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**BENEATH THE STAINS OF TIME: THE BANALITY OF
RACE, THE HOUSING AND FORECLOSURE CRISIS,
AND THE FINANCIAL GENOCIDE
OF MINORITIES**

ALEATRA P. WILLIAMS*

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I. INTRODUCTION

The unveiling truth of time is that a post-racial society¹ in the United States is an unattainable reality. The evidence that race still matters is substantiated

* Associate Professor of Law, Charleston School of Law; University of California, Berkeley, LL.M.; University of Oklahoma, J.D.; Purdue University, B.A. The author wishes to thank Cheryl Harris, the panelists and panelists at the “Whiteness as Property: A Twenty-Year Appraisal” Symposium at the University of California, Los Angeles School of Law in October 2014. It was my pleasure to share with you and learn from you. Thank you.

¹ See Hua Hsu, *The End of White America?*, THE ATLANTIC ONLINE (Jan./Feb. 2009), <http://www.theatlantic.com/magazine/archive/2009/01/the-end-of-white-america/7208/>; see also GWEN IFILL, THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA (2009) (heralding Obama as a black politician who has successfully overcome the strictures of race in politics). But compare Sean McElwee, *Five Signs We’re Not a ‘Post Racial’ Society*, HUFFINGTONPOST.COM (Aug. 29, 2014, 3:52 p.m.), http://www.huffingtonpost.com/sean-mc-elwee/five-signs-were-not-a-pos_b_5737794.html?utm_hp_ref=black-voices&ir=Black+Voices (arguing that there are five areas where race matters: 1) education (schools have become more segregated); 2) wealth (the recession widened wealth gaps between whites and blacks, and whites and Hispanics); 3) job market (more African Americans are unemployed due to discrimination and employment segregation); 4) limited upward mobility for minori-

by the recent events in Florida, Missouri, New York and South Carolina. Long before Trayvon Martin,² Michael Brown,³ Tamir Rice,⁴ Eric Garner,⁵ or Walter Scott⁶ became national symbols of racial injustice, racial tensions in America and the inequities therefrom have never truly retrenched. Tensions were surreptitiously bubbling beneath the surface and have, in a sense, reached a near boiling point once again.⁷

Evidence of intensified frustrations with institutional authority are present in the racial strains and protests of today.⁸ Within criminal law, the police “are not

ties; and 5) incarcerations (noting that although the data for drug use and sales are similar for whites and blacks, blacks are 74% of the incarcerated population for drug possession). *Id.*

² Trayvon Martin was an unarmed seventeen-year-old African American high school student shot and killed by George Zimmerman, a neighborhood watch captain, in Florida. Mr. Zimmerman claimed that he shot Trayvon in self-defense. He was later acquitted. See *Trayvon Martin Shooting Fast Facts*, CNN.COM (Feb. 22, 2014, 1:48 PM), <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html>.

³ Michael Brown was an unarmed eighteen-year-old recent high school graduate shot and killed by a white police officer in the St. Louis suburb of Ferguson, Missouri in August 2014. See Emily Brown, *Timeline: Michael Brown Shooting in Ferguson, Mo.*, USA TODAY.COM (Dec. 2, 2014, 7:37 PM), <http://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827/>.

⁴ Tamir Rice was a twelve-year-old African American boy who was shot and killed by a white police officer in Cleveland, Ohio in November 2014. Tamir was holding a BB pellet gun when he was shot and killed. See Emma G. Fitzsimmons, *12-Year-Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html?_r=0.

⁵ Eric Garner was an unarmed 43-year-old man, killed by a chokehold administered by a white police officer after being accused of selling illegal cigarettes. A grand jury chose not to indict the officer. See J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

⁶ On April 4, 2015, 50-year-old Walter Scott was fatally shot in the back while running away from North Charleston police officer Michael Slager. John Bacon and William M. Welch, *Police Video Shows Walter Scott Running from Car*, USATODAY.COM (Apr. 10, 2015, 2:28 AM). Mr. Slager pulled over Mr. Scott due to a broken taillight. *Id.* Mr. Slager is now facing murder charges. Michael S. Schmidt and Matt Apuzzo, *Officer is Charged with Murder of a Black Man Shot in the Back*, N.Y. TIMES at A1 (Apr. 4, 2015).

⁷ Racism, one may argue, is manifested differently today. See, e.g., Alyssa Brown, *Views of Race Relations as Top Problem Still Differ by Race*, GALLUP.COM (Jun. 11, 2015) (noting that Black Americans view racism as the most important issue facing the United States in 2015); *King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RESEARCH CENTER (Aug. 22, 2013), <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#black-home>.

⁸ Kevin Sack and Megan Thee-Brenan, *A Broad Division over Race in U.S. is Found in Poll*, N.Y. TIMES, at A1 (Jul. 24, 2015) (reporting that a recent NY Times poll found that 6 out of 10 Americans find that race relations are bad and 4 out of 10 Americans believe that

merely a ‘spark’ factor,” but are an additive that when combined with other injustices creates a volatile situation.⁹ Almost fifty years after the Kerner Commission was charged with assessing what triggered race riots and increased racial tensions in the United States, a similar commission examining contemporary racial conditions would, arguably, find nearly identical results.¹⁰ The Kerner Commission noted that:

to some African Americans, the “police have come to symbolize white power, white racism and white repression [in 1967]. And the fact is that many police do reflect and express these white attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread belief among [African Americans] in the existence of police brutality and in a “double standard” of justice and protection—one for Negroes and one for whites.¹¹

Today, the “Black Lives Matter” campaign reiterates these sentiments.¹² The loss of black lives arguably because of race is, under no circumstances, ever

race relations are getting worse). The authors quoted President Obama’s eulogy of Late South Carolina State Senator and Reverend Clementa Pinckney, who was shot by an alleged white supremacist while worshipping during a weekday service in June 2015 in Charleston, SC to further underscore the racial tensions that exist today. *Id.* In Rev. Pinckney’s eulogy, President Obama said, “For too long, we’ve been blind to the way past injustices continue to shape the present.” *Id.* See also Barbara Tasch, *US Race Relations Are Deteriorating*, BUSINESSINSIDER.COM (Aug. 6, 2015, 4:37 p.m.), businessinsider.com/us-race-relations-are-deteriorating-2015-8 (noting an uptick in marches and riots against racism in many U.S. major cities since 2013).

⁹ U.S. RIOT COMM’N (ALSO KNOWN AS “THE KERNER COMMISSION”), REPORT OF THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS 1, 5 (1968) (finding that police perceptions by African Americans are more negative than those held by White Americans.). *Id.* at 5.

¹⁰ In 1968, the Kerner Commission deduced that racial inequality in previous triggered social unrest. *Id.* at 5. Once again, sensed disparities in treatment based on race has led to five major incidents of civil unrest since 2009. See, e.g., Ben Shapiro, *5 Race Riots in Obama’s Post-Racial America*, BREIBART.COM (Aug. 11, 2014) (outlining the race riots stemming from incidents of racial injustice). In explaining contemporary racial tensions, Eduardo Bonilla-Silva, a Duke University Professor of Sociology, argues that “The main problem nowadays is not the folks with the hoods, but the folks dressed in suits.” John Blake, *The New Threat: Racism without Racists*, CNN.COM (Nov. 24, 2014, 9:32 AM). Professor Bonilla-Silva continues, “The more we assume that the problem of racism is limited to the Klan, the birthers, the tea party or to the Republican Party, the less we understand that racial domination is a collective processes and we are all in this game.” *Id.*

¹¹ U.S. RIOT COMM’N, *supra* note 9, at 5.

¹² Alicia Garcia, Patrisse Cullors and Opal Tometi started the #BlackLivesMatter campaign began following the acquittal of George Zimmerman, who shot and killed Trayvon Martin. Alicia Garcia, A Herstory of the #BlackLivesMatter Movement by Alicia Garcia, THEFEMINISTWIRE.COM (Oct. 7, 2015), available at <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/>. Garcia states that “Black Lives Matter is an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise.” *Id.*

warranted. There can be no true recompense for this loss. Once a life is lost, it is lost. However, inequality in the criminal law arena is not the only area where many are scrutinizing the interplay between race, society and the law.¹³ The calliope sounds of discrimination are echoing in the halls of federal regulatory offices, and many are monitoring how injustices based on race and ethnicity have played a role in the housing market decline.¹⁴

During the Housing and Foreclosure Crisis, foreclosures disproportionately affected Latinos and African Americans.¹⁵ These foreclosures removed millions of Americans from their homes and confiscated the American Dream for a large number of minorities.¹⁶ Unquestionably, unrestricted lending discrimination was a major contributing factor in the housing and foreclosure crisis.¹⁷ Despite national housing policies and legal protections against it, lending discrimination has been a stain that time has yet to erase.¹⁸

Unlike other personal attributes, race is treated as an immutable and all-encompassing characteristic.¹⁹ Historically, a person's morality and intelligence was determined based on race.²⁰ This racial consciousness has seeped into the social psyche, and has engendered socially-accepted racial hierarchies and a legacy of legally-sanctioned racial discrimination.²¹ Collectively, then, a person's designated race propagated his status, and whether he would receive certain social, political, legal or economic advantages or disadvantages.²²

Racial classification has been used, either overtly or subvertly, historically and currently to predict one's behavior.²³ The "[l]aw is both a system of behavioral control and an ideology, and legal actors are in some senses both conscious and unwitting participants in the legal construction of race."²⁴ These impartialities incorporated into "the legal construction of race pushes in many

¹³ See, e.g., Gloria J. Browne-Marshall, *Race, Law, and American Society: 1607–Present* (Routledge, Taylor & Francis Group, 2013) (discussing intersections of race with education, voting rights, property ownership, military service and immigration, among other things). *Id.* at 19, 177, 207, 251 and 279; Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* (Civ. Rts. Project, 2001), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf> (last visited Aug. 30, 2015) (examining race, society and education)

¹⁴ See *infra* Part IV.A.

¹⁵ See *infra* Part IV.

¹⁶ See *infra* Parts IV.B–V.

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part IV.

¹⁹ See *infra* Part II.

²⁰ See *infra* Part II.

²¹ IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 113 (Richard Delgado & Jean Stefancic eds., 1996).

²² *Id.*

²³ See *infra* Part II.

²⁴ LÓPEZ, *supra* note 21, at 113. The author uses the term "the law" to refer to "a set of

different directions on a multitudes of levels, sometimes along mutually reinforcing lines but often along divergent vectors, occasionally entrenching existing notions of race but also at other times or even simultaneously fabricating new conceptions of racial difference.”²⁵ To overcome the limitations of a racially discriminatory system, policymakers and enforcers must first truthfully recognize “the flaws of American society—flaws rooted in historic inequalities and long-standing cultural stereotypes. How we set up the terms for discussing racial issues shapes our perception and response to these issues.”²⁶

This Article proceeds to analyze how the conceptualization of race and concomitant racial discrimination affected the housing and mortgage markets in four parts. Part II reviews the conceptualization of race and traces how race progressed into a system of socio-legally accepted hierarchies. Part III examines the lending anti-discrimination laws and appraises the performance of the regulators responsible for implementing and enforcing fair lending laws. Part IV details the lending discrimination during the Housing and Foreclosure Crisis and some its aftereffects. Part V asserts that minorities suffered their deepest economic setback—essentially a financial genocide—as a result of the Housing and Financial Crisis, which will have lingering effects for many years to come. This Article concludes that lending discrimination, a major factor in the Housing and Foreclosure Crisis, was due to historical constructions of race. Despite policies and laws, which promised fair and equal access to lending, racial inequalities were inescapable. The banality of racial hierarchy inevitably produced legal inequalities, culminating in one of the greatest acts of financial genocide against minorities: the Housing and Foreclosure Crisis.

II. THE CONCEPTUALIZATION OF RACE & SOCIALLY ACCEPTED RACIAL HIERARCHIES

Race is a contrivance employed to categorize and rank individuals based on outward appearances.²⁷ These categories have been used both socially and legally to subjugate all races other than those deemed white, but African Americans and Latinos, particularly.²⁸ Those who created the race hierarchy naturally placed their perceived race at the highest point of the hierarchy and the “lesser races” at the bottom based on their own personal predilections.²⁹ Those whom

institutions, actors, and ideas that are interdependent and yet only infrequently, if ever, in concert with one another.” LÓPEZ, *supra* note 21, at 114.

²⁵ LÓPEZ, *supra* note 21, at 115.

²⁶ CORNEL R. WEST, RACE MATTERS 3 (1993).

²⁷ See Am. Anthropological Ass’n, Statement on “Race” (1998), <http://www.aaanet.org/stmts/racepp.htm> (“[S]cholars and the general public have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences.”).

²⁸ *Id.*

²⁹ *Id.* (“The ‘racial’ worldview was invented to assign some groups to perpetual low

the creators of the race hierarchy deemed to be antithetical to themselves where placed at the bottom.³⁰ Therefore, if the creator was a white European male, then the European male was the supreme race, and the black African male was the subordinate race.³¹

America is supposed to be a “melting pot,”³² an amalgamation of races and cultures blended seamlessly together.³³ Assimilation was key, each person shedding his race and becoming a “new race of man”³⁴: American. However, those entitled to become citizens of America were limited to mainly white immigrants, not all immigrants.³⁵ Those who were allowed to “melt” together in the cauldron of America were typically outwardly similar.³⁶ Naturalization laws were designed to keep America a white nation.³⁷ Thus, the fight for immigration rights became one of proving similarities, or whiteness.³⁸

status, while others were permitted access to privilege, power, and wealth. The tragedy in the United States has been that the policies and practices stemming from this worldview succeeded all too well in constructing unequal populations among Europeans, Native Americans, and peoples of African descent.”).

³⁰ *Id.*

³¹ Race designations have been a part of the bio-anthropological landscape for centuries. See MICHAEL BANTON, *RACIAL THEORIES* 1–3 (Cambridge Univ. Press, 2d ed. 1987). See also COLIN KIDD, *THE FORGING OF RACES: RACE AND SCRIPTURE IN THE PROTESTANT ATLANTIC WORLD, 1600–2000* (Cambridge Univ. Press, 2006); JOHN P. JACKSON & NADINE M. WEIDMAN, *RACE, RACISM AND SCIENCE: SOCIAL IMPACT AND INTERACTION* 1–24 (Rutgers Univ. Press, 2006).

³² J. Hector St. John de Crevecoeur, *LETTERS FROM AN AMERICAN FARMER*, (1782) [hereinafter *LETTER III*], <http://xroads.virginia.edu/~HYPER/CREV/home.html>. (“What then is the American, this new man? .†.†. He is an American, who, leaving all ancient prejudice and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He has become an American by being received in the broad lap of our great Alma Mater. Here individuals of all races are melted into a new race of man, whose labors and posterity will one day cause great changes in the world. Americans are the western pilgrims.”).

³³ *Id.*

³⁴ *Id.*

³⁵ See, e.g., *Ex parte Dow*, 211 F. 486 (E.D. S.C. 1914) (an early case debating who is eligible for naturalization as a “free white person”).

³⁶ *Id.*

³⁷ LÓPEZ, *supra* note 21, at 117.

³⁸ LÓPEZ, *supra* note 21, at 120 (arguing that the “white person” prerequisite to naturalization made citizenship a condition and code for White and non-White racial identity). See also *Dow*, 211 F. at 487; *U.S. v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923) (“[T]he term ‘race’ is one which, for the practical purposes of the statute, must be applied to a group of living persons now possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another.”). Immigration and Naturalization laws are not the only laws that affect social norms. Several law such as anti-miscegenation laws, segregation

The “[l]aw, then, constructs racial differences on several levels through the promulgation and enforcement of rules that determine permissible behavior.”³⁹ The construction of race determined and legitimized perceived attributes that one possessed.⁴⁰ These characteristics became branded upon an individual based solely upon his appearance.⁴¹

In 1776, Carolus Linneaus ascribed general personalities to racial groups he created.⁴² The (Native) American race were said to be choleric and prone to anger.⁴³ Europeans were deemed sanguine, or cheerful.⁴⁴ Asians were characterized as melancholic.⁴⁵ Finally, Africans were categorized as phlegmatic, or sluggish.⁴⁶ Linneaus further believed that all: (Native) Americans were “ruled by habit,” Europeans were “ruled by custom,” Asians were “ruled by belief,” and Africans “were ruled by belief.”⁴⁷

Regrettably, beliefs based on the ascribed behaviors became the foundations of political doctrines as well.⁴⁸ Gilbert Murray, an influential scholar in establishing the League of Nations and United Nations, acknowledged racial hierarchies.⁴⁹ He said, when comparing country ranks based on race:

Those nations [,white nations,] which eat more, claim more, and get higher wages, will direct and rule others, and the lower work of the world will tend in the long run to be done by the lower breeds of men. This much we of the rule color [white nations] will no doubt accept as obvious.”⁵⁰

Racial marginalization produced a system of locks and chains, where the keys were seemingly tossed away long ago. Early on, a branding of “white” immediately transmitted positive traits, such as being beautiful,⁵¹ industrious,⁵²

laws, and criminal sentencing laws also affect social perceptions of race. *See, e.g., Miscegenation*, STATE OF TENNESSEE, <http://www.tn.gov/tsla/exhibits/blackhistory/pdfs/Miscegenation%20laws.pdf> (miscegenation); *Jim Crow Laws*, NAT'L PARK SERV., http://www.nps.gov/malu/learn/education/jim_crow_laws.htm (discussing segregation laws); David V. Baker, *Purposeful Discrimination in Capital Sentencing*, 5 J. L. & SOC. CHALLENGES 189 (2003).

³⁹ LÓPEZ, *supra* note 21, at 121.

⁴⁰ LÓPEZ, *supra* note 21, at 121.

⁴¹ LÓPEZ, *supra* note 21, at 122.

⁴² *See* Stephen Jay Gould, *The Geometer of Race*, DISCOVER MAGAZINE (Nov. 1, 1994), <http://www.discovermagazine.com/1994/nov/thegeometerofrac441>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ BANTON, *supra* note 31, at 6.

⁴⁹ BANTON, *supra* note 31, at 6.

⁵⁰ BANTON, *supra* note 31, at 6.

⁵¹ JOHANN FRIEDRICH BLUMENBACH, ON THE NATURAL VARIETY OF MANKIND, § IV at 265 (3d ed. 1795), <https://archive.org/stream/anthropological00blumuoft#page/280/mode/>

and intelligent.⁵³ Being “Asian” meant one was a part of the “model minority” due to math genius or overall high performance on standardized tests.⁵⁴ Latinos were typecast as being below standard due to lower standardized test scores and low high school graduation rates.⁵⁵ The negative stereotypes associated with African Americans are plentiful.⁵⁶ African Americans were labeled ignorant, lazy, buffoonish, irresponsible, savage, “welfare queens,” criminal, unintelligent, angry, underclass, naturally athletic, musical, or joyous.⁵⁷

2up (describing the Caucasian variety as the “most handsome and becoming” of all varieties of men). Blumenbach also quotes Meiners’ characterization of beauty based on color, stating that “Meiners refers to all nations in two stocks: (1) handsome, (2) ugly. The first white, the latter dark.” *Id.* at 268.

⁵² Leonard Gordon, *On Attitude-Behavior Correlations*, THE AM. SOCIOLOGIST 250 (1969) (referring to Katz and Braly’s 1932 survey of 100 Princeton University students).

⁵³ *Id.* at 250.

⁵⁴ ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL, 140–44 (1992).

⁵⁵ *Id.* at 146.

⁵⁶ Laura Green, *Stereotypes: Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, 11 PERSPECTIVES ON MULTICULTURALISM & CULTURAL DIVERSITY 1 (1988–1989), available at <http://ferris.edu/jimcrow/links/VCU.htm>.

⁵⁷ *Id.*; see generally Ronald E. Hall, *The Ball Curve; Calculated Racism and the Stereotype of African American Men*, 32 J. OF BLACK STUDIES 1, 104–19 (2001). Patently, some of these attributes do not appear to be denigrating. However, these terms carry loaded subtexts. Historically, to call an African American person a “natural athlete” meant that it was his/her brawn and not his/her brain that produced the result. This was one of the major reasons the NFL resisted having quarterbacks of color. The quarterback was believed to be the “brain” of the team, thus necessitating that the position be held by a white player. See, e.g., Brett St. Louis, *Sports, Genetics and the ‘Natural Athlete’: The Resurgence of Racial Science*, 9 BODY & SOC’Y 75, 75–95 (2003). An illustration of the subversive discrimination against African Americans in professional sports was given during an infamous Nightline interview with Al Campanis. In this interview, Campanis said that African Americans did not have leadership roles in major league baseball forty years after Jackie Robinson, because “they may have some of the necessities to be a field manager or perhaps a general manager.” Interview by Nightline with Ted Koppel with Al Campanis, Gen. Manager, Los Angeles Dodgers, N.Y.C., N.Y. via satellite (Apr. 6, 1987). Campanis goes further and promotes the historical stereotypical biological distinctions between races by saying that African Americans are “outstanding athletes. They are gifted with great musculature and various other things. They’re fleet of foot, and this is why there are a lot of black major league ballplayers. Now, as far as having the background to become club presidents, or presidents of a bank, I don’t know.” Colin McEnroe, *Notion that White Men Can’t Jump Springs from Black Stereotypes*, HARTFORD COURANT (Apr. 13, 1992), available at http://articles.courant.com/1992-04-13/features/0000203286_1_black-stereotypes-white-players-black-eyed-peas. Little has changed since Campanis’ statement in 1987. There is still a lack of diversity in leadership of professional sports. See e.g., Jeffri Chadiha, *Progress for Minority Coaches Stalls*, ESPN.COM (Jan. 19, 2013), http://espn.go.com/nfl/story/_/id/8858126/nfl-progress-minority-coaches-stalls (asserting that attempts to diversify front offices in the National Football

Scholars illuminated that “[r]ace is indeed a pre-eminently sociohistorical concept. Racial categories and the meaning of race are given concrete expression by the specific social relations and historical context in which they are embedded.”⁵⁸ In 1957, Judge Walter B. Jones wrote “I Speak for the White Race”⁵⁹ in defense of segregation. He said, “students of race recognize three main divisions: white mongoloid and negroid, each created by God with different qualities, instincts, and characteristics, transmissible by descent.”⁶⁰ Judge Jones continued explaining the virtues of being “white,” including being able to name Jesus Christ as the preeminent white person.⁶¹ With that said, Judge Jones proclaimed, “we all have kindly feelings for the world’s other races, but we maintain at any and all sacrifices the purity of our blood strain and race. We shall never submit to the demands of integrationists. The white race shall forever remain white.”⁶²

Though many may find Judge Jones’ comments reprehensible, his viewpoint reflects the pronouncements from the origins of “race.”⁶³ As a judge, with authority to enforce the law, one could reasonably speculate how this viewpoint would color his enforcement of the law. Thus, race as a separator and delineator will remain isolated. The old beliefs are still a part of the modern landscape and are manifested in areas such as the housing and credit markets.

For example, the term “safe neighborhood” has become synonymous with a predominately white neighborhood.⁶⁴ Conversely, “dangerous neighborhood” typically insinuates that the neighborhood is predominantly minority or African

League are half-hearted, at best); Rob Woodfork, *NFL Recap: More Diversity Needed in Coaching Ranks*, WTOP.COM (Jan. 21, 2013, 5:42 AM), <http://wtop.com/news/2013/01/nfl-recap-more-diversity-needed-in-coaching-ranks/>. These are examples of how centuries of classifications permeate an institution like professional sports. The old justifications for division and hierarchies of races are held as incontrovertible truths, even in modern times.

⁵⁸ MICHAEL OMNRI & HAROLD WINANT, *RACIAL FORMATIONS*, reprinted in *POWER, PRIVILEGE & LAW, A CIVIL RIGHTS READER*, 159, 160 (Leslie Bender & Dean Braveman, eds., West Wadsworth 1994).

⁵⁹ Walter B. Jones, *I Speak for the White Race*, *THE ALABAMA LAWYER* 201 (Mar. 4, 1957).

⁶⁰ *Id.* at 201.

⁶¹ *Id.*

⁶² *Id.* at 203.

⁶³ *Id.* at 201.

⁶⁴ See, e.g., Katie J.M. Baker, *Pick the Perfect Neighborhood without Pesky Ethnic Groups Getting in the Way!*, JEZEBEL.COM (Apr. 26, 2012, 5:45 PM), <http://jezebel.com/5905501/pick-the-perfect-neighborhood-without-pesky-ethnic-groups-getting-in-the-way>. In her article, Baker points to a website, Picket Report, which helps interested parties by describing Detroit area neighborhoods. For example, predominantly white Bloomfield Hills is described as: “Silver Sophisticated—Mature, upscale couples and singles in suburban home;” “American Royalty—Wealthy, influential and successful couples and families living in prestigious suburbs;” “Full Pockets, Empty Nests—Empty-nesting, upper middle class households with discretionary income living sophisticated lifestyles.”

American.⁶⁵ Likewise, affluence is a characteristic associated with whiteness, while poverty is stereotypically a minority attribute.⁶⁶ Responsible and hardworking are related to whiteness, whereas irresponsible and lazy are features more closely aligned with African American and Latinos.⁶⁷ These “virtues” prevail notwithstanding evidence to the contrary and affect economic and loan values of homes in those neighborhoods.⁶⁸ These virtues also affect the lending terms of individuals deemed to be of those types of neighborhoods.⁶⁹

Many may dream of a post-racism society, where race is no longer a factor, but the stereotypes of races still remain in the collective subconscious. The effects of this age-old hierarchal system cannot and will not disappear overnight, if at all. Biases based on race are almost second nature; they are entrenched in legal, social, and economic institutions as well.⁷⁰ Historian Stephen Jay Gould stated in an interview, “I think [Americans] are largely unaware of how our own deep beliefs—which just seem either logical or necessary or proven to us—are as immersed in bias.”⁷¹

The efforts to standardize perceived differences rigs the system in a way where minorities are not likely ever to be placed at the top of the hierarchy. The race system breeds prejudice, where certain races rank higher or are given preferred status and access to privileges over other races.⁷² These beliefs fueled lending discrimination.

Because one’s race is mostly immutable, historical and modern stereotypes create inescapable discrimination as social, political, legal, and economic biases are tacitly transmitted. Thus, the lesser minorities often are barred from equal pay, equal justice, or access to fair lending and homeownership.

⁶⁵ *Id.* The Picket Report goes on to derogatorily describe neighborhoods in the 48208 zip code, a poorer neighborhood: “Soul Survivor—older, down-scale African-American singles and single parents established in modest urban homes;” “Hard Times—older, down-scale and ethnically-diverse singles typically concentrated in inner-city apartment;” “Soulful spenders—upper middle-class African-American couples and families living in the expanding suburbs;” “Cuidad (sic) Strivers—Mid-scale Hispanic families and single parent in gateway communities;” “Rolling the Dice—middle-aged, mid-scale income singles and divorced individuals in secondary cities.” *Id.*

⁶⁶ Baker, *supra* note 64.

⁶⁷ Green, *supra* note 56.

⁶⁸ Baker, *supra* note 64.

⁶⁹ Green, *supra* note 56.

⁷⁰ See John P. Jackson & Nadine M. Weidman, *Race, Racism and Science: Social Impact and Interaction 1–6* (Rutgers Univ. Press, 2006).

⁷¹ Interview with Stephen Jay Gould, *Race—The Power of Illusion*, PBS.ORG (2003), http://www.pbs.org/race/000_About/002_04-background-01-09.htm#top.

⁷² See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1725 (1993) (“The law’s construction of whiteness defined and affirmed critical aspects of identity (who is white), of privilege (what benefits accrue to that status), and of property (what legal entitlements arise from that status).”).

III. HOMEOWNERSHIP IN THE U.S.

The historical construct of racial hierarchies has resulted in decreased homeownership opportunities for racial minorities and continued segregation.⁷³ Traditionally, race and ethnicity were both factors lenders routinely and explicitly used to grant or deny mortgages.⁷⁴ Before and during the Great Depression, there were no discrimination laws in place to protect minorities from inequitable lending practices.⁷⁵ In fact, federal agencies propagated a system of segregation and lending discrimination.⁷⁶

President Franklin D. Roosevelt advocated that Congress create legislation that: (1) “protect[ed] the small homeowner from foreclosure;” (2) relieve[d] him of part “of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power;” and (3) “declare[d] that it was a national policy to protect home ownership.”⁷⁷ In response, Congress enacted the Home Owners’ Loan Act in 1933.⁷⁸ The national policy, however, excluded minorities, specifically African Americans, from coverage.⁷⁹ The Home Owners’ Loan Corporation’s appraisers color-coded maps to delineate the areas to which it would lend.⁸⁰ Considerations included the “percentage of ‘negro families’ to total number of families, percentage of families on relief, and ‘threat of infiltration of foreign born, negro or lower grade population.’”⁸¹ Likewise, the National Housing Act of 1934 “became an implement

⁷³ Myron Orfield, *Segregation is Still Wrong and Still Pervasive*, THE RACE POVERTY ENVIRONMENT, <http://reimaginerpe.org/node/2809>, (last visited Dec. 19, 2014); U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES, OWNERSHIP RATES (last updated Oct. 31, 2011) [hereinafter U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES], <http://www.census.gov/hhes/www/housing/census/historic/ownrate.html>. Because the Census Bureau did not separate out Latinos and Asians in 1950, there is no available data concerning their homeownership rates. The data for all groups is missing in 1960.

⁷⁴ See C. LOWELL HARRISS, HISTORY AND POLICIES OF THE HOME OWNERS’ LOAN CORPORATION (1951), available at <http://www.nber.org/books/harr51-1>.

⁷⁵ Stephen M. Dane, *A History of Mortgage Lending Discrimination in the United States*, 20 J. INTERGROUP REL. 16, 16-19 (1993).

⁷⁶ Amy E. Hillier, *Redlining and the Home Owners’ Loan Corporation*, 29 J. URB. HIST. 394, 395 (2003). While appraising real estate for HOLC loans, HOLC staff incessantly gave “a fourth grade, or hazardous, rating to African Americans”, dubbing them a security risk. *Id.* at 395

⁷⁷ HARRISS, *supra* note 74, at 9.

⁷⁸ Nat’l Home Owners’ Loan Act of 1933, Pub. L. 73-43, 48 Stat. 128 (1933).

⁷⁹ HARRISS, *supra* note 74, at 9.

⁸⁰ Benjamin Howell, *Exploiting Race and Space: Consequential Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 107–08 (2006); see also FED. HOUS. ADMIN., UNDERWRITING MANUAL (1938).

⁸¹ Charles Lord & Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENVTL. L. 551, 580 (2010). Developers in surrounding white neighborhoods who were unable to get approval for FHA Insurance by appraisers took extreme measures. One developer went as far as building a concrete wall between a white area and

of spatial exclusion and inequality which, at the same time, sustained and perpetuated homeownership disparity and economic inequality for minorities.”⁸² In 1930, the gap in homeownership rates between African Americans and Caucasians was 15.6%.⁸³

Following the Great Depression, governmental ratification of discriminatory lending policies persisted, and minorities’ ability to progress socially and economically continued to be hindered by racial inequality.⁸⁴ On February, 8, 1954, the Administrator of the Housing and Home Finance Agency, Albert M. Cole, declared to the Detroit Economic Club:

It is very poor business to ignore one-tenth of our population as a housing market. It is worse than bad business. We are simply not living up to the standards of a free economic and democratic society. For the housing economy has not been a free economy for the Negro.⁸⁵

Under President Dwight Eisenhower, the Executive Branch rebranded national housing policies that included minorities for the first time.⁸⁶ President Eisenhower signed the Housing Act of 1954 into law on August 2, 1954. Upon signing the 1954 Act into law, President Eisenhower remarked that revised Act improved upon the 1949 Housing Act by fortifying “private mortgage credit facilities” and “reorganizing the Federal National Mortgage Association.”⁸⁷

black area in Detroit. THE FAIR HOUSING. CTR. OF GREATER BOSTON., HISTORICAL SHIFT FROM EXPLICIT TO IMPLICIT POLICIES AFFECTING HOUSING SEGREGATION IN GREATER MASSACHUSETTS, 1934–1968: FHA MORTGAGE INSURANCE REQUIREMENTS UTILIZE REDLINING, <http://bostonfairhousing.org/timeline/1934-1968-FHA-Redlining.html>. As a result of literally building a barrier, white families who lived in the barrier that bordered the African American area were approved mortgages on their property. *Id.*

⁸² See Aleatra P. Williams, *Lending Discrimination, the Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.*, 6 WM. & MARY BUS. L. REV. 601, 608 (2015) (referring to Kenneth T. Jackson, *Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 J. URB. HIST. 419, 430 (1980)).

⁸³ African American and Caucasian homeownership rates were 28% and 43.6%, respectively. DAVID L. MORAN MASON, HOMEOWNERSHIP IS COLORBLIND: THE ROLE OF AFRICAN AMERICAN SAVINGS AND LOANS IN HOME FINANCE, 1880–1980 (2010), 8 BUS. & ECON. HIST. ON-LINE, 2010, at 2, available at <http://www.thebhc.org/sites/default/files/mason.pdf>.

⁸⁴ ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960, 9–10 (1983).

⁸⁵ B.T. McGraw, *The Housing Act of 1954 and Implications for Minorities*, 16 PHYLON 171, 177 (1955), available at <http://www.jstor.org/stable/272718>.

⁸⁶ President Eisenhower’s Advisory Committee on Housing Policies and Programs issued a final report which noted that “[t]oo often, the opportunities of minority group families to obtain adequate housing are extremely limited or nonexistent. Too often, the workings of our free economy do not provide solutions that benefit minorities” McGraw, *supra* note 85, at 176. The committee demanded that “changes in the attitudes of private investors” be “bolstered by vigorous administrative practice.” *Id.*

⁸⁷ President Dwight D. Eisenhower, Statement by the President upon Signing the Hous-

Under the Act, President Eisenhower imagined, “private financial institutions [would] have a really good chance to mobilize their own resources to supply adequate mortgage credit . . . to home owners in every part of our country.”⁸⁸

Years later, the Fair Housing Act of 1968⁸⁹ included the Federal Housing Administration’s Section 235 Home Owner Assistance program, which provided subsidized loans for low-income families by offering mortgage insurance.⁹⁰ Theoretically, the national homeownership policies and subsidized lending programs should have expanded homeownership among minorities.⁹¹ However, Section 235, considered a failure, expired on October 1, 1989.⁹²

The national homeownership policies amounted only to lip service, as federal agencies actually endorsed segregation, minority citizens consistently encountered racial discrimination, and racial restrictive covenants were very common.⁹³ A nationally circulated magazine awarded a “shield of honor” to ten communities “for an umbrella of restrictions against “the wrong kind of people.”⁹⁴ It was reported that by 1940, 80% of Chicago and Los Angeles had restrictive covenants that excluded African American families.⁹⁵

Consequently, social unrest emerged in 1967. At President Lyndon B. Johnson’s request, the Kerner Commission (Commission) researched the causes of

ing Act of 1954, 1954 Pub. Papers 675 (Aug. 2, 1954), <http://www.presidency.ucsb.edu/ws/index.php?pid=9962&st=&st1=>.

⁸⁸ *Id.*

⁸⁹ Fair Housing Act, of 1968, Pub. L. 90-284, 82 Stat. 81 (codified as amended in 42 U.S.C. §§ 3601–3619).

⁹⁰ Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 235, 82 Stat. 476, 476–85, *repealed by* Pub. L. No. 100-242, § 401(d), 101 Stat. 1898, 1899 (1988).

⁹¹ Michael H. Schill and Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1322 (1995).

⁹² Fed. Hous. Administration: Removal of Section 235 Home Ownership Program, 80 Fed. Reg. 18,095 (Apr. 3, 2015) (Modified 24 C.F.R. pt. 200 and 235) (expiration of Section 235); Michael H. Schill and Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1322 (1995) (unsuccessful nature of Section 235). Section 235 failures were related to unpredictable social factors such as blockbusting. *Id.* Blockbusting is a segregationist practice of playing upon white homeowners’ fears of minority penetration in their predominantly white neighborhood. *Id.* Another factor that led to Section 235’s demise was fraudulent appraisals by FHA appraisers, who accepted “under the table” compensation and failed to mention major structural defects. *Id.* Consequently, the “blockbusted” neighborhoods slowly became predominantly minority, which depressed property values. *Id.* Further, approximately 18% of the Section 235 homes were turned over to HUD or foreclosed upon by 1979. *Id.*

⁹³ SEPARATE IS NOT EQUAL, SMITHSONIAN NAT’L MUSEUM OF AM. HIST., <http://americanhistory.si.edu/brown/history/1-segregated/seggregated-america.html> (last visited Sept. 8, 2015), archived at <http://perma.cc/Y9X6-4JLE>.

⁹⁴ U.S. COMM’N ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING, 4 (1973).

⁹⁵ *Id.*

the racially-charged protests.⁹⁶ The Commission determined that “pervasive discrimination and segregation in employment, education, and housing, which resulted in the continuing exclusion of great numbers of Negroes from benefits of economic progress,”⁹⁷ played major roles in the protests. The Commission ultimately found that the “structure of discrimination has stringently narrowed opportunities for the Negro and restricted his prospects.”⁹⁸

In 1950, African American homeownership rates were at 34.5%.⁹⁹ Homeownership rates for African Americans grew to 41.6% in 1970.¹⁰⁰ The U.S. Census Bureau reported that Latinos’ homeownership rates were at 43.7%.¹⁰¹ Between 1980 and 1990, homeownership rates for African Americans dropped from 44.4% to 43.4%.¹⁰² Latinos experienced a similar drop from 43.4% to 42.4%.¹⁰³

Even though discrimination against minorities remained uncurbed, Presidents Bill Clinton and George W. Bush pushed national homeownership policies that increased both national and minority homeownership.¹⁰⁴ By 2000, homeownership rates were 46.3% for Latinos, 47.2% for African Americans, 52.8% for Asians, and 73.8% for Caucasians.¹⁰⁵ National homeownership rates reached a peak rate of 69.2%.¹⁰⁶ Although homeownership rates increased, certain races prospered more than others. Specifically, Latinos and African Amer-

⁹⁶ U.S. RIOT COMM’N, *supra* note 9, at 1. (“On July 28, 1967, the President of the United States established this Commission and directed [it] to answer three basic questions: What happened? Why did it happen? What can be done to prevent it from happening again?”). *Id.*

⁹⁷ U.S. RIOT COMM’N, *supra* note 9, at 5.

⁹⁸ U.S. RIOT COMM’N, *supra* note 9, at 5.

⁹⁹ U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES, *supra* note 73. No census data exists for Latinos and Asians in 1950 and 1960 because the Census Bureau did not distinguish these racial groups.

¹⁰⁰ U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES, *supra* note 73.

¹⁰¹ U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES, *supra* note 73. The Census Bureau defined “Hispanic” as one whose “mother tongue” is the Spanish language. Even so, Hispanic was not considered a separate race. *Id.*

¹⁰² U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES, *supra* note 73. One report stated that the homeownership rate for African Americans was 45.2% in 1990. Annie-Rose Strasser, *The Housing Crisis Pushed Black Homeownership Rate Below 1990 Level*, THINKPROGRESS (Mar. 12, 2012, 10:45 AM), <http://thinkprogress.org/economy/2012/03/12/442397/black-homeowneshiplummets/>.

¹⁰³ U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES, *supra* note 73.

¹⁰⁴ President William J. Clinton, Remarks on the National Homeownership Strategy, 1995 PUB. PAPERS 805 (Jun. 5, 1995), <http://www.presidency.ucsb.edu/ws/?pid=51448>; Expanding Home Ownership, Pres. George W. Bush’s Record of Achievement, WHITEHOUSE.GOV, <http://georgewbush-whitehouse.archives.gov/infocus/achievement/chap7.html> (last visited May 6, 2014).

¹⁰⁵ U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES, *supra* note 73.

¹⁰⁶ U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES, *supra* note 73.

icans remained less likely to own a home than Caucasians.¹⁰⁷

In 2013, four years after the reported end of the Great Recession, homeownership rates looked very similar to previous decades.¹⁰⁸ The data showed that homeownership rates were 73.4% for Caucasians, 43.1% for African Americans, 46.1% for Latinos, and 57.4% for Asians.¹⁰⁹ Similarly, by the third quarter of 2014, overall homeownership rates in the U.S. were 64.4%.¹¹⁰ Breaking down the data according to race, the rates showed that homeownership for Latinos and African Americans continued to decline. White homeownership rates were relatively steady at 72.6%, but African American and Latino homeownership rates were 42.9% and 45.6%, respectively.¹¹¹

One could argue that the homeownership rate gains were artificial.¹¹² Although minority homeownership rates increased, unrestrained lenders who included race as a factor in lending only increased minorities' likelihood of default.¹¹³ This is because minorities received a disproportionate number of higher cost loans or adjustable rate mortgages, which caused minority homeownership to become economically unfeasible.¹¹⁴ "Rising foreclosure and mortgage delinquency rates reflect the fact that, for some families, debt had swelled to unsustainable levels."¹¹⁵

Even though each of the preceding efforts was aimed at expanding homeownership opportunities for minorities, the programs accomplished very little to make homeownership a reality for minorities.¹¹⁶ Moreover, some private lenders who extended credit insured by the government used these policies to only temporarily include minorities or make homeownership more difficult for

¹⁰⁷ RAKESH KOCHHAR ET AL., PEW RESEARCH CTR., III. HOMEOWNERSHIP 1995 TO 2008 (May 12, 2009), <http://www.pewhispanic.org/2009/05/12/iii-homeownership-1995-to-2008/>.

¹⁰⁸ Strasser, *supra* note 102.

¹⁰⁹ Strasser, *supra* note 102.

¹¹⁰ U.S. CENSUS BUREAU, RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE THIRD QUARTER 2014 (Oct. 28, 2014, 10:00 AM) [hereinafter U.S. CENSUS BUREAU, RESIDENTIAL VACANCIES], available at <http://www.census.gov/housing/hvs/files/qtr314/q314press.pdf>.

¹¹¹ *Id.* at 9. The Census Bureau data does not delineate Asian homeownership rates. All Asians were lumped together with Native Hawaiians, Pacific Islanders, American Indian, Alaskan Natives, and multi-racial homeowners into a category labeled "all other races". For this group, homeownership rates for the third quarter of 2014 was 45.6%. *Id.*

¹¹² The author argues that increases in minority homeownership rates were due to predatory or unfair lending practices. See *infra* Part IV. Subsequently, a substantial number of those home were lost in foreclosure. *Id.* Any gains noted were not the product of a fair lending system and were, thus, temporary from the onset.

¹¹³ Debbie Gruenstein Bocian, Wen Li, Carolina Reid & Roberto G. Quercia, CTR. FOR RESPONSIBLE LENDING, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures* (Nov. 5, 2011), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf>.

¹¹⁴ *Id.*

¹¹⁵ KOCHHAR ET AL., *supra* note 107, at III. Homeownership, 1995 to 2008.

¹¹⁶ Williams, *supra* note 82, at 623–29.

minority groups in the future.¹¹⁷ For example, hundreds of thousands of minorities faced steering, redlining, and other forms of discrimination when attempting to utilize these programs in modern times.¹¹⁸

In any event, declines in homeownership rates have damaging effects on minority households. Minority homeowners likely will have more difficulty in recovering from the foreclosure crisis, and in fact may never recover from this major economic setback. If history is the best predictor, minorities' financial struggles will linger because of social, psychological, political, and legal tolerance of racial hierarchies. Intrinsically, the idiom of race will continue to counteract any anti-discriminatory laws in place.

IV. LENDING DISCRIMINATION DURING THE HOUSING AND FORECLOSURE CRISIS

*Our effort should be to secure to each man, whatever his color, equality of opportunity, equality of treatment before the law. As a people striving to shape our actions in accordance with the great law of righteousness we cannot afford to take part in or be indifferent to oppression or maltreatment of any man who, against crushing disadvantages, has by his own industry, energy, self-respect, and perseverance struggled upward to a position which would entitle him to the respect of his fellows, if only his skin were of a different hue.*¹¹⁹

Progress, as envisioned during the Civil Rights Movement of the 1950s and 1960s, has been slow and painful. The aspiration and expectation of most Americans, regardless of skin color, is that they will have an unencumbered opportunity to attain every aspect of the American Dream, which includes homeownership.¹²⁰ The American Dream is an "American" standard or ideal.¹²¹ Racial minorities in the U.S. are Americans. As such, this American "status"

¹¹⁷ Williams, *supra* note 82, at 628–29. ("The U.S. spent billions of dollars on these housing programs while banks made trillions of dollars in order to 'fulfill the call' of these programs. However, arguably, these programs created a system of widespread deception and fraud perpetrated by predatory wolves, lenders, dressed in sheep's clothing, which the government tolerated, or even authorized by inaction, until the house fell down.").

¹¹⁸ Bocian, Li, Reid & Quercia, *supra* note 113. Redlining is described as the practice of refusing a loan to a qualified applicant because he or she currently resides or will reside in a particular neighborhood. FEDERAL RESERVE, Consumer Compliance Handbook Fair Lending: Overview (1/06) 1, available at http://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_over.pdf. Intentionally guiding prospective loan applicants or purchasers to or from particular loan products or neighborhoods is known as "racial steering". *Id.*

¹¹⁹ President Theodore Roosevelt, Speech on Lincoln and the Race Problem at the Republican Club, New York City (Feb. 13, 1905).

¹²⁰ It is commonly accepted that homeownership is a part of the American Dream. WILLIAM M. ROHE & HARRY L. WATSON, CHASING THE AMERICAN DREAM: NEW PERSPECTIVES ON AFFORDABLE HOMEOWNERSHIP 1, 3 (Cornell Univ. Press 2007).

¹²¹ *Id.*

entitles minorities to audaciously hope, no *demand*, equal treatment in *all* areas.

Minorities' inability to attain financial equality stems from the deeply rooted system of racial superiority and inferiority that has been adopted into how "American" is defined. Under this outmoded definition, Caucasians are the only group that are fully American, while others are only hyphenated Americans, a subcategory of the primary.¹²² Because fundamental rights, such as equitable lending and homeownership opportunities accompany the "American" status, attempts must be made to extinguish such an exclusive scheme that favors Caucasians above all other races.

The legal battle for homeownership rights has been ongoing since before the end of slavery.¹²³ Post slavery, however, the Civil Rights Act of 1866 (CRA) guaranteed "all citizens, regardless of race, color, or past servitude, the same rights to purchase, hold, or convey real or personal property, among other things, as white citizens possessed."¹²⁴ Because the CRA included only the right to own property, private agreements prohibiting certain races and religious groups from owning homes in particular areas created the "ingrained [the] belief that minorities were second-class citizens," thus "fashion[ing] a system of segregation following the CRA."¹²⁵ The U.S. Supreme Court outlawed private restrictive covenants, which prohibited sales based on race, in *Shelley v. Kraemer*.¹²⁶ However, these laws were ineffective to prevent housing discrimination, and consequently, lending discrimination.¹²⁷

Lending discrimination based on race tumbled to its nadir during the Housing and Foreclosure Crisis.¹²⁸ Minorities, though a smaller segment of U.S. homeowners, received a markedly higher number of subprime and high cost mortgages¹²⁹ and were disproportionately foreclosed upon by lenders during

¹²² JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* 2, 197–99 (Rutgers Univ. 1955) (discussing the Anti-hyphenated American as a method to ferret out disloyal Americans, or foreign sympathies with Germany before World War II. The staunchest supporters of this movement were Presidents Theodore Roosevelt and Woodrow Wilson.). *Id.* Unfortunately, intense nativism or anti-hyphenation deviated toward racism. *Id.* at 131.

¹²³ CIVIL RIGHTS ACT OF 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) & 42 U.S.C. §§ 1981–1982 (2006)).

¹²⁴ CIVIL RIGHTS ACT OF 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) & 42 U.S.C. §§ 1981–1982 (2006)); Williams, *supra* note 82, at 635 (summarizing the Civil Rights Act of 1866).

¹²⁵ See, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940); *Gandolfo v. Hartman*, 49 F. 181 (S.D. Cal. 1892); *Fairchild v. Raines*, 151 P.2d 260 (Cal. 1944); *Burke v. Kleiman*, 277 Ill. App. 519 (Ill. App. Ct. 1934). See also Williams, *supra* note 82, at 635.

¹²⁶ 334 U.S. 1, 20–21 (1948).

¹²⁷ See *infra* Part IV.B.

¹²⁸ Bocian, Li, Reid & Quercia, *supra* note 113.

¹²⁹ Gregory D. Squires, Derek S. Hyra & Robert N. Renner, Segregation and the Sub-

the crisis.¹³⁰ Ultimately, the laws put into place to ensure all Americans fair lending¹³¹ and equal access to credit¹³² did very little to retard racial biases in the lending and homeownership markets.

A. *Lending Discrimination Laws and Enforcement Agencies*

Two major laws deal with fair lending in the United States. Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act)¹³³ prohibits lending discrimination based on disparate treatment of a member in a protected class or disparate impact on a protected group. Under the Fair Housing Act, it is unlawful to refuse to grant a residential mortgage loan or provide information regarding mortgage loans; impose different terms or conditions on a loan; discriminate in appraisals; refuse to purchase a loan; or set different terms or conditions for purchasing a loan based on an applicant's race, color, national origin, religion, sex, familial status, or disability.¹³⁴

In addition to the Fair Housing Act, Congress enacted the Equal Credit Opportunity Act (ECOA).¹³⁵ The ECOA was amended in 1976 and prohibits discriminations based on sex, national origin, race, color, religion, and age.¹³⁶ The ECOA bars discrimination based on these prohibited factors as related to any feature of a transaction that involves the extension of residential or commercial credit.¹³⁷

The federal agencies responsible for ensuring lawful lending are the U.S. Department of Housing and Urban Development (HUD), U.S. Department of Justice (DOJ), Federal Reserve Board (FRB), and the Consumer Financial Protection Board (CFPB).¹³⁸ HUD houses the Office of Fair Housing and Equal

prime Lending Crisis, 3 (Apr. 16, 2009) (presented at 2009 Federal Reserve System Community Affairs Research Conference, Wash., D.C.) available at <http://www.kansascityfed.org/publicat/events/community/2009carc/Hyra.pdf> (reporting that approximately 53.7% of African American and 46.6% of Latino mortgagors received subprime mortgages compared to 17.7% of White mortgagors.).

¹³⁰ Bocian, Li, Reid & Quercia, *supra* note 113 (stating that minority borrowers with comparable good credit scores—around 660—were three times more likely to receive subprime mortgages than white borrowers).

¹³¹ Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3631 (1968).

¹³² Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* (2010)

¹³³ 42 U.S.C. §§ 3601–3631 (1968).

¹³⁴ 42 U.S.C.A. § 3604 (2012).

¹³⁵ 15 U.S.C. § 1691 *et seq.* (2010).

¹³⁶ Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (1976). Other prohibited factors included marital status and consideration that any part of the applicant's income was derived from public assistance. FEDERAL RESERVE, Consumer Compliance Handbook Fair Lending: Overview (1/06) 1, available at http://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_over.pdf.

¹³⁷ FEDERAL RESERVE, *supra* note 136, at 1.

¹³⁸ In addition to HUD, other federal regulators, such as the CFPB, FRB, Office of the

Opportunity (FHEO). One of HUD's duties includes oversight and enforcement of relevant federal laws and establishing "national policies that make sure all Americans have equal access to the housing of their choice."¹³⁹ In particular, HUD enforces the Fair Housing Act and Title VI of the Civil Rights Act of 1964.¹⁴⁰

The FHEO receives and reviews housing discrimination claims. It assesses whether the presented assertions are sufficient to issue a charge of discrimination.¹⁴¹ Once HUD issues a charge of discrimination, HUD may seek an administrative action.¹⁴² Either HUD or the defendant may decide to transfer the action from administrative adjudication to federal court.¹⁴³ Once either party elects to transfer the action to federal court, the DOJ may follow up.¹⁴⁴

The Civil Rights Division of the DOJ may enforce both the FHA and the ECOA.¹⁴⁵ In 2010, the DOJ established the Fair Lending Unit to address the prevailing discriminatory lending practices that occurred during the Housing and Foreclosure Crisis.¹⁴⁶ The Fair Lending Unit may directly pursue actions against lenders engaged in patterns or practices of unlawful discrimination.¹⁴⁷

Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), Federal Trade Commission (FTC), Federal Deposit Insurance Corporation (FDIC), and National Credit Unit Administration (NCUA), may refer matters pertaining to systematic discrimination to the DOJ. 15 U.S.C. § 1639b(c)(3)(C) (2012). The CFPB must confer with the applicable prudential regulator or agency before proposing a rule or regulation. 15 U.S.C. § 1002.14 (2012). Prudential regulators or agencies include the FDIC, OCC, FRB, and National Credit Union Administration. *Id.* See also, Thomas E. Perez, Asst. Att'y Gen., The Attorney General's 2010 Annual Report to Congress (U.S. DEPT. OF JUSTICE Apr. 5, 2011) [hereinafter Perez, 2010 Annual Report], available at http://www.justice.gov/crt/about/hce/documents/ecoa_report_2010_color.pdf. According to the DOJ, a regulatory agency "need not have overwhelming proof of an extensive pattern or practice of discrimination" before referring a matter to the FEDERAL RESERVE, *supra* note 136, at 4; see also Equal Opportunity Credit Act, 15 U.S.C. § 1691e (2012); Fair Housing Act, 42 U.S.C. § 3614(a) (2012).

¹³⁹ *About the Office of Fair Housing and Equal Opportunity*, U.S. DEPT. OF HOUS. AND URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/aboutfheo/aboutfheo (last visited Aug. 10, 2015).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Dept. of Justice Agencies*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/agencies/index-list> (last visited May 6, 2014); *Civil Rights Division Housing Enforcement Section*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/crt/about/hce/> (last visited May 6, 2014).

¹⁴⁶ *Dept. of Justice Civil Rights Division 2011 Fair Lending Accomplishments*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/crt/about/hce/documents/fairlending.pdf> (last visited May 6, 2014). The Fair Lending Unit was created in early 2010 with the expressed goal to make "fair lending . . . a top priority."

¹⁴⁷ 15 U.S.C. § 1691e(h) (2012); 42 U.S.C. § 3614(a) (2012).

However, before the DOJ files a lawsuit under the ECOA or FHA, “the Attorney General must have a reasonable belief that a pattern or practice of discrimination exists.”¹⁴⁸

Between 2009 and 2001, HUD, together with the FTC, referred 109 matters to the DOJ.¹⁴⁹ Referrals do not automatically mean that the DOJ will pursue legal action. The DOJ must accept the action before any enforcement action is taken. The DOJ has several factors it considers before seeking enforcement.¹⁵⁰ Of the 109 matters referred between 2009 and 2011, fifty-five concerned lending discrimination based on race or national origin.¹⁵¹ The agencies were more lax in prior years.¹⁵² Between 2001 and 2008, only 30 racial and national-origin mortgage discrimination matters were referred to the DOJ.¹⁵³ Nearly double the amount of incidents related to race and national origin were reported in two years in contrast to the seven years preceding.¹⁵⁴

Likewise, the FRB is empowered to implement “various federal laws intended to protect and inform consumers in credit and other financial service transactions, ensuring that consumers receive comprehensive information and fair treatment in these transactions, and promoting economic development and community lending in historically underserved areas.”¹⁵⁵ The FRB’s control extends to the member banks it supervises, i.e., banks with assets greater than \$10 billion. The FRB mandates that its member banks adhere to the Fair Hous-

¹⁴⁸ Williams, *supra* note 82, at 654 n.452 (quoting U.S. DEPT. OF JUSTICE, *Identifying Lender Practices That May Form the Basis of a Pattern or Practice Referral to the Department of Justice* 1, 2 (1996), <http://www.justice.gov/crt/about/hce/documents/regguide.pdf>).

¹⁴⁹ Perez, 2010 Annual Report, *supra* note 138.

¹⁵⁰ Williams, *supra* note 82, at 654 (referring to the U.S. DEPT. OF JUSTICE, *Identifying Lending Practices That May Form the Basis of a Pattern or Practice Referral to the Department of Justice*, at 1, 2 (1996), <http://perma.cc/RFA2-TMcLS>). Before the DOJ accepts a referral, there must be: (1) a serious pattern related to “either financial or emotional harm to members of protected classes”; (2) necessity of a court action to curtail the practice; (3) inadequacy of compensation by the protected class members if there without a court action; (4) more damages, beyond out of pocket damages, are required to deter this type of practice the lender or others; and (5) “the agency believes the practice to be sufficiently common in the lending industry, or raises an important issue, so as to require its public disclosure as a deterrent to other lenders.” *Id.*

¹⁵¹ Perez, 2010 Annual Report, *supra* note 138.

¹⁵² Perez, 2010 Annual Report, *supra* note 138 (between 2001 and 2010, the Civil Rights Division received a mere thirty referrals involving discrimination based on race and national origin compared to forty-nine referrals received based on patterns of race discrimination in 2010 alone).

¹⁵³ FED. RESERVE SYS., *Annual Report 2012*, <http://www.federalreserve.gov/publications/annual-report/2012-consumer-and-community-affairs.htm> (last visited Sept. 7, 2015), archived at <http://perma.cc/96EM-66JV>.

¹⁵⁴ *Id.*

¹⁵⁵ FED. RESERVE SYS., CONSUMER AND COMMUNITY AFFAIRS, <http://www.federalreserve.gov/econresdata/cacr-staff.htm> (last updated Aug. 10, 2015).

ing Act.¹⁵⁶ For banks with less than \$10 billion in assets, the FRB has supervisory authority to mandate compliance with both the FHA and ECOA.¹⁵⁷

The FRB has limited sole jurisdiction to rectify fair lending violations. It may pursue actions only if the actions do not constitute a pattern or practice of discrimination.¹⁵⁸ The remedies available to the FRB likewise are limited. For actions not “necessary to protect consumers,” the FRB may issue Memoranda of Understanding or Board Resolutions.¹⁵⁹ Regarding matters necessitating consumer protection, the FRB may enter into public, formal enforcement actions” for “violations of laws, rules, regulations, unsafe or unsound practices, breaches of fiduciary duty, and violation of final orders.”¹⁶⁰ Actions may include “cease and desist orders, written agreements, prompt corrective action directives, removal and prohibition orders, and orders assessing civil money penalties.”¹⁶¹

Of all the federal agencies with jurisdiction to protect consumers from unfair lending, the CFPB has the widest array of authority. The CFPB has dominion to ensure compliance with the ECOA.¹⁶² Some of the CFPB’s powers include the authority to create, supervise, and enforce regulations concerning consumer financial services and products.¹⁶³ Additionally, the CFPB may draft regulations that ban “unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age”¹⁶⁴

To enforce violations of the ECOA, the CFPB may elect to file an administrative action in its Office of Administrative (OAA) or refer violations to the U.S. Attorney General.¹⁶⁵ The OAA, “an independent judicial office [located]

¹⁵⁶ FED. RESERVE SYS., CONSUMER AND COMMUNITY AFFAIRS, CONSUMER COMPLIANCE HANDBOOK (6/12), http://www.federalreserve.gov/boarddocs/supmanual/cch/about_contents.pdf (last visited Sept. 14, 2015). *Id.* at iii.

¹⁵⁷ *Id.*

¹⁵⁸ Board of Governors of the Federal Reserve System, *99th Annual Report 2012*, DIVISION OF CONSUMER AND COMMUNITY AFFAIRS, (last updated Jun. 25, 2013) [hereinafter *99th Annual Report*], <http://www.federalreserve.gov/publications/annual-report/2012-consumer-and-community-affairs.htm>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; ENFORCEMENT ACTIONS, FED. RESERVE SYS., <http://www.federalreserve.gov/apps/enforcementactions/> (last updated Sept. 19, 2014).

¹⁶¹ *99th Annual Report*, *supra* note 158.

¹⁶² 12 U.S.C. § 5516 (2012).

¹⁶³ 15 U.S.C. § 1639b (e)(1)–(2) (2012).

¹⁶⁴ 15 U.S.C. § 1639b (c)(3)(C) (2012). The CFPB must confer with the applicable prudential regulator or agency before proposing a rule or regulation. 15 U.S.C. § 1002.14 (2012). The FDIC, OCC, FRB, and National Credit Union Administration are the prudential regulators or agencies. *Id.*

¹⁶⁵ 15 U.S.C. § 1691e (g) (2012).

within the [CFPB]” hears enforcement actions pursued by the CFPB.¹⁶⁶ The CFPB has filed many actions before the OAA. In 2012, the CFPB pursued 5 actions; it pursued 13 actions in 2013 and 17 actions as December 2014.¹⁶⁷

In addition to its enforcement actions, the CFPB has undertaken reforms of four major residential mortgage laws. The CFPB has amended the Equal Credit Opportunity Act (ECOA),¹⁶⁸ Home Disclosure Mortgage Act (HMDA),¹⁶⁹ Real Estate Settlement Procedures Act (RESPA),¹⁷⁰ and Truth in Lending Act (TILA).¹⁷¹ Five of the enforcement actions brought by the CFPB as July 2014 were related to § 8 of RESPA.¹⁷²

In January 2014, the CFPB unveiled the “Ability-to-Repay Rule,” otherwise known as “Regulation Z,” which implements the Truth in Lending Act (TILA) and clarifies standards identified in §§ 1411–1412, 1414 of the Dodd-Frank Act.¹⁷³ The CFPB designed this new regulation to rectify the unfettered injustices of the recent crisis.¹⁷⁴

The Ability-to-Repay rule creates the structure for acceptable mortgages

¹⁶⁶ *Administrative Adjudication*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/administrativeadjudication/> (last visited Dec. 20, 2014).

¹⁶⁷ *Id.*

¹⁶⁸ 15 U.S.C. § 1691 *et seq.* (2010).

¹⁶⁹ 12 U.S.C. §§ 2801–2810 (2012).

¹⁷⁰ 12 U.S.C. § 2601 *et seq.* (2012); REGULATION X, 24 C.F.R. § 3500 (2012).

¹⁷¹ TRUTH IN LENDING ACT, 15 U.S.C. §§ 1601–1667 (2001).

¹⁷² *See, e.g.*, In the Matter of Fidelity Mortg. Corp. and Mark Figert, 2014-CFPB-0001 (2014); In the Matter of PHH Corp. et al., 2014-CFPB-0002 (2014) (seeking a permanent injunction to prevent future violations of § 8 of RESPA, disgorgement of money (to be determined by the administrative judge), restitution to borrowers, civil penalties and prosecution costs); In the Matter of 1st Alliance Lending, LLC, 2014-CFPB-0003 (2014) (parties agreeing to a consent order of \$83,000 civil monetary penalty payable to the Civil Penalty Fund); In the Matter of JRHBW Realty, d/b/a RealtySouth, et al., 2014-CFPB-0005 (2014) (resulting in consent order with \$500,000 civil penalty to the Civil Penalty Fund); In the Matter of Stonebridge Title Services, Inc., 2014-CFPB-0006 (2014) (\$30,000 civil monetary penalty to the Civil Penalty Fund); In the Matter of Paul Taylor, et al., 2013-CFPB-0001 (2013) (resulting in a consent order with disgorgement of over \$118,000); *available at* <http://www.consumerfinance.gov/administrativeadjudication/>. The above represent the enforcement actions filed before the OAA only.

¹⁷³ Ability-to-Repay & Qualified Mortgage Standards Under the Truth in Lending Act, (Regulation Z), 78 Fed. Reg. 6408 (2013) [hereinafter Ability-to-Repay] (to be codified at 12 C.F.R. § 1026 *et seq.*).

¹⁷⁴ *Id.* at 6408 (noting that a large number of mortgages were made without considering borrowers’ ability to repay and/or through loose underwriting standards). One of Dodd-Frank’s objectives was to standardize loan products. The hope was that consumer protection would be the byproduct of this standardization. *See* Tanya D. Marsh, Statement before the House Committee on Oversight and Government Reform, *Regulatory Burdens: The Impact of Dodd Frank on Community Banking 5* (July 18, 2013), *available at* <http://oversight.house.gov/wp-content/uploads/2013/07/Tanya-Marsh-Testimony.pdf>.

called “Qualified Mortgages” (“QMs”).¹⁷⁵ The CFPB modified TILA by establishing minimum underwriting standards for applicable mortgages. In order to comply, a lender must consider a borrower’s:

- (1) current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations, alimony, and child support; (7) the monthly debt-to-income ratio or residual income; and (8) credit history.¹⁷⁶

The modification requires that lenders “generally use reasonably reliable third-party records to verify the information they use to evaluate the factors” as a safety net for responsible lending.¹⁷⁷

The CFPB has determined that a borrower’s ability to repay necessitates a debt to income ratio of 43% or less.¹⁷⁸ Additionally, lenders are prohibited from charging high points or fees.¹⁷⁹ Other reprehensible behaviors, which were typical historically, such as steering borrowers into higher cost mortgages,¹⁸⁰ or loans with risky features, e.g., negative amortization, interest only, stated-income loans, or loans lasting longer than 30 years, are expressly verboten.¹⁸¹

The CFPB spells out that a safe harbor exists for a lender.¹⁸² If a lender satisfies the criteria for QMs and the loan is not a higher-priced loan as defined by the FRB 2008 modification, then there is a conclusive presumption that the lender made a reasonable determination of the borrower’s ability to repay and acted in good faith.¹⁸³ This provides lenders with safe harbors against liability from consumers.¹⁸⁴ If a lender complies with the QM standard, then a rebuttable presumption against liability may be established.¹⁸⁵

The statute of limitations for bringing an action for violation of the Ability-to-Repay rule is three years after an alleged violation.¹⁸⁶ Victorious plaintiffs

¹⁷⁵ Ability-to-Repay, *supra* note 173, at 6408

¹⁷⁶ Ability-to-Repay, *supra* note 173, at 6408.

¹⁷⁷ Ability-to-Repay, *supra* note 173, at 6408.

¹⁷⁸ Ability-to-Repay, *supra* note 173, at 6409.

¹⁷⁹ Ability-to-Repay, *supra* note 173, at 6409 (for example, on a mortgage loan of \$100,000, points or fees may not exceed 3%). *See also*, *Mortgage Rules: What the New CFPB Mortgage Rules Mean for Families and Homeowners*, CONSUMER FIN. PROT. BUREAU, http://files.consumerfinance.gov/f/201312_cfpb_mortgagerules.pdf (last visited Aug. 28, 2015).

¹⁸⁰ Ability-to-Repay, *supra* note 173, at 6409.

¹⁸¹ Ability-to-Repay, *supra* note 173, at 6409.

¹⁸² Ability-to-Repay, *supra* note 173, at 6409.

¹⁸³ Ability-to-Repay, *supra* note 173, at 6409.

¹⁸⁴ Ability-to-Repay, *supra* note 173, at 6409.

¹⁸⁵ Ability-to-Repay, *supra* note 173, at 6409.

¹⁸⁶ Ability-to-Repay, *supra* note 173. *See, e.g.*, *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 726 n.3 (8th Cir. 2013) (citing *Williams v. Wells Fargo Home Mortg., Inc.*, 410

may recoup damages including all paid finance charges and fees, plus other actual damages, costs, and attorney fees.¹⁸⁷

Even though the CFPB created new safeguards, the data shows that minorities' homeownership rates have not improved, but continue to decline.¹⁸⁸ The Ability-to-Repay rule will also likely preclude minorities from being a significant part of the housing market in the future. Arguably, because of discrimination in other areas, African American and Latinos' personal net worths are substantially lower.¹⁸⁹ The chain of discrimination leads to a larger number of African Americans and Latinos graduating with greater education debt than Whites.¹⁹⁰ It was reported that "81 percent of non-Hispanic black students and 67 percent of Hispanic students left their undergraduate programs with higher debt compared to non-Hispanic white classmates."¹⁹¹ An estimated "27 percent of black bachelor's degree holders had more than \$30,000 in loans, compared with 16 percent of white bachelor's degree holders."¹⁹² Consequently, the Ability-to-Repay rule may frustrate the dream of homeownership for African Americans and Latinos because student loan debt is considered in determining the 43% debt to income ratio.¹⁹³

Additionally, the efforts to reform the lending industry may be too little, too late. The CFPB has created new servicing guidelines, which should unify lending standards for some lenders. However, the new standards are particularly stringent, leading to the concern that minorities will be driven out of the housing market further. The rectification does not take into consideration the long-term discrimination that has taken place, which has created inequalities in education, employment, and pay.¹⁹⁴ Thus, the uniform system starts all applicants

Fed.Appx. 495, 499 (3d Cir. 2011) which held that mere notice is sufficient and that a borrower must file suit within three years to invoke the rescission provision of Regulation Z).

¹⁸⁷ 15 U.S.C. § 1640 (2013).

¹⁸⁸ See U.S. CENSUS BUREAU, RESIDENTIAL VACANCIES, *supra* note 110.

¹⁸⁹ Rakesh Kochkar, Richard Fray & Paul Taylor, *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RESEARCH CTR., (Jul. 26, 2011), <http://www.pew-socialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

¹⁹⁰ Equal Justice Works, *How Student Debts Affects Women, Minorities*, THE STUDENT LOAN RANGER, (May 1, 2013, 10:00 AM), <http://www.usnews.com/education/blogs/student-loan-ranger/2013/05/01/how-student-debt-affects-women-minorities>; *Minority Students Are Saddled School Loan Debt*, THE NAT'L L.J. (Jan. 30, 2013), <http://www.nationaljournal.com/thenextamerica/education/minority-students-are-saddled-by-school-loan-debt-20130130>.

¹⁹¹ Isaac Juarez, *Minority Students Have More Student Loan Debt*, LOANS.ORG, (Nov. 2, 2012, 3:30 PM), <http://loans.org/student/news/minorities-have-more-debt-92467>.

¹⁹² Equal Justice Works, *supra* note 190.

¹⁹³ Ability-to-Repay, *supra* note 173, at 6409.

¹⁹⁴ RICHARD ROTHSTEIN & MARK SANTOW, A DIFFERENT KIND OF CHOICE: EDUCATIONAL INEQUALITY AND THE CONTINUING SIGNIFICANCE OF RACIAL SEGREGATION, 17-19, ECON.

at level 0 when in actuality some start at level 5 and others start at level -5. Inequities are not remedied unless the system of inequity is a part of the equation. Therefore, minorities will continue to lag behind.

B. *Left Behind: Minorities During the Housing and Foreclosure Crisis*

A review of the regulators' activities before and during the Housing and Foreclosure Crisis shows that very little was done to protect consumers from lending discrimination. This is true despite laws being firmly in place for over forty years. The banality of racial discrimination caused American and Latino homeowners to carry the heaviest burden of the housing and foreclosure crisis.¹⁹⁵

As early as 2006, the Center for Responsible Lending (Center) questioned the lop-sidedness of high-cost loan distributions to African Americans and Latinos.¹⁹⁶ The Center demanded that lenders explain why African American and Latino borrowers received higher cost loans more often than White borrowers.¹⁹⁷ Lenders explained that African Americans and Latinos tended to have shakier credit histories, which made loans to them riskier.¹⁹⁸ However, upon comparing African American and Latino credit profiles with White credit profiles, the Center showed that disparities occurred even when the borrowers had equal credit profiles.¹⁹⁹ In fact, African Americans and Latinos were a third more likely to receive a high-priced loan.²⁰⁰ Thus, the preconceptions of African Americans and Latinos made them riskier, not shakier credit histories. The Center found that "the disparities [we]re not only unfair, [but] they have serious economic repercussions: Higher loan costs discourage minority families from buying a home; and higher costs increase the risk of foreclosure for those who *do* buy homes, threatening working-class neighborhoods and the U.S. economy

POL'Y INST. (Aug. 22, 2012); URBAN INST., THE RACIAL GAP IS THREE TIMES GREATER THAN THE RACIAL INCOME GAP, <http://www.urban.org/changing-wealth-americans/lost-generations-interactive-race.cfm>, archived at <http://perma.cc/ZX78-6XC> (finding that wealth gaps by Caucasians grew to be six times that of African Americans and Latinos in 2010).

¹⁹⁵ Debbie Gruenstein Bocian, Wen Li & Keith S. Ernst, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, CTR. FOR RESPONSIBLE LENDING 1, 2 (June 18, 2010), <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>.

¹⁹⁶ CTR. FOR RESPONSIBLE LENDING, SUBPRIME MORTGAGE LENDERS' EXPLANATIONS FOR CHARGING AFRICAN-AMERICANS AND LATINOS MORE DON'T ADD UP, THE CTR. FOR RESPONSIBLE LENDING PROVES, CTR. FOR RESPONSIBLE LENDING (May 31, 2006), <http://www.responsiblelending.org/media-center/press-releases/archives/lenders-explanations-for-charging-african-americans-and-latinos-more-don-t-add-up.html>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

as a whole.”²⁰¹

Indeed, the Center’s predictions came true: the unequal access to fair credit caused more losses for African Americans and Latinos during the Housing and Foreclosure Crisis.²⁰² These particular minority groups were disproportionately affected by foreclosures in relation to their share of mortgage originations.²⁰³ Eight percent of African Americans and Latinos who obtained loans between 2005 and 2008 lost their homes to foreclosures during the crisis.²⁰⁴ On the other hand, only 4.5% of whites who obtained loans during the same timeframe lost their homes.²⁰⁵

Non-Hispanic whites represented approximately 56% of families foreclosed upon between 2007 and 2009.²⁰⁶ On the other hand, 11.6% of African American and 16.2% of Latino families were foreclosed upon during this same time.²⁰⁷ Although more non-Hispanic whites lost their home through foreclosure than any other racial group, the impact of loss is much greater for African Americans and Latinos whose estimated proportion of mortgage originations were 7.8% and 11.2%, respectively.²⁰⁸ The Center estimated that African Americans lost 240,020 homes and Latinos lost 335,950 homes between 2007 and 2009.²⁰⁹

Interestingly, data examined by the Center disproved the suspicion that most of the foreclosure disparities would be concentrated in lower income classes.²¹⁰ The data shows similar levels of foreclosure rate disparities on all income levels—low, moderate, middle, and high-income levels.²¹¹ For instance, non-Hispanic Caucasians had an approximated 74.1% of the low-income mortgage originations between 2005 and 2008, while African Americans accounted for about 14.8% and Latinos accounted for around 11%.²¹² The percentages of completed low-income foreclosures from 2007 to 2009 were as follows: non-Hispanic whites accounted for 67.1% of the foreclosures, African Americans accounted for 21%, and Latinos accounted for 11.9%.²¹³

²⁰¹ *Id.* (emphasis in original).

²⁰² Bocian, Li, Reid & Quercia, *supra* note 113, at 10.

²⁰³ Bocian, Li, Reid & Quercia, *supra* note 113, at 10.

²⁰⁴ Bocian, Li, Reid & Quercia, *supra* note 113, at 10.

²⁰⁵ Bocian, Li, Reid & Quercia, *supra* note 113, at 10.

²⁰⁶ Bocian, Li & Ernst, *supra* note 195, at 2.

²⁰⁷ Bocian, Li & Ernst, *supra* note 195, at 2.

²⁰⁸ Bocian, Li & Ernst, *supra* note 195, at 8.

²⁰⁹ Bocian, Li & Ernst, *supra* note 195, at 8.

²¹⁰ Bocian, Li & Ernst, *supra* note 195, at 10.

²¹¹ Bocian, Li & Ernst, *supra* note 195, at 10.

²¹² Bocian, Li & Ernst, *supra* note 195, at 10. The rates were similar for moderate income borrowers. The number of moderate income mortgage originations (with completed foreclosures) was: Caucasians (non-Hispanic): 75.4% (66.5%), African Americans: 12.3% (18%), and Latinos: 12.3% (15.5%). *Id.*

²¹³ Bocian, Li & Ernst, *supra* note 195, at 10.

The data further revealed that the African American share of mortgage origination rates declined at the middle and high-income levels.²¹⁴ In contrast, non-Hispanic Caucasian and Latino mortgage originations slightly increased.²¹⁵ However, the rates of completed foreclosure unexpectedly indicated higher disparity ratios.²¹⁶ Regarding the middle-income level, the completed foreclosures between 2007 and 2009 were: 66.5% for non-Hispanic whites, 14.5% for African Americans, and 13.2% for Latinos.²¹⁷ On the high-income level, the completed foreclosures from 2007 to 2009 were: 67.3% for non-Hispanic whites, 9.9% for African Americans, and 22.8% for Latinos.²¹⁸

The most plausible explanation for the above-mentioned imbalances is that minority borrowers were given inequitable terms in financing as compared to similarly situated white borrowers. Discrimination then propelled this set of minority borrowers toward default and foreclosure. As previously discussed, there was a higher incidence of foreclosure of subprime mortgages held by minorities from 2007 through 2009.²¹⁹ Further, the DOJ unearthed unequivocal evidence of lending discrimination by major lenders.

In *United States v. AIG Fed. Savings Bank et al.*, the Civil Rights Division simultaneously filed and settled an action alleging that AIG Federal Savings Bank (AIG) had violated the ECOA and FHA by charging higher fees associated with wholesale loans to African Americans from July 2003 through May 2006.²²⁰ In December 2011, the DOJ settled its landmark discrimination case, *United States v. Countrywide Financial Corporation*, for \$335 million, the largest lending discrimination settlement in DOJ history.²²¹

Racial equality, expressly embodied in law,²²² is subverted by the old racial-caste system. This system predominates objective factors and allows lenders to subjectively justify providing subprime loan products to minorities who qualify for prime mortgages²²³ or refuse to modify loans before foreclosure.²²⁴ Further, the *laissez-faire* attitude of the agencies charged with enforcing fair lending

²¹⁴ Bocian, Li & Ernst, *supra* note 195, at 10. On the middle income level, African American represented 9.8% of these mortgage originations; on high income level African American represented 6.4% of these mortgage originations. Bocian, Li & Ernst, *supra* note 195, at 10.

²¹⁵ Bocian, Li & Ernst, *supra* note 195, at 10.

²¹⁶ Bocian, Li & Ernst, *supra* note 195, at 10.

²¹⁷ Bocian, Li & Ernst, *supra* note 195, at 10.

²¹⁸ Bocian, Li & Ernst, *supra* note 195, at 10.

²¹⁹ Bocian, Li & Ernst, *supra* note 195, at 7, 10.

²²⁰ Perez, 2010 Annual Report, *supra* note 138.

²²¹ Perez, 2010 Annual Report, *supra* note 138.

²²² Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601–3631 (1968); Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* (2010).

²²³ Bocian, Li, Reid & Quercia, *supra* note 113, at 5.

²²⁴ See, e.g., Pat Garofalo, *Bank vs. America: Bank of America's Continued Foreclosure Shenanigans Show How Broken the Financial System Still Is*, US NEWS (Jul. 15, 2013, 4:30

and equal credit access²²⁵ exhibit the inconsequentiality of racial minorities, particularly African Americans and Latinos. Ultimately, written laws do not work in a vacuum. The attitudes behind enforcement must change.

As William Blake said, “This life’s . . . windows of the soul [d]istorts the [h]eavens from pole to pole [a]nd leads you to believe a lie [w]hen you see with, not [through], the eye.”²²⁶ Discrimination has existed before “race” existed; it does not require animus towards a group. Discrimination simply requires perceptions engrained in one’s subconscious where rights and/or benefits are unequal. “The moral virtues, then, are produced in us neither by nature nor against nature. Nature, indeed, prepares in is the ground for their receptions, but their complete formation is the product of habit.”²²⁷ These devastating losses caused by brokers and lenders are likely to affect many minorities for a time to come. According to one report, a disproportionate number of African Americans, Asians and Latino are not yet out of the woods in the foreclosure crisis.²²⁸

V. THE FINANCIAL GENOCIDE OF MINORITIES

A. Homeownership Gaps

The recent Housing and Foreclosure Crisis culminated in a worse financial blow to minorities than any other economic crisis in U.S. history.²²⁹ Because of the systematic failure of protections by federal regulators, lenders deliberately or haphazardly discriminated in lending to minorities. Combined, these actions completely annihilated minorities’ past and prospective economic and financial gains, i.e., resulted in financial genocide. Minorities’ homeownership rates

PM), <http://www.usnews.com/opinion/blogs/pat-garofalo/2013/07/15/bank-of-america-hamp-foreclosure-problem-is-holding-back-the-economy>.

²²⁵ Perez, 2010 Annual Report, *supra* note 138.

²²⁶ WILLIAM BLAKE, THE EVERLASTING GOSPEL SEC. 3, LINE 102 (1818), available at <http://genius.com/William-blake-the-everlasting-gospel-annotated>.

²²⁷ 2 ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 1711 (Penguin Books, 1976).

²²⁸ Ilye Glink, *Foreclosure Crisis Not Over for Minorities*, CBS NEWS (Jun. 25, 2013, 8:04 AM), http://www.cbsnews.com/8301-505145_162-57590795/foreclosure-crisis-not-over-for-minorities/.

²²⁹ Though the Great Depression was devastating on a national level and resulted in loss of jobs for all, I argue that the Great Recession was more ruinous for minorities. During the Great Depression, African Americans and other minorities were excluded from the housing market due to lending discrimination by the Fair Housing Administration and Home Owners’ Loan Corporation. See 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, 206–07 (2005). Minorities eventually were able to attain homeownership, narrowing the gaps in homeownership. However, as a result of the Housing and Foreclosure Crisis, minority homeowners disproportionately lost their homes, which resulted in financial destabilization of minorities on every economic class level. See Bocian, Li & Ernst, *supra* note 195, at 10.

sharply declined²³⁰ and gaps compared to white homeownership rates widened.²³¹ For minorities, especially, the loss of homeownership decimated economic gains.

According to the Census Bureau's Annual Social and Economic Supplement, homeownership for minorities are relatively low, with 44.0% of African Americans, 57.0% of Asians, and 46.0% of Latinos owned their own homes, compared to 73.0% of Caucasians in 2012.²³² Homeownership gaps that had somewhat narrowed from the mid-1980's through the mid-2000's, widened again from 2007 onward, especially for African Americans.²³³ The Pew Research Center reported that gaps in homeownership between African Americans and Caucasians in 2012 is similar to the status quo of 1976.²³⁴ For Latinos, the Latino homeownership gap scantily narrowed with Caucasians in 2012.²³⁵ Asians had the narrowest homeownership gap with Caucasians, with a 78% rate of the Caucasian homeownership rate.²³⁶ Since experiencing peak homeownership rates in 2004 through 2012, Caucasian homeownership rates fell only 2.7% while homeownership rates for African Americans and Latinos dropped by 5.8% and 3.3%, respectively.²³⁷

The U.S. Census Bureau compiles data on homeownership rates based on race and ethnicity. Similar to the categories created by Bernier and Blumenbach, the Census Bureau divides race and ethnicity into six groups: White, Black, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, and "some other race."²³⁸ In 2000, the U.S. Census Bu-

²³⁰ U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDERS, 2009–2013 (2013) [hereinafter U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY], available at <http://perma.cc/G839-WBT7>.

²³¹ See Rakesh Kochbar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> (reporting that non-Hispanic whites homeownership rates dropped 2% between 2010 and 2013, while minority homeownership rates decreased by 6.5% during that time frame). *Id.*

²³² *King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RESEARCH CENTER (Aug. 22, 2013), <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#black-Home>, archived at <http://perma.cc/EMY5-ZWU6>.

²³³ *Id.*

²³⁴ *Id.* (noting that after 1976, the gap between African American and Caucasian homeownership rates fluctuated greatly as African American homeownership rose, only to return in 2012 to a nearly 40 year high).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2013_chap4_homeownership.pdf.

²³⁸ U.S. CENSUS BUREAU, HOMEOWNERSHIP BY RACE AND HISPANIC ORIGIN [hereinafter U.S. CENSUS BUREAU, HISPANIC HOMEOWNERSHIP], available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2013.pdf> (last revised Oct. 31, 2011).

reau, for the first time, created an option that allowed multi-racial persons to choose more than one race.²³⁹

Based on the Census Bureau's data, homeownership rates for all races and ethnic groups plummeted between 2006 and 2009.²⁴⁰ White homeownership rates were 72.6% in 2006, but dropped to 71.4% in 2009,²⁴¹ a 1.2% decline. African American homeownership rates in 2006 were 47.9%, but plunged to 46.2% in 2009,²⁴² a drop of 1.7%. Latino homeownership rates regressed by 1.3% between 2006 and 2009. In 2006, homeownership rates for Latinos were 49.7% but sank to 48.4% in 2009.²⁴³ Asian homeownership rates decreased 1.5% from 60.8% to 59.3% between 2006 and 2009.²⁴⁴ Comparatively, African Americans had the sharpest descent in homeownership during that period.

More remarkably, however, is that from the years 2010 to 2014, homeownership rates continue on the downswing.²⁴⁵ The Census Bureau's data reveals that the 2010 homeownership rates in the fourth quarter per racial group were: 74.2% for Caucasians, 44.8% for African Americans, 57.7% for all other races, and 46.8% for Latinos.²⁴⁶ By 2014, though, fourth homeownership rates were reported as: 72.3% for Caucasians, 42.1% for African Americans, 55.3% for all other races, and 44.5% for Latinos.²⁴⁷ This is a loss of 1.9% for Caucasians, 2.7% for African Americans, 2.4% for all other races, and 2.3% for Latinos. Thus, four years after the housing market depression, homeownership rates continue to sag. It is very difficult to reconcile this data with the reports that the real estate market crisis is over.²⁴⁸

²³⁹ *Id.*

²⁴⁰ Kochbar & Fry, *supra* note 231. Homeownership rates for other minority races also deteriorated. For example, homeownership rates for American Indian, Aleut and Eskimo (lumped together as one race) dropped from 58% in 2006 to 52.3% in 2010, while "other" races homeownership rates fell from 59.9% to 57%. *Id.*

²⁴¹ U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY, *supra* note 230. The homeownership rates for Caucasians during 2006–2009 were: 72.6% (2006), 72% (2007), 71.7% (2008), and 71.4% (2009). *Id.*

²⁴² U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY, *supra* note 230. The 2006–2009 homeownership rates for African Americans were: 47.9% (2006), 47.2% (2007), 47.4% (2008), and 46.2% (2009). *Id.*

²⁴³ U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY, *supra* note 230. The 2006–2009 homeownership rates for Latinos were: 49.7% (2006), 49.7% (2007), 49.1% (2008), and 48.4% (2009). *Id.*

²⁴⁴ U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY, *supra* note 230. The 2006–2009 homeownership rates for Asians were: 60.8% (2006), 60.0% (2007), 59.5% (2008), and 59.3% (2009). *Id.*

²⁴⁵ U.S. CENSUS BUREAU, BULLETIN ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE FOURTH QUARTER 2014, TABLE 7 (2014) [hereinafter U.S. CENSUS BUREAU, 2014 TABLE 7], available at <http://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Christopher Matthews, *After 8 Years, the Real Estate Market is Finally Looking Nor-*

Homeownership rates continued to on a downward spiral in 2014. The average homeownership rates by race were: 42.95% for African Americans,²⁴⁹ 72.65% for Caucasians,²⁵⁰ 45.425% for Hispanics,²⁵¹ and 55% for “all other races”, which includes Asian, Native Hawaiian, Native Alaskan and Native American (regardless of selection of more than one race).²⁵²

Amidst the narrative that the housing and mortgage market is rebounding,²⁵³ nationally, the number of completed foreclosures grew 14.7% in January 2015 from December 2014.²⁵⁴ In January 2015 alone, lenders completed approximately 43,000 foreclosures.²⁵⁵ Further, 552,048 foreclosures were completed in the twelve months prior to January 2015.²⁵⁶

Additionally, foreclosures filings are rising in several states. States with foreclosure filing escalations are: (1) South Carolina—up by 4%,²⁵⁷ (2) Geor-

mal Again, FORTUNE.COM (Mar. 31, 2014), <http://fortune.com/2014/03/31/after-8-years-the-real-estate-market-is-finally-looking-normal-again/> (noting that an alignment between the supply and demand is a sign of a normal real estate market). Thus, according to Matthews, “normal” in 2014 is 5.2% below the highest percentage of homeownership rate (in 2004) and 1.2% below the 20 year homeownership rate in 1994. See U.S. CENSUS BUREAU, BULLETIN ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE FOURTH QUARTER 2014, TABLE 4SA (2014) [hereinafter U.S. CENSUS BUREAU, 2014 TABLE 4SA], available at <http://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

²⁴⁹ U.S. CENSUS BUREAU, 2014 TABLE 7, *supra* note 245. The Census Bureau reported that African American homeownership rates per quarter were: Fourth Quarter—42.1%, Third Quarter—42.9%, Second Quarter—43.5%, and First Quarter—43.3%. *Id.* The average of these four quarters is 42.95%.

²⁵⁰ U.S. CENSUS BUREAU, 2014 TABLE 7, *supra* note 245. For White Homeowners, the Census Bureau reported that homeownership rates per quarter were: Fourth Quarter—72.3.1%, Third Quarter—72.6%, Second Quarter—72.9%, and First Quarter—72.9%. *Id.* The average of these four quarters is 72.65%.

²⁵¹ U.S. CENSUS BUREAU, 2014 TABLE 7, *supra* note 245. Per quarter of 2014, the Census Bureau reported that homeownership rates for Hispanics were: Fourth Quarter—44.5%, Third Quarter—45.6%, Second Quarter—45.8%, and First Quarter—45.8%. *Id.* The average of these four quarters is 45.425%.

²⁵² U.S. CENSUS BUREAU, 2014 TABLE 7, *supra* note 245. For this group, the Census Bureau reported that homeownership rates as: 55.3% for the fourth quarter, 54.2% for the third quarter, 54.7% for the second quarter, and 55.8% for the first quarter. *Id.* The average of these four quarters is 55%.

²⁵³ Matthews, *supra* note 248.

²⁵⁴ CORELOGIC, NATIONAL FORECLOSURE REPORT 3 (Jan. 2015), <http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-january-2015.pdf>.

²⁵⁵ *Id.* at 3.

²⁵⁶ *Id.* at 8.

²⁵⁷ Chris Kahn, *Top Foreclosure States*, BANKRATE.COM (Aug. 28, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-south-carolina/> (finding an incline in filings between June 2015 and July 2015). Nationally, 1 in 1,057 housing units received a foreclosure filing. *Id.* In South Carolina, 1 in 932 housing units received a foreclosure filing. *Id.*

gia—27.6%,²⁵⁸ (3) New Mexico—158.6%,²⁵⁹ (4) Illinois—24.9%,²⁶⁰ (5) Nevada—15.4%,²⁶¹ (6) New Jersey—12.4%,²⁶² (7) Maryland—3.5%,²⁶³ and (8) Florida—19%.²⁶⁴ Five states, Florida, Michigan, Texas, California, and Georgia, account for nearly half of all completed foreclosures nationally during the twelve months before January 2015.²⁶⁵ Curiously, a few of these states are also sites of racial clashes,²⁶⁶ which if there is any correlation between race and foreclosure, then there will be more fall out from the foreclosure crisis that has not yet been realized.

B. *Wealth Depletion*

Homeownership is a valuable asset to most Americans. A Pew Research Center Study in April 2011 revealed that “eight-in-ten (81%) adults agree that buying a home is the best long-term investment a person can make”²⁶⁷ The forfeiture of homeownership, for some minorities, has an especially ruinous economic effect, more so than it has on many Whites. In general, minorities have lower net worths than Whites.²⁶⁸ More appreciably, though, equity in a

²⁵⁸ Chris Kahn, *Top Foreclosure States*, BANKRATE.COM (Aug. 28, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-georgia/>. One in 900 housing units received a foreclosure filing. *Id.*

²⁵⁹ Chris Kahn, *Top Foreclosure States*, BANKRATE.COM (Aug. 28, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-new-mexico/>. In New Mexico, 1 in 741 foreclosure filings per housing units. *Id.*

²⁶⁰ Chris Kahn, *Top Foreclosure States*, BANKRATE.COM (Aug. 28, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-illinois/>. In Illinois, 1 in 730 foreclosure filings per housing units. *Id.*

²⁶¹ Chris Kahn, *Top Foreclosure States*, BANKRATE.COM (Aug. 28, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-nevada/>. In Nevada, 1 in 587 housing units received a foreclosure filing. *Id.*

²⁶² Chris Kahn, *Top Foreclosure States*, BANKRATE.COM (Aug. 28, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-new-jersey/>. In New Jersey, 1 in 520 foreclosure filings per housing units. *Id.*

²⁶³ Chris Kahn, *Top Foreclosure States*, BANKRATE.COM (Aug. 28, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-maryland/>. In Maryland, 1 in 513 foreclosure filings per housing units. *Id.*

²⁶⁴ Chris Kahn, *Top Foreclosure States*, BANKRATE.COM (Aug. 28, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-florida/>. In Florida, 1 in 408 foreclosure filings per housing units. *Id.*

²⁶⁵ CORELOGIC, *supra* note 254, at 7. The total number of completed foreclosures per these 5 states, January 2014–December 2014, were: Florida (110,000), Michigan (51,000), Texas (34,000), California (30,000) and Georgia (28,000). *Id.*

²⁶⁶ *See supra* Part I.

²⁶⁷ *Home Sweet Home. Still*, 1, PEW RESEARCH CENTER (April 12, 2011), <http://www.pewsocialtrends.org/2011/04/12/home-sweet-home-still/>.

²⁶⁸ Caucasians’ average net worth at the height of the housing market in 2005 was approximately \$134,992. Rakesh Kochkar, Richard Fry & Paul Taylor, *Wealth Gaps Rise to*

home is inextricably tied to most minorities' net worths.²⁶⁹

According to a recent study, home equity represented 62% of the median African American owner's net wealth and 67% of the median Latino owner's net wealth.²⁷⁰ Conversely, home equity accounted for only 38% of the median Caucasian owner's net worth.²⁷¹ With home equity representing nearly two-thirds of African Americans' and Latinos' personal net worth, the loss of this most precious asset significantly decreases their financial standing. The home is an important asset in a minority homeowners' portfolio. Consequently, the catastrophic home losses during the crisis widened the wealth gap swelled between Caucasians and African Americans, Latinos, and Asians.²⁷²

The reverberations of lending discrimination are still being felt. In December 2014, the Pew Research Center reported that wealth gaps between Whites and minorities continue to widen. According to the report, the average net worth for a White Americans escalated to an amount equal to approximately 17 times greater than the average net worth for an African American between 2010 and 2013.²⁷³ Wealth gaps between Whites and Latinos increased to a level of 10 times greater between 2010 and 2013. Further, African American net worths plummeted 33.7%, from \$16,600 to \$11,000, between 2010 and 2013.²⁷⁴ Similarly, Latinos' net worth plunged 14.3%, from \$16,000 to \$13,700, between 2010 and 2013.²⁷⁵

Moreover, African Americans, particularly, tend to not be boomerang homeowners; once removed from homeownership, they are less likely to become

Record Highs Between Whites, Blacks, Hispanics, PEW RESEARCH CENTER, (Jul. 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>. At the height of the foreclosure crisis in 2009, this group's net worth fell 16%, down to \$113,149. *Id.* Comparatively, African Americans' average net worth was only \$12,124 in 2005. *Id.* By 2009, however, this group's average net worth dwindled by 53% to \$5,677. *Id.* Similarly, Latinos' median net worth dropped 66% from \$18,359 in 2005 to \$6,325 in 2009. *Id.* In contrast, Asians' average net worth was higher than Caucasians with a net worth of \$168,103 in 2005, but sharply declined by 54% to \$78,066 in 2009, falling below the average Caucasian net worth. *Id.*

²⁶⁹ JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 237, at 14.

²⁷⁰ JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 237, at 14. ("The differences by race and ethnicity were nearly as large, with home equity accounting for 62 percent of net wealth for the median black owner and 67 percent for the median Hispanic owner, but only 38 percent for the median white homeowner.")

²⁷¹ JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 237, at 14.

²⁷² A source recently reported that, in 2010, the median net worth of Caucasians were as much as 7.9 times higher than African Americans and 8.2 times higher than Latinos. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 237, at 14.

²⁷³ Kochbar & Fry, *supra* note 231. During this period, the average net worth for Caucasians was \$141,900 while the average net worth for African Americans was \$11,000. *Id.*

²⁷⁴ Kochbar & Fry, *supra* note 231. This compares the average net worth of Caucasians (\$141,900) to the average net worth of Latinos (\$13,700).

²⁷⁵ Kochbar & Fry, *supra* note 231.

homeowners again.²⁷⁶ There are multiple reasons why this phenomenon occurs; it may include both a combination of ability, e.g., stricter credit standards bar a return, or desire, the homeowner simply does not want homeownership.²⁷⁷ The data shows that home loans to African Americans dropped 80% from 1.3 million in 2005 to only 280,000 in 2011.²⁷⁸ Similarly, home mortgage loans fell 76% for Latinos, from 1.9 million in 2005 to a mere 442,000 in 2011.²⁷⁹ Thus, the even though the market is rebounding, a segment of the population is not living the American Dream of homeownership.

When one considers that race, more likely than creditworthiness, played a defining role in the type of loan received, it becomes discouraging that the economic status of minorities will improve. How does one “level the playing field” when such discrimination has become so socially accepted, banal?

VI. CONCLUSION

Langston Hughes wrote:

What happens to a dream deferred?
Does it dry up
like a raisin in the sun?
Or fester like a sore—
And then run?
Does it stink like rotten meat?
Or crust and sugar over—
Like a syrupy sweet?
Maybe it just sags
Like a heavy load.
Or does it explode?²⁸⁰

The deferred dreams of nondiscriminatory lending have become a heavy yoke for many minorities to carry. African Americans, Latinos and Asians, believing that safeguards were in place in the lending process throughout the lending and foreclosure processes soon discovered that their faith was misplaced. Federal agencies, imbued with jurisdiction to enforce the laws that were designed to end discriminatory lending, exercised their power with the vigor of

²⁷⁶ Williams, *supra* note 82, at 634 (citing Donald R. Haurin & Stuart S. Rosenthal, *The Sustainability of Homeownership: Factors Affecting the Duration of Homeownership and Rental Spells*, U.S. DEP'T OF HOUSING & URBAN DEV., OFFICE OF POLICY DEP'T & RESEARCH (Dec. 2004)).

²⁷⁷ Williams, *supra* note 82, at 635.

²⁷⁸ Williams, *supra* note 82, at 634 (referring to Jim Carr, *The Challenges to Homeownership in America*, CENTER FOR AMERICAN PROGRESS (Nov. 7, 2013) (relying upon ComplianceTech's analysis of the Home Mortgage Disclosure Act data for 2011)).

²⁷⁹ Williams, *supra* note 82, at 634.

²⁸⁰ LANGSTON HUGHES, *HARLEM*, reprinted in *SELECTED POEMS OF LANGSTON HUGHES* 268 (Random House Inc., 1990).

a paper tiger. Time has passed, yet most minorities are still waging war to achieve equal rights in home finance. So, how does one transcend race?

Minorities, principally Latinos and African Americans, are still awaiting nondiscriminatory access to mortgages and homeownership in areas of their choosing. Forty years into this unalleviated battle for basic civil rights, there exists ample evidence of patterns of racial inequality which creates a legacy of economic inequality.

Lending discrimination should not be considered just a *minority* issue. This is a *U.S.* problem. The housing market is a major segment of the national economy.²⁸¹ In 2043, it is widely believed that Caucasians will become the racial minorities.²⁸² If race being a factor in the lending process, and minorities are disparately treated, then the U.S. homeownership levels will be continually depressed. As a result, the U.S. economy will equally be adversely effected.

It is imperative that federal agencies vigorously enforce fair mortgage and credit laws. The many years of inaction in this area are inexcusable, especially when there was observable warnings of lending discrimination before thousands of minorities lost their most valuable asset, their homes. When the federal agencies finally stepped in by filing suit against lenders who demonstrated patterns of disparate treatment or held policies which disparately impacted minorities, lenders had already perpetrated the most egregious offenses which caused devastating losses for minorities.

The CFPB and DOJ have taken some steps to right the wrongs committed against minorities. However, suits against offending lenders and brokers were minor bruises instead of the shake-up that was needed. Moreover, the solutions generated to unify lending standards do not alleviate the ills created by the inheritance of discrimination. Thus, the regulators must fashion remedies that accurately account for the dimensions of not only modern problems, but also historical problems.

Notwithstanding the tiresome grandiloquence,²⁸³ the caste system based on race still persists. The acquiescence of a racial pecking order is so cemented into the foundations of the collective social conscious that institutions build upon it to construct legal, political, and financial frameworks. From this, racial

²⁸¹ Ben S. Bernanke, Chairperson, Fed. Reserve Bd., Speech at the Fed. Reserve Sys. Conference on Housing & Mortgage Markets (Dec. 4, 2008) (discussing the interrelationship between the housing market in that “weakness in the housing market has proved a serious drag on the overall economic activity”).

²⁸² Press Release, U.S. Census Bureau, U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html> (predicting that the U.S. population will be comprised of 57% minority by 2043).

²⁸³ See, e.g., Barack Obama, U.S. Pres., Press Conference at the White House: End of the Year Conference (Dec. 19, 2014). President Obama stated that “Like the Rest of America, Black America, in the aggregate, is better off than it was when I came into office.” *Id.*; but compare *supra* Parts III–V.

hierarchy becomes acknowledged through actions and is given legal credence. Consequently, those at the bottom of the hierarchy are deprived of the greater privileges, such as equal lending, homeownership, and generational wealth.

Virtues are acts of “conformity to a standard of right.”²⁸⁴ Aristotle believed that virtues are formed by the “habit of acting in a certain way.”²⁸⁵ If this is true, then a guiding virtue in the United States is that certain races—Whites—are favored, while others races—African Americans, Asians, and Latinos—are less favored. For centuries, institutions in the United States have habitually provided disparate amenities to the less favored races. This practice has become the “standard of what is right.” Animus is not a prerequisite to embracing a social, legal and financial apartheid. In most cases, it is likely that many are unaware of their acquiescence of the system because discrimination is typically hidden behind the feckless promises of equality.

Henceforth, a series of questions with perceivably less hopeful answers arise. How does one extricate oneself from an immutable trait like race to instigate changes in prejudicial attitudes toward minorities, especially African Americans and Latinos? Or, better yet, should separation from one’s race be a prerequisite to receiving fair lending? How does one truly transcend one’s race? Furthermore, what other cures exist that may drive out the ills of discriminatory behavior in the consumer credit market and elsewhere?

In a system where there is the standard, preferred group, there must likewise exist a substandard, the spurned group. In the race categorization system, the eminent group is the same as it has been historically—“White” Americans. At the bottom are African Americans, Latinos and Asians. Statistics show that the bottommost group, disfavored racial minorities, bore the brunt of the housing crisis due to iniquitousness in the lending process. The costs to these victims are extremely great. The ability to regain homeownership, the most direct pathway by which minorities accumulate wealth, is profoundly impeded.

The consequences of lending discrimination for the perpetrators have not been cumbrous enough in terms of the penalties related to benefits conferred. Lenders, who were alleged to have violated fair lending laws, paid approximately \$525 million dollars to settle lawsuits based on discriminatory lending practices in 2011 and 2012.²⁸⁶ On the other hand, banks and thrifts received an

²⁸⁴ *Virtue Definition*, M-W.COM, <http://www.merriam-webster.com/dictionary/virtue> (last visited Dec. 21, 2014).

²⁸⁵ ARISTOTLE, *supra* note 227, at 15.

²⁸⁶ *Fair Lending: Hearing Before S. Comm. on the Judiciary*, 112th Cong. (2012) (testimony of Asst. Atty. General Thomas E. Perez, U.S. DEP’T OF JUSTICE testifying as to the 8 fair lending cases brought against lenders with settlements totaling \$350 million in 2011); Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charge*, N.Y. TIMES (Jul. 12, 2012), http://www.nytimes.com/2012/07/13/business/wells-fargo-to-settle-mortgage-discrimination-charges.html?_r=0 (reporting on DOJ’s settlement with Wells Fargo Bank for \$175 million).

estimated \$955.5 billion in profits between 2004 and second quarter 2014,²⁸⁷ and \$113.2 billion in government bailouts.²⁸⁸ As of the second quarter of 2014, banks and thrifts were posting near record profits.²⁸⁹ Perhaps a system of criminal liability or debt cancellation would be better deterrents.

In the 21st century, the American Dream signifies that *all Americans* will have the privilege of achieving homeownership equally. The Dream denotes that if one works hard enough, then one may grasp it. Unfortunately, the status quo related to homeownership offers false piety of change. Hopefully, President Obama's plans for change will be adopted and the construction of race will evolve. President Obama said:

*Change is hard—in our own lives, and in the lives of nations. And change is even harder when we carry the heavy weight of history on our shoulders. But today we are making these changes because it is the right thing to do. Today, America chooses to cut loose the shackles of the past so as to reach for a better future*²⁹⁰

Although the concept of race has no scientific basis, in fact, it can be judicially determined.²⁹¹ Despite this fact, race and racism have become difficult to erase. Some may believe that racism has faded into background of history, but the race system remains the undercurrent of how people are identified and thence treated.

As James Baldwin stated, as Americans, we should not discount the deep roots of history, which “is not merely something to be read. And it does not

²⁸⁷ Robin Sidel & Saabira Chaudhuri, *U.S. Bank Profits Near Record Levels*, WSJ.COM (Aug. 11, 2014, 7:55 PM), <http://www.wsj.com/articles/u-s-banking-industry-profits-racing-to-near-record-levels-1407773976> (last visited Dec. 21, 2014). This is an approximate amount and accounts for deficits in fourth quarter of 2008 and first, second and fourth quarter in 2009.

²⁸⁸ *Bailed Out Banks*, CNNMONEY.COM, <http://money.cnn.com/news/specials/story-supplement/bankbailout/> (last visited Dec. 21, 2014). These figures are U.S. Treasury bailout payments to Wells Fargo, Bank of America, Chase, Citigroup on October 28, 2008, and SunTrust Bank, U.S. Bank, BB&T Bank and Merrill Lynch (which Bank of America purchased) on November 17, 2008. This group of banks were the largest offenders of lending discrimination. Perez, 2010 Annual Report, *supra* note 138.

²⁸⁹ Sidel & Chaudhuri, *supra* note 287.

²⁹⁰ Barack Obama, U.S. Pres., Press Conf. at the White House: Relations with Cuba (Dec. 17, 2014), <http://www.whitehouse.gov/blog/2014/12/17/president-obama-charts-new-course-cuba-5-things-know>.

²⁹¹ Robert Wald Sussman, *The Myth of Race: The Troubling Persistence of an Unscientific Idea 1* (Harvard 2014) (pointing out the United Nations Educational, Scientific and Cultural Organization, UNESCO, issued a statement, after extensive studies by anthropologists, geneticists, sociologist and psychologists, that race was not due to biological and has not biological implications as early as 1950). For judicial determination of race, *see, e.g.*, *U.S. v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

refer merely, or even principally, to the past."²⁹² History is so connected to our beings that we "are unconsciously controlled by it in many ways," making "history . . . literally present in all that we do."²⁹³ Through the lens of history, we frame our references.²⁹⁴ Part of the generally accepted reference is that races are hierarchal. Hierarchies produce privilege to those at the top and disadvantages to all not in the top group.

If regulators or legislators desire to eradicate lending inequities, then they must first concede that unequal access to mortgage credit will not cease to exist in time. As history has shown, although times have changed, the issues remain the same. Discrimination will be preserved so long as the lip service of fairness exists with the paradox of a racial pecking order. The failure of such a promise of equality, whether it be in the real estate market or otherwise, will engender frustration, then will, in turn, prompt social unrest. Accordingly, until we, as a society, reconcile these contradictions and dismantle the hierarchal race scheme, discrimination will continue for many more decades.

²⁹² James Baldwin, *White Man's Guilt*, EBONY (Aug. 1965), available at <http://www.douglasficek.com/teaching/phil-4450-phil-of-race/baldwin.pdf>.

²⁹³ *Id.*

²⁹⁴ *Id.*