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The Fair Housing Act at Forty: Predatory Lending and the City as Plaintiff

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The Fair Housing Act at Forty: Predatory Lending and the City as Plaintiff

Ngai Pindell

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I. Introduction

It is fitting that the fortieth anniversary of the Fair Housing Act (FHA) fell in the same year that an African American, Barack Obama, won the election for president of the United States. It is fitting because the FHA has always reflected, like the Congress that created it and the many cities and neighborhoods affected by it, an ambivalence concerning the salience of race as an issue. Some indicators, such as the success of individuals like Obama, suggest that race-based economic and legal policies are anachronisms. The social, economic, and political gains of millions of African Americans over the last forty years suggest a positive resolution to the Kerner Commission's fears of a racially separate and unequal society.[1] The urban inequalities that continue to exist pale in intensity to the disorder and riots that augured the passing of the FHA in 1968. Other indicators, however, do not support such optimism. From a mountaintop view, many of the nation's cities are identified by white and nonwhite enclaves, areas of affluence and poverty, and neighborhoods enjoying a renaissance of wealth juxtaposed with neighborhoods marked by a dizzying number of foreclosed homes, vacant homes, and struggling homeowners.

The availability of credit, to individual borrowers and to communities, is an integral factor shaping the geography of housing opportunity. Cities are shaped by the housing and borrowing choices of their residents and the attendant mobility—or lack of mobility—of families. When lenders deny

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credit to neighborhoods or borrowers because of race, communities suffer.[2] And when lenders flood these same neighborhoods with subprime or predatory loan products, the communities suffer once again.[3] The economic gains of individuals and of communities in cities over the last several decades are threatened by massive property devaluations, loss of equity, and foreclosures. These losses threaten the ability of families to move to better neighborhoods, the continued sustainability of marginal urban communities, and the general social and economic health of cities burdened by foreclosures, declining revenues, and increased demands for local services.

Predatory lending litigation under the FHA attacks this new threat faced by individuals, communities, and cities. This litigation also deploys a new weapon: the city as plaintiff.[4] Cities taking proactive steps to address the effects of race and credit on the geography of the city is a promising evolution. Cities have frequently been the target of fair housing lawsuits but also the site for locally based community development efforts. The failures of housing and development policies over the years to effectively grapple with the urban institutional structures created by decades of racial segregation and animus are, in part, a political failure.[5] But the continuing difficulty in reconciling the pernicious structural effects of racial discrimination and segregation with individual and community wealth-building strategies also reflects the complexity of the problem. The city as fair-lending plaintiff offers a hope of reconciliation between race and wealth creation.

One critique of FHA litigation is its relatively limited enforcement. Although courts have construed standing to be "as broad as is permitted by Article III of the Constitution,"[6] a recent Baltimore case is the first predatory lending case to have a city as plaintiff.[7] The Department of Housing and Urban Development (HUD) enforces the FHA.[8] Private parties[9] and the Department of Justice (DOJ)[10] can also bring FHA claims in court. Similarly, private organizations, such as neighborhood nonprofits employing fair housing testers, have brought FHA claims. These cases are an important part of FHA enforcement, but still rely primarily on recognizing and responding to individual acts of housing discrimination. Public and private resources to identify and pursue these acts of discrimination are limited, and, by many indications, the public enforcement of the FHA is not as effective as it should be.[11] The city as plaintiff in FHA suits offers an additional opportunity to pursue FHA violations, and on a broader scale than remedying individual acts of discrimination. Although other plaintiffs, like DOJ and private organizations, may bring suits on behalf of a large group, the city as plaintiff is in an ideal position to identify the public harms of predatory lending and address these harms at an effective level.[12]

II. The FHA's Role in Combating Discriminatory Lending Practices

The FHA has been used to combat discriminatory lending practices since its enactment in 1968. Section 3604(a) of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse

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to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[13]

Section 3604(b) prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[14]

Section 3605 of the FHA makes it unlawful for "any person or other entity whose business includes engaging in residential real estate–related transactions[15] to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."[16]

Courts have recognized that both § 3604 and § 3605 apply to discrimination in the availability of mortgage financing for the purchase of a home.[17] Section 3605 clearly applies to a home equity loan or similar refinancing transaction. Courts are sometimes hesitant, however, to construe the *otherwise make unavailable* language in § 3604(a) to reach refinancing transactions.[18] Plaintiffs have a two-year statute of limitations under the FHA,[19] which can be extended if the plaintiffs demonstrate a continuing violation.[20]

Plaintiffs alleging discrimination in lending often rely on laws besides the FHA, including the Equal Credit Opportunity Act,[21] the Racketeer Influenced and Corrupt Organizations Act (RICO),[22] § 1981,[23] and § 1982.[24] In addition, state attorneys general have pursued predatory lending claims under state antifraud laws. California was one of the first states to sue Countrywide Financial, alleging predatory lending practices in violation of state law.[25] California and a coalition of other states recently settled the suit against the company for $8.4 billion in direct assistance to affected borrowers, among other terms.[26]

III. The Elusive Nature of Predatory and Subprime Lending

The term *predatory lending* in mortgage markets has dominated the popular and legal literature in recent years.[27] Defining the term has proven more challenging. One defendant mortgage corporation argued that "the term 'predatory lending is of little value as a legal term,' and that it is an amorphous concept which is 'vacuous, with its description the subject of a semantic shell game.' "[28] A subsequent study by professors Kathleen C. Engel and Patricia A. McCoy offers a frequently cited definition of *predatory lending*:

> [P]redatory lending [is] a syndrome of abusive loan terms or practices that involve one or more of the following five problems: (1) loans structured to result in seriously disproportionate net harm to borrowers, [e.g., loans that contain unaffordable balloon payments], (2) harmful rent seeking, [e.g., prepaid credit life insurance], (3) loans involving fraud or deceptive practices, (4) other forms of lack of transparency in loans that are not actionable as fraud, and (5) loans that require borrowers to waive meaningful legal redress.[29]

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A precise definition of *predatory lending* is also elusive because of its overlap with *subprime lending. Subprime lending* refers to the practice of extending credit to borrowers under terms that are less favorable than given to borrowers with excellent credit histories. Not all subprime loans are predatory, and many borrowers with less than prime credit have been able to obtain mortgages to finance housing purchases, one large component of the American dream. These subprime loans are more expensive than other loan products, however, and one commentator found that "the great bulk of subprime loans contain predatory terms."[30]

The combination of subprime and predatory lending has caused a massive foreclosure crisis.[31] The frequency and amount of this lending has increased dramatically, and, as a result, millions of borrowers are unable to repay mortgage loans. Predatory lending threatens the twin goals of the FHA, i.e., integration and nondiscrimination. Integration goals suffer as individuals lose equity in their homes, depriving them of the financial means to move out of segregated neighborhoods and into integrated neighborhoods. The nondiscrimination goal is endangered when lenders target racial minority neighborhoods to sell inferior credit products.

IV. The FHA's Traditional Application to Discriminatory Lending and Redlining

Before predatory lending, an earlier battleground of the FHA involved redlining, that is, the practice of denying credit to certain neighborhoods based on the racial composition of those areas. Redlining can be described through two lenses, the first focusing on a higher rate of loan denials in minority neighborhoods compared with nonminority neighborhoods (a process-based approach), and the second focusing on the smaller amount of credit extended in minority neighborhoods compared to nonminority neighborhoods (an outcome-based approach).[32]

Identifying individual instances of lending discrimination can be difficult. There are many opportunities in the home buying process to exercise acts of discrimination. A buyer may be impermissibly influenced by a racially focused real estate ad; a buyer may have multiple encounters with one or more realtors; and a buyer will have multiple interactions with different actors during the lending process, including banks, appraisers, and insurers.[33] Discriminatory conduct could occur in any of these instances or encounters, and the conduct is often not obvious to a buyer. "The subtlety of discriminatory practices means ... discrimination is difficult for an individual home-seeker to detect."[34]

Community-based reinvestment strategists fought the lending industry's resistance to lend in minority neighborhoods in cities across the country.[35] Largely as a result of these campaigns, Congress enacted laws to provide additional information about how lending decisions, lending outcomes, and race intertwine. Congress enacted the Home Mortgage Disclosure Act (HMDA) in 1975.[36] The HMDA requires banks to report aggregate loan and application information according to census tract, race, gender,

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and income level.[37] The HMDA does not, however, capture other characteristics of borrowers that would be helpful in figuring out the true extent of discrimination. For example, the HMDA does not include information on borrowers' indebtedness or credit histories, two important measures of the creditworthiness of borrowers. Congress also enacted the Community Reinvestment Act (CRA) in 1977.[38] The CRA helps to provide information about lending patterns in minority areas and rewards lenders for providing credit in areas traditionally underserved.[39] Although they have their limitations, both laws are important in providing information about credit and race to housing advocates.

V. The Current Battleground: Applying the FHA to Cases of Reverse Redlining

In recent years, another battleground, reverse redlining, has emerged. Reverse redlining is the practice of targeting credit products to minority neighborhoods under discriminatory and unfavorable terms. In contrast to traditional redlining concerns of communities starved for credit, minority communities are flooded with credit products under reverse redlining. These credit products frequently contain predatory terms and are disproportionately expensive compared to products offered in nonminority neighborhoods to nonminority borrowers with similar creditworthiness. The onerous terms of these predatory loan products cause a massive number of defaults, and ultimately foreclosures, when borrowers can no longer afford the high payments or penalties that the loans require.

The Pew Foundation estimates that one in thirty-three homeowners will experience foreclosure, with most of them occurring before 2010.[40] Few states are immune from the foreclosure crisis, as illustrated by an increase of at least 20 percent in mortgage loans entering foreclosure between 2006 and 2007 in forty-seven states and Washington, D.C.[41] At the same time, some states and some groups of people are especially hard-hit by the foreclosure crisis. Just seven states account for more than half of loans that are in foreclosure or seriously delinquent.[42] African American and Latino borrowers are significantly more likely to receive higher-rate subprime loans than white borrowers with the same income and credit risk factors.[43] The terms of subprime loans place borrowers at a higher risk of foreclosure.[44]

The number of subprime loans has increased commensurate with the increased technological ability of lenders to effectively price loans outside of the prime borrower market.[45] Subprime debt constituted $1.3 trillion in 2007, up from $332 billion in 2003.[46] Other factors that contributed to the growth of subprime lending in the 1990s included inconsistent financial regulation among banks, thrifts, and mortgage and finance companies; federal preemption of state usury laws; growth of an elderly population less familiar with conventional lending products and in need of cash from refinancing equity in homes; and an increase in credit card debt leading to pressures to refinance.[47]

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Some blame the foreclosure crisis on increased pressure to construct lower-cost housing in financially creative ways. One argument puts the blame on laws like the CRA. Under this reasoning, lenders were pressured to overextend credit to financially unqualified borrowers and communities under practices that were unsound and unsafe.[48] A related view holds that lenders are unfairly criticized for making defensible (and socially minded) business decisions. Subprime lending makes credit available to areas traditionally underserved by the credit market and to borrowers with less than prime credit scores. Lenders are being sued for making this credit available in the first instance and for making it available at a price that, lenders argue, compensates the industry for its higher risk of default in these geographic areas or among these borrowers.[49]

A precise measure of the relative contributions of government policies, borrower decisions, and lending practices toward the current foreclosure crisis may be impossible to establish. In FHA suits, plaintiffs target the lenders' share of responsibility for the crisis. In order to establish a prima facie case of discrimination based on reverse redlining, a plaintiff "must show that the defendants' lending practices and loan terms were 'unfair' and 'predatory,' and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race."[50] A plaintiff can therefore establish a prima facie case by arguing either disparate impact or intentional targeting.[51] If there is evidence that a lender made loans to white and nonwhite borrowers on different terms, then plaintiffs may be successful arguing disparate impact. If, on the other hand, lenders make loans only in nonwhite communities to nonwhite borrowers, then a disparate impact argument will not be available and plaintiffs can attempt to demonstrate that lenders intentionally targeted the nonwhite area.[52]

Racially segregated communities facilitate targeting. In one Chicago case, lenders targeted a 95 percent African American community for credit with predatory terms.[53] The loan products offered in targeted communities were less favorable than in other communities. Plaintiffs alleged that Capital City Mortgage Company targeted African Americans in the Washington, D.C., area with less favorable loans than those for similarly situated white borrowers.[54] The targeting of African American borrowers may occur through advertisements on gospel radio stations,[55] lending offices intentionally placed within African American communities,[56] and expressions of trust and solidarity with African American leaders.[57]

Another illustration of predatory lending is the practice of high-yield spread premiums, or "the difference between the interest rate the lender would accept for the loan and the interest rate that the borrower is actually charged."[58] Lenders target unsophisticated borrowers (and in FHA claims, minority borrowers) to get them to agree to higher interest rates. The practice is objectionable for "setting rates based on the perceived financial sophistication of the borrower rather than the risk of extending the loan."[59] This practice is fostered by the separation between the underlying mortgage lender and the person or entity selling the loan to the consumer

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face-to-face. Plaintiffs alleged that Countrywide's policy of allowing point-of-sale lenders, brokers, and agents to subjectively mark up the pricing of loan products above the company's objective, risk-based criteria forced African Americans to borrow at a higher rate than white borrowers.[60] Similarly, a plaintiff in Chicago alleged that minority borrowers received less favorable loans than nonminority borrowers through high-yield spread premiums.[61]

Refinancing also presents an especially dangerous predatory lending opportunity, particularly when employed against elderly borrowers. Refinance and home equity lending make up the bulk of the growth of subprime loans.[62] Elderly borrowers are likely to have substantial equity in their homes, and predatory lenders target this group for high-priced loans to fund home repairs or to consolidate debt.[63] These loans contain terms, like prepayment penalties or exorbitant interest rates, that borrowers find impossible to repay. The added tragedy of these home equity loans is that they affect those homeowners who own their houses free and clear or who have accumulated substantial equity. These borrowers lose their homes and the wealth that they accumulated over the years. Refinancing is clearly covered by § 3605 and may also be covered by § 3604.[64]

In another attempt to combat predatory lending practices, the NAACP sued a number of lending institutions citing violations of the FHA, the ECOA, § 1981, and § 1982. The NAACP alleged that lenders sold "subprime residential mortgages to African Americans who qualify for prime residential mortgages at grossly unfavorable terms compared to Caucasians who continue to receive better terms than their African American counterparts."[65] The NAACP also claimed that a number of facially neutral lending policies create an adverse disparate impact on African Americans in violation of the FHA, including

> A. actively marketing subprime residential loan products directly to consumers, without providing applicants with sufficient information on how to purchase prime residential mortgage products from [the lender];
> B. providing financial incentives for mortgage brokers to steer consumers to subprime residential mortgage products in lieu of prime residential mortgage products from [the lender];
> C. not providing meaningful review of loan applications to determine whether the applicant qualifies for a prime residential mortgage product offered by [the lender].[66]

Additionally, the NAACP alleged that lenders disproportionately marketed teaser-rate loans to African American communities and evaluated these borrowers' ability to pay the loans based only on the introductory teaser rate and not the adjusted higher rate that kicked in later.[67] Some argue that the magnitude of these teaser rates has been exaggerated. As one commentator noted, "An urban legend is that subprime hybrid ARMs came with low teaser rates.... [S]ubprime hybrid ARMs always came with substantial starter rates—often little different from subprime thirty-year fixed

rates."[68] Banks and borrowers understood that these loans were meant to be refinanced, and they would have been if housing prices had continued to climb.[69] On the other hand, even if interest rates between ARMs and subprime thirty-year fixed-rate loans were similar, these subprime loans carried substantial up-front and prepayment fees that eroded buyer equity and increased the loans' attractiveness to mortgage lenders and brokers who could collect those fees.[70]

VI. The Next Phase? The City as Plaintiff

Cities, because of their size and influence on the lives of residents, are frequently the location of fair housing and economic development activity and offer a new way to approach these claims: the city as plaintiff.

America's metropolitan areas have endured hard economic and social shifts. Suburban outmigration has depleted inner cities of relatively wealthier, and whiter, residents. Deindustrialization and globalization have altered the employment landscape for traditional manufacturing cities, thrusting many urban residents out of jobs and shuttering industries that once contributed heavily to economic and social interests. Federal government policies have exacerbated these same trends through a home mortgage income tax deduction that has facilitated suburban outmigration, mortgage insurance programs, highway transportation funding, public housing, and other programs that have facilitated the economic and racial segregation of cities.[71] Cities have often been the targets of criticism and judicial sanction for responding to these challenges by isolating minority communities through land use policies and selective economic development programs. It is significant that cities are now on the offensive in holding private actors accountable for predatory lending and its harmful effect on minority communities.

The city as fair-lending plaintiff offers an opportunity to effectively dismantle the structures of racial segregation that continue to affect individual borrowers and neighborhood characteristics. Cities are at the appropriate geographic level to meaningfully affect wealth distribution through access to credit and housing, as well as the racial structures that impede this access. Cities are increasingly participating as independent, influential actors in a wide variety of policy and legal arenas such as immigration[72] and economic development.[73] This increased participation and influence reflects cities' importance as economic engines, social centers, and political actors. Moreover, cities are geographically and psychologically aligned with their residents. Individuals and neighborhood representatives actively participate in city decisions perceived to have a direct impact on their lives. Individuals are defined by their city neighborhood. In turn, these communities of individuals define cities. One cannot think of New York, San Francisco, or Chicago without thinking about distinct neighborhoods, such as SoHo, Chinatown, or Hyde Park.

Baltimore's suit against Wells Fargo marks the first time that a city has been a plaintiff in an FHA predatory lending suit. Cities satisfy the FHA's

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liberal standing requirements because they qualify as "aggrieved person[s]" injured by a discriminatory housing practice.[74] Cities sue not in a representative capacity but instead for harms that the city suffers. Cities have been plaintiffs, however, in other types of FHA litigation besides predatory lending. In *Gladstone, Realtors v. Village of Bellwood,* the village of Bellwood (a suburb of Chicago) claimed that realtors steered African American home buyers toward a target area of the city and white home buyers away from that area in violation of the FHA.[75] The City of Chicago brought a similar steering claim against realtors,[76] as did Cleveland Heights, Ohio.[77] Cities also have the option to bring predatory lending suits under doctrines other than the FHA. Cleveland sued Deutsche Bank and other financial institutions under the theory of public nuisance.[78] Buffalo recently brought suit against a lender under nuisance law and city code provisions.[79]

Cities sue under the FHA alleging harms to the municipality itself. Calculating the harm to cities begins with tracking the massive number of foreclosures in minority neighborhoods caused by predatory lending. As noted earlier, redlining starved some urban communities of credit and deprived residents within those communities of experience and sophistication about mortgage products and terms.[80] One can draw a straight line from redlining to the phenomenon of reverse redlining. When the subprime spigots open, these residents become the prime targets for expensive lending products. Cities with segregated housing markets allow lenders to more easily target minority borrowers in minority communities for these subprime products.[81]

Lenders specialize in making loans to different neighborhoods within a segregated housing market. For example, eighteen of the top twenty refinance lenders in white neighborhoods in 1998 Chicago were prime lenders compared to eighteen of the top twenty refinance lenders in black neighborhoods that were classified as subprime lenders.[82] Concentrated subprime lending within targeted communities leads to geographically concentrated foreclosures.[83]

These foreclosures increase the number of vacant homes. In a city like Baltimore, where there are already a significant number of vacant homes, these new vacancies are particularly troublesome.[84] Vacant houses harm neighborhoods by reducing the values of nearby homes. In addition to being unsightly, vacant homes attract vandalism and crime. Similarly, slipshod attempts to repair vacant or distressed houses and resell these homes to unwitting purchasers is actionable under the FHA.[85]

At the same time, city property tax receipts fall as property values decline. Cities must expend additional money to cope with an increase in foreclosures and an increase in vacant housing. Cities must pay "for services related to foreclosures, including the costs of securing vacant homes, holding administrative hearings, and conducting other administrative and legal procedures."[86] Cities also have to devote additional resources to fire and police protection.[87] Empirical studies have calculated declines in property values and increases in municipal expenditures as a result of

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foreclosure. Dan Immergluck and Geoff Smith found that foreclosures have reduced nearby property values by an average of $159,000 per foreclosure in Chicago.[88] In another study of Chicago, William Apgar found that each foreclosure could cost municipalities $34,000 in increased expenditures and nearby property values could decline as much as $220,000.[89] These quantifiable damages to cities, along with punitive damages, are available under the FHA.[90]

Litigation is not the only opportunity for cities to combat predatory lending, but legislative responses have not been enthusiastically received. For example, city ordinances combating predatory lending have often been struck down under the argument that state or federal laws preempt their enforcement.[91] Until local legislative responses are more effective, litigation continues to offer the best means for cities to confront the problems posed by predatory lending.

VII. Conclusion

The National Fair Housing Alliance, a consortium of private, nonprofit fair housing organizations, state and local civil rights organizations, and individuals observed the fortieth anniversary of the FHA with events throughout 2008. In the fortieth Anniversary Commemorative Statement, the organization wrote, "Today, we commemorate the fortieth anniversary of the Fair Housing Act. We commemorate, not celebrate, because we are still so far from achieving the balanced and integrated living patterns envisioned by the original Act's authors."[92]

This is the sobering truth of housing opportunity today. Although the country has made significant strides in race relations and wealth creation, much remains to be done. The recent subprime and predatory lending crisis threatens to undo many of the tenuous economic gains of minority individuals and the communities in which they live. The FHA can be a powerful weapon against predatory lending, particularly with a city as plaintiff, if it is employed broadly and boldly.

Cities, as "aggrieved persons" under the FHA, have the potential to be powerful advocates for fair housing goals. They are geographically and cognitively appropriate sites for identifying lending discrimination and for effectively deploying remedies. Cities, as local service providers, are close to the needs of their residents and often expected to be the primary responders to public health and economic development concerns. Cities as plaintiffs give cities the resources they need to respond to this new economic threat.

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1. "Our nation is moving toward two societies, one black, one white—separate and unequal." NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968). The report, also known as the Kerner Commission Report, was released in March of 1968.

2. *See infra* Part II.

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3. *See infra* Part III.

4. *See infra* Part VI.

5. These criticisms have been particularly acute against programs involving a large amount of government funding. Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 559 (2008); *see also* Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 388 (2003) ("The danger of [the HOPE VI] approach is that policies that do not engage the structures of community disadvantage in terms of race cannot dismantle those institutions and policies formed using race as an explicit criterion. In this case, the failure of HOPE VI to account adequately for race as a primary cause of current, pervasive residential economic and racial segregation threatens the program's short and long term success.").

6. Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 109 (1979) (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972)).

7. John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 630 (2008) (describing Complaint for Declaratory and Injunctive Relief and Damages, Mayor of Balt. v. Wells Fargo Bank, No. L08CV 062 (D. Md. Jan. 8, 2008)).

8. 42 U.S.C. §§ 3610–3612 (2000).

9. 42 U.S.C. § 3613.

10. 42 U.S.C. § 3614. In one recent case, the Justice Department reached a $185,000 settlement with an Alabama bank that charged African American borrowers higher interest rates on manufactured housing loans in violation of the FHA. Press Release, Justice Department Resolves Case Alleging Race Discrimination by Alabama Bank (Sept. 29, 2008), *available at* www.usdoj.gov/opa/pr/2008/September/08-crt-864.html (announcing settlement between DOJ and First Lowndes Bank in Lowndes County, Alabama). Alleging redlining, DOJ reached a more substantial settlement ($55 million in loan commitments to underserved areas) in a 1997 consent decree in *United States v. Albank*. Consent Decree, United States v. Albank, No. 97-CV-1206 (N.D.N.Y. 1997), *available at* www.usdoj.gov/crt/housing/documents/albanksettle.htm. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 18–14 n.22 (2008), for a list of cases settled by the U.S. Department of Justice.

11. *See, e.g.*, Michael B. de Leeuw, *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 377–81 (2008) (detailing shortcomings of HUD investigation and enforcement, the unfamiliarity of the public with fair housing laws, and the underfunding of private fair housing groups to enforce the FHA).

12. *See infra* Part VI. It is important, however, to be cautious about extolling the possibilities of litigation, even litigation with cities as plaintiffs, to remedy the structural impacts of racism and disinvestment in America's cities. The lead counsel in Baltimore's 2008 FHA predatory lending suit against Wells Fargo noted "the implications that the remedies sought by Baltimore have for the broader struggle to promote integration. It is this last connection—that between the litigation objective and unresolved FHA objective of integration—that remains the most difficult to unravel." Relman, *supra* note 7, at 631.

13. 42 U.S.C. § 3604(a).

14. 42 U.S.C. § 3604(b).

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15. The term *residential real estate—related transaction* is defined as

(1) The making or purchasing of loans or providing other financial assistance—

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

42 U.S.C. § 3605(b).

16. 42 U.S.C. § 3605(a).

17. Nat'l Cmty. Reinv. Coal. v. Novastar Fin., Inc., No. 07-CV-0861, 2008 WL 977351, at *3 (D.D.C. Mar. 31, 2008).

18. Eva v. Midw. Nat'l Mortgage Banc, Inc., 143 F. Supp. 2d 862, 886 (N.D. Ohio 2001) (finding that § 3604 does not reach refinancing transactions). *But see* Beard v. Worldwide Mortgage Corp., 354 F. Supp. 2d 789, 809 (W.D. Tenn. 2005) (finding that § 3604 reaches refinancing transactions because the burden of the debt affects the ability to buy or sell a dwelling).

19. 42 U.S.C. § 3613(a)(1)(A).

20. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 380–81 (1982) (applying the continuing violation theory in which complaints are timely where the "last asserted occurrence" of a continuing pattern of violations falls within the statute of limitations).

21. 15 U.S.C. §§ 1691–1691f (2006).

22. 18 U.S.C. §§ 1961–1968 (2006).

23. 42 U.S.C. § 1981 (2000).

24. 42 U.S.C. § 1982.

25. California sued Countrywide Financial under §§ 17200 (unfair competition) and 17500 (making or disseminating untrue or misleading statements) of the Business and Professions Code. *See* Complaint at 42–45, People v. Countrywide Fin. Corp. (Cal. Super. Ct. June 24, 2008), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1582_draft_cwide_complaint2.pdf.

26. *See* Gretchen Morgenson, *Countrywide to Set Aside $8.4 Billion in Loan Aid*, N.Y. TIMES, Oct. 6, 2008, at B1.

27. Predatory lending is not a new phenomenon. *See* DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 88 (2004) (citing a 1955 study stating that because of the reluctance of banks to make home loans in the African American community, individuals extended loans in these communities are assessed fees as much as 25 percent of the underlying mortgage principal).

28. Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 19 n.6 (D.D.C. 2000).

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

30. Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 356 n.6 (2006).

31. Engel & McCoy, *supra* note 29, at 1261–70.

32. STEPHEN L. ROSS & JOHN YINGER, THE COLOR OF CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND FAIR-LENDING ENFORCEMENT 228 (2002).

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33. Nancy A. Denton, *Segregation and Discrimination in Housing*, *in* A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 61, 68 (Rachel G. Bratt et al. eds., 2006).

34. *Id.*

35. *See generally* FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSES TO URBAN DISINVESTMENT (Gregory D. Squires ed., 1993) (including reinvestment campaigns in Boston, Pittsburgh, Detroit, Chicago, Milwaukee, Atlanta, and cities in California).

36. Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801–2811 (2006).

37. 12 U.S.C. § 2803(b)(4).

38. 12 U.S.C. §§ 2901–2908 (2006), *amended by* Pub. L. No. 110-315, 122 Stat. 3078 (2008).

39. The academic literature on the CRA is vast and not uncritical. *See* Michael S. Barr, *Credit Where it Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513 (2005), for a recent evaluation of the act supporting the CRA as a necessary and effective policy response to lending discrimination and market failure.

40. THE PEW CHARITABLE TRUSTS, DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 9 (Apr. 2008), *available at* www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/defaulting_on_the_dream.pdf.

41. *Id.*

42. *Id.* at 11–12 (reporting loan statistics from California, Florida, Michigan, Ohio, Texas, New York, and Georgia).

43. DEBBIE GRUENSTEIN, KEITH S. ERNST & WEI LI, CENTER FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (May 31, 2006); *see also* Second Amended Complaint, NAACP v. Ameriquest Mortgage Co., No. SACV 07–0794 (C.D. Cal. Mar. 7, 2008) (citing Center for Responsible Lending study as well as reports with similar conclusions from the National Community Reinvestment Coalition, the Federal Reserve Board, and ACORN); Lei Ding et al., *Neighborhood Patterns of High-Cost Lending: The Case of Atlanta*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 193, 193–94 (2008) (finding that in Atlanta "[h]igher concentrations of higher-priced mortgages are found in low-income neighborhoods and predominantly African American neighborhoods. Additionally, individual African American and Hispanic borrowers are more likely to receive higher-priced loans regardless of the profile of the neighborhoods in which they live.").

44. *See supra* Part III.

45. Relman, *supra* note 7, at 634.

46. *Id.* at 634–35.

47. IMMERGLUCK, *supra* note 27, at 124–32.

48. R. Christopher Whalen, *The Subprime Crisis—Cause, Effect, and Consequences*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 219, 220–24 (2008).

49. Richard E. Gottlieb & Andrew J. McGuinness, *When Bad Things Happen to Good Cities: Are Lenders to Blame?*, BUS. L. TODAY, July/Aug. 2008, at 13, 14–15.

50. Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

51. Disparate impact remains a viable doctrine in FHA cases. *See* Nat'l Cmty. Reinv. Coal. v. Accredited Home Lenders Holding Co., 573 F. Supp. 2d 70, 77–79 (D.D.C. 2008) (supporting both intentional discrimination and disparate

impact theories under the FHA); *see also* Rivera v. Inc. Vill. of Farmingdale, 571 F. Supp. 2d 359, 367–69 (E.D.N.Y. 2008) (denying motion to dismiss in an argument by plaintiffs in New York that a village's adoption of a redevelopment plan displacing existing low-income Latino residents violated both the disparate impact and disparate treatment prongs of the FHA).

52. Barkley v. Olympia Mortgage Co., No. 04 CV 875, 2007 WL 2437810, at *14–15 (E.D.N.Y. Aug. 22, 2007).

53. Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885, 886–87 (N.D. Ill. 2000) (surviving motion for summary judgment).

54. *Hargraves*, 140 F. Supp. 2d at 14–15.

55. Jackson v. Novastar Mortgage, Inc., No. 06-2249, 2007 WL 4568976, at *9 (W.D.Tenn. Dec. 20, 2007) (denying motion to dismiss).

56. *Hargraves*, 140 F. Supp. 2d at 21.

57. *Id.* (describing picture of mortgage company president next to former Mayor Marion Barry, Reverend Jesse Jackson, and former District of Columbia council member Arrington Dixon that hung in the company's office entrance).

58. *Jackson*, 2007 WL 4568976, at *2.

59. *Id.*

60. Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 253–55 (D. Mass. 2008) (denying motion to dismiss).

61. Martinez v. Freedom Mortgage Team, Inc., 527 F. Supp. 2d 827, 834 (N.D. Ill. 2007) (denying motion to dismiss).

62. IMMERGLUCK, *supra* note 27, at 121.

63. Johnson v. Equity Title & Escrow Co. of Memphis, 476 F. Supp. 2d 873, 877–78 (W.D. Tenn. 2007) (denying motion to dismiss).

64. Beard v. Worldwide Mortgage Corp., 354 F. Supp. 2d 789, 808–09 (W.D. Tenn. 2005) (denying motion to dismiss under 42 U.S.C. § 3604(b)).

65. Second Amended Complaint at 23, NAACP v. Ameriquest Mortgage Co., No. SACV 07–0794 (C.D. Cal. Mar. 7, 2008).

66. *Id.* at 24. NAACP repeats these allegations against each defendant institution.

67. *Id.* at 24–25.

68. Michael Krimminger, *"It's Alive!"—Mortgage Risk Reborn: Issues and Possible Solutions*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 259, 261 (2008).

69. *Id.* at 261–62.

70. Keith S. Ernst & Deborah N. Goldstein, *The Foreclosure Crisis and Its Challenge to Community Economic Development Practitioners*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 273, 275 (2008). The authors also note that the impact of adjustable loan resets has been mitigated in part by a relatively low LIBOR rate in 2008. Interest rates are typically reset based on the LIBOR rate. *Id.* at 285 n.22.

71. *See generally* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

72. *See, e.g.*, Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (exploring the role of cities and local governments in addressing immigration).

73. *See, e.g.*, Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091 (2008) (rethinking the role of cities and

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local governments in the economy and under constitutional doctrines affecting commerce).

74. Cities qualify as "persons" under 42 U.S.C. § 3602(d). A "discriminatory housing practice" includes acts unlawful under § 3604 and § 3605. 42 U.S.C. § 3602(f) (2000).

75. Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 93–94 (1979).

76. Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1088–89 (7th Cir. 1992).

77. Heights Cmty. Cong. v. Hilltop Realty, Inc., 774 F.2d 135, 137 (6th Cir. 1985).

78. Complaint, Cleveland v. Deutsche Bank Trust Co., No. CV 08 646970 (Ohio Ct. C.P. 2008).

79. Complaint, Buffalo v. ABN Amro Mortgage Group, Inc., No. 002200/2008 (N.Y. Sup. Ct. Feb. 20, 2008); *see also* Engel, *supra* note 30, at 377–89 (discussing fraud, consumer protection, public nuisance, unjust enrichment, and discrimination claims).

80. *See supra* Part IV.

81. Relman, *supra* note 7, at 636–37.

82. IMMERGLUCK, *supra* note 27, at 114.

83. *See id.* at 121 (describing studies of the links between subprime lending and foreclosure).

84. Relman, *supra* note 7, at 633.

85. *See, e.g.,* Barkley v. Olympia Mortgage Co., No. 04 CV 875, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007) (involving a property-flipping scheme with cosmetic repairs to damaged properties and subsequent loans and sales to African American purchasers).

86. Relman, *supra* note 7, at 633.

87. *Id.* at 633–34.

88. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 58 (2006).

89. WILLIAM C. APGAR ET AL., HOMEOWNERSHIP PRESERVATION FOUNDATION, THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 2 (2005), *available at* www.nw.org/network/neighborworksProgs/foreclosuresolutionsOLD/documents/2005Apgar-DudaStudy-FullVersion.pdf.

90. 42 U.S.C. § 3613(c)(1) (2000).

91. *See, e.g.,* Mayor of N.Y. v. Council of N.Y., 780 N.Y.S.2d 266 (Sup. Ct. 2004) (invalidating New York City ordinance that did not allow predatory lenders to do business with the city), and Am. Fin. Servs. Ass'n v. Oakland, 104 P.3d 813 (Cal. 2005) (invalidating Oakland's ordinance regulating predatory lending). *See generally* Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757 (2007).

92. NAT'L FAIR HOUS. ALLIANCE, NATIONAL FIAR HOUSING ALLIANCE COMMEMORATES 40TH ANNIVERSARY OF FAIR HOUSING ACT (Apr. 11, 2008), http://nationalfairhousing.org/Portals/33/reports/NFHA%2040th%20anniversary%20statement%20website.pdf.

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