

# Rebuilding a House of Cards: Envisioning Sustainable Federal Housing Policy

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## INTRODUCTION

On February 10, 2009, President Obama held a town hall meeting in Fort Myers, Florida, to promote the federal stimulus package.<sup>1</sup> At the town hall, a woman named Henrietta Hughes raised her hand and took the microphone.<sup>2</sup> She told the President that she and her son were homeless and living in her car.<sup>3</sup> The waiting list at the local housing authority was two years, so waiting for subsidized, affordable housing to become available was not a plausible option.<sup>4</sup>

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1. See Tad DeHaven, *Henrietta Hughes, HUD, and the Ft. Myers Housing Authority*, CATO @ LIBERTY (Feb. 13, 2009, 1:06 PM), <http://www.cato-at-liberty.org/2009/02/13/henrietta-hughes-hud-and-the-ft-myers-public-housing-authority>. See *infra* notes 194–200 and accompanying text, for a discussion of the American Recovery and Reinvestment Act, the Stimulus Bill.

2. See Linda Bergthold, *Whatever Happened to Henrietta Hughes?*, HUFFINGTON POST (Apr. 27, 2009, 4:18 PM), [http://www.huffingtonpost.com/linda-bergthold/whatever-happened-to-henr\\_b\\_191303.html](http://www.huffingtonpost.com/linda-bergthold/whatever-happened-to-henr_b_191303.html); see also Yunji de Nies & Sunlen Miller, *Henrietta Hughes*, ABC NEWS (Feb. 10, 2009, 3:05 PM), <http://blogs.abcnews.com/politicalpunch/2009/02/henrietta-hughe.html>.

3. See de Nies & Miller, *supra* note 2.

4. *Id.* Ms. Hughes made an impassioned plea to the President:

I have an urgent need, unemployment and homelessness, a very small vehicle for my family and I to live in . . . . The housing authority has two years' waiting lists, and we need something more than the vehicle and the parks to go to. We need our own kitchen and our own bathroom. Please help.

*Id.*

The President kissed Henrietta on the cheek and told her, “We’re going to do everything we can to help you, but there are a lot of people like you.”<sup>5</sup> Before continuing the town hall, he told Ms. Hughes to stay and that his staff would help her after the event ended.<sup>6</sup> After the event, United States Representative Nick Thompson offered Henrietta and her family a house to live in until they were back on their feet.<sup>7</sup> However, most low-income families are not as lucky as Henrietta Hughes and struggle, largely unassisted, to find and keep safe, affordable housing.

There is a long history of federal support for helping families secure affordable, safe homes. In 1949, Congress first declared its goal for a national housing policy: “a decent home and a suitable living environment for every American family.”<sup>8</sup> In reaffirming its commitment to this goal in 1968, Congress declared that better meeting the housing needs of lower-income Americans was an issue of “grave national concern.”<sup>9</sup> That same year, Congress enacted the Fair Housing Act of 1968 (FHA)<sup>10</sup> to prohibit discrimination in the

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5. DeHaven, *supra* note 1.

6. *Id.*

7. Berghold, *supra* note 2. Representative Thompson was trying to sell a house he owned in the area. *Id.* He and his wife offered to let Henrietta and her son live there, at least until he found a buyer. *Id.*

8. Housing Act of 1949, Pub. L. No. 90-19, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 (2006)).

9. See Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (codified at 12 U.S.C. § 1701t (2006)). Section 1701t states:

The Congress affirms the national goal, as set forth in section 1441 of title 42, of “a decent home and a suitable living environment for every American family.”

The Congress finds that this goal has not been fully realized for many of the Nation’s lower income families; that this is a matter of grave national concern; and that there exist in the public and private sectors of the economy the resources and capabilities necessary to the full realization of this goal.

The Congress declares that in the administration of those housing programs authorized by this Act which are designed to assist families with incomes so low that they could not otherwise decently house themselves, and of other Government programs designed to assist in the provision of housing for such families, the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality; and in the carrying out of such programs there should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques.

*Id.*

10. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42

selling or leasing of housing, furthering the goal of expanded access to decent and suitable housing for all American families.<sup>11</sup> The aims of the Fair Housing Act were reinforced by the Community Reinvestment Act of 1977 (CRA),<sup>12</sup> which sought to expand access to mortgage financing for borrowers in low-income and minority neighborhoods.<sup>13</sup> Despite the potential for improved access to mortgage financing for all Americans, President Bill Clinton, concerned by falling homeownership rates in the 1990s, urged shifting to homeownership as the focal point of national housing policy in the United States, and subsequent administrations followed suit.<sup>14</sup>

In many ways pushing for increased homeownership precipitated the subprime mortgage boom, and bust, that was at the heart of the

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U.S.C. §§ 3601–3631 (2006)).

11. *See infra* notes 82–86 and accompanying text (discussing the purpose and history of the Fair Housing Act).

12. Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111 (codified as amended at 12 U.S.C. § 2901 (2006)).

13. *See infra* notes 93–111 and accompanying text (reviewing the enactment and effectiveness of the Community Reinvestment Act).

14. In November 1994, President Clinton called on former Housing and Urban Development (HUD) Secretary Henry Cisneros to develop a policy to reverse the trend of falling homeownership rates. Peter Coy, *Bill Clinton's Drive to Increase Home Ownership Went Way Too Far*, BUS. WK. (Feb. 27, 2008), [http://www.businessweek.com/the\\_thread/hotproperty/archives/2008/02/clintons\\_drive.html](http://www.businessweek.com/the_thread/hotproperty/archives/2008/02/clintons_drive.html). Then, in 1995, President Clinton declared June 5 National Homeownership Day and in the accompanying proclamation declared:

For the better part of this century, America has made homeownership a priority of national policy. The National Housing Act of 1934 created the Federal Housing Administration's home mortgage insurance program, empowering more than 23 million Americans to buy their own homes. In 1944, the GI Bill of Rights set up the Veterans Administration's home loan guaranty program, enabling millions of veterans to start a new life for themselves and their families. The Housing Act of 1949 declared that every American family should enjoy a "decent home and a suitable living environment"—an ideal that has been reaffirmed in myriad ways since then.

Proclamation No. 6807, 60 Fed. Reg. 29,957 (June 2, 1995). President George W. Bush continued support for homeownership as the focus of U.S. housing and domestic policy, announcing his desire to "give every American a stake in the promise and future of our country . . . and build an ownership society. We will widen the ownership of homes and businesses." President George W. Bush, Second Inaugural Address (Jan. 20, 2005), in 41 WEEKLY COMP. PRES. DOC. 74 (Jan. 24, 2005). It appears, however, that, while the Obama Administration supports strengthening the housing finance system in order to stabilize and to promote homeownership, unconditional support for homeownership for all Americans is no longer a policy priority. *See infra* notes 216–19 and accompanying text.

Great Recession,<sup>15</sup> but President Clinton did achieve his goal of increasing interest in homeownership.<sup>16</sup> Unfortunately, problems with housing finance long have been troublesome for the overall economy.<sup>17</sup> At the same time, however, homeownership is an essential wealth-building tool for many households.<sup>18</sup> Seemingly learning from past mistakes, the Obama Administration announced a major housing policy shift in February 2011 when the Treasury Department and the Department of Housing and Urban Development (HUD) announced in a joint report to Congress: “The government must help ensure that all Americans have access to quality housing that they can afford. This does not mean our goal is for all Americans to be homeowners.”<sup>19</sup> This essential policy shift, however, came too late, after the financial damage was done.

President Clinton’s support for homeownership was so successful that in the early days of the new millennium, housing prices seemed like they might rise indefinitely. The dot-com bubble burst, and the ensuing recession created an environment ripe for home price appreciation.<sup>20</sup> Interest rates fell to a forty year low, and buyers seized the opportunity to buy in the growing market sooner rather than later.<sup>21</sup>

Even when interest rates eventually rose, buyers still flocked to the real estate market.<sup>22</sup> Lenders were more than willing to finance—and refinance—mortgages, regularly relaxing underwriting standards to speed the mortgage lending process along.<sup>23</sup> Borrowers, however,

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15. In a February 2011 joint report issued by the Department of the Treasury and the Department of Housing and Urban Development, the government referred to the financial crisis as “The Great Recession.” THE DEP’T OF THE TREASURY & THE U.S. DEP’T OF HOUS. & URBAN DEV., REFORMING AMERICA’S HOUSING FINANCE MARKET: A REPORT TO CONGRESS 4 (2011) [hereinafter TREASURY/HUD JOINT REPORT].

16. See *infra* Part I.E (discussing precipitating factors to the dramatic increase in homeownership).

17. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2009, at 9 (2009) [hereinafter STATE OF HOUSING 2009].

18. See Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, 88 FED. RES. BANK OF ST. LOUIS REV. 31, 31 (2006).

19. TREASURY/HUD JOINT REPORT, *supra* note 15, at 2.

20. STATE OF HOUSING 2009, *supra* note 17, at 1.

21. *Id.*

22. *Id.*

23. Lenders relaxed traditional underwriting standards like down payment amounts and required debt-to-income ratios. *Id.* Lenders also failed to verify borrowers’ incomes, and they

often did not understand the terms and features of their loans, but they would accept the financing anyway.<sup>24</sup> In the lending flurry, however, even less-creditworthy borrowers easily found financing in the subprime market, and, consequently, homeownership in the United States surged to its highest rate ever—nearly 70 percent.<sup>25</sup>

At the same time, many of the largest investment banks and financial institutions on Wall Street made a fortune trading bonds backed by pools of securitized mortgages.<sup>26</sup> Everything seemed to be moving along smoothly, but the housing bubble proved that such continued growth was not sustainable. Large numbers of mortgages entered default, an overwhelming number of which loans were subprime, and national housing prices began to fall consistently for the first time since the 1930s.<sup>27</sup> Problems that first emerged in the housing finance markets transferred over to the broader financial markets and “forced financial institutions to take massive write-downs on their mortgage portfolios, igniting a broader banking crisis.”<sup>28</sup> Consumer borrowing in all sectors dropped for the first time ever, and the economy began what seemed, at the time, like a never-ending tailspin.<sup>29</sup> Americans, burdened by excessive housing costs

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used loan products with artificially low initial payments that later drastically increased and other non-traditional offerings to knowingly sell homes borrowers could not afford. *See id.*; *see also* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 68 (2d ed. 2010) [hereinafter SCHWARTZ 2d]; John C. Dugan, Comptroller of the Currency, Remarks Before the Special Seminar on International Banking and Finance 3-4 (Nov. 18, 2009), *available at* <http://www.occ.treas.gov/news-issuances/speeches/2009/pub-speech-2009-143.pdf> (“Yet it’s striking that, despite all of the hard and very fine work that is being done around the world on these very difficult regulatory issues, relatively little attention has been paid to the initial problem that sparked the crisis: the exceptionally weak, and ultimately disastrous, mortgage underwriting practices accepted by lenders and investors—primarily but not exclusively in the United States.”).

24. *See* SCHWARTZ 2d, *supra* note 23, at 74–75.

25. At the height of the market, homeownership in the United States surged to near 70 percent. David Wessel, *Rethinking Part of the American Dream*, WALL ST. J. (June 17, 2010), <http://online.wsj.com/article/SB10001424052748703513604575310383542102668.html>; *see also infra* notes 26, 27, and 59–65 and accompanying text (discussing the rise in homeownership and subprime lending).

26. For an explanation of the development and the popularity of mortgage-backed securities, *see infra* Part I.E.

27. STATE OF HOUSING 2009, *supra* note 17, at 1–2; TREASURY/HUD JOINT REPORT, *supra* note 15, at 4–5.

28. STATE OF HOUSING 2009, *supra* note 17, at 2.

29. *Id.*

and staggering amounts of other consumer debt, found themselves standing at the precipice of a deep recession with massive job losses ahead.<sup>30</sup>

Further complicating matters, the problems of racial- and income-based discrimination that plague many areas of American society are particularly apparent and troublesome in the world of housing finance. While the United States government proclaimed that it would ensure affordable housing for all Americans after the Great Depression,<sup>31</sup> historically, it has not always fulfilled that promise. In 1968, the government did make a symbolic commitment beyond ensuring safe and secure housing for all. The government committed to preventing race-based discrimination in mortgage lending by passing the Fair Housing Act,<sup>32</sup> a commitment strengthened almost a decade later with the passing of the Community Reinvestment Act of 1977.<sup>33</sup>

Over the decades since the enactment of the CRA, it became more common for lenders to extend mortgage financing to borrowers in both minority and low-income communities, though it should be noted that the roots of the subprime market expansion lie in deregulation of large financial institutions rather than in the increased lending encouraged by the CRA.<sup>34</sup> Instead of implementing and enforcing the goals of the CRA, the government seemed satisfied to make the broad policy statement condoning practices, like redlining,<sup>35</sup> that led to discrimination without also making a

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30. *Id.* at 2–3.

31. *See supra* notes 8–9 and accompanying text.

32. *See also infra* notes 82–86 and accompanying text.

33. *See infra* notes 98–113 and accompanying text.

34. *See infra* Parts I.C, I.D, and I.E (examining the goal of increased access to credit encouraged by the CRA and the evolution of lending to low-income and minority families and of federal regulation of housing finance after enactment of the CRA).

35. Lenders used a practice described as “redlining” to deny mortgage financing to, typically, minority borrowers. Ren S. Essene & William C. Apgar, *The 30th Anniversary of the CRA: Restructuring the CRA to Address the Mortgage Finance Revolution*, in FED. RES. BANK OF S.F., REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 12, 14 (2009), available at [http://www.frbsf.org/publications/community/cra/revisiting\\_cra.pdf](http://www.frbsf.org/publications/community/cra/revisiting_cra.pdf). Mortgage lenders refused to finance even qualified applicants based solely on the racial or financial demographics of the neighborhood in which they wanted to purchase a home. *Id.* Areas deemed undesirable for lending and other services would be marked with a red line that showed where lenders refused to invest. *See infra* notes 87–92 and accompanying text.

concurrent commitment to take affirmative action to enforce CRA provisions and to provide enforcement mechanisms that could protect the groups harmed by reluctant lenders.

Growing quickly after the wave of financial deregulation, the subprime mortgage market became the most common place for low-income and minority borrowers to secure mortgage financing.<sup>36</sup> But the subprime market was also an excellent place for lenders to practice reverse redlining, or, essentially, predatory lending.<sup>37</sup> In the end, the CRA's goal of ending predatory and discriminatory lending policies was brushed aside by mortgage brokers and investment bankers who made more and more money dealing in bonds backed by unsound mortgages.<sup>38</sup> These large financial actors only saw the potential for profits rather than taking into account the wisdom of their actions.

The end result was devastating both to the financial markets and to the millions of Americans facing foreclosure and, potentially, homelessness.<sup>39</sup> Many were quick to blame the CRA for causing the foreclosure crisis, but, in reality, CRA loans accounted for only a small portion of the troubled subprime mortgages.<sup>40</sup> The true problem with the CRA was that it lacked sufficient enforcement mechanisms, and the government failed to enforce provisions or to fully implement tools in the Act intended to repair the broken finance system.<sup>41</sup> Similarly, in an attempt to ease the burden on tenants, typically low-income tenants, caused by the foreclosure crisis and a newly broken

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36. *Id.* at 18–19.

37. Vern McKinley, *Community Reinvestment Act: Ensuring Credit Adequacy or Enforcing Credit Allocation*, 4 REG. 25, 26 (1994).

38. See generally SCHWARTZ 2d, *supra* note 23, at 69–75 (detailing the rise of the modern mortgage-backed security market and its faulty premises and execution).

39. Although outside the scope of this Note, for an excellent analysis of how the foreclosure crisis impacted the problem of homelessness in the United States, see generally SHERRI DOWNING ET AL., FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS (2009), available at <http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf>.

40. See, e.g., HungryCoyote, Comment to *Republicans Blaming Minorities/CRA for Financial Crisis*, DAILY KOS (Oct. 3, 2008, 2:05 AM), <http://www.dailykos.com/story/2008/10/3/2846/77498> (citing several instances of critics blaming the CRA for the foreclosure crisis); see also Essene & Apgar, *supra* note 35, at 12 (noting that analysis of data related to CRA lending clearly shows that the CRA did not cause the subprime mortgage collapse).

41. See *infra* notes 100–08 and accompanying text.

financial system, Congress passed the Protecting Tenants in Foreclosure Act of 2009 (PTFA),<sup>42</sup> but PTFA, like the CRA, lacks sufficient enforcement mechanisms to provide real help to low-income families.<sup>43</sup>

Gaining access to affordable housing<sup>44</sup> in the United States is incredibly difficult. Further complicating matters, American families were already overburdened by housing costs and continued to be in the wake of the foreclosure crisis.<sup>45</sup> Even before the crisis, the affordable rental housing stock was shrinking, as aging caused attrition of some of the oldest, and most affordable, units even before the foreclosure crisis.<sup>46</sup> As a result of the crisis, many former homeowners flooded into the rental markets, and they often rented the few available, affordable units.<sup>47</sup>

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42. Pub. L. No. 111–22, 123 Stat. 1660 (2009).

43. See Sasha Abramsky, *Innocent Victims of the Subprime Crisis*, THE GUARDIAN (Feb. 6, 2010, 4:00 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/feb/06/housing-us-subprime-renting-tenants>.

44. While there are different standards for assessing housing affordability in the United States, the most common standard requires that a household spend no more than 30 percent of its income on housing costs. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES: AN INTRODUCTION 23 (1st ed. 2006). A household that spends between 30 and 50 percent of its pre-tax monthly income on housing costs is categorized as having an excessive housing cost burden. *Id.* Households that spend 50 percent or more of their monthly incomes on housing are considered to have a severe housing cost burdens. *Id.* For purposes of this Note, the term “affordable housing” refers to housing that is considered affordable under this common standard.

45. The number of severely burdened households remained relatively stable between 1980 and 2000, but by 2008 the number of severely burdened households jumped by a third to 16 percent of households. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2010, at 27 (2010) [hereinafter STATE OF HOUSING 2010]. A stunning “18.6 million households faced these high cost burdens . . . [in 2008], an increase of 640,000 since 2007 and 4.7 million since 2001.” *Id.* Renter households accounted for the largest percentage of severely burdened households, with almost one-quarter of renter households affected, while only about one-eighth of owner households are severely burdened. *Id.* During the same period nearly half of all renters and one-third of all owners dealt with moderate housing cost burdens. *Id.*

46. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2008, at 25 (2008) [hereinafter STATE OF HOUSING 2008]. Between 1995 and 2005, about 14 percent of the affordable rental stock built before 1940 was permanently removed. *Id.* During the same time period, 10 percent of the units built between 1940 and 1970 were permanently removed from the available affordable rental stock. *Id.*

47. See STATE OF HOUSING 2008, *supra* note 46, at 5; see also STATE OF HOUSING 2010, *supra* note 45, at 31.

The end result is that there simply is not enough affordable housing for those with the lowest household incomes, as “about 9 million [of the] lowest-income households must compete for just 3 million affordable and available rental units.”<sup>48</sup> When long waiting lists for federally-subsidized, affordable rental housing are combined with the affordable housing shortage problems,<sup>49</sup> low-income tenants find themselves in particularly difficult positions when their landlords lose properties to foreclosure.<sup>50</sup> Although PTFA was enacted to begin to remedy the situation, its lack of enforcement mechanisms makes the Act as toothless as the CRA.<sup>51</sup>

In order to truly build a sustainable national economy, Congress must do more than make a broad policy statement about the future of housing policy, and it must move past the days of stating a lofty ideal without supporting that ideal with adequate mechanisms for enforcement. Parts I.A through I.E of this Note survey the policies that precipitated the housing market collapse and the economic crisis. Part I.F examines the effects of the economic crisis and the United States government’s response. Part II discusses the essential role that housing plays in the national economy and analyzes the repetitive nature of federal housing policy failures. Part III proposes a better housing policy standard for the United States as it recovers from the economic and foreclosure crises.

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48. STATE OF HOUSING 2010, *supra* note 45, at 31.

49. See *Federal Housing Assistance Program*, NAT’L COAL. FOR THE HOMELESS, <http://www.nationalhomeless.org/factsheets/federal.html> (last visited July 5, 2011). Long waiting lists to receive a Section 8 voucher from local housing authorities are typical, yet gaining access to the Section 8 programs is essential for low-income families seeking to reduce their housing burdens, as the program aims to supplement the deteriorating and shrinking affordable housing stock. *Id.*

50. See, e.g., Vicki Been & Allegra Glashauser, *Tenants: Innocent Victims of the Nation’s Foreclosure Crisis*, 2 ALB. GOV’T L. REV. 1, 4–8 (2010) (discussing the difficulties tenants face as their landlords fall prey to the foreclosure crisis).

51. See *infra* Part II for further discussion of PTFA and its shortcomings.

## I. HISTORY

*A. The Rise of Homeownership in the United States*

America began as a nation of renters. Before the Great Depression, homeownership in the United States was a possibility for only the most affluent Americans.<sup>52</sup> Financing was difficult to find.<sup>53</sup> Where individuals could secure loans, their mortgages rarely covered more than 60 percent of a property's value and rarely lasted for a term longer than eleven years.<sup>54</sup> The declining economic climate during the Depression saw millions of Americans lose their jobs, and, consequently, many homeowners lost their homes to foreclosure.<sup>55</sup> Those lucky enough to avoid foreclosure often had to sell their homes, as banks began demanding immediate payment in full.<sup>56</sup>

In a striking parallel to the current economic crisis, the government was forced to overhaul the entire housing finance system in order to stabilize the economy, deal with the foreclosure problems, and save the failing housing industry.<sup>57</sup> Sweeping reforms to the entire financial system, like "deposit insurance, limits on the risks banks [could] take, better transparency and investor protections in securities markets, [and] a stronger Federal Reserve," paved the way for decades of "unprecedented prosperity" in America.<sup>58</sup> The Depression-era federal initiatives also slowly began to increase accessibility to mortgage financing for more Americans.<sup>59</sup>

With increased access to mortgage finance, America transformed from a nation of renters to a nation of homeowners.<sup>60</sup> In the 1940s,

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52. SCHWARTZ, *supra* note 44, at 47.

53. *Id.*

54. *Id.* The terms of such mortgages acted as a barrier to all but the most affluent individuals. *See id.*

55. *See id.* at 47–48 ("By the spring of 1933, more than half of all home mortgages were in default and more than 1,000 mortgages were foreclosed every day.")

56. *Id.* at 48.

57. *See id.*

58. TREASURY/HUD JOINT REPORT, *supra* note 15, at 4.

59. SCHWARTZ, *supra* note 44, at 48. For a thorough discussion of the early development of housing finance reform, see *id.* at 48–52.

60. Angelo R. Mozilo, Chairman, President, and Chief Exec. Officer, Countrywide Fin. Corp., and Chairman, Countrywide Home Loans, Inc., Remarks at the John T. Dunlop Lecture:

the homeownership rate in the United States hovered around 40 percent.<sup>61</sup> Around the same time, Congress created public rental housing to serve the “submerged middle class” who could not afford the expenses of the private housing market.<sup>62</sup> After World War II, however, middle-class interest in owning, rather than renting, a home rose.<sup>63</sup> By the 1960s, the homeownership rate reached 60 percent and rose slowly, but steadily, until it approached 65 percent in the mid-1990s.<sup>64</sup> Homeownership rates peaked just below 70 percent in 2004 at the height of the housing market boom.<sup>65</sup>

### *B. Evolution of Federally Subsidized Rental Housing*

Subsidized public housing is available to families that qualify as either low- or very low-income.<sup>66</sup> After World War II, as middle-

The American Dream of Homeownership: From Cliché to Mission (Feb. 4, 2003), *available at* [http://www.jchs.harvard.edu/publications/homeownership/M03-1\\_mozilo.pdf](http://www.jchs.harvard.edu/publications/homeownership/M03-1_mozilo.pdf).

61. See Wessel, *supra* note 25.

62. SCHWARTZ, *supra* note 44, at 105.

63. See *id.* at 13–14; HOUS. & HOUSEHOLD ECON. STATISTICS DIV., U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES 1 (2004), <http://www.census.gov/hhes/www/housing/census/historic/owner.html> [hereinafter HISTORICAL CENSUS OF HOUSING].

64. Wessel, *supra* note 25.

65. *Id.*

66. SCHWARTZ, *supra* note 44, at 105. Low-income families are those that earn less than 80 percent of an area’s median family income, while very low-income families are those whose incomes are less than 50 percent of the area’s median family income. OFFICE OF POL’Y DEV. & RES., U.S. DEP’T. OF HOUS. & URBAN DEV., FY 2010 HUD INCOME LIMITS BRIEFING MATERIAL 1–2 (2010), [http://www.huduser.org/portal/datasets/il/i1110/IncomeLimitsBriefingMaterial\\_FY10.pdf](http://www.huduser.org/portal/datasets/il/i1110/IncomeLimitsBriefingMaterial_FY10.pdf).

HUD subsidies are available to any household earning less than 80 percent of the area median income. MARGERY AUSTIN TURNER & G. THOMAS KINGSLEY, THE URBAN INST., FEDERAL PROGRAMS FOR ADDRESSING LOW-INCOME HOUSING NEEDS 4 (Dec. 2008), *available at* [http://www.urban.org/uploadedPDF/411798\\_low-income\\_housing.pdf](http://www.urban.org/uploadedPDF/411798_low-income_housing.pdf). However, 75 percent of all vouchers must be allocated to very low-income households, or those earning less than 30 percent of the area median income. See SCHWARTZ, *supra* note 44, at 151; TURNER & KINGSLEY, *supra*, at 3. It is those families that qualify as very low-income that are in the most need of social services and housing subsidies because they face the greatest risk of homelessness. TURNER & KINGSLEY, *supra*, at 3.

Although outside the scope of this Note, for an overview of the homelessness problem in America, see generally SCHWARTZ, *supra* note 44, at 38–40. For an argument that the government needs to act quickly on issues of homelessness due to current economic conditions, see Barbara Sard, *Number of Homeless Families Climbing Due to Recession*, CTR. ON BUDGET & POL’Y PRIORITIES, 1 (Jan. 8, 2009), <http://www.cbpp.org/cms/index.cfm?fa=view&id=2228> (arguing for expeditious government action on homelessness due to current economic conditions).

class interest in homeownership rose,<sup>67</sup> public housing became increasingly popular among very low-income families.<sup>68</sup> Approximately 2.3 million Americans, including 400,000 low-income families, rely on subsidized public housing;<sup>69</sup> however, traditional public housing is no longer the dominant form of federal subsidies for low- and very low-income families.<sup>70</sup> Instead, tenant-based subsidies, predominantly Section 8 Housing Choice Vouchers (“Section 8”), replaced traditional public housing as the main federal subsidy program.<sup>71</sup>

Tenant-based subsidies, like the Section 8 program, first emerged on an experimental basis. With the Experimental Home Allowance Program (EHAP),<sup>72</sup> a provision of the Housing and Urban

67. In 1940, the homeownership rate nationwide was 43.6 percent. HISTORICAL CENSUS OF HOUSING, *supra* note 63. That number skyrocketed to 61.9 percent by 1960. *Id.*

68. SCHWARTZ, *supra* note 44, at 105 (“[T]he median income of public housing residents fell from 57% of the national median in 1950 to 41% in 1960, 29% in 1970, and less than 20% by the mid-1990s.”). Congress has attempted to broaden the range of incomes of families residing in public housing in order to create more integrated public housing facilities. For a discussion of federal programs designed to promote income diversity in public housing, see *id.* at 105–06.

69. Barbara Sard & Will Fischer, *Preserving Safe, High Quality Public Housing Should Be a Priority of Federal Housing Policy*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (Oct. 8, 2008), <http://www.cbpp.org/9-18-08hous.pdf>. Additionally, “[n]early two-thirds of all public housing households include an elderly person or an individual with a disability.” *Id.* These households often rely on their public housing units to accommodate their needs. *Id.* at 2.

70. SCHWARTZ, *supra* note 44, at 6.

71. *Id.* at 8 (“Subsidies designed to help low-income households rent existing housing in the private market . . . in less than a decade became the dominant form of low-income housing assistance.”).

72. Experimental Home Allowance Program, Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1770, 1786 (codified as amended at 12 U.S.C. § 1701z-3 (2006)). In pertinent part, EHAP required:

(a) Purpose of payments

The Secretary is authorized to undertake on an experimental basis programs to demonstrate the feasibility of providing housing allowance payments to assist families in meeting rental or homeownership expenses.

....

(c) Report to Congress

The Secretary shall report to the Congress on his findings pursuant to this section not later than eighteen months after August 22, 1974.

*Id.*

Development Act of 1970,<sup>73</sup> Congress charged HUD with testing a program to allow families to choose their own rental homes in the private market.<sup>74</sup> Ideally, families would enter the private rental market while receiving a federal housing subsidy to help ensure that monthly rental payments remained as affordable as those in traditional public housing.<sup>75</sup> HUD accepted the challenge. The resulting program was so successful that by 1974 “Congress was convinced that tenant-based housing assistance was a viable alternative to public housing,”<sup>76</sup> and it made the program permanent.<sup>77</sup>

The Section 8 program is vital to helping low-income Americans bridge the affordable housing gap.<sup>78</sup> Nearly two million households rely on Section 8 vouchers to subsidize their rent.<sup>79</sup> Despite the large number of families that either receive vouchers or live in subsidized public housing, only one in four families that are eligible for some form of direct subsidy actually receive one, leaving 12.4 million needy households to struggle unassisted.<sup>80</sup> The reality for more than

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73. 12 U.S.C. § 1701s (2006).

74. See STAFF OF H. COMM. ON BANKING & CURRENCY, 91ST CONG., EMERGENCY HOME FINANCE ACT OF 1970 AND HOUSING AND URBAN DEVELOPMENT ACT OF 1970, at iii (Comm. Print 1970). Congress passed the legislation with the goal of developing a new national urban growth policy and creating the tools necessary to achieve policy objectives. *Id.*

75. 12 U.S.C. § 1701z-3(a).

76. U.S. DEP’T OF HOUS. & URBAN DEV., SECTION 8 TENANT-BASED HOUSING ASSISTANCE: A LOOK BACK AFTER 30 YEARS 1, 4 (2000), available at <http://www.huduser.org/publications/pdf/look.pdf>.

77. *Id.* at 4–5. The Housing and Community Development Act of 1974 permanently added Section 8 to the Housing Act of 1937. See 42 U.S.C. §§ 5301–5321 (2006); Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 653 (codified as amended at 42 U.S.C. § 1437 (2006)); U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 76, at 4–5. The program created the first permanent tenant-based subsidy for privately owned rental housing. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 76, at 5.

Section 8 of the Housing Act, as originally written, provided for two types of subsidies: “Section 8 Existing,” tenant-based housing subsidies, and “Section 8 New,” subsidies used for new construction or substantial rehabilitation of existing units. *Id.* “Section 8 New” was discontinued in 1983. SCHWARTZ, *supra* note 44, at 133.

78. See *infra* notes 79–81 and accompanying text (examining the affordable housing gap).

79. TURNER & KINGSLEY, *supra* note 66, at 4. Additionally, about 1.05 million households live in public housing. *Id.* 1.29 million live in private units with project-based vouchers. *Id.*

80. *Id.* at 5.

90 percent of very low-income tenants is that they “either receive housing assistance or suffer from housing problems.”<sup>81</sup>

*C. Push for Low-Income Homeownership Despite Rental Housing Assistance Evolution*

Even as homeownership rates rose in the decades after World War II,<sup>82</sup> minority borrowers faced significant barriers to purchasing a home. Before the Fair Housing Act of 1968 passed, the Federal Housing Authority actively discriminated against minorities by “explicitly discourag[ing] lenders from offering government-insured mortgages for properties in minority neighborhoods.”<sup>83</sup> Once passed, however, the Fair Housing Act prohibited racial discrimination in the sale or rental of housing.<sup>84</sup> Unfortunately, the Act lacked the necessary enforcement mechanisms to cause a significant reduction in discriminatory mortgage lending practices.<sup>85</sup> Without such enforcement mechanisms, the Fair Housing Act failed to be anything more than symbolic disapproval of race-based discrimination in the housing finance industry.<sup>86</sup>

By the 1970s, redlining was a serious and disturbingly common problem in mortgage lending.<sup>87</sup> Inner-city, urban decline in low-income and minority communities led to neighborhood instability, while suburbs, on the other hand, thrived.<sup>88</sup> Residents in urban neighborhoods struggled to become homeowners, mainly due to a

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81. *Id.* at 3.

82. *See supra* notes 63–65 and accompanying text.

83. SCHWARTZ, *supra* note 44, at 239.

84. *Id.* For a thorough overview of the Fair Housing Act’s history and potential for improving racial and economic justice in American communities moving forward, see NAT’L COMMISSION ON FAIR HOUSING & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING (2008), available at [http://www.lawyerscommittee.org/admin/fair\\_housing/documents/files/0005.pdf](http://www.lawyerscommittee.org/admin/fair_housing/documents/files/0005.pdf).

85. *Id.* at 240. Passing the Fair Housing Act was difficult, and in order to do so several concessions were made. The concessions stripped the Act of its enforcement mechanisms. *Id.* Consequently, the Act became merely a symbolic representation of the government’s commitment to fair housing goals. *Id.*

86. *See infra* notes 226–31 (analyzing the shortfalls of the Fair Housing Act).

87. *See* DANIEL IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 87 (2004); *see also supra* note 35 (describing the practice of redlining certain neighborhoods).

88. *See* Essene & Apgar, *supra* note 35, at 14.

lack of access to conventional mortgage products due to redlining.<sup>89</sup> Although redlining was not a new problem,<sup>90</sup> anger over its use was a central focus of housing policy debates during the 1960s and 1970s.<sup>91</sup> Just as the federal government promoted discrimination in the days before the Fair Housing Act, federal agencies also played a role in promulgating redlining behaviors, primarily by rating minority neighborhoods as risky or otherwise undesirable for lending.<sup>92</sup>

To prevent redlining and to begin to remedy neighborhood blight, Congress passed the Community Reinvestment Act of 1977.<sup>93</sup> Spurred by continuing problems with race- and income-based lending discrimination and with the lack of enforcement mechanisms in the Fair Housing Act, the CRA aimed to ensure that local lending institutions met their communities' mortgage lending needs.<sup>94</sup> The CRA, as passed, was premised on the notion that local lenders have a "continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered."<sup>95</sup> Lenders

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89. *Id.*

90. Redlining occurred well before the Great Depression. IMMERGLUCK, *supra* note 87, at 87. According to a 1917 article published in the *Cleveland Advocate*, an African-American newspaper, lenders refused financing to a group of African-Americans attempting to build affordable housing for other minority families. *Id.* Throughout the 1940s and 1950s, mortgage lenders continued to practice systematic racial discrimination. *Id.* at 87–88.

91. *Id.* at 87. Fair housing advocates pointed to the hypocrisy of depository institutions willingly accepting deposits from inner-city residents while remaining unwilling to lend that money back to help strengthen the local communities. *Id.* Very few loans were granted for the purchase of properties in minority neighborhoods, and it was nearly impossible for a minority family to receive mortgage funding for a property in a white neighborhood. *Id.* at 88.

Additionally, predatory lending practices, a common term in recent subprime mortgage lending, were also major roadblocks for low-income and minority borrowers in the early days of mortgage finance. *See* discussion *infra* notes 165–68 and accompanying text (describing predatory lending practices associated with subprime lending). Where lenders were willing to lend to African-American families, the mortgages often were substantially more expensive than comparable mortgages to white families. *See* IMMERGLUCK, *supra* note 87, at 88, 91–92.

92. For a thorough discussion of the role of Depression-era federal housing overhaul in promoting redlining behaviors, see generally *id.* at 92–96.

93. Pub. L. No. 95-128, 91 Stat. 1111 (codified as amended at 12 U.S.C. § 2901 (2006)); *see* Essene & Apgar, *supra* note 35, at 12.

94. McKinley, *supra* note 37, at 25.

95. 12 U.S.C. § 2901 (a)(3). Proposed during the Carter Administration, the CRA originally had two sections. McKinley, *supra* note 37, at 25. The first section was substantive and addressed community lending goals, while the second section was mainly procedural with specific guidelines for lender compliance. *See id.* at 25–26. The procedural section was removed from the final bill in order to secure passage; instead, the CRA delegated the authority to regulatory agencies to periodically review lending institutions' records of addressing

were expected to use the same lending criteria regardless of where in a community a borrower planned to purchase a home.<sup>96</sup> Therefore, in theory, similarly situated families would receive identical mortgage rates and terms regardless of who they were or where they wanted to purchase a home.<sup>97</sup>

Initially, the CRA did little to improve lending to low-income and minority neighborhoods.<sup>98</sup> However, by the late 1980s and during the early 1990s, it began to reshape the mortgage lending landscape.<sup>99</sup> Critics during the late 1980s complained that the CRA was not as effective as it should have been, and in response, Congress held a series of public hearings to discuss the future of the Act.<sup>100</sup> In response to the hearings, the regulatory agencies responsible for CRA enforcement joined together in 1989 to issue a joint policy statement outlining new guidelines for lending procedures and CRA enforcement.<sup>101</sup> The agencies vowed to increase enforcement and deny mergers to banks that did not include CRA compliance measures in their merger plans.<sup>102</sup> The regulatory agencies followed through on their promises of increased examination of acquisition and merger requests, but, beyond those examinations, the government took little action to ensure the goals of the CRA came to fruition.<sup>103</sup>

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community needs to federal regulatory agencies. *Id.* at 26–27. The intent was to “require the federal banking regulatory agencies ‘to encourage such institutions to help meet the credit needs of the local communities . . . with the safe and sound operation of such institutions.’” Richard D. Marsico, *Subprime Lending, Predatory Lending, and the Community Reinvestment Act Obligations of Banks*, 46 N.Y.L. SCH. L. REV. 735, 736–37 (2002–2003) (quoting 12 U.S.C. § 2901(b)).

96. Essene & Apgar, *supra* note 35, at 15.

97. *Id.* Unfortunately, racial discrimination remains a serious problem in the housing market even today. See SCHWARTZ 2d, *supra* note 23, at 317–19.

98. See generally McKinley, *supra* note 37, at 27.

99. See SCHWARTZ, *supra* note 44, at 242–43; McKinley, *supra* note 37, at 25–28.

100. See generally McKinley, *supra* note 37, at 27. At one Congressional hearing in 1989, the CRA’s main sponsor, Senator Proxmire of Wisconsin, “complained that, despite passage of the CRA, inner-city neighborhoods were [still] ‘starving for credit.’” *Id.*; see also Essene & Apgar, *supra* note 35, at 15–16 (“[U]nderserved markets continued to lack access to credit, and racial disparities persisted. Documenting these challenges was the ground-breaking, Pulitzer Prize-winning ‘Color of Money’ series in the *Atlanta Journal Constitution*, which raised concerns about the ongoing racial disparities in access to mortgage loans and the lack of enforcement of the CRA and fair lending laws.”).

101. Essene & Apgar, *supra* note 35, at 15.

102. *Id.*

103. *Id.*

In the early 1990s, transformations in the financial services industry allowed increased mortgage lending to occur outside the regulation of the CRA.<sup>104</sup> Depositories that were traditionally regulated by the CRA began forming subsidiaries and affiliates as a way to avoid the rigors of regulation.<sup>105</sup> Additionally, technological advances led to an increase in the number of large, independent mortgage lenders.<sup>106</sup> The new, large lenders used the new technology to tap into global, non-deposit-based funding resources and to reach borrowers over great geographic distances.<sup>107</sup>

The evolution of the financial services industry undermined the basic goal of the CRA: to support mortgage financing in communities with deposited funds from within that community.<sup>108</sup> At President Clinton's request, a new framework for evaluating CRA compliance was implemented in 1995.<sup>109</sup> The new regulations attempted to bring objectivity to the compliance examinations and to increase disclosure among actors involved in different types of lending activities.<sup>110</sup> But the modest changes, which failed to "fundamentally rethink . . . [or] potentially realign the rationale for the CRA," came perhaps too late, as other, alternative means of lending to low-income or minority families became increasingly popular among lenders.<sup>111</sup>

#### *D. Financial Deregulation as a Catalyst for Increased Low-Income Lending*

By the mid-2000s, the majority of mortgage lending to low-income and minority borrowers occurred outside the channels of the

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104. *Id.* at 16.

105. *Id.*

106. *Id.* at 16–17 (“Emerging technology in data processing and telecommunications encouraged the growth of large banking operations . . .”).

107. *Id.*

108. *See id.* at 17. For a full discussion of CRA developments during the 1990s, see *id.* at 16–18.

109. *Id.*

110. *Id.* at 17. The new regulations focused on “specific performance measurements,” and “required greater disclosure on a range of lending” activities. *Id.* Additionally, the regulations created a set of new tests to assess whether institutions were in compliance with the CRA. *Id.* The tests varied based upon the size and the types of financial dealings of a given institution. *See id.*

111. *Id.*

CRA, primarily through the growing subprime mortgage market.<sup>112</sup> Although the subprime mortgage market did not gain national attention until the mid- to late 1990s, the origins of its growth lie in the financial deregulation of the 1980s.<sup>113</sup> With the Depository Institutions Deregulation Act of 1980 (DIDA),<sup>114</sup> President Carter set a “deregulatory snowball” into motion.<sup>115</sup> Before DIDA, lenders were not able to charge borrowers the high rates and fees commonly associated with subprime mortgage products.<sup>116</sup> DIDA eliminated interest rate caps which encouraged subprime lending, as lenders were allowed to offer less-creditworthy borrowers financing at higher interest rates than ever before.<sup>117</sup>

The wave of deregulation that began with DIDA only intensified in subsequent administrations.<sup>118</sup> Two years after the enactment of DIDA, the Alternative Mortgage Transaction Parity Act (AMTPA)<sup>119</sup> allowed for further new mortgage features, namely balloon payments and variable interest rates.<sup>120</sup> Together, DIDA and AMTPA “opened the door for the development of the subprime market.”<sup>121</sup> However, it was the Tax Reform Act of 1986 (TRA),<sup>122</sup> which attached tax incentives to mortgage debt, that truly allowed the subprime market to become viable.<sup>123</sup> By incentivizing the exchange of consumer debt

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112. *Id.* at 12.

113. See Chomsisengphet & Pennington-Cross, *supra* note 18, at 36–38.

114. Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified as amended in scattered sections of 12 U.S.C.).

115. Sanford M. Jacoby, *Finance and Labor: Perspectives on Risk, Inequality, and Democracy*, 30 COMP. LAB. L. & POL’Y J. 17, 30 (2008).

116. Chomsisengphet & Pennington-Cross, *supra* note 18, at 38.

117. DIDA was provided for the orderly phasing-out, and ultimately the elimination, of interest rate ceilings, while simultaneously allowing states to opt-out of the regulations. See Marc J. Lifset & Kathryn J. Sheingold, *The Law of DIDA Section 501*, 54 CONSUMER FIN. L.Q. 122, 126 (2000), for an overview of the DIDA interest rate ceiling regulations. See also Chomsisengphet & Pennington-Cross, *supra* note 18, at 38.

118. Jacoby, *supra* note 115, at 30.

119. Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended at 12 U.S.C. §§ 3801–3806 (2006)).

120. Chomsisengphet & Pennington-Cross, *supra* note 18, at 38.

121. *Id.*

122. Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended at 26 U.S.C. §§ 336–469 (2006)).

123. Chomsisengphet & Pennington-Cross, *supra* note 18, at 38. After the TRA passed, mortgage debt became more desirable than consumer debt. *Id.* Homeowners could claim a deduction for interest on their mortgages, while interest paid on other, more common consumer

for mortgage debt, interest in purchasing homes and refinancing existing mortgages rose.<sup>124</sup> For less-creditworthy borrowers, the subprime mortgage market became their best option to qualify for the tax incentives.<sup>125</sup>

The final blow to the remnants of the Depression-era financial regulations that were originally created to prevent similar economic collapses in the future was the Financial Services Modernization Act of 1999, more commonly known as the Gramm-Leach-Bliley Act (GLBA).<sup>126</sup> The new regulatory system created under GLBA left commercial banks “relatively free of regulatory oversight” as they pursued new financial services opportunities, like securitization.<sup>127</sup>

All of the deregulation of the 1980s and 1990s coupled with the developments in mortgage finance “spilled over into the new millennium in the form of an equally dramatic explosion of new subprime mortgage products.”<sup>128</sup>

#### *E. The Expansion of the Secondary Mortgage Market*

The world of housing finance evolved from the days before the Great Depression when only the affluent could afford mortgages.<sup>129</sup> By the end of the 1930s, there were “two distinct circuits of mortgage finance, each quite insulated from the rest of the financial sector.”<sup>130</sup> uninsured mortgage loans granted by thrifts<sup>131</sup> and federally-insured

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loans remained non-deductible. *Id.* Additionally, prime borrowing rates dropped around the time the TRA passed, and many lenders turned “to the subprime market to maintain volume.” *Id.*

124. *See id.*

125. *See id.*

126. Jolina C. Cuaresma, *The Gramm-Leach-Bliley Act*, 17 BERKELEY TECH. L.J. 497, 497 (2002). GLBA not only destroyed the remnants of Depression-era financial regulations, it also addressed and raised serious privacy concerns. *See generally id.*

127. Jacoby, *supra* note 115, at 17, 30; *see infra* notes 129–53 (addressing the securitization of mortgages).

128. Essene & Apgar, *supra* note 35, at 17.

129. *See supra* notes 52–57 and accompanying text.

130. SCHWARTZ, *supra* note 44, at 52.

131. The term “thrifts” covers a broad range of traditional depository institutions like savings and loan associations and mutual savings banks. *Id.* Thrifts typically rely on deposits made by local households to cover their mortgage lending needs, taking advances from a regional Home Loan Bank when necessary. *Id.* at 52–53.

Twelve regional Home Loan Banks were established by the Federal Home Loan Bank Act

mortgage loans granted by non-depository institutions.<sup>132</sup> Federally insured mortgages were rare, and lenders were typically independent brokers and mortgage companies that financed their lending with borrowed, rather than deposited, funds.<sup>133</sup> The lenders sold the insured mortgages to other financial institutions and investors, thus creating the first secondary mortgage market.<sup>134</sup>

In the early stages of the secondary mortgage market, purchasers held mortgages in private portfolios, but beginning in the 1960s, institutions began creating early forms of tradable mortgage-backed securities.<sup>135</sup> The first mortgage-backed securities, pass-through certificates, offered investors the opportunity to purchase just a share in a pool of mortgages rather than purchasing an entire mortgage on the secondary market for the first time.<sup>136</sup> The early pass-through securities, however, were not attractive investments, as investors fully bore the risks like borrower prepayment or default.<sup>137</sup> Eventually, mortgage-backed bonds replaced mortgage-backed securities.<sup>138</sup> Investors were able to purchase bonds collateralized by a pool of mortgages rather than purchasing a direct share of the pool itself.<sup>139</sup> The new securities “further integrated housing finance with other financial markets,” and allowed global investors to purchase mortgage-backed bonds just as they would any other corporate or government bond.<sup>140</sup>

Initially, the mortgage bond market centered on bonds backed by prime mortgages, but it eventually extended to include bonds backed by both prime mortgages and also subprime mortgages granted to less-creditworthy borrowers.<sup>141</sup> The inclusion of subprime mortgage

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of 1932. *Id.* at 48. Home Loan Banks provided more liquidity to thrifts by infusing them with instant capital in the event that the demand for mortgage financing exceeded the amount that a thrift’s deposits could cover. *Id.* For a more thorough discussion of the role Home Loan Banks played in reforming the housing finance system, see *id.* at 48–53.

132. *Id.* at 52–53.

133. *Id.* at 53.

134. *Id.*

135. *Id.* at 57.

136. *Id.*

137. *Id.* at 57–58.

138. *Id.* at 57.

139. *Id.*

140. *Id.* at 57–58.

141. MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* 6 (2010).

debt in the bonds led to the formation of significantly more mortgage-backed bonds,<sup>142</sup> but bond investors faced the same fear of prepayment as investors in earlier mortgage-backed securities.<sup>143</sup> The bonds represented a mere “claim on the cash flows from a pool of thousands of individual mortgages.”<sup>144</sup> If interest rates fell, borrowers typically repaid their mortgages early by refinancing, and bond holders received their returns at a time when reinvestment was an unattractive option due to the lower interest rates.<sup>145</sup>

The financial services industry responded and created new features to provide more certainty to investors as to how long an investment would last and to make mortgage-backed bonds significantly more attractive to investors than ever before.<sup>146</sup> A complicated tranche system was developed to offer investors different degrees of protection by dividing the payments made on the mortgages in a pool into different risk and return categories from which investors could choose.<sup>147</sup> With the creation of the tranche system, the popularity of the mortgage bond market exploded and

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142. *Id.*

143. *Id.* at 7; SCHWARTZ, *supra* note 44, at 57–58.

144. LEWIS, *supra* note 141, at 7.

145. *Id.*

146. *See id.* at 6–7.

147. *Id.* at 7. Salomon Brothers, a major player in the creation of a successful mortgage bond market, created a tranche system to try to draw otherwise reluctant investors to the mortgage-backed bond market. *Id.* When creating the bonds, pools of mortgage loans were combined and then the payments were divided into separate levels, or tranches, each with different degrees of risk and opportunities for rates of return. *Id.* As Michael Lewis describes it in easily understood terms in *The Big Short*:

The buyer of the first tranche was like the owner of the ground floor in a flood: He got hit with the first wave of mortgage prepayments. In exchange, he received a higher interest rate. The buyer of the second tranche—the second story of the skyscraper—took the next wave of prepayments and in exchange received the second highest interest rate, and so on. The investor in the top floor of the building received the lowest rate of interest but had the greatest assurance that his investment wouldn’t end before he wanted it to.

*Id.* This system, created in the 1980s, showed that investors feared being repaid too soon, as opposed to the fear some twenty-five years later that they may never be repaid at all. *See id.* Eventually the idea of mortgage-backed bonds expanded to include bonds backed not only by prime loans but also bonds backed by subprime loans. Investors in the bottom tranche absorbed the risk of mortgage loan defaults rather than of prepayment-related losses. *Id.* at 8. For a discussion of the irrationality of the tranche system, and the related investment rating system, during the period leading up to the crash of the mortgage bond market, see *id.* at 100–03.

“extended Wall Street into a place it had never before been: the debts of ordinary Americans.”<sup>148</sup>

One main reason that the fear of early prepayment discouraged early investment in mortgage-backed bonds was because, at first, each individual mortgage in a pool conformed to so-called “safe” lending standards, and the federal government insured the individual mortgages in the event that a borrower defaulted.<sup>149</sup> Borrowers, in the beginning, were typically more fluid and were able to refinance mortgages when interest rates dropped. Investors then received the returns on their investments at a time when interest rates were low and reinvesting, therefore, was less attractive. Government insured mortgages often led to the same result for investors if a borrower defaulted during a time when interest rates were low. But, over time, lenders relaxed underwriting standards, and subprime mortgage financing was extended to less creditworthy borrowers.<sup>150</sup> Wall Street pooled mortgages granted to less-creditworthy borrowers together with prime mortgages and used the tranche system to address the threat of non-payment of uninsured mortgages.<sup>151</sup> Investors in the riskiest tranche bore the risk of actual losses rather than just of prepayment, but, admittedly, the degree of risk in any given investment was unclear due to the work of the credit rating agencies<sup>152</sup> who were less than transparent and did not react and adjust their ratings as subprime lenders labeled mortgage defaults as

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148. *Id.* at 6.

149. *Id.*

150. *Id.* at 8.

151. *Id.*

152. Credit-rating agencies, or Nationally Recognized Statistical Rating Organizations (NRSROs), exist to protect investors. *See* Press Release, U.S. Sec. & Exch. Comm’n, Seven Credit Rating Agencies Register with SEC as Nationally Recognized Statistical Rating Organizations (Sept. 24, 2007), available at <http://www.sec.gov/news/press/2007/2007-199.htm>. NRSROs review financial statistics and, through different processes and methodologies, assign ratings to financial institutions and potential investments. *Id.* The ratings inform potential investors about the soundness of an institution or investment instrument. *Id.*; *see also* *Oversight of Nationally Recognized Statistical Rating Organizations: A Small Entity Compliance Guide*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/divisions/marketreg/tmcompliance/nrsro-secg.htm> (last updated Apr. 10, 2009) (defining “credit rating agency” and explaining how to register as an NRSRO).

prepayments because “[i]nvoluntary prepayment’ sounds better than ‘default.’”<sup>153</sup>

With the increased attractiveness of mortgage-backed bonds, the subprime lending industry also exploded. During a first subprime boom in the early 1990s, subprime mortgage lenders began taking their businesses public in increasing numbers.<sup>154</sup> The ease with which lenders could dispose of the risk of lending in the marketplace attracted an abundant number of bad actors to the industry.<sup>155</sup> Subprime lenders used “goofy accounting” to create what was essentially a giant Ponzi scheme.<sup>156</sup> Following on the heels of the collapse of a large hedge fund, Long-Term Capital Management, which signified trouble in the markets, the subprime lenders of the 1990s had difficulty finding capital to finance their businesses and many entered bankruptcy.<sup>157</sup> By 2002, there were no more publicly traded subprime lenders.<sup>158</sup>

It did not take long, however, for the subprime lending industry to recover. As home values around the United States skyrocketed, securitized mortgages “became tools for speculative, short-term investments and a means to access easy cash.”<sup>159</sup> By 2005, subprime lending was back in full swing.<sup>160</sup> In the 1990s, a \$30 billion year “was a big year for subprime lending.”<sup>161</sup> In 2000, before the fall of the first subprime lending boom, the industry had a \$130 billion year, with \$55 billion worth of mortgages repackaged into bonds.<sup>162</sup> But by 2005, subprime mortgage lending was a \$625 billion industry,<sup>163</sup> and

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153. LEWIS, *supra* note 141, at 14.

154. *Id.* at 9–10.

155. *Id.* at 9 (“Because the lenders sold many—though not all—of the loans they made to other investors, in the form of mortgage bonds, the industry was also fraught with moral hazard. ‘It was the fast buck business,’ says [Sy] Jacobs [an employee of the small investment Alex Brown]. ‘Any business where you can sell a product and make money without having to worry how the product performs is going to attract sleazy people.’”).

156. *Id.* at 14. In September 1997, a report published by a Wall Street fund manager attacked the accounting methods of the subprime lenders of the 1990s. *Id.* at 14–16.

157. *Id.* at 15.

158. *Id.* at 16.

159. TREASURY/HUD JOINT REPORT, *supra* note 15, at 5.

160. LEWIS, *supra* note 141, at 27.

161. *Id.*

162. *Id.*

163. *Id.*

a whopping \$507 billion of those mortgages were pooled into mortgage bonds.<sup>164</sup>

At the same time, interest rates rose steadily, and subprime mortgages evolved to include new, often misleading or predatory, features.<sup>165</sup> Fixed-rate subprime mortgages were replaced by newer, confusing mortgages with adjustable rates. Borrowers often did not fully appreciate the complexity of their loans and did not understand that they were taking on more debt than they could afford.<sup>166</sup> Less creditworthy, low-income, and minority borrowers, in particular, were taken advantage of by subprime lenders who often used predatory lending practices to make unsound loans while knowing they easily could shift the burden of their risky lending onto investors in the secondary market.<sup>167</sup>

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164. *Id.*

165. *Id.*

166. *See id.* There also was a significant decline in lending standards. *Id.* at 27. For example, 65 percent of subprime loans had fixed interest rates in 1996. *Id.* at 23. But, by 2005, 75 percent of subprime mortgages had adjustable rates that made it difficult to predict future monthly payments accurately. *Id.* The worst mortgages were interest-only negative-amortizing adjustable-rate subprime mortgages. *Id.* at 27–28. Borrowers with those mortgages ended up owing more than their homes were worth and had to deal with mortgages that lacked clear repayment plans. *Id.* It was not surprising that borrowers jumped at what appeared to be a great opportunity to own a home with low monthly payments, but what was truly surprising was that lenders were so willing to behave irrationally. *Id.* at 28 (“The borrowers will always be willing to take a great deal for themselves. It’s up to the lenders to show restraint, and when they lose it, watch out.”).

167. *See* TREASURY/HUD JOINT REPORT, *supra* note 15, at 6, 8. There is no exhaustive list or agreed upon definition of predatory lending because “bad actors are constantly developing new abusive practices, sometimes to evade new government regulation.” U.S. DEP’T OF HOUS. & URBAN DEV.—TREASURY TASK FORCE ON PREDATORY LENDING, CURBING PREDATORY HOME MORTGAGE LENDING 17 (2000), available at <http://www.huduser.org/publications/pdf/treasrpt.pdf> [hereinafter TREASURY REPORT]. Also, such a list would “fail[] to convey that predatory lending is as much a function of the manner in which the loans are made as the oppressive terms that they contain.” *Id.* at 18.

There are, however, “overarching characteristics of predatory loans” which emerge primarily in the subprime mortgage market. *Id.* at 17. Subprime borrowers are more at risk for predatory terms for several reasons. Subprime borrowers are less likely to shop among lenders for more advantageous loan terms because they are aware that their less than ideal credit histories make them undesirable loan candidates. *Id.* at 18. Subprime borrowers typically “live in low-income and minority communities that are comparatively underserved by traditional prime lenders,” and the lack of competition among lenders decreases the likelihood of obtaining better loan terms. *Id.* Additionally, prime lenders tend to be banks, thrifts, and credit unions which are subjected to more strenuous federal regulation than the subprime mortgage and finance companies. *Id.* The lower degree of federal oversight leads to less accountability for

The subprime industry did, however, learn an important lesson from the days of “goofy accounting” that sunk lenders a few years earlier: passing on the burden of risky mortgages was essential to their survival.<sup>168</sup> While the lesson learned should have been not to make loans to borrowers who cannot repay them, greed controlled instead.<sup>169</sup> Lenders made bad loans that the largest investment banks were more than willing to buy, bundle, and resell on the secondary market without weighing the soundness of their purchases.<sup>170</sup> Remarkably, even when it became clear that adjustable-rate mortgages, which were almost exclusively subprime mortgages, were going into default, lenders still did not raise their underwriting standards.<sup>171</sup> The rating agencies did not react.<sup>172</sup> Rather, business on Wall Street continued as usual.

By 2006, home prices began to fall consistently for the first time since the Great Depression.<sup>173</sup> The “slow and possibly fraudulent unraveling” of the mortgage bond market became the “opportunity of a lifetime” for traders, but it was nearly catastrophic for the United States’ economy.<sup>174</sup> Even as the loans, primarily subprime, that served as collateral for mortgage bonds entered default at an alarming rate, the rating agencies still did not react or adjust their ratings of the soundness of mortgage bonds.<sup>175</sup> By June 2007, the subprime mortgage market was crumbling, but Wall Street seemingly ignored the warning signs and stood by idly as the mortgage-backed bond market crumbled as well.<sup>176</sup>

Risky financial decisions based on the faulty premise that housing prices could not fall consistently destroyed the nation’s financial system,<sup>177</sup> as what started in the secondary mortgage market quickly

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subprime lenders and “may create an environment where predatory practices flourish because they are unlikely to be detected.” *Id.*

168. LEWIS, *supra* note 141, at 23–24.

169. *See id.*

170. *Id.* at 24.

171. *Id.* at 59.

172. *Id.*

173. *Id.* at 94–95; TREASURY/HUD JOINT REPORT, *supra* note 15, at 5.

174. LEWIS, *supra* note 141, at 167.

175. *Id.* at 169–70.

176. *Id.* at 172, 194, 219.

177. TREASURY/HUD JOINT REPORT, *supra* note 15, at 4–5.

devolved into a broader financial crisis. Bear Stearns, a key player in the mortgage-backed bond market,<sup>178</sup> collapsed in March 2008, and by September 2008 the dire economic situation was finally clear.<sup>179</sup> Lehman Brothers, another large financial services firm and key market player, filed for bankruptcy on September 15, 2008.<sup>180</sup> Bank of America bought Merrill Lynch after it announced losses in excess of \$55 billion due to its dealings in the subprime-backed bond market.<sup>181</sup> That same week the “Federal Reserve announced that it had lent \$85 billion to the insurance company AIG, to pay off the losses on the subprime credit default swaps AIG had sold to Wall Street banks.”<sup>182</sup> The stock market dropped drastically,<sup>183</sup> and it became clear that the economy would not bounce back quickly.

#### *F. Federal Responses to the Great Recession*

By the time the government took steps to rescue failing financial institutions in October 2008, it was too late—the damage was done.<sup>184</sup> What began as a foreclosure crisis quickly devolved into a complex, worldwide economic crisis.<sup>185</sup> The housing market that had

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178. LEWIS, *supra* note 141, at 24 (“By early 2005 all the big Wall Street investment banks were deep into the subprime game. Bear Stearns, Merrill Lynch, Goldman Sachs and Morgan Stanley all had what they termed ‘shelves’ for their subprime wares with strange names . . . that made it a bit more difficult . . . to see that these subprime bonds were being underwritten by Wall Street’s biggest names.”).

179. *See id.* at 234–37.

180. *Id.* at 237.

181. *Id.*

182. *Id.* A credit default swap operates, more or less, like an insurance policy. A party pays a premium for a defined period of time and bets against the future success of a bond. If the debt underlying the bond enters default, the party stands to earn a substantial return on their investment. *See id.* at 29–31 (illustrating how a credit default swap operates and how investors used them to bet against mortgage-backed bonds).

183. *Id.* at 237.

184. *Id.*

185. Thomas Friedman, Op-Ed., *Elvis Has Left the Mountain*, N.Y. TIMES, Jan. 31, 2009, § WK, at 9. (“We have woven such a tangled financial mess with subprime mortgages wrapped in complex bonds and derivatives, pumped up with leverage, and then globalized to the far corners of the earth . . .”). In the second quarter of 2008, the grim economic outlook grew bleaker as federally insured banking institutions as a whole earned only \$5 billion in profits, \$31.8 billion less than was earned in the second quarter of 2007 and the second-lowest recorded quarterly net profit since 1991. *See* FED. DEPOSIT INS. CORP., SECOND QUARTER 2008 (Aug. 26, 2008), <http://www2.fdic.gov/qbp/2008jun/qbpall.html>. Four banks failed during the first two quarters of 2008. *Id.* In the third quarter, the net income of insured institutions dropped to

peaked at unnaturally high levels was decimated by the last quarter of 2008 when home equity, home prices, and new and existing home sales dropped dramatically.<sup>186</sup>

In the wake of the economic meltdown, several key pieces of legislation<sup>187</sup> were passed to stabilize both the housing market and the financial system as a whole. First, on September 19, 2008, then-Treasury Secretary Henry Paulson Jr. proposed a bailout scheme to rescue struggling financial institutions and stabilize the banking industry.<sup>188</sup> Paulson's original plan was unpopular, however, and failed to garner congressional support, but a similar plan was enacted on October 3, 2008.<sup>189</sup> The Emergency Economic Stabilization Act of

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\$1.7 billion, a 94 percent decline from the net income of the third quarter of 2007, and bank failures hit a fifteen-year quarterly high. FED. DEPOSIT INS. CORP., THIRD QUARTER 2008 (Nov. 25, 2008), <http://www2.fdic.gov/qbp/2008sep/qbpall.html> [hereinafter FDIC THIRD QUARTER]. In July 2008, IndyMac Bank—which had \$28 billion in assets, more than all the 31 banks that failed since 2007 combined—failed and was placed in a federal receivership. FED. DEPOSIT INS. CORP., 2008 ANNUAL REPORT (June 18, 2009), [http://www.fdic.gov/about/strategic/report/2008annualreport/statements\\_dif\\_4.html](http://www.fdic.gov/about/strategic/report/2008annualreport/statements_dif_4.html). Washington Mutual Bank also failed during the third quarter and had \$307 billion in assets, more than ten times the assets of IndyMac, at the time of failure. Compare FDIC THIRD QUARTER, *supra* (noting the value of Washington Mutual's assets at the time it failed), with 2008 ANNUAL REPORT, *supra* (discussing the creation of IndyMac Federal Bank after IndyMac Bank failed). The third quarter of 2008 marked the first time in over fourteen years that assets of financial institutions on the FDIC's troubled institutions list exceeded \$100 billion. FDIC THIRD QUARTER, *supra*.

186. STATE OF HOUSING 2009, *supra* note 17, at 2 (“From their quarterly peaks during the housing boom to the last quarter of 2008, real home equity was down 41 percent, existing median home prices 27 percent . . . and existing home sales 33 percent.”).

187. The government made several attempts to save the housing market. Initiatives like the Neighborhood Stabilization Program aim to revive foreclosed properties to prevent neighborhood blight. *Id.* at 3. The bailout package and the stimulus bill were directed at the economic system as a whole. Other programs, like Protecting Tenants in Foreclosure (PTFA), assist renters inadvertently affected when their landlords enter foreclosure. See generally *id.* (describing housing policy and the housing market in the wake of the foreclosure crisis); see also Danilo Pelletiere & Danna Fischer, *Foreclosure Intervention: Protecting Renters*, NAT'L LOW INCOME HOUS. COAL. (May 6, 2009), [http://www.nlihc.org/detail/article.cfm?article\\_id=6046&id=163](http://www.nlihc.org/detail/article.cfm?article_id=6046&id=163) (providing an overview of laws available to tenants' rights advocates).

188. *Credit Crisis-Bailout Plan (TARP)*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit\\_crisis/bailout\\_plan/index.html](http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit_crisis/bailout_plan/index.html) (last updated Dec. 7, 2010).

189. *Id.* Paulson originally asked for \$700 billion to purchase mortgage backed securities that were rendered valueless. *Id.* Had Paulson followed his own proposal, the government would have purchased the securities at inflated rates, giving firms an infusion of much-needed capital and improving their chances of weathering the crisis. *Id.* However, even when given similar authority under the bailout bill, Paulson opted not to purchase troubled assets or to address housing needs. See *infra* notes 187–96 and accompanying text.

2008,<sup>190</sup> the bailout bill, established the Troubled Assets Relief Program (TARP).<sup>191</sup> The program appropriated \$700 billion to the Treasury Secretary to buy troubled assets, including mortgages, from struggling financial institutions.<sup>192</sup> The Treasury also gained the power to regulate executive compensation and other monetary incentives for institutions that receive TARP funds, and the government took away certain compensation-related tax breaks from financial institutions receiving assistance.<sup>193</sup>

On February 13, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the “Stimulus”),<sup>194</sup> which authorized \$787 billion in new federal spending.<sup>195</sup> The President intended to use Stimulus funds to invest in both job creation and long-term economic growth plans in an attempt to rebuild the struggling economy.<sup>196</sup> As of July 2010, the White House estimated that the Stimulus either saved or created between 2.5 and 3.6 million jobs.<sup>197</sup> The White House also noted that private investors matched every dollar in federal Stimulus funds invested to promote growth by spending three of their own.<sup>198</sup> Despite the proclaimed success of the Stimulus, the national unemployment rate hovered around 10 percent

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190. Pub. L. No. 110-343, 122 Stat. 3765 (2008).

191. *Id.* at tit. I § 101.

192. *Id.* at tit. I § 101; see also Alice Gomstyn, *Bailout Bill Basics: From TARP to Tax Breaks*, ABC NEWS (Oct. 2, 2008), <http://abcnews.go.com/Business/Economy/Story?id=5932586&page=1> (providing a basic outline of the bailout bill’s provisions).

193. Gomstyn, *supra* note 192.

194. Pub. L. No. 111-5, 123 Stat. 115 (2009).

195. *The Recovery Act*, RECOVERY.GOV, [http://www.recovery.gov/About/Pages/The\\_Act.aspx](http://www.recovery.gov/About/Pages/The_Act.aspx) (last visited Dec. 2, 2010).

196. *Id.* Several of the new programs created by the Stimulus directly address housing-related problems. See U.S. DEP’T OF HOUS. & URBAN DEV., HUD ECONOMIC STIMULUS FUNDING AND THE CREATION OF JOBS, TRAINING, AND THE CREATION OF JOBS, TRAINING, AND CONTRACTING OPPORTUNITIES (2010), available at <http://www.hud.gov/offices/fheo/section3/Econ-Stimulus-sec3-final.pdf>, and *American Recovery and Reinvestment Act of 2009*, NAT’L ASSOC. OF REALTORS, [http://www.realtor.org/government\\_affairs/gapublic/american\\_recovery\\_reinvestment\\_act\\_home](http://www.realtor.org/government_affairs/gapublic/american_recovery_reinvestment_act_home) (last visited Oct. 22, 2010), for brief overviews of how the Stimulus impacts housing matters.

197. Associated Press, *New White House Report Claims More Jobs from Stimulus Bill*, U.S. NEWS, July 14, 2010, <http://politics.usnews.com/news/articles/2010/07/14/new-white-house-report-claims-more-jobs-from-stimulus-bill.html>.

198. *Id.*

in July,<sup>199</sup> while underemployment forced many families into poverty.<sup>200</sup>

Minorities, people without high school diplomas, and people with disabilities face the highest unemployment rates, as many of the jobs lost come from industries that do not require higher education.<sup>201</sup> These same groups historically have “high proportions of low-income households.”<sup>202</sup> Low-income families are also far more likely to be renters and burdened by excessive housing costs.<sup>203</sup> As renters, low-income families were in a particularly difficult position due to the foreclosure crisis and the economic meltdown.

Beyond the Stimulus, the Obama Administration has taken steps aimed solely at stabilizing the housing market and rescuing homeowners struggling to pay their mortgages.<sup>204</sup> Together with Congress, the Administration moved to expand tax credits available to first-time homebuyers to stimulate the housing market and to strengthen consumer protection laws.<sup>205</sup> Efforts were made to support community development and neighborhood stabilization programs and to provide support to state and local housing agencies working to help low-income tenants.<sup>206</sup>

Further, on May 20, 2009, President Obama signed the Protecting Tenants at Foreclosure Act of 2009 (PTFA)<sup>207</sup> which aimed to address many of the problems tenants faced if their landlords lost the properties they rented to foreclosure.<sup>208</sup> Under PTFA, any bona fide

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199. *Id.* At the end of 2007, early in the recession, the unemployment rate was only 5 percent. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2010, at 3 (2010), available at <http://www.nlihc.org/oor/oor2010/oor2010pub.pdf> [hereinafter OUT OF REACH 2010].

200. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2009, at 2 (2009), available at <http://www.nlihc.org/oor/oor2009/oor2009pub.pdf> [hereinafter OUT OF REACH 2009].

201. OUT OF REACH 2010, *supra* note 199, at 4.

202. *Id.*

203. SCHWARTZ, *supra* note 44, at 16.

204. TREASURY/HUD JOINT REPORT, *supra* note 15, at 9. For example, the Joint Report credits the Dodd-Frank Act of 2010 with creating new regulations aimed at curbing the types of abuses that caused substantial instability in the housing and other financial markets. *Id.* at 11.

205. *Id.* at 9.

206. *Id.*

207. Pub. L. No. 111-22, 123 Stat. 1660 (2009). PTFA was passed as Title VII of the larger Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009).

208. See Press Release, Nat'l Low Income Housing Coalition, Renters Have Immediate Protections from Foreclosure Under New Bill (May 21, 2009), available at [http://www.nlihc.org/detail/article.cfm?article\\_id=6140&id=48](http://www.nlihc.org/detail/article.cfm?article_id=6140&id=48).

tenant<sup>209</sup> who entered into a lease with a landlord before the property entered foreclosure is entitled to remain in their home until the end of their lease term.<sup>210</sup> If the property is sold before the natural end of a tenant's lease, then the purchaser must honor that lease, unless they intend to use the property as their primary residence.<sup>211</sup> PTFA also recognizes that many low-income tenants have either month-to-month leases or do not have written leases at all.<sup>212</sup> If that is the case, PTFA requires that the new owner, whether it be an individual or a bank, provide the tenant with a ninety-day notice before filing for eviction.<sup>213</sup>

In addition to creating roadblocks to immediate eviction, PTFA requires that the new owner assume any state landlord-tenant law obligations.<sup>214</sup> For Section 8 voucher-holders, PTFA goes one step farther: new owners must not only respect the requirements of Section 8 leases, but also must accept the Housing Assistance Payments from local housing authorities so that tenants do not lose their vouchers.<sup>215</sup>

In February 2011, the Treasury and HUD issued a report to Congress that included a drastic shift in national housing policy.<sup>216</sup> The Obama Administration committed to improving access to affordable housing, while recognizing that not every American should own a home.<sup>217</sup> In the report, the Treasury and HUD laid out a plan for restructuring and rebuilding the American housing finance system. The plan identified several fundamental flaws in the current

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209. Memorandum from Nat'l Low Income Hous. Coal. on Prots. for Tenants in Foreclosed Props. (May 21, 2009), available at <http://www.nlihc.org/doc/Memo-Renter-Protections-S-896.pdf>. Under PTFA, a bona fide tenant is a tenant who is neither the owner of the property nor a close family relative of the owner. *Id.* The lease formation must be an "arms-length" transaction entered into for fair market rental value. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. See generally TREASURY/HUD JOINT REPORT, *supra* note 15. While the report primarily proposes options for winding down the Government Sponsored Enterprises, Fannie Mae and Freddie Mac, it also describes the future role of the government in the housing world as one of "robust oversight and consumer protection" and of "targeted assistance" rather than one of unconditional support for increased homeownership for all. *Id.* at 1.

217. *Id.* at 2.

system, including: poor consumer protections that allowed for the creation of too many bad mortgages; an outdated regulatory regime; and a lack of transparency, accountability and proper capitalization to protect against unacceptable levels of risk.<sup>218</sup>

## II. ANALYSIS

In 1949, Congress first committed to ensuring “a decent home and a suitable living environment for every American family,”<sup>219</sup> and since then has declared better meeting the housing needs of lower income Americans a matter of “grave national concern.”<sup>220</sup> Before the Great Depression, only the most affluent could afford to own a home, a trend that continued in the post-Depression era, as well.<sup>221</sup> The introduction of public housing in 1937 provided safe, affordable homes to members of the “submerged middle class,” the working poor who could not afford the high costs of renting or buying in the private market.<sup>222</sup>

New banking and finance-related legislation passed in the years after the Great Depression paved the way for increased access to low-cost homeownership for the then-thriving and expanding middle class.<sup>223</sup> As a result, the demographics of public housing residents shifted to include almost exclusively low- and very-low income families.<sup>224</sup> Public housing developments also were typically located in low-income and minority neighborhoods, areas where it was

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218. See *id.* at 5–7 (listing several fundamental flaws and the damage they each caused).

219. Housing Act of 1949, Pub. L. No. 90-19, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 (2006)); see also *supra* note 8 and accompanying text.

220. See Housing and Urban Development Act of 1968, 12 U.S.C. § 1701t (2006); see also *supra* note 9 and accompanying text.

221. See SCHWARTZ, *supra* note 44, at 13, 47; see also *supra* notes 52–54 and 60–62 and accompanying text.

222. SCHWARTZ, *supra* note 44, at 102, 105.

223. See *id.* at 48–52.

224. *Id.* at 105. While public housing always has been attractive to low-income families, “over time, the public housing population has become increasingly impoverished.” *Id.* After World War II, however, the middle class began to leave public housing. *Id.* The median income of public housing residents dropped drastically “from 57% of the national median in 1950 to . . . less than 20% by the mid-1990s.” *Id.* at 129.

difficult to secure mortgage financing, providing further incentive for low-income families to live in public housing.<sup>225</sup>

Low-income and minority families seeking mortgage financing before the passage of the Fair Housing Act of 1968 faced considerable discrimination, as lenders refused to finance home purchases in certain neighborhoods based primarily on an area's racial composition.<sup>226</sup> The federal government did not merely allow lenders to openly discriminate, it promoted discriminatory redlining practices until Congress stepped in and passed the Fair Housing Act.<sup>227</sup>

The Fair Housing Act was effective as a broad policy statement against discrimination in the sale or rental of residential properties.<sup>228</sup> While it represented a definite shift away from open federal support for redlining, the Act was not without negative consequences on minority neighborhoods. Lenders faced no risk in lending, as the Federal Housing Authority insured their loans, and often relaxed their underwriting standards.<sup>229</sup> As a result, even high-risk borrowers could secure financing, but the Federal Housing Authority failed to step in and prevent lenders from taking advantage of them.<sup>230</sup>

In a striking parallel to the foreclosure crisis, the effects of the resulting foreclosures and abandoned homes in low-income, typically minority, neighborhoods caused greater neighborhood instability and blight.<sup>231</sup> Even though local residents deposited their money in local financial institutions, the same institutions remained hesitant to lend money back to the residents to finance neighborhood home purchases.<sup>232</sup> Residents were stuck choosing between abusive lending practices or not owning a home in hopes of helping to stabilize their

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225. *Id.* at 106–07; *see id.* at 51–52.

226. *See supra* notes 82–86 and accompanying text.

227. *Id.*

228. *See generally supra* notes 84–86 and accompanying text.

229. IMMERGLUCK, *supra* note 87, at 96.

230. *Id.* Meanwhile, real estate agents and mortgage brokers earned large commissions selling homes in the same areas, particularly when they could resell post-foreclosure properties. *Id.*

231. *Id.*

232. *See SCHWARTZ, supra* note 44, at 66.

communities. With this roadblock in mind, Congress passed the Community Reinvestment Act.<sup>233</sup>

At the time the CRA was passed, it is without a doubt that something needed to be done to counteract racial and economic discrimination in mortgage lending. Homeownership is an essential wealth-building tool for many households;<sup>234</sup> however, if redlining continued, low-income families in distressed, urban neighborhoods would never be able to lift themselves or their communities out of poverty. Requiring lenders to help finance homeownership in their local communities was an excellent attempt to rectify the problem, but the CRA lacked the enforcement and procedural mechanisms necessary to truly make an impact.

The federal agencies charged with oversight duties approved almost every proposed bank merger regardless of whether the post-merger bank would comply with CRA requirements.<sup>235</sup> The required periodic evaluations were essentially meaningless, as almost every lending institution received one of the two highest ratings available.<sup>236</sup> Even after the revision of the CRA guidelines in 1989, the federal agencies in charge of oversight and implementation of the CRA failed to put their full regulatory weight behind the Act.<sup>237</sup>

At a time when the CRA was losing impact, GLBA's deregulation measures struck a serious blow to arguments in favor of creating serious, functional regulatory guidelines under the CRA.<sup>238</sup> Fair housing advocates remained silent out of fear that the CRA would be the next piece of legislation to be repealed in the climate of deregulation.<sup>239</sup> Ultimately, lenders shied away from lending to minority communities through CRA channels in favor of selling subprime products, and no one was willing to take a strong stance in support of the legislation and its goals.<sup>240</sup>

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233. *Id.*

234. *See* Chomsisengphet & Pennington-Cross, *supra* note 18, at 31.

235. Essene & Apgar, *supra* note 35, at 15.

236. *Id.*

237. *See id.* at 16–19.

238. *Id.* at 17.

239. *Id.*

240. *Id.* at 17–18.

In the deregulated financial world of the late 1990s, most lending to minority and low-income borrowers began to take place outside the reach of CRA regulation.<sup>241</sup> As a result, the real barrier for low-income and minority communities became access to fair credit rather than simply access to credit.<sup>242</sup> At first glance, the subprime products that emerged as a result of deregulation appeared to help low-income and minority communities invest in stability.<sup>243</sup> Housing advocates, however, began warning against predatory lending practices, suggesting that many low-income and minority borrowers were “tak[ing] on mortgage obligations that they did not understand or were unable to pay.”<sup>244</sup> Seemingly, the CRA’s goal of increasing access to mortgage financing in minority and low-income communities succeeded, even if it mostly succeeded outside of the watchful eye of the regulators. The disturbing reality of the situation was not immediately apparent.

Pundits argue over the role of the CRA in creating the economic crisis,<sup>245</sup> but whether the CRA caused the crisis is, besides being irrelevant, highly unlikely. The government and regulatory agencies ignored the CRA for most of its history, and, in reality, only a very small percentage of subprime mortgages involved in the failed mortgage-backed bonds came from CRA channels.<sup>246</sup> What the CRA

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241. *Id.* at 18. In 2006, just 10 percent of all loans made in lower-income areas by financial institutions regulated by the CRA were CRA-related, yet 34 percent of all mortgages were granted to low-income and minority borrowers. *Id.* at 12.

242. *Id.* Interestingly, the result of the foreclosure crisis has been to resurrect that barrier to access to credit. *Id.*

243. *Id.* at 18. These communities were not served by prime mortgages, so gaining access to credit seemed like a major victory. *Id.*

244. *Id.*

245. See, e.g., Aaron Pressman, *Community Reinvestment Act Had Nothing to Do with Subprime Crisis*, BUS. WK. (Sept. 29, 2008), [http://www.businessweek.com/investing/insights/blog/archives/2008/09/community\\_reinvestment\\_act\\_had\\_nothing\\_to\\_do\\_with\\_subprime\\_crisis.html](http://www.businessweek.com/investing/insights/blog/archives/2008/09/community_reinvestment_act_had_nothing_to_do_with_subprime_crisis.html); John Carney, *Here’s How The Community Reinvestment Act Led to the Housing Bubble’s Lax Lending*, BUS. INSIDER (June 27, 2009, 9:33 AM), <http://www.businessinsider.com/the-cra-debate-a-users-guide-2009-6>; *Media Conservaties Baselessly Blame Community Reinvestment Act for Foreclosure Spike*, MEDIA MATTERS (Sept. 30, 2008, 2:06 PM), <http://mediamatters.org/research/200809300012>. The Federal Reserve, however, denies that the CRA played any role in the foreclosure crisis. See Press Release, Comm. on Fin. Servs., Federal Reserve States CRA Played No Part in Foreclosure Crisis Financial Institutions Chairman Brings Republican Myth to Light (Mar. 12, 2009), available at <https://financialservices.house.gov/press/PRArticle.aspx?NewsID=466>.

246. Essene & Apgar, *supra* note 35, at 12.

truly achieved was turning lender attention to the fact that there were previously untapped borrowers anxiously awaiting the opportunity to own a home.

Mortgage brokers abused the goal of increasing mortgage financing for low-income borrowers or borrowers without solid credit histories. Lenders, bearing almost no risk for irresponsible lending due to the ease of risk-shifting in the secondary mortgage market,<sup>247</sup> took advantage of borrowers through predatory lending practices.<sup>248</sup> They preyed on low-income and minority borrowers by ignoring underwriting standards like debt-to-income ratios and by granting mortgages without attempting to verify that borrowers had sufficient incomes to repay loans.<sup>249</sup>

As the subprime mortgages were pooled into bonds with prime mortgages, almost no one on Wall Street, including the ratings agencies responsible for rating the soundness of potential investments, paid attention to the risks the lenders were taking with subprime products. The “goofy accounting” of the 1990s was forgotten, and most just saw the equity in homes as another asset that could become a security.<sup>250</sup> The tranche system made it easier to bundle the “bad” mortgages that were not guaranteed by the government in with the “good” mortgages and still attract investors to the mortgage-backed bond market with the illusion of easy and safe money.<sup>251</sup>

The ease with which individuals could secure mortgage financing led to the highest rate of homeownership the United States had ever seen, but the seeming success of more American families achieving the American Dream<sup>252</sup> came at the expense of fiscal responsibility

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247. Mortgage brokers could set up offices in strip malls, make loans to unsophisticated or ill-informed borrowers knowing that default was likely, and immediately sell the mortgage to another party. Gregory D. Squires, *Predatory Lending: Redlining in Reverse*, SHELTERFORCE ONLINE, Jan.–Feb. 2005, <http://www.nhi.org/online/issues/139/redlining.html>.

248. See *supra* notes 165–68 and accompanying text.

249. STATE OF HOUSING 2009, *supra* note 17, at 10.

250. LEWIS, *supra* note 141, at 8, 14.

251. *Id.* at 8.

252. Homeownership is an essential element of the American Dream. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., HOMEOWNERSHIP: PROGRESS AND WORK REMAINING 1 (2000). In his first inaugural address, George Washington referenced for the first time the concept of an American Dream: “the experiment entrusted to the hands of the American people.” President George Washington, First Inaugural Address (Apr. 30, 1789).

and economic stability. The housing market destabilized, and, due to the rise in popularity of the secondary mortgage market, housing market instability spilled over into the broader financial markets. Problems with housing finance long have been troublesome for the economy as a whole,<sup>253</sup> as housing-related expenses account for approximately 20 percent of GDP.<sup>254</sup> Accordingly, what began as a foreclosure crisis quickly decimated the American economy.

Many of the largest banks were wrapped up in the subprime debacle in one way or another.<sup>255</sup> Irresponsible lending, trading, investing and leveraging left major financial institutions on the verge of bankruptcy, and the federal government announced that it had no choice but to step in and bail out the flailing institutions because they were too big to fail.<sup>256</sup> The same bad actors responsible for the financial crisis received TARP funds from the bailout bill.<sup>257</sup> The bailout bill was the first of many federal initiatives aimed at saving the economy, but the damage was done. The United States was in the middle of a deep recession caused by the instability in the banking

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Almost a century and a half later, Herbert Hoover attempted to draw support during the Great Depression by painting his picture of the American Dream for the American people, saying:

My conception of America is a land where men and women may walk in ordered freedom in the independent conduct of their occupations, where they may enjoy the advantages of wealth, not concentrated in the hands of the few but spread through the lives of all; *where they build and safeguard their homes*, and give to their children the fullest advantages and opportunities of American life; where every man shall be respected in the faith that his conscience and his heart direct him to follow; where a contented and happy people, secure in their liberties, free from poverty and fear, shall have the leisure and impulse to seek a fuller life.

President Herbert Hoover, Campaign Speech at Madison Square Garden (Oct. 31, 1932) (emphasis added). The idea that everyone can achieve upward mobility through hard work and perseverance is at the very core of the American Dream.

253. STATE OF HOUSING 2009, *supra* note 17, at 6.

254. SCHWARTZ, *supra* note 44, at 3.

255. Bear Stearns, the first major investment bank to collapse, bet heavily on the success of subprime loans and had to sell itself to J.P. Morgan in March 2008 for a very low price in order to avoid bankruptcy. Bryan Burrough, *Bringing Down Bear Stearns*, VANITY FAIR, Aug. 2008, at 106. Lehman Brothers, another major Wall Street institution wrapped up in the subprime debacle, could not find a buyer and entered bankruptcy in September 2008. LEWIS, *supra* note 145, at 237.

256. See *supra* Part I.F (discussing federal actions to rescue the financial sector).

257. For a list of financial institutions that received bailout funds, see *Bailed Out Banks*, CNN MONEY, <http://money.cnn.com/news/specials/storysupplement/bankbailout/> (last visited Oct. 11, 2010).

industry, a recession that caused significant job losses and large numbers of residential foreclosures.<sup>258</sup>

The same low-income and minority borrowers taken advantage of in the subprime crisis were disproportionately harmed by the broader economic crisis, as well.<sup>259</sup> In the neighborhoods with the highest incidence of foreclosure, typically low-income and minority neighborhoods, unemployment rates are higher, and neighborhood blight is increasing.<sup>260</sup> Foreclosed properties pose a significant problem as they sit vacant awaiting new residents.<sup>261</sup> Vacant homes affect property values and neighborhood safety and stability, as trespassers will often break in and vandalize or otherwise abuse the properties.<sup>262</sup>

Despite signals that the outlook is improving,<sup>263</sup> estimates suggest that the American job market will continue to lag for many years.<sup>264</sup> The housing market, too, has been slow to rebound.<sup>265</sup> Although the federal government has tried to stem the foreclosure crisis, mounting job losses, particularly in low-income communities, will continue to keep the foreclosure rate high.<sup>266</sup> Further complicating matters, Secretary Paulson did not use the first round of bailout funds to

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258. See generally *supra* Parts I.E & I.F.

259. STATE OF HOUSING 2009, *supra* note 17, at 3. Disturbingly, but not surprisingly based on the history of mortgage financing, foreclosure rates are highest in low-income, minority neighborhoods—the very neighborhoods that were, in theory, bolstered by the passage of the CRA. See *id.*

260. See *id.*

261. Jonathan Mummolo & Bill Brubaker, *As Foreclosed Homes Empty, Crime Arrives*, WASH. POST, Apr. 27, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/26/AR2008042601288.html>.

262. *Id.*

263. See STATE OF HOUSING 2009, *supra* note 17, at 20.

264. See, e.g., Rich Miller & Toby Alder, *Diamond, Mortensen, Pissarides Share Nobel Prize*, BUS. WK. (Oct. 11, 2010, 3:52 PM), <http://businessweek.com/news/2010-10-11/diamond-mortensen-pissarides-share-nobel-prize.html>. Shortly after receiving the Nobel Prize for his role in analyzing the job market as a search market, Professor Dale Mortensen warned that the recovery of jobs could take “a while.” *Id.* For a brief explanation of the search theory proposed by Peter Diamond, Dale Mortensen, and Christopher Pissarides, see Edward L. Glaeser, *The Work Behind the Nobel Prize*, N.Y. TIMES, Oct. 11, 2010, <http://economix.blogs.nytimes.com/2010/10/11/the-work-behind-the-nobel-prize/> (examining the differences between traditional economic models and the search theory model as a way to “make sense of unemployment”).

265. Tony Downs, *Overbuilding and High Debt Could Cause Real Estate to Obstruct Economic Growth for Years*, NAT'L REAL ESTATE INVESTOR (Oct. 13, 2010, 10:51 AM), [http://nreionline.com/finance/news/overbuilding\\_high\\_debt\\_1013/index.html](http://nreionline.com/finance/news/overbuilding_high_debt_1013/index.html).

266. See STATE OF HOUSING 2009, *supra* note 17, at 20.

purchase troubled assets, to slow the foreclosure crisis, or to address housing needs.<sup>267</sup> Instead the money was used to pump capital into the largest banks, to help borrowers secure financing, and to encourage more stable banks to purchase troubled banks.<sup>268</sup>

The taxpayers, in reality, received nothing in return for rescuing the struggling financial institutions.<sup>269</sup> Lenders learned to tighten underwriting standards to avoid another crisis, but, in doing so, they overreacted and made mortgage financing unavailable not only to lower-income families but also to middle-class borrowers.<sup>270</sup> Essentially, taxpayer dollars bolstered bank balance sheets and, in turn, banks opted not to make new loans of any kind.<sup>271</sup>

Federal legislation has focused on keeping mortgage financing available for housing and preventing foreclosures,<sup>272</sup> which is essential both to homeowners and to renters who find themselves facing homelessness when landlords lose rental properties to foreclosure. Renters typically have lower incomes than homeowners, and they already must deal with an affordable housing shortage and the difficulties involved with securing a federal housing subsidy to help them dig their way out of excessive housing cost burdens.<sup>273</sup>

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267. See *Credit Crisis-Bailout Plan (TARP)*, *supra* note 188.

268. *Id.* Nine of the largest banks, including Goldman Sachs, JP Morgan, Bank of America and Citigroup, received \$25 billion each. Andrew Clark, Elana Schor & Daniel Nasaw, *U.S. Bites the Bullet with an Aggressive \$250bn Bank Bail-Out*, THE GUARDIAN, Oct. 15, 2008, <http://www.guardian.co.uk/business/2008/oct/15/wall-street-bank-shares>.

269. See generally David D. Kirkpatrick & Charlie Savage, *Firms That Got Bailout Money Keep Lobbying*, N.Y. TIMES, Jan. 23, 2009, <http://www.nytimes.com/2009/01/24/business/24lobby.html?emc=tnt&tntemail1=y>; Joe Nocera, *First Bailout Formula Had It Right*, N.Y. TIMES, Jan. 23, 2009, <http://www.nytimes.com/2009/01/24/business/24nocera.html?page-wanted=1&tntemail1=y&emc=tnt>; Frank Rich, Op-Ed., *Slumdogs Unite!*, N.Y. TIMES, Feb. 8, 2009, [http://www.nytimes.com/2009/02/08/opinion/08rich.html?\\_r=2](http://www.nytimes.com/2009/02/08/opinion/08rich.html?_r=2).

270. STATE OF HOUSING 2009, *supra* note 17, at 20.

271. See Matthias Rieker, Marshall Eckblad & Joe Bel Bruno, *Bank Executives to Tell Congress: 'We're Lending'*, WALL ST. J., Feb. 11, 2009, <http://online.wsj.com/article/SB123431547024070839.html>; Liz Moyer, *Banks Promise Loans but Hoard Cash*, FORBES (Feb. 3, 2009, 5:05 PM), [http://www.forbes.com/2009/02/03/banking-federal-reserve-business-wall-street-0203\\_loans.html](http://www.forbes.com/2009/02/03/banking-federal-reserve-business-wall-street-0203_loans.html). Representatives of some of the largest financial institutions to receive TARP funds appeared before Congress to address the growing public resentment at their use of bailout money provided by taxpayers. Rieker, Eckblad & Bruno, *supra*. Maintaining capital, they claimed, was essential to preventing the collapse of their institutions. *Id.*

272. STATE OF HOUSING 2009, *supra* note 17, at 20.

273. See *supra* notes 44–50 and accompanying text.

President Obama signed PTFA to ameliorate the negative impact of the foreclosure and economic crises on tenants, Americans with typically the least means to survive the crises.<sup>274</sup> Unfortunately, PTFA runs the risk of following in the CRA's failed footsteps. Despite the protections PTFA supposedly provides, banks still evict tenants without adequate notice, often in direct violation of PTFA's required procedures.<sup>275</sup> PTFA requires banks to take on traditional landlord duties after foreclosing on properties,<sup>276</sup> but banks rarely are willing to do so voluntarily, especially in lower-income neighborhoods where rental units may be in a state of serious disrepair. Banks prefer to offer tenants disturbingly low cash-for-keys<sup>277</sup> settlements rather than having to assume the duties and liabilities of being landlords.<sup>278</sup>

Like the CRA, PTFA lacks enforcement mechanisms. There are no statutory penalties for violations nor are there any actual mechanisms in place to ensure banks and new owners obey PTFA's lofty, yet essential, standards. If a bank or owner violates PTFA, the only remedy is to dismiss an improperly filed eviction action, assuming courts even realize there is a PTFA violation at issue in the first place. Although Congress spoke in a clear, unequivocal manner, once it finished speaking on the matter it moved on and ignored the need to ensure that advocates have the tools to be able to enforce the law fully as intended.

The lack of enforcement mechanisms in PTFA is of particular concern for Section 8 tenants, who typically have the lowest incomes.

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274. See *supra* notes 207–16 and accompanying text.

275. See, e.g., Mary E. O'Leary, *State Acts to Protect Renters in Foreclosures*, NEW HAVEN REG., Feb. 2, 2010, <http://www.newhavenregister.com/articles/2010/02/02/news/a3-netenants.txt>.

276. See *supra* notes 207–14 and accompanying text.

277. In a cash-for-keys deal, a bank or financial institution that forecloses on an income property and becomes a landlord moves to evict any tenants living in the property. Been & Glashauser, *supra* note 50, at 3, 7. In order to settle the eviction suit, many times the bank or financial institution will offer tenants a sum of money to voluntarily abandon the property. See *id.* The money is typically intended to cover moving expenses and any related costs necessary to find a new home. See *id.* Sometimes, however, the offers are significantly higher if the new owner is particularly motivated to empty the property for resale.

278. See Kathryn Lindsay Dobies & Erin Halasz, *Renters Face Eviction, Betrayal in Landlord Foreclosure*, MEDILL REP. (Feb. 2, 2010, 2:54:53 PM), <http://news.medill.northwestern.edu/cicago/govt/story.aspx?id=156898&terms=dobies%20renters>.

Section 8 tenants who find themselves without a home face a more difficult task in finding a new home, as they are subjected to strict time limits to avoid losing their vouchers.<sup>279</sup> PTFA seemingly addresses this issue by requiring that the banks or new owners accept voucher payments; however, in practice, many new landlords ignore PTFA's requirements and move ahead with evictions immediately after purchasing a foreclosed property.<sup>280</sup>

Time is not the only constraint Section 8 tenants face. Because of the stigma attached to federal subsidies and the added paperwork involved in arranging a Section 8 lease, landlords are often hesitant to rent to Section 8 tenants.<sup>281</sup> Some states with greater tenant protections and some federal affordable housing programs prohibit discrimination based on the source of income for rental payments.<sup>282</sup> Many, however, do not, making it legal for landlords to refuse to rent to Section 8 tenants without any justification. When looked at as a

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279. Tenants are given sixty days to place a voucher. Term of Voucher Rule, 24 C.F.R. § 982.303 (2000). Placing a voucher means finding a home to rent with a landlord willing to submit to the PHA's inspection and paperwork requirements. If a tenant fails to place their voucher within sixty days, it is at the PHA's discretion whether to allow additional time. *Id.* If subsidy payments are refused by the unit owner, then tenants lose their subsidies and move to the bottom of the waiting list if they do not find a new home quickly enough. *Id.*

280. See generally NAT'L LOW INCOME HOUS. COAL., 2010 ADVOCATES' GUIDE TO HOUSING & COMMUNITY DEVELOPMENT POLICY 82-84 (2010).

281. The Section 8 voucher program does a better job than other federal housing subsidies of promoting economic and racial integration and allowing low-income families to live in lower-poverty areas. Barbara Sard, *How to Promote Integration and Choice Through the Section 8 Voucher Program*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (Sept. 22, 2008), [http://www.prrac.org/projects/fair\\_housing\\_commission/boston/sard.pdf](http://www.prrac.org/projects/fair_housing_commission/boston/sard.pdf). However, it is less successful in urban areas. *Id.* Sard argues that several reforms are necessary to improve the goals of the program, including increasing the time allowed to find a home from sixty days. *Id.* Section 8 tenants face discrimination and are stigmatized based on the "not in my backyard" or NIMBY philosophy, causing increased difficulties for placing vouchers beyond just time restrictions. *Id.*

282. Only California, Connecticut, the District of Columbia, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont, and Wisconsin have anti-discrimination laws aimed at source of income discrimination. *Section 8 Housing*, NAT'L HOUS. LAW PROJECT, [http://www.prrac.org/pdf/Source\\_of\\_Income\\_Summary.pdf](http://www.prrac.org/pdf/Source_of_Income_Summary.pdf) (last visited Dec. 2, 2010); see also *Source of Income Discrimination*, NAT'L HOUS. LAW PROJECT, <http://nhlp.org/resourcecenter?tid=123> (last visited Oct. 14, 2010). In 1996 Paula Beck argued that a nationwide source of income discrimination provision needed to be added to the Fair Housing Act, but fifteen years later, Section 8 tenants are still without nationwide protection from discrimination despite being singled-out as a protected class. See Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 159 (1996).

whole, federal housing policy in its current state fails to benefit anyone other than the largest financial actors.

### III. PROPOSAL

The problem with national housing policy is that it has always been reactive rather than proactive. Minority borrowers dealt with discrimination for years, until finally the government half-heartedly stepped in to end discriminatory lending practices. But with lofty goals set and the clamor for reform temporarily quieted, attempts to build a better system ended. It is no coincidence that foreclosure crises occur shortly before economic crises when housing-related costs account for such a large part of the United States' GDP.<sup>283</sup> In order to promote a more stable economy moving forward, a new approach to crafting a sustainable housing finance and rental system is necessary.

The government must create a sustainable, comprehensive, proactive plan to stabilize the housing industry. A cohesive plan to protect the interests of all American families will take into account, and reverse, the problems caused by the deregulation of the financial services industry, particularly the resulting irresponsible mortgage lending programs. Homeowners and tenants alike must be protected equally in the hopes of discouraging neighborhood blight and crime and strengthening families and communities. Our new vision, moving forward, must be one that includes a full commitment to providing safe, secure, and affordable homes for all Americans. It must be more than a broad, unenforced policy statement from Washington.

The government must support the creation of responsible lending programs for borrowers with lower incomes or unattractive credit histories and should incentivize responsible lending in distressed communities. Much of what caused the foreclosure and banking crises could have been avoided with stringent regulations and adequate support for existing lending programs, like the CRA, that aim to promote such responsible lending. With so much lending in distressed communities taking place outside the scope of the CRA, due largely to the rise of new types of financial institutions in the

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283. SCHWARTZ, *supra* note 44, at 3; STATE OF HOUSING 2009, *supra* note 17, at 6.

wake of financial deregulation, the CRA is at risk of becoming marginalized even further. As a first step, regulators must develop and administer enforcement mechanisms for CRA violations. Further, the reach of the CRA must be expanded to take into account the new types of financial institutions that are responsible for the large amount of lending that occurs in low-income and distressed neighborhoods outside of CRA channels.

Improving the CRA alone, however, is not enough, and new legislation will be needed. Rather than creating new legislation to broadly state a goal for lending in distressed communities, the government needs definite, specific, and enforceable measures in place to prevent both redlining and reverse redlining. Solely requiring lenders to tighten underwriting standards is not an effective solution because many low-income families would be disqualified from receiving financing. In fact, even prime borrowers are experiencing great difficulties securing financing in the wake of the economic crisis.<sup>284</sup> Low-income neighborhoods cannot move towards stabilization if their residents are unable to invest in improving their communities. A new federal program to encourage such investment is essential, as long as the new program includes sufficient safeguards for borrowers and lenders alike.

Moving forward, stricter standards regulating the most egregious predatory lending practices are essential to prevent repeating the same mistakes. Low-income borrowers are often unsophisticated financial actors. They rely on and trust that lenders would not loan them money knowing that they will not be able to repay it, yet that is exactly what happens in reverse redlining.<sup>285</sup> Maintaining the

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284. STATE OF HOUSING 2009, *supra* note 17, at 2; Bill Briggs, *Tighter Standards Slow Housing Market*, MSNBC (June 23, 2010), [http://www.msnbc.msn.com/id/37831562/ns/business-real\\_estate](http://www.msnbc.msn.com/id/37831562/ns/business-real_estate).

285. Squires, *supra* note 24. The CRA is hailed for ending redlining. Essene & Apgar, *supra* note 35, at 1. But in the thirty-four years since its passage, the real threat to low-income, minority neighborhoods has come in the form of reverse redlining. Reverse redlining is essentially another term for predatory lending. Squires, *supra* note 24. Borrowers in low-income, minority neighborhoods are targeted by lenders and offered unfavorable loan terms, often even when they could qualify for cheaper, more stable prime mortgages. *Id.* One study estimates that as many as 50 percent of subprime borrowers actually qualify for conventional, prime mortgages, mortgages they likely could have afforded to repay had they been given the option. *Id.* These borrowers live almost exclusively in minority neighborhoods. *See id.*; *see also* Manny Fernandez, *Study Finds Disparities in Mortgages by Race*, N.Y. TIMES, Oct. 15, 2007,

American Dream is important, but part of our responsibility as a society also includes protecting those who are unable, or unaware of the need, to protect themselves. Accordingly, in addition to supporting responsible lending, the federal government must promote informed borrowing programs and practices—especially among lower-income and less creditworthy borrowers. Borrowers bear some of the responsibility for irresponsible lending, and they deserve to have the tools and information necessary for informed decisions readily provided.

In addition to reshaping the world of mortgage finance through new regulations, the federal government needs to commit more fully to protecting tenants, particularly those that have the lowest incomes. The current affordable rental housing programs are not helping enough families to secure safe, suitable homes and should be augmented with new, experimental programs aimed at reducing the affordable housing shortage. Very low-income tenants eligible for Section 8 subsidies have been singled out by the federal government as a group in need of special assistance. However, a lack of funding combined with the failure to adapt to changing economic conditions has eroded the goals of and the protections provided by the Section 8 program. There is an urgent need for more units that are available to very low-income renters at the heavily subsidized rates provided for by the Section 8 program, particularly due to the worsening economic conditions, but there are few programs in place that can help keep units in the private rental market available and affordable for Section 8 tenants. Additionally, the Great Recession has shown that the Section 8 program does not adapt well to changing economic conditions. The program should be modified to allow more vouchers to be made available, even if only a temporary basis, during significant economic downturns to avoid widening the affordability gap and increasing homelessness during such periods.

The decline of affordable rental housing units has plagued the United States for many years, but it has only worsened in the wake of

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[http://www.nytimes.com/2007/10/15/nyregion/15subprime.html\\_r=1&ex=1350187200&en=a9978e04a9864642&ei=5088&partner=rssnyt&emc=rss](http://www.nytimes.com/2007/10/15/nyregion/15subprime.html_r=1&ex=1350187200&en=a9978e04a9864642&ei=5088&partner=rssnyt&emc=rss); STATE OF HOUSING 2010, *supra* note 45, at 19 (high cost lending concentrated in low-income minority neighborhoods); TREASURY REPORT, *supra* note 167, at 47–49, 71–72.

the foreclosure and economic crises.<sup>286</sup> As units in lower-income neighborhoods sit empty, the opportunity to use those vacant units as affordable rental housing is squandered. Communities would benefit by having families move into vacant properties that are otherwise likely to remain vacant for at least the next few years.<sup>287</sup> There is little reason not to incentivize investors and property owners to transform vacant properties into affordable and safe private rental housing.

PTFA can be modified easily to address these types of problems. As discussed above, PTFA lacks enforcement mechanisms. Adding incentives for new owners, typically banks and purchasers at foreclosure sales, to keep units filled with residents rather than allowing them to sit vacant is a simple first step. Further, statutory damages for PTFA violations, which do not exist now, will create a disincentive for banks and new owners to move to evict tenants in direct violation of PTFA, as they often do now. Finally, additional training information addressing how to identify PTFA violations should be made available to law enforcement officials, judicial officers, housing advocates, and any other party foreseeably involved in eviction actions with potential PTFA claims. This will ensure that all parties are apprised of the new law and are better equipped to spot violations in time to rectify them and to keep tenants in their homes.

While implementation of such programs cannot happen overnight, there is a smaller change that can be made immediately to drastically improve low-income tenants' abilities to secure subsidized housing. While it is not a new idea,<sup>288</sup> the need is particularly urgent under current economic constraints. Congress must pass a nationwide source-of-income anti-discrimination provision to prevent private landlords from discriminating against Section 8 tenants just because they have a housing choice voucher. Such a provision would help to alleviate the pressures Section 8 voucher holders face when trying to find a new, affordable unit after they are displaced from their homes

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286. There is a serious affordable housing shortage in the United States. *See supra* notes 44–48 and accompanying text (discussing the affordable housing shortage in the United States).

287. *See* Alan Zibel, *Freddie Mac To Rent Foreclosed Properties*, THE SEATTLE TIMES, Feb. 14, 2009, [http://seattletimes.nwsourc.com/html/realstate/2008742377\\_freddiemacrent15.html](http://seattletimes.nwsourc.com/html/realstate/2008742377_freddiemacrent15.html).

288. *See* Beck, *supra* note 282, at 171.

in the aftermath of the foreclosure crisis, even though it is a minor change to an otherwise relatively successful program.

#### IV. CONCLUSION

The health of all sectors of the housing market, from rentals to home purchases, underpins the overall health of the American economy. As we sit at a moment in time when there is great change in areas like financial regulation and healthcare reform, we have a prime opportunity to also reexamine federal housing policy. While federal housing policy has always reacted to problems like discrimination in mortgage lending or a submerged middle class, a definite shift should be made to become more aggressive in our policy goals.

Rather than making a broad statement and abandoning it shortly thereafter, as the FHA and CRA did in proclaiming that racial discrimination would no longer be tolerated in mortgage financing, new housing policy instead must take a proactive approach. It must search out potential problems, particularly enforcement problems, and make every effort to ensure policy objectives can and will be thoroughly implemented before Congress moves on to a new topic and forgets the housing sector again. Without a doubt, the health of the American economy and our financial future depends on developing a new vision for sustainable federal housing policy and on following through to meet those new goals.