuel the unregulated greed that was consuming Wall and Main Streets. Based, in large part on the optimistic models, ninety percent of securitized sub-prime loans received the highest rating available: AAA. Reality ultimately struck and about 50 % of AAA-rated sub-prime securities defaulted. During this same period of mirage, collateralized debt obligations (CDO) were revived as a way to diversify the mortgage pool by mixing sub-prime mortgages with asset-backed securities and credit derivatives. When the smoke cleared, almost 100% of all AAA CDOs had at least partially defaulted.¹⁷³

CDOs and ABSs are secured by underlying real estate. When the note defaults, the holder of the CDO or ABS should be able to sell the underlying property to recover any financial loss. However, in this new market, the property is likely to be worth far less than the debt it secures. Moreover, the housing market has been stalled by the collapse of the credit market. The credit market stall should have been temporary and should have been reversed with the infusion of government TARP funds, but it was neither temporary nor reversed, thus exacerbating the decline of the housing market. Inaccessibility to credit has less to do with housing policy or sub-prime mortgages and more to do with another Wall Street invention designed to make more money for investors. Coupled

with failing sub-prime market securities, the failure and potential failure of credit default swaps would send the global markets reeling.

Credit Default Swaps and Their Role in the Credit Collapse

American billionaire Warren Buffett described speculatively-bought derivatives as financial weapons of mass destruction.¹⁷⁴ A credit default swap (CDS) is a credit derivative where one party makes periodic payments to the other and gets promise of a payoff if a third party defaults.¹⁷⁵ The first party gets credit protection and is called a buyer. The second party gives credit protection and is called the seller. The third party is known as the reference entity. The CDS is an insurance policy written in favor of the insured who is not the owner of the product that is actually being insured. An investor, also known as the buyer, can gamble that a company will likely default and purchase an insurance policy that pays the investor-buyer money if the reference entity defaults.¹⁷⁶

The underlying theory for the CDS probably comes from the 1958 Modigliani-Miller theorem,¹⁷⁷ which finds that the value of a firm can be independent of the firm's ratio of debt to equity,¹⁷⁸ and that swaps and derivatives ensure the safety of the financial system.¹⁷⁹ However, it is a mathematical computerized financial model created by David Li that is at the core of the financial collapse of 2008.¹⁸⁰ Li's model, which catapulted the Modigliani-Miller theorem into the huge derivatives market, was designed to calculate default correlations by predicting risk.¹⁸¹ Notwithstanding Li's own warnings about important flaws in his model, investment bankers, beginning with those at Banker's Trust and J P Morgan Chase, relied on the model.¹⁸²

An estimated \$58 trillion in outstanding CDS liability exists. If this CDS market collapses, it will produce consequences far greater than sub-prime mortgage defaults.¹⁸³ There will not be enough money to pay all the claims, which is why the federal government

is attempting to shore up banks and insurance companies with cash infusion and why the cash is not being used to extend credit. The cash infusions are being hoarded to pay off the CDS claims of savvy billionaire investors, not of sub-prime borrowers. These buyers who have cashed out (and will cash out in the future) by insuring products they didn't even own have made out like bandits. Yet, because the CDS market is completely unregulated,¹⁸⁴ it will be far more difficult to identify these winners than it was to identify the hedge fund winners.

Selling Short (Short sales)

Out of the CDS market grew "the short sale," another tool investors used to make unimaginable sums of money.¹⁸⁵ Unlike the traditional "long sale" where the investor bets that the company in which she is investing will prosper, the short seller bets that the company will fail.¹⁸⁶ The short sale has existed since the seventeenth century and has remained controversial throughout its lifetime. Short trading is legal,¹⁸⁷ but the government sought to regulate the practice, which one congressman called "the greatest evil that has been permitted or sanctioned by the Government," after the stock market crashed in 1929.¹⁸⁸

Until recently, the Securities and Exchange Commission (SEC) regulated short selling.¹⁸⁹ The regulation prohibited the short sale of an exchange-traded security in a falling market. The prohibition applied to every transaction effected on a national securities exchange and to transactions in certain exchange-traded securities affected in the over-the-counter market.¹⁹⁰ On the other side of the debate, de-regulators suggested that the short seller is a valuable town crier in the economic marketplace. Arguing that the short seller does not cause the company to fail, but merely identifies which companies are struggling due to poor management and overvaluation, the SEC deregulated the industry on July 2, 2007.

At issue in this article is how significant a role short sales played in the

current economic crisis. Some investors viewed mortgage trading as a bubble that would eventually burst and shorted the companies—principally banks, insurance companies, and mortgage companies—that were investing in this debt. As debtors began to default and credit schemes began to unravel, short sellers profited—some in huge amounts. If the short sale represents a peculiar industry of buying and selling borrowed stock, the credit default swap, which gives investors unregulated power to insure companies that they do not own, makes the short sale seem less menacing.

Credit

A weak American credit market substantially affects the overall health of international economies. The American consumer uses credit to pay for homes and education in the U.S., but also for goods imported from abroad. American businesses rely on credit to conduct, maintain, and expand operations both domestically and abroad. When lenders fail or refuse to lend, people around the globe suffer.

One of the reasons banks are unwilling to lend is because they fear that toxic debt, otherwise described as potential CDSs and short sale liability, is yet to be fully identified or assessed. Banks are hoarding money in reserve to defray potential losses in debt. Generally, a bank's equity-to-debt ratio is about one dollar in equity to support every twenty dollars in debt. The SEC permitted investment banks to have a 1:30 equity-to-debt ratio.¹⁹¹ To assess the accuracy of the ratio and therefore the risk, banks rely on rating agencies. When the rating agencies incorrectly rate high risk ABSs, CDOs, and sub-prime MBSs as AAA, thereby severely discounting the risk, lenders are left seriously undercapitalized.¹⁹² The government's infusion of capital into these banks, while bolstering the reserves needed to ward off potential liability, has not adequately contributed to re-opening the credit markets.¹⁹³

In other words, if the banks did not have to provide reserve funds

for so-called toxic debt, they would be able to make more loans to companies, consumers, and home buyers. The current economic catastrophe is rooted in the failure of these myriad investment vehicles' inability to expand the sale of single family homes to Americans. That said, a healthy economy cannot survive purely on credit and consumerism. Nor can opening the credit markets alone restore the economy. Credit should be governed by sensible business principles that include re-opening mortgage markets even to higher risk borrowers.

Part IV: Looking for Solutions

You got Wall Street firms, Bear Stearns, Lehman Brothers. You got insurance companies like AIG. Merrill lost a ton of money on this... Everybody's lost a ton of money. They're supposed to be the smartest investors in the world. And they did it to themselves. They blew themselves up.¹⁹⁴

Numerous factors contributed to the economic collapse of 2008. The sub-prime mortgage market was one factor but was not the only culprit. Indeed, losses related to high risk mortgages are dwarfed by those related to derivatives and securitization. According to Frank Partnoy, "we wouldn't be in any trouble right now if we had just had underlying investments in mortgages. We wouldn't be in any trouble right now."¹⁹⁵ In fact, even though foreclosure rates on sub-prime mortgages are much higher than foreclosure rates on prime mortgages, some 80 % of sub-prime loans are still performing, and sub-prime loans continue to enable borrowers to own homes, increase wealth, and convert their sub-prime loans to conventional ones.¹⁹⁶

If Partnoy is correct (and the numbers reflect that he is),¹⁹⁷ it would be foolhardy to abandon the goal of

increasing homeownership opportunities in America. Instead, government policy should continue to recognize the value of homeownership to individual and national wealth. This would require the nation to continue to address the barriers to homeownership, particularly the financial barriers, in a comprehensive and rational way. That said, not every American needs or is able to own a home. Financial prudence and good sense must work in concert with any program designed to expand homeownership opportunities.

Addressing the absence of Credit

The government has tried to stimulate the financial markets and reinvigorate lending, but the credit market remains closed. Instead, banks are putting money received from the government into reserves in anticipation of CDS claims. While estimates of potential CDS claims continue to rise, it is likely they are in the hundreds of billions of dollars. Chase Bank alone is involved in over 4 trillion dollars in CDS investments.¹⁹⁸ At these rates, there will never be enough money to stimulate the financial markets back into lending again. This leaves the government as the major source of loans, and there are a number of government-backed programs in place to provide the funding necessary to support homeownership.

In order to stop the market's financial bleeding, regulators should put a halt to CDSs. There should also be a time-specific requirement that all holders of CDS instruments must report their holdings. In this way, potential liability can be calculated and the proper amount of reserves needed to compensate can be set aside. Since CDSs terminate after time, the markets will also know how long the potential loss exists. In the event the CDS continues as an investment vehicle, the law prohibiting regulation should be overturned so that the CDS market will be at least as transparent as the overall investment market.¹⁹⁹

Specific Financial Remedies: No need to re-invent the wheel

Various existing government programs provide financial fixes through subsidies that fill the gap between funds needed to close sales and funds potential buyers have to purchase homes.²⁰⁰ These programs provide down payment assistance, tax credits,²⁰¹ expanded funds to the secondary mortgage market²⁰² and various financial incentives to private homebuilding and financing entities.²⁰³ There is significant value in these programs, but additional government money to support these programs where few alternatives exist could serve as a much needed ‘TARP’ for ordinary citizens.

The Land Trust

Land trusts are used to protect natural resources.²⁰⁴ While the land trust movement has grown tremendously since its inception more than one hundred years ago, it remains principally a conservation and environmental protection tool.²⁰⁵ The land trust concept can easily be expanded to include the goal of protecting affordable housing stock and homeownership opportunities.²⁰⁶

Land trust corporations²⁰⁷ may acquire land in fee simple for the charitable or public purpose of providing affordable homeownership opportunities.²⁰⁸ Technically, the trust would acquire the land and retain ownership of it,²⁰⁹ and the homeowner would purchase the house itself but not the underlying land. This option could be particularly helpful in gentrified communities where land values, property taxes, and insurance costs are so high that homeownership can become unaffordable.²¹⁰

Under this option, homeowners would pay the taxes assessed solely on the house value, while property taxes assessed on the land value would be exempt or paid by the trust.²¹¹ Similarly, homeowner insurance would be based on the cost of replacing the house and not on the price of the land. The

homeowner could acquire the land over time at a low purchase price (pre-escalated or modified escalation value) and even share profits from the sale of the property with the trust.²¹² The financial gain to the homeowner at the sale of the property would be based on the number of years the property would be held as affordable. A homeowner could sell the property to another qualified buyer without penalty allowing the land use restrictions to transfer to the new owner. On the other hand, a homeowner who sold the property to a fair market purchaser could share some profit from the sale with the trust. The amount of profit realized would be related to the number of years the homeowner owned the property under the affordability restriction.²¹³ Moreover, an incentive to participate in such a transaction could be to permit the initial buyer to share in some of the appreciated land value as well as the value of the house itself.

The sales agreement between the trust and the homeowner can provide for an affordable housing payment to the trust. Rather than securing a sub-prime mortgage, the qualified buyer would contract for a loan that would be affordable. Not only might this affordable housing program help improve the buyer’s financial condition, but the homeowner will pay a return to the public upon sale.

Tax Abatement and Exemption Programs

Property taxes are calculated based on the assessed value of the property and are commonly described as ad valorem taxes. Affordable housing developments are often constructed on land with low valuation. Low value appraisals are essential for ensuring low or affordable sales prices. Pre-development residents generally pay lower taxes than do residents who move in post-development, when property values for the area have risen. Affordable housing developments tend to address blighted conditions, upgrade the community, and generally increase the value of new residences as well as existing ones.²¹⁴ As more housing is developed and a more

stable community is established, values continue to increase. The double-edged sword of development is that it could tax existing residents as well as newcomers out of their homes.²¹⁵ This is especially true of development near downtown locations where land values may increase dramatically and quickly.²¹⁶

Effectively addressing the property tax problem is challenging. One option is for the owner to sell at higher value, enjoying the windfall of equity build up in the land since it was purchased. This is not necessarily averse to the public interest of building wealth in historically impoverished communities.²¹⁷ However, the drawback to electing the windfall option is the potential reduction in economic and racial diversity in the community and the displacement and replacement of longtime community residents. This is commonly referred to as gentrification—the replacement of lower income residents with higher income residents through increased property taxes and sale prices.

A second option tempers the first option’s market-driven approach. A municipality or developer can impose restrictive affordability covenants that run with land purchased under the affordable housing program. Presuming that the program is designed to increase affordable housing stock and expand homeownership opportunities to historical renters, the covenant would be designed to retain affordability for an express term and could be written in a way to permit the homeowner to recover a share of the equity that would be less than the windfall of option one. Under this second option, the homeowner may sell the property at a price higher than was paid based on the higher valuation but may keep only a percentage of the profit based on the length of time he or she owned the property. This meets two goals: increasing homeowner wealth and retaining an affordable housing fund even if the specific housing stock is no longer affordable.

A third option is tax abatement. Commonly used by municipalities to attract business enterprises, it could also be used to encourage economically

diverse communities and reduce the displacement of residents who have no viable relocation alternatives. Tax abatement and tax exemption programs are legislatively-established measures for shifting the burden of property taxes away from a target taxpayer population.²¹⁸ The general purpose of the tax exemption is to encourage publicly desired objectives.²¹⁹ A cost-benefit analysis should be done to determine which groups will be impacted positively, which groups will be affected negatively, and whether a complete or partial exemption is or should be available.²²⁰ Tax abatements are also financing tools that may be used to revitalize economically-depressed areas.²²¹ Abatements commonly forgive all or a portion of property taxes for a specified period of time. Tax abatements are often used to attract business communities with the goal of creating jobs and encouraging community vitality.²²² It is unclear how beneficial such business abatements have actually been in the past, but as part of a comprehensive redevelopment program, they could increase the level and speed of a community's revitalization.²²³

Tax Credits

Tax credit programs provide incentives for tax-burdened entities to participate in low-income housing programs. The Tax Reform Act of 1986 established the low income housing tax credit and was designed to increase the number of affordable housing rental units in the United States.²²⁴ It is often criticized,²²⁵ but there is also a growing movement to expand the program to include low-income homeownership tax credits.²²⁶ Among the proposals is a low-income second mortgage tax credit that would encourage homeownership by lowering down payment and closing costs and by reducing housing costs in general.²²⁷

Tax Increment Financing (TIF)

Tax increment financing (TIF) is a mechanism by which local government provides homeownership opportunities.

TIF allows local governments to finance improvements, in infrastructure for example, in an effort to attract business redevelopment in a target area.²²⁸ TIF relies on property value increases and property tax revenue to pay for community revitalization that could include redeveloping or rehabilitating deteriorated areas of a city, facilitating the construction of low-to-moderate income housing, promoting economic development, and providing employment opportunities.²²⁹

Addressing Creditworthiness

Some potential buyers who have adequate income to pay the house note and costs are still not creditworthy under traditional lending criteria.²³⁰ Though helpful, programs designed to clean buyers' credit histories are not designed to monitor buyers' future credit habits. A three-part program that allows the purchaser to buy the home during the pending credit "cleanup" will likely yield better results. Under this option, the buyer would qualify for the program based on income and evidence of financial stability. Those with less than stellar credit ratings will have to participate in a credit counseling and cleaning program during the first year of homeownership as a condition of the mortgage subsidy or other assistance. Finally, the buyer will agree to a wage garnishment plan that hedges against the risk posed by the buyer's limited credit worthiness.

It may also be possible to divert attention from the traditional house to a less expensive form of housing like the modular housing that was popular in places like Levittown during the post war era.²³¹ Other forms of construction could also be made available, as well as smaller cottages and bungalows that support lower construction and sales prices.

Standard financing programs need to address the cost of constructing homes and its effect on affordability.²³² In markets where housing prices fall below the average, demand tends to be very high.²³³ These markets consist of

the working poor who do not qualify for public housing but do not make enough money to purchase a home. While no person should be pressured into homeownership, the opportunity could be made available for those Americans who desire to be homeowners. Often, construction costs limit the accessibility of this market in several ways. Contractors who build in the affordable market already realize limited profit margins that discourage entrepreneurial interest. They are not equipped to reduce the sales prices of homes to meet the needs of this forgotten market.²³⁴ The working poor generally do pay for housing and its amenities in the form of rent and utility payments, but they often do not qualify for homeownership opportunities at rates comparable to rent.

Foreclosure

Access to credit does not always portend success as a homeowner. Some will lose their home to foreclosure. There are three sources of risk that commonly lead to mortgage payment terminations:²³⁵ interest-rate related refinancing, default, and moving.²³⁶ For various reasons, higher risk loans are more likely to be affected by mortgage payment factors. Market conditions may reduce the homebuyer's ability to maintain mortgage payments. For example, a slow market may affect the owner's ability to resell the home and move unless the seller is willing to accept a loss. Clearly, selling at a loss undermines the home purchase as a tool for building wealth.²³⁷ On the other hand, high risk homeowners in a fast market are commonly impacted by the rising costs, including increased property taxes, associated with the house, but such costs can be offset by the sale of the property at its enhanced value. Here, the homebuyer is forced from her home as a "victim" of a gentrified community. While such displacement does not necessarily mean financial detriment to the homeowner, it could significantly affect the maintenance and availability of affordable housing.²³⁸ Foreclosure then looms as a potential threat to the

affordable homebuyer.

*Addressing the Roots of Barriers to
Homeownership Comprehensively*

Capital and access to capital significantly impact a family's ability to purchase a home. As short term remedies, down payment assistance, mortgage buy downs, and other subsidies are very helpful but should be employed as part of a long-term plan. Education is internationally recognized as the single most powerful tool against poverty,²³⁹ yet illiteracy in America is believed to be at least 20 %.²⁴⁰ Since the United States provides access to public education, it seems infeasible that so many Americans are uneducated or undereducated.²⁴² Studies show that when poor people are relocated from depressed communities to more mainstream communities, they tend to develop and maintain a new culture supportive of upward mobility and education.²⁴³ Thus, concentrated communities of poor people limit homeownership, and any potential solution should address racial, cultural, and economic diversity as part of its design.

Conclusion

There is substantial reason to maintain a strong policy of homeownership in America. Homeownership is the primary means of developing wealth for most American families. When whole groups of people, defined often by their race, are denied access to this source of wealth, it sustains an economic division that retards national growth and development. As the American population is increasingly dominated by this group of have-nots, the impact of poverty on the United States and world economy is clear.

For over six decades, the United States has promoted a policy favoring safe, decent, and sanitary housing for its citizens. For much of that time, however, homeownership was reserved for Whites, while significant barriers existed for African Americans who wanted to own their own homes. These barriers

often closed the door to homeownership altogether for African Americans. In other cases, the cost was so high as to have a deleterious impact on wealth, even for those African Americans who owned homes. During the last decade, the policy has shifted to encourage homeownership, particularly for African Americans. Regardless of whether this shift occurred because the nation finally recognized that African Americans were being denied an important vehicle to prosperity, because of a desire for racial equality, or because of investor greed, the shift did produce an increase in African American homeownership. At any rate, recognition of the goal of homeownership is meaningless without an assault on the remaining barriers to reaching that goal. If the goal is to be achieved, solutions must be aggressively pursued.

The current world economic state has multiplied the challenges America faces. Many of the last decade's financial practices have failed in catastrophic ways, and recovery is expected to be very slow. Nevertheless, the role of the mortgage market and of the sub-prime loan in this calamity is infinitely small, so the American policy of homeownership should not be reversed. We should ensure that all Americans will share in the economic recovery and that the history of disparity will be reversed. An important part of that recovery is the revival of the housing market and the development of strategies making housing more affordable. Our efforts will be maximized if we pursue a comprehensive program that meets short-term needs but also addresses long-term cures.

The government must employ meaningful regulation to help identify the extent of the continuing CDS liability. Every buyer, holder, broker or seller of a CDS should be given a limited period of time to report its existence and its potential liability. Companies or individuals who fail to self report within the time period should be subjected to specified penalties. The fledgling private lending marketplace should be supplemented with direct government mortgages,

and the government should work with the private marketplace to ensure that lending practices are sound. Mortgage lending programs should be developed that permit higher risk borrowers to buy non-traditional, and affordable, homes under more traditional financing structures. Public and private policies must be in place to maintain reasonable and realistic property valuations. Programs that include features like wage garnishment or mortgage escrow agreements to help ensure loan repayment should be considered. The costs of affordable housing can be reduced in various ways, one of which is through waivers of income generating municipal and regulatory fees. Also, historically un- and underserved communities can be targeted for capital improvements, particularly in infrastructure. Lower cost building product alternatives, such as prefabricated or modular homes, can be used. Land banks and/or land trusts can also reduce the cost of housing. The sources of low-cost loans (investments), such as pension funds, should be identified. Mixed-use and mixed-income residential developments should be encouraged, programs that provide down payment assistance should be continued, and predatory lending should be reduced while shoring up fair sub-prime products. Finally, homeownership illiteracy should be reduced via, for example, continued education components as part of loan requirements or community-based campaigns to inform target populations of the various programs available. In the long term, we must bridge the income gap between Asian Americans, Anglo Americans, African Americans, and Latinos, especially in those situations where the gap can only be explained by race. We must reverse the trend of school drop outs and public education failure toward a trend of achievement and productivity. Finally, we must enact inclusive zoning laws and eliminate the myth of the inherently substandard African American residential community.

The impact of a wealthier nation will be felt by all Americans. The fact that government policies denied

access to wealth to its citizens because of their race makes it important not

only to retain its policy of expanded homeownership opportunities, but to

couple it with specific strategies to reach a fair and equitable result.

Endnotes

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² See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 23 (2000), quoted in Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 239 n.270 (2003) (explaining that property ownership was a prerequisite for suffrage in nearly every state during the Revolutionary Era); see also JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 128 (1989), quoted in James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 459 n.62 (1999) (explaining that “even in the most representative colonial legislatures, suffrage only was extended to one-sixth of the population. Women, children, servants, and those without property all were ineligible to vote”).

³ ALEXIS DE TOCQUEVILLE, *Democracy in America* (1835), in *DEMOCRACY IN AMERICA: AND TWO ESSAYS ON AMERICA* 73 (Gerald Bevan trans., Penguin Books 2003) (“[T]he strength of free nations resides in the townships. Town institutions are to freedom what primary schools are to knowledge: they bring it within people’s reach and give me the enjoyment and habit of using it for peaceful ends.”); see also DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW*, § 2.9 (2d ed. 1986); Patrick J. Skelley, *Public Participation In Brownfield Remediation Systems: Putting Community Back on the (Zoning) Map*, 8 FORDHAM ENVTL. L. J. 389, 395-98 (1997) (discussing the challenges to cleaning hazardous waste, a presumably positive modification of land use, if surrounding landowners are not brought into project as participants. Among the other things landowners may be concerned with the affect on the nature of the surrounding

community. It alters traffic patterns and density, increases noise, and changes the balance of uses in a particular area).

⁴ See Olufunmilayo B. Arewa, *Measuring and Representing the Knowledge Economy: Accounting for Economic Reality under the Intangibles Paradigm*, 54 BUFF. L. REV. 1, 1-2 (2006) (recognizing the historical measure of wealth by tangible assets but suggesting that the technological age may increase the importance of intangible assets); Jeanne Goldie Gura, *Preserving Affordable Homeownership Opportunities in Rapidly Escalating Real Estate Markets*, 11 J. AFFORDABLE HOUS. & CMY. DEV. L. 78, 79 (2001) (explaining that home ownership has traditionally been considered an integral step toward building wealth and achieving the American Dream; Michael A. Stegman, Roberto G. Quercia, & George McCarthy, *The Center for Housing Policy, Housing America’s Working Families*, 1 New Century Housing Issue 1 (June 2000) available at http://www.ccc.unc.edu/abstracts/0600_Housing.php (last visited November 30, 2009).

⁵ See Brian Gilmore 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, 264-66 (2008) (tracing the history of homeownership among African-Americans since emancipation in 1865); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 618-19 (1999) (tracing the history of mortgage-based discrimination in the housing market).

⁶ *Id.* See also Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1054 (2008) (listing many reasons why homeownership is valued in American households). Cf. Dearborn, *supra* note 77, at 40, 44, where the author acknowledges that research supports these purported benefits of homeownership, however she argues “homeownership advocates fail to recognize that most of the evidence supporting these claims comes from studies of middle- to upper-income White populations. The premise that homeownership has absolute benefits has rarely been tested among low- to moderate- income and minority populations. As a result, few of the putative benefits of homeownership can be expressly substantiated for traditionally underrepresented groups.”

⁷ See Melissa B. Jacoby, *Home Ownership*

Risk Beyond A Subprime Crisis: The Role Of Delinquency Management, 76 FORDHAM L. REV. 2261, 2276 (2008) (explaining that home ownership is key to wealth-building); John K. McIlwain, *Show Me the Money: A Proposed Federal Response to Urban Sprawl*, 11 J. AFFORDABLE HOUS. & CMY. DEV. L. 26, 27 (2001) (citing home ownership as the American dream for millions of Americans); Rick Santorum, *Wealth Creation in the New Millennium: Transforming Poverty in America*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 391 (2002) (explaining that most Americans consider home ownership the signal that they have reached the “economic mainstream”).

⁸ See Charles Lewis 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 (2007) (attributing the homeownership gap between African-Americans and Whites to the nation’s history of racial discrimination in the housing market and blaming lack of available and fair credit as a source of this problem).

⁹ *Id.* at 133 n.12 (citing the 2005 report which conveyed President Clinton’s goal of increasing minority home ownership); see also Lorna Fox, *Re-Possessing “Home: A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 470-71 n. 327 (2008) (citing the specific agenda of the William Clinton administration to expand homeownership opportunities to minorities); Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 189, 216-220 (2005) (describing how the intent of banking regulations during the Kennedy administration were designed, in part, to eliminate the segregation patterns fostered by the Roosevelt legislation, but failed to do so); George Steven Swan, *The Law and Economics of Affirmative Action in Housing: The Diversity Impulse*, 15 U. MIAMI BUS. L. REV. 133, 135 (2006) (describing the exclusionary effect of the homeownership regulations implemented during the Franklin D Roosevelt presidency).

¹⁰ KERWIN CHARLES AND ERIK HURST, *The Transition to Homeownership and the Black-White Wealth Gap*, in 84(2) THE REVIEW OF ECONOMICS AND STATISTICS 281-297 (MIT Press, 2002).

¹¹ U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP, ANNUAL STATISTICS: 2007, TABLE 20: HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER, 1994 TO 2007, available at <http://www.census.gov/hhes/www/housing/hvs/annual07/ann07t20.html> [hereinafter U.S. CENSUS HOMEOWNERSHIP RATES]. Gilmore et al., *supra* note 4, at 266-67. (highlighting Clinton's housing programs' specific targeting of low-income and underserved populations).

¹² Matthew Nielsen and Kara Altenbaumer-Price, *The Civil, Regulatory and Criminal Responses to the Subprime Mortgage Meltdown*, 14 ANDREWS SEC. LITIG. & REG. REP. 1, 1 (2008) (tracing the efforts of the SEC to search out those responsible for creating the sub-prime mortgage crisis); see also Rachel Carlton, *Mortgage Forgiveness Debt Relief Act Of 2007*, 45 HARV. J. ON LEGIS. 601, 601-03 (2008) (describing the Mortgage Forgiveness Debt Relief Act).

¹³ See Scott C. Matasar, (Commentary) *Defenses In Subprime Litigation*, ANDREWS BANK AND LENDER LIABILITY LITIG. REP. (2008) (stating that the role of the Community Reinvestment Act is a large part of the mortgage and mortgage backed securities collapse); but see Richard D. Marsico, *Subprime Lending, Predatory Lending, And The Community Reinvestment Act Obligations Of Banks*, 46 N.Y.L. SCH. L. REV. 735 (2002) (discussing the Community Reinvestment Act and its antipathy toward bad debt including predatory and some sub-prime lending).

¹⁴ See U.S. CENSUS HOMEOWNERSHIP RATES, Historical Census of Housing Tables Ownership Rates, available at <http://www.census.gov/hhes/www/housing/census/historic/ownrate.html> (The 1970 report shows African American homeownership rates at 41.6 %, increasing by 1980 to 44.4% but decreasing by 1990 to 43.4%; the rates for Latinos were 43.7% in 1970 but by 1980 had dropped to 43.4 % and by 1990 to 42.4%. By 2000 the rates for African Americans had increased to 46.3% and for Latinos had increased to 45.7% suggesting that it was post 1990 initiatives rather than the enactment of the CRA that was responsible for the highest rates of homeownership for this population); see also Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 65 (2006) (stating that in 1995, 42.2 % of African-American families owned homes, increasing to a historic high of 49.5 % in 2004); JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING: 2005 at 15-19, in Shapiro, *supra* note 13, at 65 (The 1995 homeownership rate for African Americans was lower than the 1980 and 1990 census reported rates and only .6% higher than the 1970 rate).

¹⁵ Michael Aleo and Pablo Svirsky, *Foreclosure*

Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims under The Fair Housing Act and The Equal Credit Opportunity Act, 18 B.U. PUB. INT. L.J. 1, 16-17 (2008); see Al Yoon, *Foreclosures to Affect 6.5 Mln Loans by 2012-Report*, REUTERS, April 22, 2008, available at <http://www.reuters.com/article/bondsNews/idUSN2233380820080422> (explaining that falling home prices and lack of available credit may result in foreclosures); CENTER FOR RESPONSIBLE LENDING, UPDATED PROJECTIONS OF SUBPRIME FORECLOSURES IN THE UNITED STATES AND THEIR IMPACT ON HOME VALUES AND COMMUNITIES (2008), <http://www.responsiblelending.org/mortgage-lending/research-analysis/updated-foreclosure-and-spillover-brief-8-18.pdf> (providing statistics of foreclosures).

¹⁶ WILLIAM C. APGAR & ALLEGRA CALDER, THE DUAL MORTGAGE MARKET: THE PERSISTENCE OF DISCRIMINATION IN MORTGAGE LENDING, JOINT CENTER FOR HOUSING STUDIES, HARVARD UNIV., Dec. 2005, <http://www.jchs.harvard.edu/publications/finance/w05-11/pdf>, at 12-14; see Darnellena Christie Burnett, *Justice in Housing: Predatory Lending*, 15 APR NBA Nat'l B.A. Mag. 14.

¹⁷ See Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201, 5211 (2008) (establishing the Troubled Asset Relief Program to "restore liquidity and stability to the financial system of the United States").

¹⁸ Press Release, *Federal Housing Finance Agency, and Federal Housing Finance Agency Reports Mortgage Interest Rates* (January 27, 2009), available at http://www.fhfa.gov/webfiles/420/FHFA_Reports_Mortgage_Interest_Rates.pdf (reporting that the average loan amount in December 2008 was \$218,000); Mortgage Data Web.com, *Mortgage Industry Data and Statistics: Average FHA Mortgage Loan Amount Surges Higher and Higher!* (Sept. 4, 2008), available at <http://mortgagedataweb.blogspot.com/2008/09/average-fha-mortgage-loan-amount-surges.html> (stating that the average FHA mortgage loan is reported at slightly lower than \$200,000 around \$184,282).

¹⁹ See *US Foreclosures Rise in December; Reach 2.2 mln in 2007, up 75 pct from 2006*, FORBES, Jan. 2008, <http://www.forbes.com/feeds/afx/2008/01/29/afx4584956.html> (Realty Trac Foreclosure count statistics by state, 2008 totals at 3.16 million foreclosures in 2006 were reported at 1.26 million for three years total of 6.62 million. If half of that number is attributable to sub-prime foreclosures that would be 3.32 million. The average subprime loan amount for 2006 was about \$201,000. The average loan amount for subprime loans in the second half of 2006 was \$202,295, only 1 percent higher than the average loan amount for subprime loans of \$200,167 in the first half of 2006 as reported by Mortgage Bankers Association,

7/3/07).

²⁰ See generally Justin Ak Amoah, *Chicago technology riding its first wave since bubble burst*, MEDILL REPORTS CHICAGO, April 6, 2010, <http://news.medill.northwestern.edu/chicago/news.aspx?id=83835> (referencing the 2002 technology bubble burst before discussing Chicago's growth in the technology field).

²¹ William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 41 (1996) (explaining that immigrants began their life in America in seaport towns).

²² Nicole Stelle Garnett, *Suburbs As Exit, Suburbs As Entrance*, 106 MICH. L. REV. 277 (2007).

²³ *Federal Assistance In Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542, 543 (1959) (By the 1900's, a world housing shortage existed, chiefly because of the population increase and the concentration of the population in urban areas. The expansion of industry, a shortage of construction workers, and a lack of money for new housing also helped cause the housing shortage).

²⁴ William E. Nelson and Norman R. Williams, *Suburbanization and Market Failure: An Analysis Of Government Policies Promoting Suburban Growth And Ethnic Assimilation*, 27 FORDHAM URB. L.J. 197 (1999) (referring to census reports of homebuilding in Nassau County).

²⁵ See James C. Smith, *The Dynamics Of Landlord-Tenant Law And Residential Finance: The Comparative Economics Of Home Ownership*, 44 WASH. U. J. URB. & CONTEMP. L. 3, 62 (1993) (stating that "Economic slumps compel more families to rent, as some families lose their homes by foreclosure, and others, who hoped to purchase, postpone that decision. The lowest rate of owner occupation reflected by the decennial censuses was forty-four percent in 1940, after the country had spent a decade struggling with the Great Depression."); see also Nier, *supra* note 8 (discussing the government's shift from a pre-depression laissez-faire role in housing to an active post-depression role).

²⁶ Richard C. Schragger, *Cities, Economic Development, And The Free Trade Constitution*, 94 VA. L. REV. 1091, 1103 (2008) (finding that urbanization is the chief agent of demographic and economic change in the United States, as it has been in all developed countries since the Industrial Revolution because of the "externalities" that are borne from a diverse population of creators and thinkers in a diverse industrial and now, technological market; and further stating that "the twentieth century has witnessed monumental shifts in Americans' work and living patterns, including the great migration to the cities, a later (and smaller) movement out of the cities into the suburbs, and the

development of increasingly large and dense metropolitan areas. In 1860, less than twenty percent of the population lived in urban areas; in 2000, close to eighty percent did.”).

²⁷ Timothy Jost, *The Defeasible Fee and the Birth of the Modern Residential Subdivision*, 49 MO. L. REV. 695, 698 (1984).

²⁸ *Id.* at 701.

²⁹ *Id.* at 702-06.

³⁰ *Id.* at 724-25.

³¹ Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 433-35 (1996).

³² *United States v. Certain Lands in City of Detroit*, 12 F. Supp. 345, 348 (1935) (where the court opined that the fundamental law of both the United States and the state of Michigan prohibits the taking of private property except for public use) (*cited in* Adams, *supra* note 32, at 434 n.77).

³³ *Id.*

³⁴ 50 Stat. 888 (1937), 42 U.S.C. § 1401 (Supp. 1939).

³⁵ Alfred M. Clark, III., *Can America Afford to Abandon A National Housing Policy?*, 6 AFFORDABLE HOUS. & COMMUNITY DEV. L. 185, 185 (1997).

³⁶ Yale Law Journal, *No Room For Singles: A Gap In The Housing Law*, 80 YALE L.J. 395, 420 (1970). (discussing the post war programs enacted to spur homeownership opportunities).

³⁷ Edward Gramlich, *America's Second Housing Boom 1*, THE URBAN INSTITUTE (2007), http://www.urban.org/UploadedPDF/311418_Second_Housing_Boom.pdf.

³⁸ *City of Cleveland v. United States*, 323 U.S. 329 (1945).

³⁹ *Id.*; *see also* Housing Act of 1937, §§ 1,30, 42 U.S.C. §§1401-1440.

⁴⁰ Deborah Kenn, *Fighting The Housing Crisis With Underachieving Programs: The Problem With Section 8*, 44 WASH. U. J. URB. & CONTEMP. L. 77, 77 n.2 (1993).

⁴¹ Jon C. Dubin, *From Junkyards To Gentrification: Explicating A Right To Protective Zoning In Low-Income Communities Of Color*, 77 MINN. L. REV. 739, 752-53 (1993) (stating that “while the federal homeownership assistance programs promoted the creation of homogenous [W]hite suburbs, the federal public housing program for low-income families with children facilitated the development of segregated and locationally deficient [African American] inner city neighborhoods. From the public housing program’s inception in 1937, tenants were assigned to projects on a segregated basis, with many [African American] projects located in slums. When the program’s production goals were greatly expanded in the United States Housing Act of 1949, Congress virtually guaranteed that all new housing would continue to be constructed on a discriminatory basis when

it rejected anti-discrimination amendments to the Act”).

⁴² Housing Act of 1949 § 2, 42 USC § 1441a.

⁴³ Peter W. Salsich, Jr., *A Place to Call Home? Affordable Housing Issues in America Toward A Policy Of Heterogeneity: Overcoming A Long History Of Socioeconomic Segregation In Housing*, 42 WAKE FOREST L. REV. 459, 480-81 (2007) (stating that “The [Housing] Act [of 1949] articulated a goal of construction of 810,000 new public housing units in six years, one that required twenty years to meet, in part because of continuing controversies about the program. That same Act committed the United States to an ambitious goal of ‘the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family’”); *see also* Robert F. Drinan, *Untying the Noose*, 94 YALE L.J. 435, 436, n.5 (1984) (stating that the Housing Act of 1949 “was the first time the federal government set a national housing objective”).

⁴⁴ *See* *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L. J. 966, 968 n.12 (1968) (providing the language from the Housing Act of 1949 and how it should be read).

⁴⁵ Shelby D. Green, *The Search for a National Land Use Policy: For the Cities Sake*, 26 FORDHAM URB. L. J. 69, n. 120 (1998)

⁴⁶ Salsich, *supra* note 44, at 480.

⁴⁷ Adams, *supra* note 32, at 438-49.

⁴⁸ *Id.* at 439.

⁴⁹ *Id.*

⁵⁰ *Id.* at 436-38.

⁵¹ *See* CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 229 (Associate Faculty Press, Inc.) (1955) (likening FHA’s protection of the White neighborhood to the Nuremburg laws due to FHA’s focus on racial and social homogeneity in all housing projects), quoted in Florence Wagman Roisman, *Teaching Important Property Concepts: Teaching About Inequality, Race and Property*, 46 ST. LOUIS U. L. J. 665, 678 (2002); *see also* GAIL RADFORD, MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA 48, 188-89 (Univ. of Chicago Press 1996), *cited in* Roisman, *supra* note 52, at 673 n.28; GAIL RADFORD, *The Federal Government and Housing During the Era of the Great Depression*, in FROM TENEMENTS TO THE TAYLOR HOMES 102-03, 110-18 (John I. Bauman et al. eds. 2000), *cited in* Roisman, *supra* note 52, at 676 n.44.

⁵² *Id.* at 676.

⁵³ *Id.* at 670.

⁵⁴ *Id.*

⁵⁵ *See* Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND

USE & ENVTL. L. 89, 92 (1998) (providing the “black ghetto” as an example of the result of deliberate housing policies).

⁵⁶ *Id.* at 95; *see also* Adams, *supra* note 32, at 437.

⁵⁷ Elizabeth Sammann, *The Reality of Family Preservation under Norman v. Johnson*, 42 DEPAUL L. REV. 675, 688 (1992).

⁵⁸ *Id.* (stating that while the number of substandard housing decreased after the 1968 Act, the numbers of affordable units became a much larger problem).

⁵⁹ 42 U.S.C. §1437.

⁶⁰ *Id.* §§12701 (1990); 1441 (1965); 1425 (1940) (repealed 1990).

⁶¹ *Id.* §§ 804-806, 3404-06.

⁶² *See* Deborah Kemp, *The 1968 Fair Housing Act: Have its Goals been Accomplished?*, 14 REAL EST. L.J. 327, 328-332(1986) (discussing the broad purpose of the Fair Housing Act to cure urban problems of racially segregated urban ghettos); *see also* Dennis M. Teravainen (Note) *Federal Law’s Indifference To Housing Discrimination Based On Sexual Orientation*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 11, 22 (2002) (discussing the broad breadth of the Fair Housing Act as a statutory tool to prohibit discrimination in housing, to promote integration and to eliminate segregated housing).

⁶³ 42 U.S.C. §§ 3601-3619 (1994 & Supp. IV 1999); *see also* Kemp, *supra* note 63, at 329 (identifying the exemptions from the act).

⁶⁴ 15 U.S.C. § 1691(a)(1) (1994); *see* Joseph J. Norton, *Fair Lending Requirements: The Intervention of a Governmental Social Agenda into Bank Supervision and Regulation*, 49 CONSUMER FIN. L. Q. REP 17, 21-25 (1995) (stating that the ECOA, the FHA, the CRA, and the HMDA are the main fair lending laws. Although they impose different requirements, these requirements are sometimes interconnected. As a whole, they are the tools the federal government has used in its efforts to achieve its objectives in the fair lending area).

⁶⁵ 15 U.S.C. § 1691(a)(1).

⁶⁶ 12 U.S.C. §§ 2801-2810 (1994 & Supp. 1999). *See also* Ronald K. Schuster, *Lending Discrimination: Is The Secondary Market Helping To Make The “American Dream” A Reality*, 36 GONZ. L. REV. 153, 161 (2000) (“The HMDA requires ‘depository institutions’ to submit annual reports detailing home purchase and home improvement loans they have originated or purchased during the covered period, as well as applications received for the loans... The required HMDA disclosures encompass not only the location of the property and type of loan, but the borrower’s race, ethnicity, national origin, gender, and income as well.”).

⁶⁷ *Id.* at 162.

⁶⁸ *Id.*

⁶⁹ E.L. Baldinucci, *The Community Reinvestment Act: New Standards Provide*

New Hope, 23 FORDHAM URB. L.J. 831, 838-39 (1996).

⁷⁰ 12 U.S.C. §§ 4702-4713 (1994).

⁷¹ Norton, *supra* note 65, at 20.

⁷² David E. Runck, *An Analysis Of The Community Development Banking And Financial Institutions Act And The Problem Of "Rational Redlining" Facing Low-Income Communities*, 15 ANN. REV. BANKING L. 517, 531-33 (1996) (citing 12 U.S.C. § 4702(5)(A) (1994)).

⁷³ *Id.* at 532.

⁷⁴ Jeffrey S. Lesk and Richard M. Price, *An Introduction to the Community Development Bank Network*, 4 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 267, 269 (1995) (describing the Community Development Financial Institute Fund as having been created to expand the availability of credit, investment capital and financial services in distressed urban and rural communities).

⁷⁵ See BARRY G. JACOBS, *History of Federal Housing and Community Development Law*, in HDR HANDBOOK OF HOUSING AND DEVELOPMENT LAW, §1:56 (2009) (stating the HOPE programs were designed to encourage the use of government-owned or government financed housing for low-income home ownership); see also Danielle Pelfrey Duryea, *Gendering The Gentrification Of Public Housing: Hope VI's Disparate Impact On Lowest-Income African American Women*, 13 GEO. J. ON POVERTY L. & POL'Y 567 n.1, (chronicling the various HOPE programs and showing the focus change from rental to homeownership).

⁷⁶ Lynne Dearborn, *Homeownership: The Problematics Of Ideals And Realities*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 40 (2006) (explaining that some previous and still existing remedial actions taken by the federal government include insurance programs for those financial institutions that lend within low-income communities as well as the promotion and sponsorship by the federal government of community development programs and financial institutions).

⁷⁷ Matasar, *supra* note 12 (discussing the feasibility of banks reliance on the Community Reinvestment Act and its mandates as defenses to subprime litigation brought by minority and low-income borrowers).

⁷⁸ See Jo Carrillo, *In Translation For The Latino Market Today: Acknowledging The Rights Of Consumers In A Multilingual Housing Market*, 11 HARV. LATINO L. REV. 1, 5 (2008) (discussing the relative homeownership rates between Latinos and Whites and concluding that the rates for Latinos is low); Kenya Covington and Rodney Harrell, *From Renting To Homeownership: Using Tax Incentives To Encourage Homeownership Among Renters*, 44 HARV. J. ON LEGIS. 97, 100-103(2007) (comparing homeowner rates between African-Americans and Whites).

⁷⁹ Carmen DeNavas-Walt et al., *Poverty Status*

of People by Age, Race, and Hispanic Origin: 1959 to 2007, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 52 (Aug. 2008), <http://www.census.gov/prod/2008pubs/p60-235.pdf> (showing poverty status of persons by age, race, and Hispanic origin from 1959-2007); but see NAT'L ASS'N OF CHILD CARE RES. AND REFERRAL AGENCIES, *SCHOOL-AGE CHILDREN 5-17 LIVING IN POVERTY 1* (2007), www.naccrra.org/randd/docs/School-Age_Children_in_poverty.pdf (reporting that the number rises to about one-third for all school-aged children living in poverty).

⁸⁰ Howard A. Savage, *Who Could Afford to Buy a Home in 2002?* BUREAU OF THE CENSUS STATISTICAL BRIEF (2007), www.census.gov/prod/2007pubs/h121-07-1.pdf (stating that the 2002 number was unchanged from 1995. According to the report, "[h]ouse prices were determined for areas defined by the nine census geographic divisions and by whether a house was inside or outside a metropolitan area or in or out of a central city in a metropolitan area. A modestly priced house is one priced so that twenty-five percent of all owner-occupied houses in the area in which the survey respondents live are below this value and seventy-five percent above. A low priced house is priced so that ten percent of all owner-occupied houses in that areas are below this value and ninety percent are above.").

⁸¹ *Id.*

⁸² *Id.*

⁸³ EDWARD N. WOLFF, *DOES EDUCATION REALLY HELP? SKILL, WORK AND INEQUALITY* (Oxford Univ. P. 2006); see Daniel H. Weinberg, *A Brief Look at Postwar U.S. Income Inequality*, U.S. CENSUS BUREAU 191 (1996), <http://www.census.gov/hhes/www/p60191.html> (discussing poverty and income trends overall, for regions, by race and ethnicity and by differences in age).

⁸⁴ *Id.*

⁸⁵ See *id.* (finding that income inequality increased from 16.1 percent between 1968 and 1994 to 22.4 percent).

⁸⁶ *Id.* (reporting that the income of households within the 95th percentile was more than 8 times that of those households in the 20th percentile. In 1968, the household at the 95th percentile had 6 times the income of the household at the 20th percentile).

⁸⁷ Press Brief by Daniel H. Weinberg, *Press Briefing on 2000 Income and Poverty Estimates*, U.S. CENSUS BUREAU, *available at* <http://www.census.gov/hhes/www/income/income00/prs01asc.html> (stating that the median household income held at \$42,100 meaning that half of all households had incomes above \$42,100 and half below).

⁸⁸ *Id.*

⁸⁹ *Id.*; see also Bernadette Proctor & Joseph Dalaker, *Poverty In The United States: 1999*, U.S. CENSUS BUREAU (2000) 1, <http://www.census.gov/prod/2000pubs/p60-210.pdf> (stating that in 1999, 32.3 million people were poor, down from 34.5 million in 1998); see Bernadette Proctor & Joseph Dalaker, *Poverty In The United States: 2000*, U.S. CENSUS BUREAU (2001) v, <http://www.census.gov/prod/2001pubs/p60-214.pdf> at 1 (stating that about 31.1 million people were poor in 2000, 1.1 million fewer than in 1999).

⁹⁰ *Id.*; see also Bernadette Proctor and Joseph Dalaker, *Poverty in the United States: 1999 and 2000*, U.S. CENSUS BUREAU (reporting statistics showing the level of income).

⁹¹ *Id.* (reporting the poverty rate for African Americans fell from 23.6 percent in 1999 to 22.1 percent in 2000. For Latinos, the poverty rate fell from 22.8 percent in 1999 to 21.2 percent in 2000).

⁹² *Id.* (reporting in 2005 that African American households had the lowest median income at \$30,134, Latino household income was \$34,241, for non-Latino Whites income was \$48,977 and for Asian was \$57,518).

⁹³ *Id.*

⁹⁴ See generally A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 3-11 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989) (discussing the conditions of African Americans relative to white America and determining that the disparities that exist are stark and long standing).

⁹⁵ See Current Population Survey, Table 24, BUREAU OF LABOR STATISTICS, April 6, 2010, <ftp://bls.gov/pub/special.requests/lf/aa2003/pdf/cpsaat24.pdf> (2002 and 2003 statistics); Current Population Survey, Table 24, BUREAU OF LABOR STATISTICS, Aug. 7, 2009, <http://www.bls.gov/cps/cpsaat24.pdf> (showing unemployment rates by race from 2007 to 2008).

⁹⁶ *Id.*

⁹⁷ *Poverty: 2007 Highlights*, U.S. CENSUS BUREAU, April 6, 2010, <http://www.census.gov/hhes/www/poverty/poverty07/pov07hi.html> (reporting that poverty rates in 2007 were statistically unchanged for non-Hispanic Whites (8.2 percent), Blacks (24.5 percent), and Asians (10.2 percent) from 2006. The poverty rate increased for Hispanics (21.5 percent in 2007, up from 20.6 percent in 2006)); see also Household Income Rises, Poverty Rate Unchanged Number of Uninsured Down, U.S. CENSUS BUREAU, April 6, 2010, http://www.census.gov/Press-release/www/releases/archives/income_wealth/012528.html (reporting that real median income (adjusted for inflation) for black and non-Hispanic white households rose between 2006 and 2007, representing the first measured real increase in annual household income for each group since 1999. Real median household income

remained statistically unchanged for Asians and Hispanics. Among the race groups and Hispanics, black households had the lowest median income in 2007 (\$33,916). This compares to the median of \$54,920 for non-Hispanic white households. Asian households had the highest median income (\$66,103). The median income for Hispanic households was \$38,679).

⁹⁸ Howard A. Savage, Who Could Afford to buy a Home in 1991?, U.S. CENSUS BUREAU, April 6, 2010, http://www.census.gov/apspd/statbrief/sb93_16.pdf.

⁹⁹ *Id.*

¹⁰⁰ *Id.* (showing that the rate of White families not of Latino origin that could not afford a home in the area in which they resided was forty three percent).

¹⁰¹ U.S. CENSUS BUREAU, Housing Vacancies and Homeownership, Annual Statistics: 2006, Table 20: Homeownership Rates by Race and Ethnicity of Householder 1994 to 2006 (2006), <http://www.census.gov/hhes/www/housing/hvs/annual06/ann06t20.html>.

¹⁰² U.S. CENSUS BUREAU, Reports on residential Vacancies and Homeownership, Table 7, April 6, 2010, <http://www.census.gov/hhes/www/housing/hvs/qtr107/q107press.pdf>.

¹⁰³ U.S. CENSUS BUREAU, Housing Vacancies and Homeownership, Historical Tables, Table 14, April 6, 2010, <http://www.census.gov/hhes/www/housing/hvs/historic/index.html>.

¹⁰⁴ U.S. CENSUS BUREAU, Housing Vacancies and Homeownership, Annual Statistics, Table 20, (2000), <http://www.census.gov/hhes/www/housing/hvs/annual00/ann00t20.html>. In Census 2000, homeownership among White householders was 71 percent, higher than the national rate of 66 percent. In contrast, householders who were African American (47.2 percent) and those who were Native Hawaiian and Other Pacific Islander (53.5 percent) had homeownership rates less than the national rate. Latino householders had a 46.3 percent homeownership rate, compared with 73.8 percent for non-Latino White. Those householders with rates higher than 50 percent but less than the national rate were American Indians and Alaska Natives (56.2 percent) and Asians (52.8 percent).

¹⁰⁵ U.S. CENSUS BUREAU, Housing Vacancies and Homeownership Rates, 1994-2005, Table 20: Homeownership Rates by Race and Ethnicity of Householder, 1994-2005 (2005), <http://www.census.gov/hhes/www/housing/hvs/annual05/ann05t20.html>.

¹⁰⁶ Rakesh Kochhar, *The Wealth of Latino Households: 1996 to 2002*, PEW HISPANIC INSTITUTE 4 (2004), <http://pewhispanic.org/files/reports/34.pdf>.

¹⁰⁷ *Id.* at 2; see also *id.* at 16 (reporting that the only exceptions arose in the case of White

households who owned homes, interest earning assets and unsecured liabilities at rates in excess of 50 percent).

¹⁰⁸ *Id.*

¹⁰⁹ See Sean Zielenbach, *A Critical Analysis Of Low-Income Homeownership Strategies*, 13 J. AFFORDABLE HOUS. & CMTY DEV. L. 446, 452 (2004) (discussing the advantages and disadvantages of homeownership generally and states, "Both policy makers and practitioners often view homeownership as a central component of community development strategies. Since owners tend to remain in their homes for longer than renters (because of their financial investment, among other things), homeownership contributes to a neighborhood's residential stability. That stability can lead to both the development of greater social capital in the community as well as an appreciation of local property values.").

¹¹⁰ *Id.* at 453-54.

¹¹¹ See Fox, *supra* note 8, at 470-71 (stating that "one study published by the Department of Housing and Urban Development (HUD) in 2005 indicated that while homeownership rates were currently at historically high levels for all sections of the U.S. population, 'dramatic gaps in homeownership rates have been stubbornly present over the last several decades, and even increased somewhat during the decade of the 1990s.' This study identified several factors accounting for the homeownership gap, including not only race and ethnicity, but also differences due to income, wealth, marital status, and age of household. Yet, while concerns about homeownership rates have triggered major policy initiatives under both the Clinton and Bush Administrations to increase access to homeownership, it is also important to note that it is not only access, but the sustainability of homeownership that will have a significant impact on national homeownership rates over the medium and long term.").

¹¹² Remarks by President George Bush, President Calls for Expanding Opportunities to Home Ownership, <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020617-2.html>

¹¹³ *Id.* (stating, "First, the single greatest barrier to first time homeownership is a high down payment. It is really hard for many, many, low income families to make the high down payment. And so that's why I propose and urge Congress to fully fund the American Dream Down payment Fund. This will use money, taxpayers' money to help a qualified, low income buyer make a down payment. And that's important. One of the barriers to homeownership is the inability to make a down payment. And if one of the goals is to increase homeownership, it makes sense to help people pay that down payment. We believe that the amount of money in our

budget, fully approved by Congress, will help 40,000 families every year realize the dream of owning a home.").

¹¹⁴ See Press Release, *Barriers to Minority Homeownership*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, June 17, 2002, available at <http://www.hud.gov/news/releasedocs/barriers.cfm> (describing the multiple barriers that prevent minority families from becoming homeowners).

¹¹⁵ See Leonard S. Rubinowitz and Ismail Alsheik, *A Missing Piece: Fair Housing And The 1964 Civil Rights Act*, 48 HOW. L.J. 841 (2005) (chronicling the federal government's efforts to help minorities overcome barriers to homeownership).

¹¹⁶ David J. Garrow, *The Federal Courts and School Desegregation in the 1970's*, 21 LAW & SOC'Y REV. 879, 881 (1988).

¹¹⁷ Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL'Y 73, 75 (1999).

¹¹⁸ ALEXANDER VON HOFFMAN, JOINT CENTER FOR HOUSING STUDIES, HARVARD UNIVERSITY, LIKE FLEAS ON A TIGER? A BRIEF HISTORY OF THE OPEN HOUSING MOVEMENT 29-31 (2010) http://www.jchs.harvard.edu/publications/communitydevelopment/von_hoffman_W98-3.pdf, 1998 (where author shows that various historical events including the race riots of the 1960s sparked changes in American civil rights including housing policy).

¹¹⁹ See Gilmore, *supra* note 4, at 635 (explaining that the CRA, along with the Fair Housing Act and the Home Mortgage Disclosure Act, were enacted to respond to the ills associated with redlining).

¹²⁰ *Id.*

¹²¹ See *id.* at 637 (recognizing that "the continuing prevalence of redlining was directly related to the effects of the policies and practices adopted by lenders").

¹²² Andrene Smith, (Note) *A Different World: Financial Determinants Of Well-Being In New Orleans In Black And White*, 14 GEO. J. ON POVERTY L. & POL'Y 179, 189 (2007).

¹²³ Leland Ware, *Race And Urban Space: Hypersegregated Housing Patterns And The Failure Of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 67 (2002).

¹²⁴ Smith, *supra* note 123, at 189.

¹²⁵ *Id.* at 189-90.

¹²⁶ *Id.* at 190.

¹²⁷ Lopez, *supra* note 118, at 75 n.9 (citing Mark Anderson, Subprime Lending to Minority Groups Rises, Study Finds, WALL ST. J., Nov. 25, 1998, at B11).

¹²⁸ *Id.* at 75.

¹²⁹ See Darnellena Christie Burnett, *Justice in Housing: Curbing Predatory Lending*, NBA NAT'L B. ASS'N MAG., Mar./Apr. 2001, at 14 (explaining that high-income African-American neighborhoods were twice as likely to have sub-prime mortgages as otherwise

similar low-income White neighborhoods).

¹³⁰ Eric C. Bartley (Comment) *And Regulation for All: Federally Regulating the Mortgage Banking Industry*, 2006 MICH. ST. L. REV. 477, 485 (2006).

¹³¹ Lopez, *supra* note 118, at 77.

¹³² *Id.* at 79 (positing that “the loss of a home can be financially and psychologically devastating. Financially, a homeowner may lose all equity in his home, and ultimately may end up homeless. Psychologically, homeowners facing the loss of their homes are more likely to suffer from mental illnesses, commit suicide, or engage in criminal behavior. Therefore, the problem of predatory lending in minority communities is a grave concern.”).

¹³³ *Id.* at 77-78.

¹³⁴ Cecil J. Hunt, II, In the Racial Crosshairs. Reconsidering Racially Targeted Predatory Lending Under A New Theory of Economic Hate Crime, 35 U. TOL. L. REV. 211, 213 (2003) (stating that the recent explosive growth in the predatory subprime market has “created a crisis of epidemic proportions for communities of color, elderly homeowners, and low-income neighborhoods [because of] the plague of predatory mortgage lending.”).

¹³⁵ FORMAN CTR. FOR REAL ESTATE & URBAN POLICY, DECLINING CREDIT & GROWING DISPARITIES: KEY FINDINGS FROM HMDA 2007 1 (2008), <http://www.furmancenter.org/files/KeyFindingsfromHMDA2007FurmanCenterReport.pdf>.

¹³⁶ Holden Lewis, *What Exactly is a Subprime Mortgage?*, BankRate.com, April 18, 2007, http://www.bankrate.com/brm/news/mortgages/20070418_subprime_mortgage_definition_a1.asp (“There are conflicting accounts of the size of the subprime market. Depending on whom you talk to, it accounts for 20 percent of all mortgage loans, 15 percent or 13.5 percent. Estimating the size of the subprime market is tricky for a number of reasons. For one, it’s sometimes hard to distinguish between a subprime mortgage and an Alt-A loan -- a grade of mortgage between prime and subprime. For another, there are two ways to count them: by the number of loans or by total dollar value. Then there’s the question of whether you’re talking about all loans originated in a certain year or all outstanding mortgages. Standard & Poors says subprime originations totaled \$421 billion in 2006. The Mortgage Bankers Association says all originations totaled \$2.5 trillion. If both data sources are accurate, that means 16.8 percent of mortgage volume consisted of subprime loans last year. That’s dollar volume, not the number of mortgages. Subprime mortgage balances are probably smaller than average, so more than 16.8 percent of borrowers got subprime loans. These statistics rely on lenders to define

what they mean by subprime, and different lenders have different definitions. As a rule of thumb, a subprime mortgage is a home loan to someone with a credit score below 620. But some lenders count loans as subprime even if the borrowers have credit scores of 660 or higher, if the borrower makes a down payment of less than 5 percent or does not document income or assets. Other lenders might count those loans as Alt-A. There isn’t a definition of subprime that everyone agrees on. That’s partly what makes it difficult to judge the size of the subprime market.”) (emphasis added).

¹³⁷ Heather M. Tashman, *The Subprime Lending Industry: An Industry in Crisis*, 124 BANKING L.J. 407, 408 (2007) (explaining the nature of a subprime mortgage).

¹³⁸ Lewis, *supra* note 140, (stating that an industry of subprime mortgage lenders has sprung up to serve the vast number of Americans who have credit problems).

¹³⁹ See Cassandra Jones Havard, *To Lend or Not to Lend: What the CRA Ought to Say About Sub-Prime and Predatory Lending*, 7 FLA. COASTAL L. REV. 1, 2 (2005) (explaining the predatory nature of subprime mortgaging).

¹⁴⁰ Cathy Lesser Mansfield, *The Road to Subprime “HEL” Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 540-41 (2000).

¹⁴¹ Bartley, *supra* note 131, at 484 (stating that affluent blacks are twice as likely to refinance in the sub-prime market as low-income whites).

¹⁴² Smith, *supra* note 123, at 191.

¹⁴³ PRACTISING LAW INSTITUTE, SUBPRIME INSTITUTE 2008, RICARDO GUERRA AND ERIC OCHOA V. GMAC LLC, GMAC MORTGAGE, LLC ET. AL., UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA 748 (2008).

¹⁴⁴ Smith, *supra* note 123, at 180.

¹⁴⁵ Allison D. Matthews, *To Stop a Predator: Is a Complete Ban on For-Profit Foreclosure Rescue Operations the Best Way to Prevent Equity Stripping?*, 20 LOY. CONSUMER L. REV. 477, 478 n.4 (2008).

¹⁴⁶ Kathleen M. Howley, *Foreclosures in Military Towns Surge at Four Times US Rate*, BLOOMBERG.COM, May 7, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&refer=home&sid=awj2TMDLnwU> (referencing RealtyTrac, Inc., research).

¹⁴⁷ See 60 Minutes, A Look at Wall Street’s Shadow Market (CBS News broadcast October 5, 2008) (transcript available at <http://www.cbsnews.com/stories/2008/10/05/60minutes/main4502454.shtml?tag=contentMain;contentBody>). Howley, *supra* note 150 (the rate of affected mortgage loans was 1% in 2007, up from .58% in 2006). See, e.g., CBS Evening News, American Dream Slipping Away, (CBS television broadcast

Mar. 6, 2008) (media report stating that up to 6% of homeowners are months away from foreclosure).

¹⁴⁸ Tashman, *supra* note 141, at 411 (stating that one out of five sub-prime mortgages will go into foreclosure); see Aleo, *supra* note 14, at 16-17 (“Not surprisingly, borrowers default on subprime loans at far higher rates than typical loans and lead to foreclosure far too often. In 2008, the Mortgage Bankers Association (MBA) found that the rates of delinquency, foreclosure initiations, and loans in the process of foreclosure continue at record levels. In the first quarter of 2008, seasonally adjusted delinquency rates were 3.71% for prime loans and 18.79% for subprime loans, while in 2007 the delinquency rates were 2.58% for prime loans and 13.77% for subprime loans. Foreclosures follow similar trends; the foreclosure inventory rate in 2008 is 1.22% for prime loans and 10.74% for subprime loans, as compared to 0.54% and 5.10% in the first quarter of 2007. Alarming, “while subprime . . . [adjustable rate mortgages] represent[ed] only 6 % of all loans outstanding,” they accounted for a whopping 39 % of foreclosures. Fixed rate mortgage foreclosures for subprime loans are six times higher than prime loans, while mortgage foreclosures for adjustable rate mortgages are over four times more likely for subprime than for prime loans. Unfortunately, the situation continues to worsen. Two million adjustable-rate mortgages will reset to higher interest rates in 2008 alone, and these loans will continue to adjust in 2009 and beyond.” Homeowner vacancy rates grew from 1.5 percent in the first quarter of 1995 to 2.8 percent in the second quarter 2008, including a climb from 1.5 percent to 2.8 percent from 1995 to 2005 and a 2.0 percent to 2.8 percent climb from 2005 to 2008.); see also ROBERT R. CALLIS AND LINDA B. CAVANAUGH, CENSUS BUREAU REPORTS ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, U.S. CENSUS BUREAU NEWS (2009), <http://www.census.gov/hhes/www/housing/hvs/qtr209/files/q209press.pdf> (the latest census report on residential vacancies shows that the homeowner vacancy rate for the second quarter of 2008 was statistically insignificant when compared to the homeowner vacancy rates for the prior quarter and the entire 2007).

¹⁴⁹ See Al Yoon, *Foreclosures to affect 6.5 million by 2012*, REUTERS, April 22, 2008, <http://www.reuters.com/article/bondsNews/idUSN2233380820080422> (“Falling home prices have made an increasing number of U.S. homeowners more vulnerable to default”).

¹⁵⁰ Mansfield, *supra* note 144, at 553-54 (“[S]ubprime loans still generally default earlier than non-subprime home equity loans, and high interest rate loans-- most of which are subprime--end up in foreclosure at

a higher rate than non-subprime loans.” Also stating that by 1999 subprime mortgage loans had very high delinquency rates, especially when one looks at more serious delinquencies and foreclosures.); see also Ben S. Bernanke, Chairman, Speech at the Columbia Business School’s 32nd Annual Dinner (May 5, 2008) (transcript available at <http://www.federalreserve.gov/newsevents/speech/Bernanke20080505a.htm>) (May 5, 2008) (“The sharpest increases have been among subprime mortgages, particularly those with adjustable interest rates: About one quarter of subprime adjustable-rate mortgages are currently 90 days or more delinquent or in foreclosure. Delinquency rates also have increased in the prime and near-prime segments of the mortgage market, although not nearly so much as in the subprime sector.”).

¹⁵¹ See NAT’L URBAN LEAGUE POL’Y INST., 2007 HOME MORTGAGE DISCLOSURE ACT DATA 1 (2008), <http://www.nul.org/sites/default/files/2007%20HMDA%20Data.pdf> (reporting the race-based disparity in higher priced lending markets).

¹⁵² *Id.*

¹⁵³ Vikas Bajaj & Ford Fessenden, *What’s Behind the Race Gap?*, THE NATION, November 4, 2007, reprinted in N.Y. TIMES, <http://www.nytimes.com/2007/11/04/weekinreview/04bajaj.html>.

¹⁵⁴ NAT’L URBAN LEAGUE, *supra* note 155, at 2.

¹⁵⁵ See ALGERNON AUSTIN, ECONOMIC POLICY INSTITUTE, SUBPRIME MORTGAGES ARE NEARLY DOUBLE FOR LATINOS AND AFRICAN AMERICANS (June 11, 2008) http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_20080611/ (stating that “[r]ecent studies suggest that creditworthiness—alone or in combination with factors other than race—cannot account for race based subprime disparities. When researchers from the Federal Reserve and the Wharton School of Business conducted an analysis that took into account the percent of adults in a neighborhood who were a very high credit risk, they still found a positive relationship between the prevalence of subprime loans and the share of minorities in a neighborhood.”); see also Aleo, *supra* note 14, at 20 (stating that “[a]ccording to the CRL study, the racial disparity in subprime lending has not been strictly based on borrowers’ income-levels or risk-related credit factors. The study breaks down its data by LTV, FICO credit score range, and race. In the highest-risk borrower category—featuring an LTV of above 90% and FICO score below 620—African Americans were only 6% more likely than white borrowers to receive a subprime loan for a home purchase and 5% more likely to receive a subprime loan for refinancing. For borrowers with the

best credit histories and thus the lowest risk categories—LTV below 80% and FICO score of above 680—African Americans were 65% more likely to receive subprime loans than their similarly situated white counterparts for a home purchase and 124% more likely when refinancing. Beyond the clear racial disparities in lending, the increased disparity in refinancing is particularly unsettling as minorities who refinance with subprime loans are at risk of losing the equity that they have invested in their homes, often comprising their life savings.”).

¹⁵⁶ See Bajaj, *supra* note 157 (stating that the biggest home lenders in minority neighborhoods are subprime lenders).

¹⁵⁷ See NAT’L URBAN LEAGUE, *supra* note 155, at 2 (citing Rick Brooks and Ruth Simon, Subprime Debacle Traps Even Very Creditworthy, WALL ST. J., December 3, 2007, <http://online.wsj.com/article/SB119662974358911035.html>).

¹⁵⁸ See REALTYTRAC, AS SOME TOP METRO FORECLOSURE ACTIVITY RATES DECREASE, NEW FORECLOSURE HOT SPOTS EMERGE IN Q3 2009, (Oct.28, 2009) <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&itemid=7733> (showing the top cities hit by foreclosures); see also Nick Timiraos, Move Over Merced: Foreclosures Intensify in New Crop of Western Cities, <http://blogs.wsj.com/developments/2009/10/28/move-over-merced-foreclosures-intensify-in-new-crop-of-western-cities/>. (Oct. 28, 2009, 12:53 PM ET) (“foreclosure activity increased most sharply in several mid-size Western markets”).

¹⁵⁹ See State and County Quick Facts, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (citing to the index page: select state and city to view demographics).

¹⁶⁰ Austin, *supra* note 159; see also WILHELMINA A. LEIGH and DANIELLE HUFF, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, AFRICAN AMERICANS AND HOMEOWNERSHIP: THE SUBPRIME LENDING EXPERIENCE 1995-2007 6 (2007), <http://www.scribd.com/doc/24189487/African-Americans-and-Homeownership-The-Subprime-Lending-Experience-1995-to-2007-November-2007-Brief-2> (reporting on the disparity in incidence of subprime mortgages among African American and Latino populations showing that large percentages of minorities who receive mortgage and home improvement loans get subprime loans).

¹⁶¹ ROBERTA K. MCINERNEY, PRACTISING LAW INSTITUTE, SUBPRIME INSTITUTE 2008, RECENT FDIC SPEECHES, TESTIMONY 311 (2008) (reporting on the FDIC announcement that it will sponsor a Forum aimed at encouraging Mortgage Lending for Low- and Moderate-Income (LMI) Households on July 8, 2008). “The purpose of the LMI Mortgage

Forum is to explore a framework for LMI mortgage lending in the future, including identifying market and regulatory incentives for encouraging responsible LMI mortgage lending. The Census Bureau reports that the national homeownership rate was about 68 percent as of the first quarter 2008. However, the homeownership rate is only about 51 percent for those households with below median incomes. Moreover, data from the Federal Reserve’s 2004 Survey of Consumer Finances, the latest income stratification information available, show that for households with incomes in the bottom fifth of all earners, homeownership rates are far lower - about 40 percent. ‘I remain deeply concerned that disruptions in mortgage credit availability and in the secondary market will make it even more difficult for households of modest means to realize the benefits of owning their own homes,’ said FDIC Chairman Sheila C Bair. ‘Particularly in this environment of tightening lending standards, government must remain focused on the right incentives to promote responsible and sustainable mortgage lending. I look forward to a wide-ranging and constructive dialogue on the issues facing LMI borrowers and identifying recommendations on strategies that will benefit consumers, lenders, investors, and the economy.’”.

¹⁶² Gilmore et al., *supra* note 4, at 266 (stating “Former President Bill Clinton attempted to address homeownership during his time in office through a homeownership policy initiative. At the time of drafting the initiative later labeled Urban Policy Brief #2, the homeownership rate for White Americans was approximately 70% while the rate for African Americans was 43%. By any measure, this was a significant gap between the races with respect to homeownership. It existed well after most of the nation’s segregation laws had been repealed, which suggests that the difference in homeownership rates between whites and blacks was a complex issue that lacked an easy solution. The Clinton initiative, while directed at all Americans, did have a positive effect on the homeownership rates of African Americans and Latinos. One study from the Brookings Institution shaped the homeownership landscape during the Clinton years, and provided evidence that homeownership rates among African Americans and Latinos were improving significantly: Over the past decade, the gap between rates of homeownership has narrowed, due in part to an increasing number of mortgage loans to low-income, minority households. According to a recent report from the Brookings Institution, mortgage lending increased by 98 percent for African American homebuyers and by 125 percent for Hispanic homebuyers during

the 1990s. Rising rates of homeownership among minorities represent a positive step toward closing the wealth gap between whites and other groups.”)

¹⁶³ See Aleo, *supra* note 14, at 11 (“Villain Phil writing on behalf of the editors at the National Review, in a more measured tone, claimed that “bankers cannot blame CRA entirely; they made a lot of bad bets on rising home prices. But the CRA did influence lending standards across the banking industry, even in those institutions that are not strictly liable to its jurisdiction. The subprime debacle is in no trivial part the result of lending decisions in which political extortion trumped businesses’ normal bottom-line concerns.” The conservative critiques of the CRA were met with stern rebukes from liberal commentators. The President of the National Urban League called on Treasury Secretary Henry Paulson “to refute statements by conservative politicians and pundits that subprime mortgages provided to minorities led to the financial crisis and a \$700 billion federal rescue of Wall Street,” calling such allegations a “big lie.” Daniel Gross responded, “Let me get this straight. Investment banks and insurance companies run by centimillionaires blow up, and it’s the fault of Jimmy Carter, Bill Clinton, and poor minorities?” Gross blamed the crisis on “stupid, reckless lending, of which Fannie Mae and Freddie Mac and the subprime lenders were an integral part.” As he saw it, “Investment banks created a demand for subprime loans because they saw it as a new asset class that they could dominate. They made subprime loans for the same reason they made other loans: They could get paid for making the loans, for turning them into securities, and for trading them—frequently using borrowed capital.”)

¹⁶⁴ Leigh, *supra* note 164, at 3.

¹⁶⁵ *Id.*

¹⁶⁶ See Claire A. Hill, *Securitization: A Low-Cost Sweetener For Lemons*, 74 WASH U L Q 1061, 1062 (1996) (stating that securitization has existed since the 1970s). Kathleen C. Engel & Patricia A. McCoy, *Turning A Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2046-47 (2007) (explaining that securitization is a method of bundling a group of loans that are sliced into pieces called tranches. Each slice is rated by the rating agencies. Tranches are securities that are backed by a pool of cash-producing assets).

¹⁶⁷ Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2198 (2007) (describing GSE as including Federal National Mortgage Association (FNMA, commonly referred to as Fannie Mae), Government National Mortgage Association (GNMA commonly referred to as Ginnie Mae), and Federal Home Loan

Mortgage Corporation (commonly referred to as Freddie Mac)).

¹⁶⁸ *Id.* at 2199.

¹⁶⁹ *Id.* at 2200.

¹⁷⁰ *Id.*

¹⁷¹ Nomi Prins, *The Risk Fallacy*, FORTUNE, Oct. 27, 2008, available at http://money.cnn.com/2008/10/27/magazines/fortune/riskfallacy_prins.fortune/index.htm.

¹⁷² Thomas O. Porter, II, *The Federal Reserve’s Catch-22: A Legal Analysis of the Federal Reserve’s Emergency Powers*, 13 N.C. BANKING INST. 483, 486-89 (2009) (where author generally contextualizes the housing collapse by chronicling the dual role of the market to make money and to do by exercising some prudence).

¹⁷³ *Id.*

¹⁷⁴ See, e.g., Frank Partnoy & David A. Skeel, Jr., *The Promise and Perils of Credit Derivatives*, 75 U. CIN. L. REV. 1019, 1021 n.1 (2007) (citing Warren Buffett, Letter to Berkshire Hathaway Shareholders, and explaining that derivative are either highly praised or darkly critiqued by commentators).

¹⁷⁵ Brian J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 N. Y. U. J. L. & BUS. 549, 583 (2009).

¹⁷⁶ *Id.* (“[T]he default swap transfers the risk of default of a reference entity . . . from one party to another. The buyer of the default swap makes periodic payments to the seller of the contract. In the event of a default by the reference entity bond, the seller of the swap is obliged to stand in the shoes of the reference entity and make payment of the notional principal to the buyer of the swap.”)

¹⁷⁷ See José Gabilondo, *Leveraged Liquidity: Bear Raids and Junk Loans in the New Credit Market*, 34 J. CORP. L. 447, 506 (2009) (in 1990, three U.S. Economists shared the Nobel prize for their work on the theory of financial economics; Merton Miller, Harry Markowitz and William Sharpe); see also *Americans Win Nobel for Economics*, BBCNEWS, Oct. 15, 2007, <http://news.bbc.co.uk/2/hi/business/7045067.stm> (noting that the theory the three 2007 prize winners developed “allows us to distinguish situations in which markets work well from those in which they do not.”)

¹⁷⁸ See Merton Miller & Franco Modigliani, *Corporate Income Taxes and the Cost of Capital*, 53 AM. ECON. REV. 433 (1963). Merton Miller and Franco Modigliani, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 53 AM. ECON. REV. 261 (1958) (The theorem is called the capital structure irrelevance principle because it holds that, in the absence of taxes, bankruptcy costs, and asymmetric information and in an efficient market, the value of a company is unaffected by how that company is financed. The theory finds that whether the company is financed

by equity or debt is irrelevant as is its policy of profit distribution.).

¹⁷⁹ See MERTON H. MILLER, UNIV. OF CHICAGO GRADUATE SCHOOL OF BUSINESS, *DO WE REALLY NEED MORE REGULATION OF FINANCIAL DERIVATIVES?* 10 available at <https://www.chicagogsb.edu/faculty/selectedpapers/sp75.pdf> (stating that a bank’s swaps and derivatives book is managed to control interest-rate risk).

¹⁸⁰ See Mark Whitehouse, *How a Formula Ignited Market that Burned Some Big Investors*, WALL ST. J., Sept. 12, 2005, available at <http://math.bu.edu/people/murad/MarkWhitehouseSlicesofRisk.txt> (noting that the model “helped to estimate what return investors in certain credit derivatives should demand, how much they have at risk and what strategies they should employ to minimize that risk.”).

¹⁸¹ Robert Block & Nir Kossovsky, *IP Transfer And Pricing Considerations For Financial Service Firms*, PAT. STRATEGY & MGMT., Feb. 2006, at 1 (“A credit default swap (“CDS”) is a credit derivative that provides a buyer (often the owner of underlying bonds) protection against specific risks. Common risks include bankruptcy, failure to pay, debt restructuring, acceleration or repudiation. Building blocks of the product include complex risk pooling techniques and risk correlation calculations. The cornerstone insight is said to be the application of the Gaussian Copula to correlation calculations, but each major player in the market refines this method with its own proprietary systems.”).

¹⁸² *Id.* (“[S]pecialists now believe that CDS markets process new market information more efficiently than bond markets and thus set superior pricing signals. Impending credit downgrades will be reflected in CDS price movements before they are reflected in the underlying assets. It is the industry consensus that innovation leadership in CDS products and proprietary modeling is squarely centered in London.”).

¹⁸³ INT’L MONETARY FUND, *GLOBAL FINANCIAL STABILITY REPORT: CONTAINING SYSTEMIC RISKS AND RESTORING FINANCIAL SOUNDNESS* 37 (2008), <http://www.imf.org/external/pubs/ft/gfsr/2008/01/pdf/text.pdf> (explaining the difficulty of developing a clear picture of which institutions ultimately hold the credit risk transferred and quantifying the amount of risk transferred).

¹⁸⁴ *Commodity Futures Modernization Act of 2000*, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (passed by the House and Senate without debate and signed by President William Clinton less than a week later); see Andrew M. Kulpa, *Minimal Deterrence: The Market Impact, Legal Fallout, and Impending Regulation of Credit Default Swaps*, 5 J. L. ECON. & POL’Y 293, 297 (2009) (“The CFMA specifically prevents state and local laws from regulating gaming contracts

and bucket shops in the context of CDS agreements.” “[C]ongress also expressly excluded CDS agreements from regulation under the Securities Act of 1933 and the Securities Exchange Act of 1934. This was another specific carve out by the CFMA that actually expanded the definition of a “security” under the 1933 and 1934 Acts but explicitly excluded CDS agreements.”)

¹⁸⁵ 17 C.F.R. § 242.200 (2007) (The short sale refers to “any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.”).

¹⁸⁶ James W. Christian, Robert Shapiro & John-Paul Whalen, *Naked Short Selling: How Exposed are Investors?*, 43 HOUS. L. REV. 1033, 1041-42 (2006) (describing a traditional short sale).

¹⁸⁷ SEC v. Lyon, 529 F. Supp. 2d 444, 457 (S.D.N.Y. 2008); *Occupational Urgent Care Health Sys. v. Sutro & Co.*, 711 F. Supp. 1016, 1025 (E.D. Cal. 1989).

¹⁸⁸ Jonathan R. Macey, Mark Mitchell & Jeffrey Netter, *Restrictions on Short Sales: An Analysis of the Uptick Rule and its Role in View of the October 1987 Stock Market Crash*, 74 CORNELL L. REV. 799, 799 (1989).

¹⁸⁹ 15 U.S.C. § 78j(a)(1) (2000).

¹⁹⁰ David C. Worley, *The Regulation of Short Sales: The Long and Short of it*, 55 BROOK. L. REV. 1255, 1256 (1990).

¹⁹¹ Michael Sloan, *Investment Bank Regulation and the Credit Crisis*, 28 REV. BANKING & FIN. L. 52, 59 (2008) (comparing the standard equity to debt ratios with the SEC allowed for investment banks);

Bethany McLean, *Ratings Agencies Under Fire*, CNN MONEY.COM, Aug. 21, 2007, http://money.cnn.com/2007/08/20/magazines/fortune/ratings_agencies.fortune/index.htm (attributing the boom to out-of-date regulations, lax federal oversight, and the complicity of the three rating agencies). See, e.g., *Credit Rating Agencies Come Under Fire*, FOX BUSINESS, Oct. 22, 2008, <http://www.foxbusiness.com/story/markets/credit-rating-agencies-come/#> (stating that “inflated rating awarded to securities backed subprime loans led investors to buy them in enormous numbers. But now, most of these securities have been downgraded and the market for them has largely evaporated, contributing to the current crisis.”).

¹⁹² Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (creating the Troubled Assets Relief Program (TARP) and signed into law by President George W. Bush on October 3, 2008).

²⁰¹ Professor Frank Partnoy, University of San Diego College of Law, former derivatives broker and corporate securities attorney and Steve Kroft Oct. 5, 2008, 60 Minutes, *A Look At Wall Street’s Shadow Market*,

http://www.cbsnews.com/stories/2008/10/05/60minutes/main4502454_page4.shtml?tag=contentMain;contentBody.

¹⁹³ See 60 Minutes, *supra* note 151 (discussing the failures in judgment and otherwise that led to the collapse of the world financial markets).

¹⁹⁴ Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 12 (2009).

¹⁹⁵ See Jonathan R. Macey, *Wall Street Versus Main Street: How Ignorance, Hyperbole, and Fear Lead to Regulation*, 65 U. CHI. L. REV. 1487, 1508 (1998) (labeling Partnoy’s positions on derivatives as foolhardy).

¹⁹⁶ See Bank Credit Default Swaps (CDS), iBANKNET, Notional Amounts, www.ibanknet.com/scripts/callreports/fiList.aspx?type=bankcds (reporting that Chase is burdened with a \$1 billion dollar CDS exposure in the failure of the Chicago Tribune).

¹⁹⁷ Government Widens Support for Home Loans, Credit (PBS television broadcast Nov. 25, 2008) (transcript available at http://www.pbs.org/newshour/bb/business/july-dec08/fedrole_25.html) (reporting that the \$800 billion federal funds are aimed at jump-starting mortgage lending, continuing housing correction, and increasing consumer spending by buying up \$600 billion in debt).

¹⁹⁸ See Kulpa, *supra* note 192, at 297 (referring to the law prohibiting regulation of CDSs).

¹⁹⁹ See, e.g., Abby Cooper, Note, *\$1 Per Lot for Affordable Housing in Detroit: Non-Monetary Benefits Can Constitute Fair Value in the Sale of City-Owned Surplus Property to Community Development Corporations*, 48 WAYNE L. REV. 1191, 1220 (2002) (providing a proposal for addressing housing affordability by using a Detroit, Michigan case model).

²⁰⁰ Dan Nnamdi Mbulu, *Affordable Housing: How Effective are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families*, 8 AM. U.J. GENDER SOC. POL’Y & L. 387, 410 (2000) (explaining the LIHTC program).

²⁰¹ Clark, *supra* note 36, at 186-87.

²⁰² *Id.*

²⁰³ Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENV’T 244, 244 (2001).

²⁰⁴ *Id.* at 245.

²⁰⁵ Jeanne Goldie Gura, *Preserving Affordable Homeownership Opportunities in Rapidly Escalating Real Estate Markets*, 11 J. AFFORDABLE HOUS. & CMTY. DEV. L. 78, 83(2001).

²⁰⁶ Hocker, *supra* note 212, at 246-47 (noting land trusts are commonly private non-profit corporations but can also be established as public non-profit corporations).

²⁰⁷ Gura, *supra* note 214, at 83; see Itzchak E. Kornfeld, *Conserving Natural Resources and Open Spaces: A Primer on Individual Giving Options*, 23 ENVTL. L. 185, 206-07 (1993) (stating that

a land trust may be organized to preserve “unique natural lands and the diversity of wildlife” in fee simple).

²⁰⁸ Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. REV. 883, 886-87 (2005).

²⁰⁹ Julie Farrell Curtin & Lance Bocarsly, *CLTS: A Growing Trend in Affordable Home Ownership*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 367, 377 (2008) (discussing for example, retaining housing affordability by minimizing exposure to property tax increases by virtue of the ground lease. The author states “A CLT maintains the affordability of the housing on its land through its ground lease.”).

²¹⁰ Benjamin W. Lund, *Payment of Taxes and Available Exceptions*, NATIONAL BUSINESS INSTITUTE, 02V7511 NBI-CLE 167 (2004).

²¹¹ See Curtin, *supra* note 218, at 377 (noting that A CLT can balance the competing goals of affordability and wealth building in its resale formula).

²¹² See generally *id.* (stating the different resale formulas one can use, which favors affordability).

²¹³ John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”: Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 464 (2003) (providing examples of development that has had a profound impact on the valuation of existing homes. “Traditional working class communities close to the city center (for example, Lake View, Wicker Park) are experiencing rapid gentrification. Census tracts which have had a high percentage of vacant housing, high poverty rates, and high percentages of black or Hispanic households, experienced higher home appreciation than other locations in the 1990s. ‘New, expensive housing is being built’ and ‘concentrations of poverty [are] going farther west, southwest and to the inner ring of suburbs.’” And concluding that when viewed through the lenses of race, class, space and time, the benefits of gentrification appear to outweigh the costs as increased values results in pushing out lower income people).

²¹⁴ Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 512 (1991) (“[A]s a neighborhood gentrifies, real estate speculation may increase the value of all units, thereby driving up property taxes, a cost likely to be passed on to existing tenants.”).

²¹⁵ Powell, *supra* note 222, at 447.

²¹⁶ J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 426 (2003) (“Low-income homeowners can be more easily protected against being forced to sell prematurely by devices that do not distort the basic functioning of the market. Such homeowners

may both be harassed by rising costs and enjoy the benefit of a rapidly appreciating asset—their home. To some extent, their problem is not poverty, but the illiquidity of assets.”)

²¹⁷ Melvyn R. Durchslag, *Property Tax Abatement for Low Income Housing: An Idea Whose Time May Never Arrive*, 30 HARV. J. ON LEGIS. 367, 377 (1993) (citing Stanley S. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 HARV. L. REV. 705 (1970)).

²¹⁸ David Burke, *The Stop Tax-Exempt Arena Debt Issuance Act*, 23 J. LEGIS. 149, 150 (1997) (noting that “[i]n 1968, Congress restricted the tax subsidy to capital facilities which benefit the general public.”).

²¹⁹ *Id.* (reporting that partial tax exemptions would include fixed dollar exemptions that would exempt a specific amount of the value of a residence from taxation. An example is an exemption for the first \$20,000 of value. Such an exemption grants proportionately more relief to property assessed at a lower value while encouraging residency by higher income families to the area. Another form of this exemption is a percentage-based exemption where a percentage of the property value is exempt from taxation).

²²⁰ Seth B. Cohen, *Teaching an Old Policy New Tricks: The 421-A Tax Program and the Flaws of Trickle-Down Housing*, 16 J.L. & POL’Y 757, 766 (2008) (finding that “tax abatements encourage housing production by ‘providing a declining exemption on the new value that is created’ by the development.”).

²²¹ *Id.*

²²² See Durchslag, *supra* note 226, at 373-74 (challenging the success of tax abatement programs for housing redevelopment because it lacks economic incentive and explaining that encouraging adequate investment in the affordable housing industry is a problem on both the private and public levels, because of the low profit margins).

²²³ See David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL’Y 537, 537 (1998) (recognizing that the purpose of the Tax Reform Act was to enable the development of affordable housing).

²²⁴ See, e.g., Megan J. Ballard, *Profiting from*

Poverty: The Competition Between For-Profit and Non-Profit Developers for Low-Income Housing Tax Credits, 55 HASTINGS L.J. 211, 212 (2003) (arguing in effect that the Tax Reform Act creates an unfair advantage to for-profit entities to benefit from government subsidy to the detriment of nonprofit entities).

²²⁵ See Allison D. Christians, *Breaking the Subsidy Cycle: A Proposal for Affordable Housing*, 32 COLUM. J.L. & SOC. PROBS. 131, 147 (1999) (stating that the purpose of the tax credit is to “encourage the development of affordable housing.”). Kenya Covington & Rodney Harrell, *supra* note 79, at 108 (2007); see also Peter W. Salsich Jr., *Expanding the Low-Income Housing Tax Credit: Raising the Cap and Targeting Homeownership*, 9 J. AFFORDABLE HOUS. & CMTY. DEV. L. 28, 28 (1999) (“[E]xpansion of the LIHTC is the main hope for increasing rental and homeownership opportunities for low-income families.”).

²²⁶ Salsich, *supra* note 234, at 30.

²²⁷ George Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1001 (2001).

²²⁸ Gary P. Winter, *Tax Increment Financing: A Potential Redevelopment Financing Mechanism For New York Municipalities*, 18 FORDHAM URB.L.J. 655, 658 (1991).

²²⁹ Fred Galves, *The Discriminatory Impact of Traditional Lending Criteria: An Economic and Moral Critique*, 29 SETON HALL L. REV. 1467, 1475-76 (1999).

²³⁰ Christians, *supra* note 234, at 136.

²³¹ *Id.* at 136-37.

²³² *Id.* at 136.

²³³ JOE MATTEY & NANCY WALLACE, FEDERAL RESERVE BANK OF SAN FRANCISCO, HOUSING PRICES AND THE INSTABILITY OF MORTGAGE PREPAYMENT MODELS: EVIDENCE FROM CALIFORNIA 1 (1998), <http://www.sf.frb.org/econsrch/workingp/wp98-05.pdf>.

²³⁴ *Id.*

²³⁵ William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need For Mortgage Rules Consonant with the Economic and Physiological Dynamics of the Home Sale Loan Transaction*, 70 VA. L. REV. 1083, 1156 (1984); see also Margalynne Armstrong, *Race and Property Values Entrenched in Segregation*, 52 U. MIAMI L. REV. 1051, 1059 (1998) (considering the effect of segregation on the marketability of property in African American neighborhoods

and its effect on wealth building.)

²³⁶ See Christians, *supra* note 234, at 139.

²³⁷ Steven R. Berg, *Observations from a Legal Services Lawyer*, 1 GEO. J. ON FIGHTING POVERTY 67, 68 (1993).

²³⁸ NATIONAL CENTER FOR EDUCATION STATISTICS, STATE & COUNTY ESTIMATES OF LOW LITERACY, <http://nces.ed.gov/naal/estimates/Approach.aspx> 1 (2003) (finding that 14 percent of American adults scored “below basic” literacy, meaning that they could not perform simple, everyday tasks that required reading or writing. The report projected that an estimated 30 million American adults possessed no more than the most rudimentary literacy skills); see Pierre Thomas, Jack Date, Clayton Sandell & Theresa Cook, *Living in the Shadows: Illiteracy in America*, ABC NEWS, Feb. 25, 2008, <http://abcnews.go.com/WN/LegalCenter/story?id=4336421&page=1> (reporting that one 2008 study found that 7 million Americans are illiterate, 27 million are unable to read well enough to complete a job application and 30 million cannot read a simple sentence).

²³⁹ James A. Gross, *A Human Rights Perspective on U.S. Education: Only Some Children Matter*, 50 CATH. U. L. REV. 919, 920-21 (2001), (citing ELI GINZBERG & DOUGLAS BRAY, THE UNEDUCATED 12 (1953)). Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 496 (1998) (stating that “[f]ocusing on illiteracy as mere access to education arguably is not only simplistic, it is misleading. Minimal education – i.e., mere access – passes constitutional muster as enough to combat illiteracy. However, minimal education is not enough in today’s world. Instead, contemporary societal effort must assure all children of an adequate education; the effort must be to provide the resources necessary to achieve functional literacy.”).

²⁴⁰ See Greg J. Duncan & Anita Zuberi, *Mobility Lessons from Gautreaux and Moving to Opportunity*, 1 NW. J.L. & SOC. POL’Y 110, 111-112 (2006) (comparing the dramatic results of the early Gautreaux family studies with less attractive later results and discussing various reasons for the different results).