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The Future of Fair Housing and Fair Credit: From Crisis to Opportunity, Symposium: New Strategies in Fair Housing

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THE FUTURE OF FAIR HOUSING AND FAIR CREDIT: FROM CRISIS TO OPPORTUNITY

JOHN A. POWELL* & JASON REECE†

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I. INTRODUCTION

The year 2008 will represent a critical point in the history of fair housing in the United States. Unfair lending practices and unsustainable loans have released a torrent of foreclosures across the nation, harming our neighborhoods, crippling our national housing market and weakening both the national and international economy.[1] Unequal access to fair housing and more importantly, fair credit, sits at the core of our current global economic crisis.[2] We not only have a duel housing market but also a dual credit market.[3] As we begin to pull back the layers of complexity around the housing and credit crisis, we see that the history of racial discrimination, redlining, a new global market with inadequate oversight and poor enforcement of existing housing laws all contributed to our current crisis. What is often not addressed in our evaluation of this crisis is why the overrepresentation subprime or predatory loans (and foreclosures) occurred in Black and Latino communities. When this is discussed, the popular yet inaccurate narrative is that those people took out loans they knew they could not afford and banks were forced to loan to them because of the Community Reinvestment Act.[4] This inaccurate but popular narrative suggests that efforts to loan to these communities of color lie at the heart of our global crisis. This story or narrative is not just incomplete but is factually wrong; in fact, this narrative can lead to dangerous assumptions which could undermine fair housing. The lesson that is likely learned from such a story is to not loan or invest in these historically redlined communities, but instead to tightly lock them out of the credit market.[5] These communities that were historically left

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[1] *See* CHRIS PETERSON, THE KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, SUBPRIME LENDING, FORECLOSURE AND RACE: AN INTRODUCTION TO THE ROLE OF SECURITIZATION IN RESIDENTIAL MORTGAGE FINANCE 1 (2008), http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/pdfs/Peterson_Securitization_Primer.pdf.

[2] Juliana Babassa, *Report: Minorities Hit by Foreclosures*, USA TODAY, Mar. 6, 2008, http://www.usatoday.com/money/economy/housing/2008-03-06-minority-foreclose_N.htm.

[3] *See* CHRISTY ROGERS, THE KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, SUBPRIME LOANS, FORECLOSURE AND THE CREDIT CRISIS: WHAT HAPPENED AND WHY? – A PRIMER 4 (2008), http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/foreclosure_and_race_primer_dec_2008.pdf.

[4] The Community Reinvestment Act of 1977, 12 U.S.C. § 2901 (2005), intended to meet the depository needs of the communities, including low and moderate income communities, in which they operated. The Federal Reserve Board, Community Reinvestment Act, http://www.federalreserve.gov/dcca/cra (last visited Mar. 27, 2009).

[5] Redlining is defined as "credit discrimination by a financial institution that refuses to make loans on properties in allegedly bad neighborhoods." BLACK'S LAW DICTIONARY 1283 (7th ed. 1999).

out of the exploding new housing and credit market in the '40s, '50s and '60s may once again lose ground to the white community in terms of both home ownership and wealth, and be locked out of the housing market again as we recover from this recent crisis.

The tremendous damage inflicted on our communities of color from this challenge represents a true crisis facing these communities and our nation. It also demonstrates the deep interconnection between these marginalized communities and our entire global system. But crisis represents more than just peril—it also represents a turning point, or "an unstable or crucial time or state of affairs in which a decisive change is impending."[6] The current housing crisis has already spurred perilous conditions and uncertainty, but also new actions and possibilities. In order to benefit from the opportunity, we must have an approach that understands the foreclosure issue as a credit issue. We must aggressively and affirmatively pursue fair and opportunity based housing, and we must more adequately understand the role of race.

A monumental event in our nation's history occurred on January 20, 2009—the inauguration of President Barack Obama, our nation's first African American president.[7] This tremendous achievement presents another critical, yet broad, turning point in our nation's engagement with racial justice, not just in terms of fair housing, but in how we view race and integration in our society. This accomplishment produces both risks and opportunities for those concerned with racial justice and fair housing. President Obama and his administration may lead a new era with policies supporting racial equity, integration with opportunity and a sustained commitment to community development.

However, these positive implications are offset by a national dialogue which may undermine our commitment to racial justice.[8] Many pundits are asking if President Obama's election indicates that we are in a "post-racial" America, where race doesn't represent a significant barrier to opportunity.[9] This viewpoint presents just another iteration of the "colorblind" approach to dealing with race in our society. We strongly disagree with this view, and find this argument flawed and uninformed by the systemic barriers to opportunity facing most people of color in our society. We fear that this flawed discussion has serious implications for how our nation views the need to continue to pursue the goals of racial justice, such as fair housing.

This turning point in our history will eventually yield new opportunities to address our nation's fair housing and credit challenges and our potential for advancing racial equity. For better or worse, our housing and credit system in the U.S. will be permanently altered and transformed. As fair housing advocates, scholars and researchers we must ask if these changes will promote or suppress fair

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[6]Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/crisis (last visited Mar. 11, 2009).

[7]Carl Hulse, *Obama Is Sworn in as 44th President*, THE N.Y. TIMES, Jan. 20, 2009, http://www.nytimes.com/2009/01/21/us/politics/20web-inaug2.html.

[8]Ellis Cose, *Revisiting "The Rage of a Privileged Class,"* NEWSWEEK, Feb. 2, 2009, http://www.newsweek.com/id/181272.

[9]Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008, http://www.latimes.com/news/opinion/commentary/la-oe-steele5-2008nov05,0,6553798.story.

housing, racial justice and true integration with opportunity. The larger fair housing community must be at the forefront of these changes, affirmatively pushing to assure that the restructuring of housing finance and credit options benefits those communities of color most marginalized by our current structural and institutional arrangements.

We also must communicate our perspective on race into the national dialogue spurred by the election of President Obama. The fair housing community must ensure that our goals are not lost in this new "post-racial" rhetoric.[10] When we look at the structure of lending and housing, we see a system where race is extremely important. The comfortable claim that people self-segregate is belied by these practices. We find many of the conditions that perpetuate and maintain segregation from opportunity, including credit, not just in the conscious animus of individuals, but deeply embedded in our institutional practices as well as our unconscious attitudes. Before our nation can claim to be post-racial, we must first acknowledge and confront the systemic layers of disadvantage facing people of color.

Fair housing and true integration with opportunity is the key to dismantling these discriminatory structural arrangements. As fair housing advocates, we must be sure that the public is aware of these dynamics and we must continue to demand accountability from our institutions. Title VIII gives us a handle to begin to address some of these issues.[11] It reaches discriminatory effect and is not just limited to discriminatory intent—its call for affirmatively pursuing to the goals of fair housing, produces the potential to create a proactive role for government to produce fair housing.[12]

The following paper provides an assessment of the current housing and credit crisis from a racial justice lens. The paper explores how race was interwoven into the current crisis and demonstrates the racialized impacts of the housing and credit crisis.[13] We also explore some of the current challenges facing fair housing in our society, presenting concepts and models of reform to promote true integration with opportunity.[14] We close with a new paradigm for addressing fair housing in the future and utilizing the opportunities presented by this crisis to produce a fair housing opportunity and a just society for all.[15]

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[10]john a. powell, *Post-Racialism or Targeted Universalism*, 86 DENV. U. L. REV. (forthcoming 2009), *available at* http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/post-racialism_or_targeted_universalism_powell_feb2009.pdf.

[11]Title VIII of the Civil Rights Act of 1968 (i.e., the Fair Housing Act) prohibits discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin. Fair Housing and Equal Opportunity Programs, http://www.hud.gov/offices/fheo/progdesc/title8.cfm (last visited March 27, 2009).

[12]*See* Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (1986) ("showing of a significant discriminatory effect" establishes violation of Title VIII).

[13]*See infra* Part II.

[14]*See infra* Part III.

[15]*See infra* Part IV.

II. FROM THE INNER CITY TO WALL STREET AND BEYOND: THE CREDIT CRISIS AND GLOBAL SYSTEMS OF MARGINALIZATION

The housing and credit crisis presents a difficult racial equity challenge for the traditional advocacy community to tackle. In our global economy, advocates are directly confronted by a true systemic global challenge which produces disparate local outcomes. The media often represents this challenge as a case of Wall Street v. Main Street.[16] In reality, the global scope of this crisis stretches beyond Wall Street, touching financial centers and nations across the globe, from Europe to Asia.[17] The crisis does not represent just one or two bad actors, but a system that is poorly structured and inadequately regulated.[18] Our failure to understand this crisis as a systems breakdown, and not just an individual moral breakdown, is critical to understanding the challenges in existing policy reforms to stem the crisis. Do we assign blame to people or the system? Do we redesign policies to make people behave differently or do we restructure the system to produce better outcomes?[19] Unfortunately, many efforts to understand and respond to this crisis ignore this global aspect of the challenge. We must not view this crisis as singular, but understand that in our ever more interconnected world and global economy, these systemic global challenges will continue to arise as societies and economies around the world become more tightly interwoven.

A. Securitization, Deregulation, and the Credit Crisis

The origins of the housing and credit crisis extend well beyond the behavior of borrowers and lenders. The introduction of credit securitization (and an associated deregulation of financial services) was critical to the growth of the subprime industry and are at the root of the current credit crisis.[20] As described by Chris Peterson at the

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[16]*See* Nina Easton, *Main Street Turns Against Wall Street*, FORTUNE, Sept. 28, 2008, http://money.cnn.com/2008/09/26/news/economy/easton_backlash.fortune/index.htm; Mark Trumbull, *Credit Crisis Has Main Street Watching Wall Street*, CHRISTIAN SCIENCE MONITOR, Aug. 13, 2007, http://www.csmonitor.com/2007/0813/p01s01-usec.html.

[17]Beth Ann Bovino, *The Global Economy: Strong Headwinds for Europe and Asia*, BUSINESSWEEK, Mar. 11, 2009, http://www.businessweek.com/investor/content/mar2009/pi20090310_612593.htm?campaign_id=rss_null.

[18]TREISA MARTIN & CAITLIN WATT, THE KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, SUBPRIME CRISIS: A COMPREHENSIVE ANALYSIS FROM A SYSTEMS THINKING PERSPECTIVE (2008), http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/Subprime_Crisis_Analysis_From_Systems_Thinking_Perspective_Aug2008.pdf.

[19]We are not asserting a mutually exclusive binary between people's moral behavior and the functioning of systems. But our popular narrative overly focuses on "bad actors"—either in minority communities or on Wall Street. This is a simplistic narrative which leads to a gross misunderstanding of the problem and solution. We have incentive structures that help shape action on the part of investors, but our current laws and regulations are designed for an antiquated two party system in the changing global credit market. We also have our discussion that action around the credit market is largely sealed off from a discussion of foreclosure and the needs of minority communities in the United States. These non-connected and individualistic policy responses will not be an effective approach to remedy a housing and credit system which is structured poorly.

[20]ROGERS, *supra* note 3, at 6-7.

University of Utah Law School, securitization was critical to the development of modern capital markets:

> In recent years, Wall Street financiers opened up a new frontier of home mortgage lending to Americans of relatively modest means with minimal down payments and through exotic, untested financial products. Capital markets largely funded this new breed of aggressive subprime mortgage finance through "securitization"—the process of bundling assets, such as mortgage loans, into large pools and then reselling those assets as securities to investors. Financiers justified this new private "subprime" home mortgage market to leaders and to the American people with a promise of new opportunities for home ownership. Today, the course of events has proven this promise to be, at least for the time being, empty.[21]

The first use of securitization by Ginnie Mae and Freddie Mac provided a model which the private sector found enticing, with Bank of America and Salomon Brothers initiating the first mortgage backed securities in the late 1970s.[22] Additional congressional acts, such as the Secondary Mortgage Market Enhancement Act of 1984, encouraged the growth of securitization by reducing legal barriers to mortgage securitization.[23] The Depository Institutions Deregulation and Monetary Control Act of 1980 and Alternative Mortgage Transaction Parity Act helped set the stage for the growth of the subprime industry by easing restrictions on mortgage interest rates and preempting state regulations on non-traditional mortgages.[24] The growth of private sector mortgage securitization spread financial risk and created a new pool for global investment, further fueling the availability of subprime mortgages.[25]

With the expansion of the global economy and a growing pool of global investment capital, mortgage securities became a popular investment: private mortgage securities doubled between 1994 and 1998.[26] But the financial industry needed new markets to invest in and needed continued mortgage loan growth to support the global demand for mortgage securities.[27] Subprime loans and other non-traditional mortgages extended loans under unusual terms to many new borrowers, who may not have qualified for traditional mortgages.[28] As the subprime market flourished, lenders and brokers became less risk adverse and reckless, with more and more borrowers directed toward subprime products.[29] They were also able to shift

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[21] PETERSON, *supra* note 1, at 1.

[22] *Id.* at 8.

[23] *Id.* at 8, n.77.

[24] MARTIN & WATT, *supra* note 18, at 2.

[25] ROGERS, *supra* note 3, at 6-7.

[26] PETERSON, *supra* note 1, at 12, n.118.

[27] *See* Richard A. Oppel, Jr. & Patrick McGeehan, *Lenders Try to Fend Off Laws on Subprime Loans*, N.Y. TIMES, Apr. 4, 2001, at C1.

[28] *See id.*

[29] *See* Max Fraser, *The Housing Folds: The Housing Market and Irrational Exuberance*, THE NATION, Nov. 25, 2008, http://www.thenation.com/doc/20081215/fraser; Associated

more risk to the borrower.[30] Because many of these loans were held for short periods of time, lenders were less concerned about their worthiness.[31] Brokers were incentivized to generate as many loans as possible as their commission was dependent on the number of loans they originated and not long term loan performance.[32] As a result of these complex changes in the regulatory environment and global financial markets, the mortgage industry changed (see Figure 1 at Appendix).[33] Lenders were bundling and selling loans and were not as concerned with the long term sustainability of the loan.[34] As explained by Kevin Phillips:

> [Mortgage backed securities] were sectoral growth hormones as well as profit makers. Instead of being kept on firm ledgers, mortgage loans could be stripped of risk by derivative contract, or in most circumstances sold off in a mortgage backed security or structured CDO. The money received could be used for another loan or mortgage, then again—and again. Lending limitations became non limitations. However, as volume swelled, loan and mortgage making standards dropped. Enticements to sign up marginal borrowers—through the "exotic" forms of mortgages little used before—took on an ever larger role.[35]

With risk spread throughout various mortgage securities, unsustainable loan originations became a powerful profit generating mechanism in the industry.[36] Brokers responded to the "yield spread premium" they were awarded for issuing subprime loans, further incentivizing the growth of the subprime market.[37] Unfortunately, regulatory systems did not necessarily adjust to the changing

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Press, *Brokers, Bankers Play Subprime Blame Game*, MSNBC, May 22, 2007, http://www.msnbc.msn.com/id/18804054/.

[30] *See* Fraser, *supra* note 29.

[31] *Id.*

[32] *See Brokers*, *supra* note 29.

[33] See *infra* app. Fig. 1. Our housing market has gone from a two or three party system to a very complicated system that very few people understand. Our laws, regulation and oversight are based on this three party system. A graph of this two and three party system was created by the Kirwan Institute for the Study of Race & Ethnicity, a multiparty system figure created by Chris Peterson at the University of Utah. The figure was adapted from a presentation delivered at the Kirwan Institute for the Study of Race & Ethnicity National Convening on Subprime Lending, Foreclosure and Race, October 2-3, 2008 (*available at* http://www.kirwaninstitute.org/events/archive/subprime-convening/agenda.php).

[34] *See* PETERSON, *supra* note 1, at 12, n.118.

[35] KEVIN PHILLIPS, BAD MONEY: RECKLESS, FINANCE, FAILED POLITICS, AND THE GLOBAL CRISIS OF AMERICAN CAPITALISM 104 (2008).

[36] *See* David Olinger & Aldo Svaldi, *Examining the Subprime-Lending Crisis*, THE DENVER POST, Dec. 2, 2007, http://www.denverpost.com/business/ci_7612850 ("One-hundred eighty-two billion or more in profit was shared by brokers, lenders and investment banks.").

[37] JAMES LARDNER, BEYOND THE MORTGAGE MELTDOWN: ADDRESSING THE CURRENT CRISIS AND AVOIDING A FUTURE CATASTROPHE 9 (2008), http://www.demos.org/pubs/housingpaper_6_24_08.pdf.

marketplace.[38] But as the amount of credit in the world grew, it continued to search out new markets.[39] The feds encouraged looking to the housing market and not at the treasury.[40] The most undeveloped housing markets in the United States were in the Black and Latino communities, markets that were still experiencing the effects of redlining—reverberations from policies in place decades before.[41] The securitization of the mortgage market created a constant desire for new loan originations, pushing bankers and brokers to make more loans and originate loans faster.[42] The subprime and Alt-A market became the ideal product targeted to untapped lending markets.[43] The subprime market grew from $150 billion in 1998 to more than $625 billion by 2005.[44] Similar growth was seen in the Alt-A loan market, which grew by 660% in five years, from $60 billion in 2001 to $400 billion in 2006.[45]

Many communities of color provided the untapped markets for these subprime loans.[46] Lender behavior grew more reckless, with a surge in hybrid option ARM subprime loans making up 80% of the subprime market in 2005 and 2006.[47] There was an assumption that housing prices could continue to rise.[48] Even if an individual could not pay, the underlying value of the property would protect the investor and the investment pool.[49] This was not just an assumption by lenders; it was also shared by Alan Greenspan.[50] As new institutions and brokers got into the housing credit market, there were few regulations in these uncharted waters.[51] There were a number

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[38]*Id.* at 5 ("regulatory bodies favored the short-term interests of bankers and lenders over the public interest").

[39]*Id.* at 9.

[40]*See Brokers*, *supra* note 29.

[41]*See* LARDNER, *supra* note 37, at 8, 15-16.

[42]*Id.* at 20.

[43]Basically, Alt-A loans are considered riskier than A-paper, or "prime," and less risky than "subprime," the riskiest category.

[44]IRA GOLDSTEIN & DAN UREVICK-ACKELSBERG, THE KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, SUBPRIME LENDING, MORTGAGE FORECLOSURES AND RACE: HOW FAR HAVE WE COME AND HOW FAR HAVE WE TO GO? 5 (2008), http://4909c99d35cada63e7f757471b7243be73e53e14.gripelements.com/pdfs/goldstein_trf_paper.pdf.

[45]*Id.*

[46]AMAAD RIVERA ET AL., UNITED FOR A FAIR ECONOMY, FORECLOSED: STATE OF THE DREAM 2008 (2008), http://www.faireconomy.org/files/StateOfDream_01_16_08_Web.pdf.

[47]LARDNER, *supra* note 37, at 7.

[48]*See* Bruce Bartlett, *Who Saw the Housing Bubble Coming?*, FORBES, Jan. 2, 2009, http://www.forbes.com/2008/12/31/housing-bubble-crash-oped-cx_bb_0102bartlett.html.

[49]*See id.*

[50]*Id.*

[51]*See* Anthony Faiola et al., *What Went Wrong*, THE WASH. POST, Oct. 15, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/10/14/AR2008101403343_pf.html.

of wrong assumptions. One was that the market would regulate itself.[52] Another was that there would not be a housing bubble nationwide.[53] We were using the equity and growth in housing in part to make up for the stagnant wage structure that existed since 1973.[54] Inevitably, risky loans began to go into default.[55] Foreclosure growth choked the housing market, suppressed home values, devalued securities and set off shock waves throughout the national and global economies.[56] The systemic and reinforcing nature of this widening crisis was described by the think tank Demos in their report, *Beyond the Mortgage Meltdown*:

> As prices fall, household wealth erodes, consumers spend less, businesses cut back, jobs disappear, and still more people have trouble making mortgage payments. These are the pathways that led from last year's mortgage crisis to this year's looming recession. They could be carrying us toward something bigger than a recession: a mutually reinforcing downward spiral in the housing market and broader economy.[57]

Their 2008 prediction was proven correct, with the fall of 2008 seeing an escalating spiral of economic disruption.[58] The foreclosure crisis decimated the perceived wealth in the market's mortgage backed securities, exposing the financial risk and poor health of some of our major financial institutions. Trillions in wealth evaporated on Wall Street and some of the oldest and largest corporations in the world have faced bankruptcy (or currently teeter on insolvency).[59] As the economic consequences of this phenomenon grows, diminished home prices and job losses will

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[52]*Id.*

[53]*See* Krishna Guha, *Greenspan Alert on US House Prices*, FINANCIAL TIMES, Sept. 16, 2007, http://www.ft.com/cms/s/0/31207860-647f-11dc-90ea-0000779fd2ac.html?nclick_check=1.

[54]JARED BERNSTEIN & LAWRENCE MISHEL, ECONOMIC POLICY INSTITUTE, ECONOMY'S GAINS FAIL TO REACH MOST WORKERS' PAYCHECKS (2007), http://www.epi.org/publications/entry/bp195/. Real wage trends, after adjusting for inflation, have remained largely stagnant for low and high wage workers between 1973 and 2007; whereas the real wage trends for high wage workers during the same time has increased. *Id.*

[55]*See* ROGERS, *supra* note 3.

[56]Roger Altman, *The Great Crash, 2008: A Geopolitical Setback for the West*, FOREIGN AFFAIRS, Jan./Feb. 2009, http://www.foreignaffairs.org/20090101faessay88101/roger-c-altman/the-great-crash-2008.html.

[57]LARDNER, *supra* note 37, at 3.

[58]Alexandra Twin, *Another Huge Dow Loss*, CNNMONEY.COM, Oct. 15, 2008, http://money.cnn.com/2008/10/15/markets/markets_newyork/index.htm; Les Christie, *U.S. Homes Lose $2 Trillion In Value In '08*, CNNMONEY.COM, Dec. 16, 2008, http://money.cnn.com/2008/12/15/real_e state/underwater_borrowers_near_12million/index. htm.

[59]Jonathan D. Glater, *Advantages of Corporate Bankruptcy Is Dwindling*, N.Y. TIMES, Nov. 18, 2008, at B1; Jessica Dickler, *Personal Bankruptcies on the Rise*, CNNMONEY.COM, http://money.cnn.com/2008/10/24/pf/bankruptcy_filings/index.htm; Andrew Ross Sorkin, *Lehman Files for Bankruptcy, Merrill Is Sold*, N.Y. TIMES, Sept. 14, 2008, at A1; Katie Merx, *GM Grapples to Avoid Filing Bankruptcy as Cash Vanishes*, DETROIT FREE PRESS, Nov. 8, 2008 (West).

encourage more foreclosures, fueling and feeding the systemic crisis already underway.[60] Currently, nearly one in ten mortgage holders are either in foreclosure or delinquent on payments.[61] Recent U.S. Federal Reserve estimates indicate that throughout 2009 the U.S. economy will continue to shrink, reaching a national unemployment rate of nearly 9% by the end of 2009.[62] At this state only a sustained and significant government intervention can stop the widening crisis.

This crisis clearly exposes the delicate and interconnected systems which dominate our twenty-first century global society: systems which, for better or for worse, link the fate of all communities, nations and people. Analyzing these systemic connections can help us understand how poor lending practices in places like East Cleveland can be fueled by the behavior of financial titans on Wall Street and conversely, where escalating foreclosures in the inner city can escalate and wreak havoc on the entire U.S. and global economies. We live in a new age, which requires a new way of thinking, a new paradigm for understanding that we impact the rest of the world and the world impacts us.

B. Global Systems of Marginalization and an Advocacy Response

When systems fail, marginalized communities bear the brunt of this failure. Often, as global systems change or are reordered, marginalized communities bear the burden of this change, while the benefits accrue to the elite.[63] As global commerce has expanded and systems around the globe have changed, inequality has grown, primarily in nations with poor social safety nets, poor social norms and policies that do not support full societal membership.[64] Just as the globalization of industry has spurred the growth of sweatshops in the Global South, the growth of the credit and financial crisis disproportionately burdened our marginalized communities in the U.S. Larger systemic challenges facing our society are often first evident in marginalized communities or among marginalized populations. This phenomenon is described in the *Miner's Canary* by Lani Guiner and Gerald Torrez.[65] If we would

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[60]Pallavi Gogoi et al., *Bailout Plan: Foreclosure Issue Still a Major Hurdle*, USA TODAY, Feb. 2, 2009, http://www.usatoday.com/money/economy/2009-02-10-bailout-details_N.htm.

[61]Les Christie, *7.5 Million Homeowners "Underwater,"* CNNMONEY.COM, Oct. 31, 2008, http://money.cnn.com/2008/10/30/real_estate/underwater_borrowers/index.htm; Alan Zibel, *Record 1 in 10 Americans Are Delinquent on Mortgage,* ASSOCIATED PRESS, Dec. 5, 2008, http://www.cleveland.com/realestatenews/index.ssf/2008/12/record_1_in_10_americans_are_d.html.

[62]Jeannine Aversa, *Economy Will Sink Further, Fed Says*, ASSOCIATED PRESS, Feb. 19, 2009, http://www.dispatch.com/live/content/national_world/stories/2009/02/19/fed_economy_0219.ART_ART_02-19-09_A1_E4CVCS6.html?sid=101.

[63]JOHN A. POWELL & S.P. UDAYAKUMAR, RACE, POVERTY AND GLOBALIZATION, POVERTY AND RACE, POVERTY AND RACE RESEARCH ACTION COUNCIL (2000).

[64]PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL 129 (2007); Paul Krugman, Op-Ed, *For Richer*, N.Y. TIMES, Oct. 20, 2002, § 6, at 62; Christopher Jencks, *Why Do So Many Jobs Pay So Badly?*, *in* INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA AND ITS POISONOUS CONSEQUENCES 129-131 (James Lardner & David A. Smith eds., 2005).

[65]LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 12 (2003).

only address these systemic challenges early, we would prevent them from expanding to our friends and neighbors. True fair housing, integration with opportunity, and sustainable and fair credit practices would have helped us avoid much of the global consequences of the housing and credit crisis. In responding to these systemic challenges we must focus our energies on these communities most impacted by the crisis, the communities that are disproportionately burdened by systemic discrimination or "structural racialization."[66]

The current housing and credit crisis presents a powerful case study of how systems can produce disparate outcomes for marginalized communities. Fair housing advocates are at the forefront of dealing with this crisis, but many are at a loss when attempting to understand how to intervene in the complex global dynamics which created the crisis. Actions in Congress, on Wall Street and in global financial centers around the globe resulted in discriminatory lending behaviors, vacant properties and community distress in our backyards. Although this systemic crisis presents an unusual challenge for traditional fair housing advocates, we must not shrink away from the challenge just because of its systemic complexity and global reach.

Our communities are part of the global system and vulnerable to a new set of challenges which are dynamic and interactive. We argue that these systemic challenges will become more frequent in the future, especially as our global world becomes more interconnected. The broader social justice community must be prepared to learn how to effectively intervene into these new global systemic challenges. Be it foreclosures created by the credit crisis, job losses due to globalization or another challenge like climate change, advocates must assure that marginalized communities are actively involved in designing solutions to these challenges. In the case of the housing and credit crisis, as fair housing advocates we must not only be at the table but at the forefront as we redesign critical housing and credit systems and institutions (such as Fannie Mae and Freddie Mac).

III. THE RACIAL FOOTPRINT OF THE CREDIT CRISIS

There is clear and irrefutable evidence that in the case of the housing and credit crisis, communities of color were disproportionately burdened by the crisis.[67] Race is a critical and salient lens to understand the current credit crisis, and the current crisis is a significant lens to view the overall state of fair housing for communities of color. What is less clear is *why*. Conservatives might argue that it is because the Community Reinvestment Act (CRA) caused banks to make bad loans to irresponsible people.[68] While there certainly were many bad loans, they were not

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[66]Structural racialization refers to the ways in which the joint operations of institutions produce racialized outcomes. JOHN A. POWELL, STRUCTURAL RACIALIZATION AND IMPLICIT SOCIAL COGNITION (2008), http://74.125.95.132/search?q=cache:vL406C8yV5cJ:4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/presentations/2008_6_19_NLADA_Plenary_SR_and_IB.ppt+structural+racialization&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a.

[67]*See* RIVERA, *supra* note 46.

[68]*See* Ben S. Bernanke, Chairman, Federal Reserve System, The Community Reinvestment Act: Its Evolution and New Challenges, Speech at the Washington D.C. Community Affairs Research Conference (Mar. 30, 2007).

caused by the CRA, but more the result of the new global credit market and the lending frenzy it was creating. Liberals are more likely to see discrimination against communities of color as the reason for the high foreclosure race in these communities.[69] While this may have been a factor, in some cases there was a less nefarious goal of lenders trying to tap an undercapitalized market.[70] This desire to extend credit to these undercapitalized markets was not only an appropriate goal then—it continues to be an appropriate goal *now*. What was missing in this extension of credit was an evaluation of the terms. Credit needs to be extended to these historically credit maligned communities, but the terms of credit need to be sustainable and fair. Instead of offering sustainable and fair credit, our pricing structure for dealing with risk in underserved communities was to create exploitative credit terms that set the borrower up for failure.[71] The following section of this paper reviews the factors contributing the racialized impact of the credit crisis and reviews the overall impact of this crisis to both communities of color and fair housing in our nation. We close this section with a case study of Cleveland, one of the epicenters of the subprime crisis, looking at the intersection of race, fair housing and the credit crisis in Cleveland.

A. Race and the Credit Crisis: What the Evidence Finds

Across the nation, communities of color were heavily burdened by both discriminatory lending and foreclosures.[72] While some people should not have gotten a loan, many received the wrong type of loan and unsustainable terms. Nationally, estimates found that people of color were more than three times as likely to receive a subprime loan and approximately half of loans given to people of color were subprime.[73] Research by the Center for Responsible Lending found in 2006 that 52% of home loans for African American families were subprime; these figures were 40% for Latino families and 22% for White families.[74] In 2005, Federal Reserve data found 55% of Blacks who took out mortgages received subprime products, compared to 17% of Whites and Asians.[75] Even after factoring out for financial differences between White and Non-White borrowers, people of color were more than 30% more likely to receive a subprime loan.[76]

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[69]Posting of Jeff Tone to The Liberal Curmudgeon Blog, *Republicans Played Active Role in Subprime Loan Mess*, http://www.theliberalcurmudgeon.com/2008/10/republicans-played-active-role-in.html (Oct. 12, 2008, 15:30 EST).

[70]*See* RIVERA, *supra* note 46.

[71]*See* Babassa, *supra* note 2.

[72]*See* JAMES H. CARR, NATIONAL COMMUNITY REINVESTMENT COALITION, RESPONDING TO THE FORECLOSURE CRISIS, 18 HOUSING POLICY DEBATE (2007).

[73]*See* RIVERA, *supra* note 46.

[74]CENTER FOR RESPONSIBLE LENDING, A SNAPSHOT OF THE SUBPRIME MARKET 2 (2007), http://www.responsiblelending.org/pdfs/snapshot-of-the-subprime-market.pdf.

[75]Sue Kirchoff & Judy Keen, *Minorities Hit Hard by Rising Cost of Subprime Loans*, USA TODAY, Apr. 25, 2007, http://www.usatoday.com/money/economy/housing/2007-04-25-subprime-minorities-usat_N.htm.

[76]DEBBIE GRUENSTEIN BOCIAN, KEITH S. ERNST & WEI LI, CENTER FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME

The footprint of these loans was not only racially disparate but also geographically disparate, with communities of color victim to significant concentrations of subprime and other non-traditional or predatory loan products.[77] Research by the U.S. Federal Reserve from 2004 to 2006 found that communities with significant minority populations received large concentrations of subprime loans.[78] With a strong link between subprime or predatory loans and foreclosure, people of color and communities of color are being devastated by the rise in foreclosures.[79] Early in the foreclosure crisis, approximately one in ten Black and Latino borrowers were affected by foreclosure, compared to less than one in twenty White borrowers.[80] Race and the credit crisis are tightly interwoven, with communities of color and people of color explicitly targeted by poor lending practices and most burdened by the escalating crisis.

B. Race and the Crisis: The Residual Impact of History and The Ghost of Redlining

Why were people of color and communities of color so disproportionately impacted by the crisis? To answer this question, we must look at both the current challenges facing communities of color and the residual impact of historical patterns of disinvestment and discrimination in these communities. Historically, communities of color were systematically denied credit through public and private policies.[81] The notorious FHA "redlining" maps of the 1930's illustrated government sanctioned policy to rank racially mixed or segregated communities of color as hazardous investments and discourage financing for these communities.[82] This publically sanctioned disinvestment was followed by widespread private disinvestment and discrimination in these communities, producing a long term era of undercapitalization for our nation's communities of color.[83] This era of undercapitalization was followed by a period of capitalization through discriminatory lending products.[84] Jesus Hernandez at the University of California–Davis identifies three eras of undercapitalization inflicted on communities of color.[85] First, from

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MORTGAGES 3 (2006), http://www.responsiblelending.org/pdfs/rr011-Unfair_Lending-0506.pdf.

[77]RICK COHEN, THE KIRWAN INSTIT. FOR THE STUDY OF RACE AND ETHNICITY, NAT'L CONVENING ON SUBPRIME LENDING, FORECLOSURE AND RACE, A STRUCTURAL RACISM LENS ON SUBPRIME FORECLOSURES AND VACANT PROPERTIES 4 (2008).

[78]GOLDSTEIN & UREVICK-ACKELSBERG, *supra* note 44.

[79]LARDNER, *supra* note 37, at 15-6.

[80]ELLEN SCHLOEMER ET AL., CENTER FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 23 (2006), http://www.responsiblelending.org/pdfs/foreclosure-paper-report-2-17.pdf.

[81]GREGORY D. SQUIRES, CAPITAL AND COMMUNITIES IN BLACK AND WHITE: THE INTERSECTION OF RACE, CLASS, AND UNEVEN DEVELOPMENT 52 (1994).

[82]*See id.*

[83]*See id.*

[84]*See id.*

[85]JESUS HERNANDEZ, WRITTEN TESTIMONY SUBMITTED TO THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY CONNECTING SEGREGATION TO CONTEMPORARY

1930 to 1950, publically sanctioned redlining and restrictive covenants undercapitalized communities of color and reinforced segregation.[86] In the second era, from 1950 to 1980, public policies such as urban renewal and the federal highway program drove White flight, decimating assets in communities of color.[87] Finally, in the post-1980 "reverse redlining" era, a string of discriminatory lending products were targeted into these historically undercapitalized and segregated communities.[88] Hernandez found a concentration of subprime and other high cost loans in the traditionally redlined communities in California.[89] In the age of reverse redlining, credit discrimination shifted from outright denial to the emergence of a dual credit system.[90] This dual credit system offered products for the majority at prime rates but provided credit to marginalized borrowers at excessively high interest rates and cost.[91]

After being starved of credit and investment for nearly half a century, predatory actors infiltrated these communities with a number of predatory services, from payday lenders to furniture rental stores, from "buy here, pay here" auto dealers to subprime loans. Residents of these segregated communities were more likely to be lower income or economically marginalized, placing them in a precarious financial position, extremely sensitive to sudden losses in income or unexpected expenses. Homeowners of color in these communities provided great targets for mortgage brokers.[92] These homeowners had some limited home equity but were lower income; so lenders who aggressively marketed and promised cash back via refinancing provided an enticing offer for those concerned with other financial troubles. This phenomenon may help explain why half of all subprime loans were actually refinance loans.[93] Due to relatively low home ownership rates and little experience with mortgage lending, borrowers in these communities were less aware that they were being given unusual or high cost loan terms.[94]

HOUSING CREDIT PRACTICES AND FORECLOSURES: A CASE STUDY OF SACRAMENTO 4 (2008), http://www.prrac.org/projects/fair_housing_commission/los_angeles/hernandez.pdf.

[86]*See id.*

[87]*See id.* at 7.

[88]*See id.* at 10-11; *see also* Gregory D. Squires, *Predatory Lending: Redlining in Reverse*, 139 SHELTERFORCE ONLINE, Jan./Feb. 2005, http://www.nhi.org/online/issues/139/redlining.html.

[89]HERNANDEZ, *supra* note 85, at 10.

[90]Goliath.com, *California Banks Continue to Fail African American and Latino Borrowers: Mortgage Lending Study Reveals Dual Credit System*, http://goliath.ecnext.com (last visited Apr. 6, 2009).

[91]*See id.*

[92]GOLDSTEIN & UREVICK-ACKELSBERG, *supra* note 44.

[93]CENTER FOR RESPONSIBLE LENDING, 14 SUBPRIME LENDING: A NET DRAIN ON HOMEOWNERSHIP (2007), http://www.responsiblelending.org/pdfs/Net-Drain-in-Home-Ownership.pdf.

[94]DEBBIE GRUENSTEIN BOCIAN, KEITH S. ERNST & WEI LI, CENTER FOR RESPONSIBLE LENDING, STEERED WRONG: BROKERS, BORROWERS, AND SUBPRIME LOANS (2008),

Given financial incentives for pushing lucrative subprime products, brokers exploited these vulnerabilities, using aggressive marketing in these communities to lure in new borrowers and then steer inexperienced borrowers into high cost loan products.[95] By the late years of the subprime loan era, lenders were steering nearly half of borrowers who qualified for prime credit into subprime products.[96] Historical undercapitalization created communities ripe for exploitation by unfair lending practices; subprime loans are just a more recent and extreme manifestation of discriminatory credit concentrated in vulnerable communities.[97]

In the end, a perfect storm of systemic barriers to opportunity produced widespread vulnerability in communities of color.[98] As lenders looked to expand the pool of borrowers to fuel the securitization fire that was overtaking Wall Street, these communities provided perfect targets for non-traditional and predatory lending products.[99] As a result, communities of color became both the most exploited population in respect to this crisis—the root of escalating foreclosures which eventually ensnared our entire housing market and economy.[100]

C. Why Is this Crisis so Damaging to Communities of Color?

Before the current housing and credit crisis, a number of fair housing challenges degraded access to opportunity for people of color.[101] The damage inflicted upon communities of color as a result of the credit and housing crisis will significantly frustrate fair housing goals and exacerbate many of these existing conditions. As we look toward the future of fair housing, we must not only take stock of the ongoing fair housing challenges that burdened communities of color prior to the crisis, but also assess the direct impacts of today's crisis on the fair housing challenges facing these communities in the future.

1. Fair Housing Challenges Pre-Credit Crisis

Heightened attention has been focused on the fair housing implications of credit, lending, and foreclosure in light of the credit and housing crisis.[102] This additional

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http://www.responsiblelending.org/pdfs/steered-wrong-brokers-borrowers-and-subprime-loans.pdf; *see also* LARDNER, *supra* note 37.

[95]*See* LARDNER, *supra* note 37.

[96]Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007, at A1.

[97]Richard Williams et al., *The Changing Face of Inequality in Home Mortgage Lending*, *in* 52 SOCIAL PROBLEMS 181-208 (2005).

[98]*See id.*

[99]*See id.*

[100]*See id.*

[101]*See* JONATHAN BROWN & CHARLES BENNINGTON, RACIAL REDLINING: A STUDY OF RACIAL DISCRIMINATION BY BANKS AND MORTGAGE COMPANIES IN THE UNITED STATES, GIS FOR EQUITABLE AND SUSTAINABLE COMMUNITIES (1993), http://public-gis.org/reports/redindex.html.

[102]john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605 (2008).

energy and attention is needed, but fair housing scholars and advocates must continue to focus on the preexisting fair housing challenges plaguing communities of color. Broadly speaking, although there have been some victories and progress in the forty years after the enactment of the Fair Housing Act, our nation has still fallen far short of meeting the goal of true fair housing and integration with opportunity for people of color.[103] Minority suburbanization and the slow growth of minority homeownership rates must be placed in the context of persistent racial segregation, extremely racialized concentrated poverty, excessive housing cost burdens for people of color and increasing rates of school segregation.[104]

Consider that in 2000, nearly one in ten Blacks living in the 100 largest metropolitan areas were living in high poverty neighborhoods.[105] Three out of four of the three million people living in concentrated poverty in 2000 were Black or Latino.[106] The fact that more minorities can be found in the suburbs than the inner city has not lessened these numbers; in fact our suburbs are now home to more people in poverty than our central cities.[107] Research indicates that minorities who leave for the suburbs are more likely to be re-concentrated in distressed suburban communities.[108] Integration has become more challenging as our metropolitan areas are becoming more polarized, with middle income neighborhoods on the decline.[109] Residential rates of segregation remain high, with dissimilarity index results for our nation's metropolitan areas remaining at .65, indicating that nearly two out of three White or Black residents would need to relocate to produce integrated neighborhoods.[110] White dissimilarity rates have dropped faster in smaller, less diverse metropolitan areas; in our larger diverse metropolitan regions the decline has

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[103] *Id.*

[104] john a. powell, *Race, Place and Opportunity*, 19 AM. PROSPECT, A21-23 (2008).

[105] U.S. Census Bureau, Census 2000 Special Reports, *Areas with Concentrated Poverty: 1999* (July 2005), www.census.gov/prod/2005pubs/censr-16.pdf (last visited Mar. 9, 2009).

[106] Paul Jargowsky, *Studding Progress, Hidden Problems: The Dramatic Decline of Concentrated Poverty in the 1990's*, THE BROOKINGS INSTITUTION (2003), http://www.brookings.edu/es/urban/publications/jargowskypoverty.htm.

[107] Haya El Nasser, *Minorities Reshape Suburbs*, USA TODAY, July 9, 2001, http://www.usatoday.com/news/nation/census/2001-07-09-burbs.htm.

[108] Samantha Friedman & Emily Rosenbaum, *Does Suburban Residence Mean Better Neighborhood Conditions for All Households?: Assessing the Influence of Nativity Status and Race/Ethnicity*, 36 SOCIAL SCIENCE RESEARCH 22-24 (2007); Myron Orfield & Thomas Luce, *Minority Suburbanization and Racial Change: Stable Integration, Neighborhood Transition, and the Need for Regional Approaches*, REPORT OF INSTITUTE ON RACE AND POVERTY (presentation at the *Race and Regionalism Conference*, MN May 6-7, 2005); Monifa Thomas, *Suburbs No Guarantee of Opportunity: Affluent Blacks Leaving the City Tend to Cluster in Just a Few Communities, but May Offer Limited Economic Benefits or Access to Good Schools, Jobs*, CHI. SUN-TIMES, Nov. 15, 2005, at 6.

[109] George Galster, et al., *Where Did They Go? The Decline of Middle Income Neighborhoods in Metropolitan America*, THE BROOKINGS INSTITUTION (2006), www.brookings.edu/reports/2006/06poverty-booza.aspx.

[110] E. Glaeser & J. Vigdor, *Racial Segregation in the 2000 Census*, THE BROOKINGS INSTITUTION (2001), http://www.brookings.edu/dybdocroot/es/urban/census/glaeser.pdf.

been at half the rate found in smaller less diverse areas.[111] Despite changes in our metropolitan landscape in the forty years since the enactment of the Fair Housing Act, residential segregation—most notably for African Americans—remains persistent, and true integration into communities of opportunity for most people of color remains an elusive goal.

A complex web of factors contributes to persistent denial of fair housing and integration with opportunity for communities of color.[112] These dynamic, persistent and reinforcing challenges existed before the current credit and housing crisis and will continue to persist after the crisis. First, we must remember that the housing market serves people of color poorly; our market rarely builds and provides housing at prices which meet the income conditions found in the Black and Latino communities. Even before addressing the policy and personal contributors to denial of housing opportunity, we must be clear that our current housing system is failing most people of color. For example, our research here in Franklin County, OH (home county to Columbus) found that in the early part of the past decade, more than 90% of all new single family homes were unaffordable to the median income Black and Latino family in the region.[113] In 2000, more than 40% of African American households in the State of Ohio had "housing problems" related to affordability, crowding, or substandard housing.[114] Similar conditions can be found in housing markets throughout the nation.

Personal and institutional discrimination in the housing market continues.[115] Steering and "editorializing" by realtors reinforces patterns of residential segregation, while outright discrimination in the market has declined but is still problematic.[116] But public policy with respect to housing, land use, zoning, development and education plays a profound role in upholding residential segregation and denial of housing opportunity for people of color.[117]

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[111]John Logan, *Ethnic Diversity Grows: Neighborhood Integration Lags Behind*, LEWIS MUMFORD CENTER FOR COMPARATIVE URBAN AND REGIONAL ANALYSIS (2001), http://mumford1.dyndns.org/cen2000/report.html.

[112]*See* BROWN & BENNINGTON, *supra* note 101.

[113]john a. powell & Jason Reece, The Kirwan Inst. for the Study of Race and Ethnicity, Housing Need and Opportunity in Franklin County, Ohio: An Assessment of Housing Need and Opportunity Based Housing for Franklin County, Ohio (2005), http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/BREADHousingReport.pdf.

[114]U.S. Department of Housing and Urban Development's Consolidated Plan, CHAS 2000 Database, http://www.huduser.org/datasets/cp.html (last visited Mar. 9, 2009).

[115]*See* John Yinger, *Housing Discrimination Is Still Worth Worrying About*, 9 HOUSING POLICY DEBATE 893-927 (1998); *see also The Crisis of Segregation: 2007 Fair Housing Trends Report*, NATIONAL FAIR HOUSING ALLIANCE, Apr. 30, 2007, www.nationalfairhousing.org.

[116]George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the US in 2000*, 71 J. AM. PLANNING ASS'N 251, 253 (2005).

[117]*See* john a. powell, *Sprawl, Fragmentation, and the Persistence of Racial Inequality: Limiting Civil Rights by Fragmenting Space*, *in* URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY RESPONSES (Gegory Squires ed. 2002); john a. powell, *2002 Report of the Citizens' Commission on Civil Rights: Rights at Risk, Equality in an Age of Terrorism*, *in*

Although the days of explicitly sanctioned government housing discrimination are gone, a number of facially race neutral factors produce clear racially disparate and discriminatory outcomes for people of color.[118] Localism and exclusionary zoning (and similar land use policies) produce severe obstacles to the development of affordable and rental housing, which denies access to opportunity-rich communities for most people of color.[119] Despite clear evidence of the racially disparate outcomes of exclusionary land use policies, the courts are split as to whether there must be intent. While Title VIII has been interpreted to not require intent in some circuits, others have read intent into the statutes. [120]

In addition, land use policies and infrastructure policies which encourage suburban sprawl have heighted the opportunity divide facing inner city communities of color.[121] Court decisions which have limited the possibility of interregional school desegregation (focusing only on intercity desegregation) have contributed to the racial segregation in our metropolitan regions and encouraged White flight.[122] Finally, subsidized housing (which in metropolitan areas disproportionately serves people of color) is largely concentrated in distressed and segregated neighborhoods.[123] Although the era of traditional public housing towers is ending, much of our nation's subsidized housing inventory in metropolitan areas is found in our central cities, usually in more segregated and higher poverty neighborhoods.[124] In 2000, 75% of federally subsidized housing and 59% of Low Income Housing Tax Credit (LIHTC) units were located in central cities, while only 37% of the nation's population resides in central cities.[125] In 2000, the average metropolitan neighborhood had a poverty rate of 13%, while the average neighborhood with

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URBAN FRAGMENTATION AS A BARRIER TO EQUAL OPPORTUNITY (2002); George Galster, *Residential Segregation in American Cities: A Contrary Review*, 7 POPULATION RESEARCH AND POLICY REVIEW 93-112 (1988).

[118]Menendian et al., *A Report to the U.N. Committee for the Elimination of Racial Discrimination On the Occasion of Its Review of the Periodic Report of the United States of America* (Feb. 2008), http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN2.doc.

[119]*See* Pendall, Rolf, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLANNING ASS'N 125-42 (2000); *powell, 2002 Report of the Citizens' Commission on Civil Rights*, *supra* note 64.

[120]Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 287 (1977), United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1975).

[121]john a. powell, *Achieving Racial Justice: What's Sprawl Got to Do with It?*, POVERTY & RACE Sept.-Oct. 1999, http://www.prrac.org/full_text.php?text_id=292&item_id=1841&newsletter_id=46&header=Search%20Results.

[122]*See* Milliken v. Bradley, 418 U.S. 717 (1974).

[123]*See* Florence W. Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, CITYSCAPE, 1999, http://www.huduser.org/periodicals/cityscape.html.

[124]*See id.*

[125]Lance Freeman, *Siting Affordable Housing: Location and Neighborhood Trends of Low Income Housing Tax Credit Developments in the 1990s*, THE BROOKINGS INSTITUTION (2004), http://www.brookings.edu/urban/pubs/20040405_Freeman.pdf.

LIHTC units had a poverty rate of approximately 20%. For the average neighborhood with other types of subsidized housing, the poverty rate was 29%.[126]

2. New Challenges Post-Credit Crisis

The foreclosure crisis is expanding housing pressure on families of color, creating widespread financial hardship for homeowners of color and decimating many communities of color. Families immediately impacted by foreclosures face great economic hardship and dislocation, and must seek new housing in a tightening rental market.[127] Renters are also being unexpectedly displaced as inner city property investors are allowing properties to go into default.[128] The social fabric of neighborhoods is ripped apart when homeowners and renters are displaced and children are forced to relocate to new schools.[129] Communities of color, many of which had faced a number of challenges already, such as high poverty, disinvestment or vacant properties prior to the foreclosure epidemic, are now facing extreme conditions. The foreclosure crisis is producing widespread vacant properties, which act like a toxin in the urban environment, poisoning the health of the entire community.[130] The growth in vacant properties is further dragging down property values, creating extensive blight and safety risks in communities of color and in some cases spiraling stable neighborhoods into a permanent state of distress, as well as undermining entire cities.[131] For people of color and others living segregated in these neighborhoods, the crisis is creating widespread burdens, ensnaring all residents, even those who are not facing foreclosure.[132] The impact of living in one of these neighborhoods is cumulative and not adequately captured by just focusing

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[126] *Id.*

[127] David Rothstein, *Collateral Damage: Renters in the Foreclosure Crisis*, POLICY MATTERS OHIO, June 2008, http://www.policymattersohio.org/CollateralDamage2008.htm; Danilo Pelletiere & Keith Wardip, *Renters and the Housing Credit Crisis*, POVERTY & RACE July/Aug. 2008, https://www2398.ssldomain.com/nlihc/doc/Pelletiere-Wardrip-7-8-08 PRRAC.pdf; DANILO PELLETIERE, RENTERS IN FORECLOSURE: DEFINING THE PROBLEM, IDENTIFYING SOLUTIONS, NATIONAL LOW INCOME HOUSING COALITION (2009), https://www2398.ssldomain.com/nlihc/doc/renters-in-foreclosure.pdf.

[128] *See* Rothstein, *supra* note 127.

[129] *See id.* at 10.

[130] *See* David Kraut, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139 (1999).

[131] *See* Scott Simon, *In Cleveland, Foreclosures Decimate Neighborhoods*, National Public Radio (May 24, 2008), http://www.npr.org/templates/story/ story.php?storyId=907 45303; Robert Gavin, *As Foreclosures Widen, a Neighborhood Erodes, Crisis Tests Many in North Lawrence*, THE BOSTON GLOBE, Oct. 7, 2007, http://www.boston.com/realestate /news/articles/2007/10/07/as_foreclosures_widen_a_neighborhood_erodes/; Kraut, *supra* note 130; William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J. CRIM. JUST. 481 (1993); R. TAYLOR & A. HARRELL, PHYSICAL ENVIRONMENT AND CRIME, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT, Jan. 1996, http://www.ncjrs.gov/pdffiles/physenv.pdf.

[132] Kraut, *supra* note 130, at 1143-52.

on the number of home in foreclosures; residents face a variety challenges outside of housing, including education, economic health, and public health.[133]

Research also finds the crisis will have significant impacts on the racial wealth gap in the U.S. In 2000, the U.S. Census Bureau studies found the disparity between assets held by White households and Black households to exceed 900%, thus for every $1 held in assets for Blacks, Whites held $9 in assets.[134] Home equity is the primary source of assets and wealth for American households, therefore disparity in home equity is a significant contributor to the wealth gap.[135] Wealth is critical to advancement and stability in our society and a far more important indicator of financial well being than income.[136] Due to assets lost directly from foreclosure and the home equity losses from surrounding foreclosures, the wealth impacts of the crisis on people of color are predicted to be tremendous.[137] United for a Fair Economy's 2008 study on the wealth impacts of the crisis projected a net loss of nearly a quarter trillion dollars in assets for Black and Latino homeowners.[138] In addition, research indicates that Black and Latino borrowers are also draining their existing non home-based assets (e.g. savings and retirement accounts) to avoid foreclosure.[139] This phenomenon, described as "asset stripping," is depleting the other assets held by borrowers of color, just before they lose their home equity via foreclosure.[140]

The foreclosure crisis also could bring about a new wave of redlining or substantially restricted credit for borrowers and communities of color.[141] As financial attempts to stabilize and stem their exposure to future loss, credit will be more difficult to obtain.[142] People of color who have been directly impacted by

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[133] *Id.*

[134] U.S. Census Bureau, *Household Economic Studies, Net Worth and Asset Ownership 1998-2000*, http://www.censusbureau.biz/prod/2003pubs/p70-88.pdf (last visited Apr. 7, 2009).

[135] *Id.*

[136] *See* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (Univ. of Cal. Press 1999); *see also* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (Routledge 1995).

[137] Ed Cutlip, *Subprime Crisis Causing Historic Wealth Loss for People of Color*, MEDIA MOUSE, Feb. 5, 2008, http://www.mediamouse.org/news/2008/02/subprime-crisis.php.

[138] RIVERA, *supra* note 46.

[139] *See* Hannah Thomas, Brandeis University, Panel Presentation at the Kirwan Institute for the Study of Race and Ethnicity National Convening on Subprime Lending, Foreclosure and Race (Oct. 2, 2008) (transcript *available at* http://kirwaninstitute.org/events/archive/subprime-convening/agenda.php).

[140] *See id.*

[141] To live in a marginal neighborhood segregated from opportunity negatively impacts all people including Whites living in such neighborhoods. The impact of this creates a negative incentive to live in such neighborhoods.

[142] Valeria Fernandez, *Communities Foreclosed*, COLORLINES, Jan./Feb. 2009, http://colorlines.com/article.php?ID=475.

foreclosure will find their credit permanently marred for years.[143] Their neighborhoods will continue to be locked in a credit system that does not serve them well and does not lead to effective participation in the larger credit market.[144] Borrowers who have not been foreclosed upon themselves will still face a restrictive lending environment.[145] Borrowers of color seeking to refinance are also more likely to be impacted by declining home values and will be more prone to denial for refinance loans.[146] Some evidence of these trends is already apparent. Nationally, the racial divide is starting to widen in mortgage applications, with mortgage applications down 40% for Black and Latino borrowers, compared to 19% for White borrowers.[147] In Ohio, the racial divide in mortgage denials has grown between 2005 and 2007: in 2005, 29% of African American borrowers were denied purchase loans; this figure was up to 36% in 2007.[148] For Black borrowers looking to refinance, 50% were denied in 2005 compared to 60% in 2007.[149] An increasingly tight and restrictive credit market will only further expand the denial of prime credit to borrowers and communities and create further impediments to fair housing.

D. Cleveland, OH: A Case Study

Cleveland, like Detroit and other rust belt regions, is at the epicenter of the credit and housing crisis.[150] As one of the most segregated metropolitan areas, Cleveland suffers from a number of fair housing challenges which have long predated today's housing and credit crisis.[151] With a Black/White residential dissimilarity index

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[143] *See* Vikas Bajaj & Ron Nixon, *For Minorities, Signs of Trouble in Foreclosures*, THE NEW YORK TIMES, Feb. 22, 2006, http://query.nytimes.com/gst/fullpage.html?res =9505E7DD1E3EF931A15751C0A9609C8B63&sec=&spon=&pagewanted=all.

[144] *See* Simon, *supra* note 131.

[145] *See id.*

[146] *See* Bajaj & Nixon, *supra* note 143.

[147] Solomon Greene, Open Society Institute, Panel Presentation at The Kirwan Institute for the Study of Race and Ethnicity National Convening on Subprime Lending, Foreclosure and Race: Philanthropic Response to the Subprime and Foreclosure Crisis (Oct. 2, 2008) (transcript and presentation *available at* http://kirwaninstitute.org/events/archive/subprime-convening/agenda.php) (citing forthcoming data from the Furman Center for Real Estate and Urban Policy at NYU).

[148] JEFFREY D. DILLMAN ET AL., RACIAL AND ETHNIC DISPARITIES IN OHIO MORTGAGE LENDING, HOUSING RESEARCH & ADVOCACY CENTER (2006), http://www.thehousingcenter.org/docman/Download-document/15-Racial-and-Ethnic-Disparities-in-Ohio-Mortgage-Lending-2006.html; JEFFREY D. DILLMAN ET AL., PERSISTING RACIAL AND ETHNIC DISPARITIES IN OHIO MORTGAGE LENDING, HOUSING RESEARCH & ADVOCACY CENTER (2009), http://www.thehousingcenter.org/docman/Download-document/61-Persisting-Racial-Ethnic-Disparities-in-Ohio-Mortgage-Lending-February-2009.html.

[149] *Id.*

[150] LISA NELSON, A LOOK BEHIND THE NUMBERS: FORECLOSURE FILINGS IN CUYAHOGA COUNTY, THE FEDERAL RESERVE BANK OF CLEVELAND 1 (2008), http://www.clevelandfed.org/Our_Region/Community_Development/Publications/Behind_the_Numbers/2008/0908/ALBTN_V1_I1.pdf.

[151] *Id.*

ranking of .77, the Cleveland metropolitan area has the seventh highest rate of Black/White residential segregation in the nation.[152] The average African American household in the Cleveland region lives in a neighborhood with a 24% poverty rate in 2000, more than three times the poverty rate experienced by the average White household's neighborhood poverty rate of 7.5%.[153] In 2000, data from HUD indicated that nearly 40% of African Americans and 43% of Latinos living in Cuyahoga County had housing problems (primarily due to cost), compared to 24% of Whites.[154]

These preexisting fair housing challenges have been exacerbated by discriminatory lending and escalating foreclosures.[155] Black and Latino borrowers in the region are far more likely to be denied mortgage financing and refinancing.[156] In 2006, 13% of Whites were denied a home purchase loan, compared to 40% for Black borrowers and 23% for Latinos.[157] In 2006, more than half of Black borrowers were denied refinancing loans.[158] African American and Latino borrowers were also disproportionately burdened with high cost loans. In 2006, nearly 70% of home purchase loans and nearly 60% of refinance loans were high cost loans; these figures for White borrowers were 20% and 28% respectively.[159]

Further, high cost loans were disproportionately concentrated in the city's communities of color, primarily African American neighborhoods on Cleveland's

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[152]For rankings and dissimilarity indices see Lewis Mumford Center, Metropolitan Racial and Ethnic Change - Census 2000, http://mumford.albany.edu/census/WholePop/WP download.html (download data from "Option 2" by selecting "2000," "Entire metro area," and "Dissimilarity indices") (last visited Mar. 12, 2008).

[153]Lewis C. Mumford Center for Comparative Urban and Regional Research at the University of NY Albany, Measuring Neighborhood Inequity Graph, http://mumford.albany.edu/census/SepUneq/PublicSepDataPages/1680msaSep.htm (last visited Mar. 12, 2008).

[154]SOCDS CHAS Data, Housing Problems Output for Black Non-Hispanic Households, http://socds.huduser.org/CHAS/CHAS_java.htm (select "Housing Problems," "Ohio," "2000," "Black Non-Hispanic Households," "County," "Cuyahoga") (last visited Mar. 12, 2008); SOCDS CHAS Data, Housing Problems Output for Hispanic Households, http://socds.huduser.org/CHAS/CHAS_java.htm (select "Housing Problems," "Ohio," "2000," "Hispanic Households," "County," "Cuyahoga") (last visited Mar. 12, 2008); SOCDS CHAS Data, Housing Problems Output for White Non-Hispanic Households, http://socds.huduser.org/CHAS/CHAS_java.htm (select "Housing Problems," "Ohio," "2000," "White Non-Hispanic Households," "County," "Cuyahoga") (last visited Mar. 12, 2008).

[155]*See* JEFFREY D. DILLMAN ET AL., THE STATE OF FAIR HOUSING IN NORTHEAST OHIO: APRIL 2008, HOUSING RESEARCH & ADVOCACY CENTER (2008), http://www.thehousingcenter.org/Publications/Research-Reports.html.

[156]*See id.*

[157]*Id.*

[158]*Id.*

[159]*Id.*

East Side, where more than two out of three mortgages were high cost loans.[160] As a result of these lending disparities, foreclosures escalated throughout the region, with extreme concentrations of foreclosures and vacant properties in many of the region's urban communities of color.[161] Research by the Center on Urban Poverty and Community Development at Case Western Reserve University in 2008 found that one-third of subprime loans made in Cuyahoga County resulted in foreclosure (compared to a 4% default rate for prime loans) and that the top twenty subprime loan originators in 2005 produced 82% of all foreclosures.[162] Both low and high income Black borrowers were more likely to receive subprime loans, and 28% of all loans made in 2005 to Black borrowers resulted in foreclosures.[163] The cost of foreclosure is severe: a 2008 study released by Community Research Partners estimated the financial cost to the City of Cleveland as more than $35 million, due to the city's vacant properties.[164] Residents in foreclosure stricken neighborhoods are dealing with growing neighborhood blight, declining property values, increased crime, vandalism, and widening neighborhood instability.[165] Families who have been foreclosed upon are thrust into a difficult housing market and growing financial instability.

Fair housing advocates, local non-profits, neighborhood groups, and local governments have made significant efforts to stem the crisis in Cleveland and throughout Ohio.[166] But, these institutions do not have the resources to effectively stem the extent of the crisis. Prior to the economic stimulus bill passed in February of 2008, only $4 billion had been allocated by Congress to address the vacant property produced by the crisis via the Neighborhood Stabilization grants, while $700 billion was given to the financial sector to stabilize lenders.[167] For example,

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[160]For a map image of high interest loans in Cuyahoga County, see *Tracking High-Interest Lending*, CLEVELAND.COM NEWS, Mar. 12, 2009, http://www.cleveland.com/news/ wide/ index.ssf?lending0122.html.

[161]Dan Harkins, *Tattered; Rampant Foreclosures Have Torn the Very Fabric of the Region*, CLEVELAND SCENE, July 9, 2008, http://www.freetimes.com/ stories/15/62/tattered; Juliana Barbassa, *Report: Minorities Hit by Foreclosures*, USA TODAY, Mar. 6, 2008, http://www.usatoday.com/money/economy/housing/2008-03-06-minority-foreclose_N.htm.

[162]Mark Gillispie, *84% of Local Foreclosures are Subprime Loans*, THE PLAIN DEALER, June 23, 2008, http://blog.cleveland.com/metro/2008/06/cuyahoga_county_foreclosures_8.html.

[163]*Id.*

[164]COMMUNITY RESEARCH PARTNERS, $60 MILLION AND COUNTING: THE COST OF VACANT AND ABANDONED PROPERTIES TO EIGHT OHIO CITIES (2008), http://www.community researchpartners.org/uploads/publications//FullReport_Nonembargoed.pdf.

[165]*See* Simon, *supra* note 131.

[166]*See* Les Christie, *Foreclosure Focus: Why Cleveland?*, CNNMONEY.COM, Nov. 14, 2007, http://money.cnn.com/2007/11/12/real_estate/Cleveland_foreclosure_factors.

[167]David Herszenhorn, *Bailout Wins Approval; Democrats Vow Tighter Rules*, THE NEW YORK TIMES, Oct. 3, 2008, http://www.nytimes.com/2008/10/04/business/ economy/04bailout.html?partner=permalink&; Press Release, U.S. Department of Housing and Urban Development, Preston Allocates Nearly $4 Billion to Stabilize Neighborhoods in States and

resources like the Neighborhood Stabilization Funds are helpful, but the $25 million earmarked for the City of Cleveland does little to address the magnitude of Cleveland's vacant property challenge, produced by the foreclosure crisis.[168] The most recent plan proposed by the city for the funds is to demolish 1700 vacant homes and support other investments like community gardens and rental housing.[169] These are good goals, but given the limited resources provided by the federal government, these efforts will not be sufficient. Cuyahoga County had roughly 14,000 foreclosures in 2007 alone, and the U.S. Department of Housing and Urban Development estimated more than 23,000 vacant residential addresses were in the City of Cleveland in June of 2008.[170] Foreclosure prevention and mediation through "work outs" are viable strategies, and several non-profits in the region have been leaders in helping promote work outs.[171] However, national and state public programs to support this work are limited in scope and too little pressure has been applied to lenders to work out loans in lieu of foreclosure.[172] The institutional and policy arrangements that led to the conditions in Cleveland and other segregated markets are cumulative, interactive and historical. As stated earlier, the initial redlining of these communities started in the 1930s, '40s, and '50s.[173] This lack of appropriate credit led to a deteriorating neighborhood in a city with a declining tax base for essential services, including schools. With the explosion of credit, securitization and the push for new markets, these communities became the focus of poor lending, including inappropriate sub-prime and predatory products. To stem the tide of foreclosure is a critical intervention but isn't enough—this would still leave these communities marginalized by the larger credit system. Thus solutions must look beyond just stemming foreclosure and embrace measures to bring sustainable

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Local Communities Hard-Hit by Foreclosure (Sept. 26, 2008), http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/.

[168]Press Release, Cleveland City Council, Another Step Taken Toward Breaking the Cycle of Abandonment (Feb. 4, 2009), http://www.clevelandcitycouncil.org/Home/News/February42009/tabid/619/Default.aspx.

[169]Henry J. Gomez, *Mayor Frank Jackson Wants Federal Funds Used for Demolishing Abandoned Homes*, THE PLAIN DEALER, Jan. 27, 2009, http://blog.cleveland.com/metro/2009/01/mayor_frank_jackson_wants_fede.html.

[170]Gabriel Baird, *Ohio Foreclosures Hit a Record; Northeast Ohio Sees Some Declines*, THE PLAIN DEALER, Feb. 12, 2009, http://blog.cleveland.com/metro/2009/02/ohio_foreclosures_hit_a_record.html; *see also* HUD, Neighborhood Stabilization database, http://www.huduser.org/DATASETS/nsp_foreclosure _data.html.

[171]A foreclosure "work out" involves resuming payments and arranging to pay past due payments over a short period of time, sometimes involving a modification of the mortgage. Ohio Dept. of Commerce, Office of Consumer Affairs, *Foreclosure Prevention "Work Out Resolutions,"* http://www.com.state.oh.us/dfi/pub/cons_foreclworkout.pdf (last visited Apr. 11, 2009).

[172]Dina El Boghdady, *HUD Chief Calls Aid on Mortgage A Failure*, THE WASH. POST, Dec. 17, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/12/16/AR2008121603177.html; Patrick Mitchell, *Data: Mortgage Foreclosure Prevention Fixes Failing to Work*, FORBES, Dec. 18, 2008, http://www.forbes.com/ prnewswire/feeds/prnewswire/2008/12/18/prnewswire200812181400PR_NEWS_USPR_____DC53586.html.

[173]*See* SQUIRES, *supra* note 81.

credit back to these neighborhoods. This entire process which marginalizes these communities is deeply racialized without there being a need for conscious racial animus.

The expanding recession in Ohio and Northeast Ohio is placing further financial strain on housing stability. The state of Ohio recorded more than 80,000 foreclosure filings in 2007, and another 291,000 foreclosures are projected over the next four years.[174] An estimated 420,000 Ohio homeowners are now "underwater" or have negative equity, due to loan terms and declining property values.[175] These challenges will continue to grow for Cleveland, Northeast Ohio, and the State until significant state and federal reforms stem the crisis. These ongoing challenges also speak to the need to not only stem the foreclosure crisis, but to strategically intervene in hard hit neighborhoods littered with vacant properties. We also need to reform or strengthen fair housing throughout the state, to prevent the next housing crisis and assure that sustainable credit becomes available for all Ohioans, including our most marginalized communities.

IV. MOVING FROM CRISIS TO OPPORTUNITY: TRANSFORMATIONAL THINKING

The dire fair housing challenges described in this article present a serious problem for social justice advocates and for our nation. Housing and fair credit provide more than just shelter and resources in our society; housing and credit are transformational vehicles which can be critical pathways or bridges to opportunity.[176] Fair housing provides the best mechanism to produce true integration into communities of opportunity.[177] Access to good schools, stable and safe neighborhoods, productive employment opportunities and strong professional and social networks is dependent on living in or near neighborhoods which contain these assets. Therefore, civil rights advocates have rightly focused great attention on fair housing, the "last plank" of the civil rights movement as the "structural linchpin" of inequality, the critical intervention point to produce a more just and racially equitable society.[178]

Sustainable credit also is a transformative intervention, opening a number of opportunities such as wealth building or allowing investments in education or

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[174]The Center for Responsible Lending, Projected Foreclosures by State, http://www.responsiblelending.org/issues/mortgage/quick-references/projected-foreclosures-by-state.html (last visited Apr. 11, 2009).

[175]Jonathan Stempel, *One in Five Homeowners with Mortgages Underwater*, REUTERS, Oct. 31, 2008, http://www.reuters.com/article/gc03/idUSTRE49S3Q520081031; Paul Jackson, *7.6 Million Borrowers Underwater on Mortgages: Study*, HOUSINGWIRE.COM, Oct. 31, 2008, http://www.housingwire.com/2008/10/31/76-million-borrowers-underwater-on-mortgages-study.

[176]*See* powell, *supra* note 102, at 189.

[177]*See id.*

[178]OLIVER & SHAPIRO, *supra* note 136 (referring to Lawrence Bobo, *Keeping the Linchpin in Place: Testing the Multiple Sources of Opposition to Residential Integration*, 2 REVUE INTERNATIONALE DE PSYCHOLOGIE SOCIALE 305, 307 (1989)); SHERYL D. CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 3 (2004) ("Housing was the last plank in the civil rights revolution, and it is the realm in which we have experienced the fewest integration gains.").

training. Sustainable credit can allow families to survive economic dislocation and provide a bridge to new opportunities, like a college education or a home in an opportunity-rich neighborhood. Because of the significance of both fair housing and sustainable credit, we must continue to push for the implementation of a true transformative vision of fair housing for our nation. We must not be discouraged by the new challenges created by the current housing and credit crisis; we must instead utilize this window of opportunity to advocate and implement a transformative vision of fair housing. The following section of this article closes by looking at the weaknesses of our current methods of promoting fair housing through the 1968 Fair Housing Act. We recommend a number of strategies and principles to guide fair housing if we are going to achieve the goal of integrated communities of opportunity, fair housing for all, and a just sustainable society.

A. A Review of the FHA: Challenges

One of the primary limitations of the Fair Housing Act is that it is a tort approach, which relies too heavily on proving individual claims.[179] The Act's enforcement by the Department of Justice is also underwhelming. The Department of Justice pursues only hundreds of cases a year, a severe deficiency considering that the Department of Housing and Urban Development estimates nearly two *million* acts of housing discrimination occur each year.[180] However, scholars have drawn attention to the fact that the Act requires the federal government to affirmatively further fair housing.[181] The 1968 Civil Rights Act has two "affirmatively further" provisions: § 3608(e)(5) requires the Secretary of HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title."[182] Section 3608(d) notes that other federal departments and agencies have the same obligation.[183] Wagman writes that in the Supreme Court case *Trafficante v. Metropolitan Life Insurance Company*, the Court refers to the purpose of the legislation, which was to "foster integration and counter discrimination."[184] In *National Association for the Advancement of Colored People, Boston Chapter v. United States Department of Housing and Urban Development*, Judge Breyer emphasized that Title VIII addressed segregation as well as

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[179]Brian Patrick Larkin, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1647 (2007); John Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. Rev. 1553, 1584 (1992-1993). For a review of the proof standard, see also John O. Calmore, *Fair Housing the Black Poor*, 18 CLEARINGHOUSE REV. 605, 620, 646 (1984) and Florence Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunity for Poor People of Color*, 24 CLEARINGHOUSE REV. 312, 315-16 (1990).

[180]powell, *supra* note 102, at 616.

[181]Florence Wagman Roisman, *A Place to Call Home? Affordable Housing Issues in America*, 42 WAKE FOREST L. REV. 333, 353 (2007).

[182]The Civil Rights Act of 1968, U.S.C. § 3608 (1968), http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00003608----000-.html (last visited Apr. 11, 2009).

[183]*Id.*

[184]Roisman, *supra* note 181, at 364; *see generally* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 284 (1976).

discrimination.[185] Despite these precedents, this important provision is critical and has not been interpreted in a broad enough manner to meet this goal.

B. Using Fair Housing to Provide True Integration with Opportunity

Another challenge with our current paradigm for thinking of fair housing is that it does not directly focus enough energy on affirmatively connecting marginalized communities to opportunity. Racial integration is an important and critical goal, but equally important is true integration into opportunity. Our model of "opportunity based housing" interprets the primary goal of fair housing as providing fair housing choices to all people in communities of opportunity.[186] To truly meet the goals of fair housing, we must turn out resources toward an opportunity oriented model of housing and community development. We must strategically link efforts to build and create opportunities in distressed areas, while allowing access to communities of opportunity and other opportunity structures to marginalized populations. This model and approach means focusing on more than just assuring housing mobility, but also assuring that sustainable and equitable community development improves marginalized communities, and that marginalized communities have direct access to critical opportunities like high performing schools.[187]

This new approach to fair housing also means retiring the old twentieth century dichotomy of always relating the suburbs with opportunity. Opportunity is dynamic and fluid in our metropolitan regions; many older, mature inner suburbs have declined while some urban neighborhoods have rebounded. Moving people of color indiscriminately to the suburbs does not guarantee they are moving into healthy, stable communities of opportunity. Our efforts to link people of color to these communities must respect this changing urban geography—this could mean prioritizing moving to affluent suburbs and assuring affordable housing in maintained, redeveloping or gentrifying communities.

C. Reinvigorating the Federal Role in the Housing Market: Fannie, Freddie, and the Future of Fair Housing

The federal government must play a significant role in addressing both this crisis and affirmatively furthering fair housing in the future. The federal government has always played a role in our nation's housing market—U.S. government action in the wake of the Depression built the foundation of homeownership and the American middle class. Local actions are critical, but must be fully supported by federal resources and policy. Budget deficits are already plaguing our State and local budgets, and the philanthropic sector's assets have been impacted by the crisis on Wall Street. Non-profits, many of which are funded by governments or foundations, are dealing with resource shortages and increasing demands on their service. Local governments, philanthropy, non-profits, and states do not have the resources to address the systemic and widespread challenges facing our nation.

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[185] Roisman, *supra* note 181, at 367.

[186] JOHN A. POWELL, ET AL., THE KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, COMMUNITIES OF OPPORTUNITY: A FRAMEWORK FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE FOR ALL (2007), http://www.kirwaninstitute.org/publicationspresentations/publications/index.php.

[187] *Id.*

This resource mismatch is evident in Ohio. Consider that the State of Ohio's total projected 2010 general revenue expenditures were $29 billion, and that in 2006, the top fifty philanthropic foundations giving in Ohio spent $350 million.[188] These figures are dwarfed by the size of the initial TARP legislation ($700 billion) and the February 2008 stimulus package ($789 billion).[189] Prior to February of 2008, the federal government's effort to solve the current crisis had been uncoordinated and disconnected from the fair housing roots of the crisis. Too little attention had been paid to the interrelated nature of vacancy and abandonment in our cities, the crisis on Wall Street and the global credit market. Unfortunately, these issues continue to be thought of as largely separate. So while there is a massive effort to stabilize banks and other lending institutions, the federal rescue package is only weakly related to the continuing foreclosure crisis that is destabilizing housing markets, neighborhoods and cities across the country. There are good reasons to believe that these fragmented approaches will not work and that instead, a more deliberate effort to address and link these efforts is required.[190]

1. Fannie Mae and Freddie Mac

Another opportunity for a renewed federal role is the new status of Fannie Mae and Freddie Mac. Fannie and Freddie were government chartered, publicly traded companies before their historic takeover by the federal government in September 2008.[191] They are currently under "conservatorship"; Treasury Secretary Paulson deferred decisions regarding the mission of the companies for the next President and Congress.[192] As newly emerging entities of the federal government, what are the opportunities for holding Fannie and Freddie to the requirement of "affirmatively furthering fair housing" as mandated in 1968 Fair Housing Act?[193] As Fannie Mae and Freddie hold about five trillion dollars of housing mortgages (about 70% of all

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[188]For an overview of the projected biennial Ohio state budget, please see the Ohio Office of Budget and Management's budget overview, Ohio Office of Budget and Management, Budget, http://obm.ohio.gov/sectionpages/Budget/FY1011/ExecutiveBudget.aspx (last visited Apr. 11, 2009). For a listing of the largest philanthropic organizations giving in Ohio, see The Foundation Center, Top 50 U.S. Foundations Award Grants in the State of Ohio, circa 2006, http://foundationcenter.org/findfunders/statistics/pdf/03_fund_geo/2006/50_found_states/f_oh_06.pdf (last visited Apr. 11, 2009).

[189]Neighborhood Link, The 2009 Stimulus Package Explained, http://www.neighborhoodlink.com/article/Community/The_2009_Stimulus_Package_Explained (last visited Apr. 11, 2009).

[190]*See* JOHN A. POWELL, THE KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, PRELIMINARY REPORT OF THE IMPACT OF THE ECONOMIC STIMULUS PLAN ON COMMUNITIES OF COLOR (2009), http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/preliminary_report_on_stimulus_impacts_feb2009.pdf.

[191]David Ellis, *U.S. Seizes Freddie and Fannie*, CCNMONEY.COM, Sept. 7, 2008, http://money.cnn.com/2008/09/07/news/companies/fannie_freddie/index.htm?postversion=2008090720.

[192]*See id.*

[193]Fair Housing Act, *supra* note 11, at Executive Order 12892.

new home loans), these entities set much of the standard for the entire market.[194] Could the federal government proactively utilize Fannie and Freddie to meet the goals of the Fair Housing Act?

What about the other financial institutions backed by federal bailout funds? From the emergence of the secondary market through the work of FHA, the federal government historically has been instrumental in expanding housing opportunities and developing our nation's middle class, but these efforts largely ignored or marginalized communities of color. It is imperative that the concerns and interest of communities of color not be ignored again. A deliberate effort needs to be made to reset loans, to stabilize the market, to develop appropriate products, to extend appropriate credit and to affirmatively further fair housing. We believe these new policy goals should be addressed together to support the opportunity based vision of fair housing discussed above.[195]

On February 18, 2009, President Obama unveiled a new plan to address the credit and housing crisis.[196] His plan brings at least $75 billion in additional assistance to encourage banks to work out loan terms (through financial incentives to financial institutions) with delinquent borrowers.[197] The plan also dedicates investment into Fannie Mae and Freddie Mac to stabilize both entities and allows refinancing options for "underwater" mortgage holders whose loans are currently held or backed by these entities.[198] This enhanced federal role is a good start but needs bolstering to assure financial institutions cooperate, ideally through federal pressure on financial institutions, especially institutions that receive federal TARP funds. In addition, this new plan is just a start, and the federal government must begin to look toward the long term needs of marginalized communities of color who have been locked out of the prime credit market. The federal government must assure that sustainable credit products are available to these communities and that federal resources are directed to communities most traumatized by the dislocations and vacant properties created by the crisis. The federal government must take this opportunity to use its newfound leverage in the housing and credit market to produce true fair housing opportunities for all communities.

D. The Future: How Do We Structure Fair Housing Policies to Reflect this New Paradigm?

In designing fair housing initiatives and policies we must use new principles to guide our thinking. A new era of systemic social justice challenges requires a new approach and response, a new paradigm and way of thinking about our challenges. We need to be targeted, outcome driven, tailor our policies and actions to situational

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[194]Alan Ziebel, *Fannie, Freddie to Pay $294m in Bonuses*, 9 NEWS, Apr. 4, 2009, http://74.125.95.132/search?q=cache:ZH8bZFXnLjwJ:news.ninemsn.com.au/article.aspx%3Fid%3D797550+Fannie+Freddie+5+trillion+70%25&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a.

[195]*See* POWELL, *supra* note 190.

[196]President Barack Obama, Address on the Homeowner Affordability and Stability Plan (Feb. 18, 2009), http://www.nytimes.com/2009/02/18/us/politics/18text-obama.html?_r=1.

[197]*Id.*

[198]*Id.*

constraints, be systems oriented and multifaceted, and inclusive in process. Universal strategies, policies and programs and "one size fits all" solutions will not address the complex dynamics impeding fair housing.

1. Be Systems Oriented and Multi-Faceted

The root of the housing and credit crisis is a systemic challenge which requires a new method of analysis and calls for different types of solutions. Our traditional "Newtonian" perspective on causation utilized a simple linear model of determining causes and identifying solutions.[199] A systemic approach to understanding causation moves away from this linear approach, recognizing that causation is impacted by multiple factors or represents a system of interactions among various factors. Causation is reciprocal, mutual, and cumulative. In understanding the fair housing problems created by the housing and credit crisis, these dynamics become quite clear. The crisis in communities of color was not just the result of one factor but the result of multiple factors, involving borrowers, neighborhoods, lenders, the financial markets and others. These factors reinforced each other and worked together to produce disparate outcomes in communities of color. As Jeffrey Sachs notes in *The End of Poverty*, "economies are complex systems." Sach's calls systems thinking "clinical economics."[200]

To adequately intervene in these complex systems, we must fully understand them and design our responses with clear recognition of the systems' complex interactions. Our solutions should both provide comprehensive relief while looking for strategic intervention points within the system which would have the greatest impact. In the case of the foreclosure crisis, too many responses have not taken this "clinical" or systemic approach. For example, extensive efforts have been made to prevent foreclosure through mediation or "work outs" but these strategies will only be effective in a broad way if other factors in the system cooperate. So, if servicers are not coerced or mandated to be more involved in work outs or are nonresponsive to homeowners seeking help, then public policy efforts to encourage work outs among borrowers will not be an effective transformative strategy to end the crisis.

2. Targeted Universalism and Tailoring to Situational Constraints

Universal policies assume a universal norm. This conception, in fact, often reflects a particular in its design and implementation. For example, Social Security—often described as the quintessential universal policy—was universal only insofar as the universal was an able-bodied white male working outside the home.[201] In its early years, the elderly were excluded since they had not been in the work force long enough to qualify.[202] Under the cultural norms of the era, men were the primary wage-earners, and women typically worked in the home. Unpaid household labor and child rearing responsibilities are not counted toward Social Security earnings.

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[199] D.A. FREEDMAN, LINEAR STATISTICAL MODELS FOR CAUSATION: A CRITICAL REVIEW 2 (2005), http://www.wiley.com/legacy/wileychi/eosbs/pdfs/bsa598.pdf.

[200] Jeffrey Sachs, *Development Economics as Clinical Economics*, THE GLOBALIST, July 5, 2005, http://www.theglobalist.com/StoryId.aspx?StoryId=4602.

[201] POWELL, *supra* note 190, at 7.

[202] *Id.*

Even today, women who take time off to raise children or select careers with more flexible working hours will earn less, on average, then their male counterparts, and will therefore have lower social security benefits upon retirement. And because of exclusions of agricultural and domestic workers—exclusions built-in to appease Southern resistance to the Act—sixty-five percent of African Americans were initially denied its protections.[203]

Unfortunately, when based on a rigid particular (rather than reflecting the different situations of people and communities), "universal" programs are as likely to exacerbate inequality as to reduce it.[204] All communities and people are influenced by a set of situational constraints. For marginalized communities and populations these situational constraints can be severe and create a tremendous impediment to opportunity. For example, borrowers in communities of color were far more vulnerable to subprime mortgage brokers than the general population; they had a number of situational constraints which enhanced their vulnerability to predatory lenders.[205] Factors such as reduced financial literacy, heightened economic insecurity and community conditions created different vulnerabilities for these populations.[206] Meanwhile, the lending system changed with rapid growth in new types of predatory loans and actors due to changes in the financial industry.[207]

Our current protections to assure fair lending did not take all of these situational constraints or dynamic changes in the mortgage market into account. Policies which may have protected the majority population were very insufficient to protect marginalized communities who are situated differently and more vulnerable. Our policies and initiatives to promote Fair Housing must accept and be designed by these situational constraints. Fair housing solutions and norms must be sensitive to the hyper vulnerability of marginalized communities of color. The critical insight is this: treating people who are situated differently as if they were equally able to access the benefits of "universal" policies can in fact lead to greater inequities. In the case of the foreclosure epidemic, the U.S. Department of Housing and Urban Development neighborhood stabilization funds represent an intervention which must be strategically targeted. Spreading neighborhood stabilization funds across all neighborhoods would provide limited relief and probably no relief to neighborhoods with the greatest concentrations of foreclosed properties.

The extreme concentrations of foreclosure in these communities have situated them in a delicate situation, and in some cases are sending them spiraling into a state of permanent distress. These communities require a different approach, and more resources to arrest their fall. Some analysts feel that President Obama's new foreclosure plan (if it is successful) also represents a strategy which targets those most impacted directly by the crisis (emphasizing individuals who currently cannot make mortgage payments).[208] These types of targeted strategies will become more

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[203] *Id.* at 8.

[204] *Id.*

[205] *Id.* at 7.

[206] *See id.*

[207] *See id.*

[208] Edmund Andrews, *Obama Plan on Housing Said to Push On Lenders*, N.Y. TIMES, Feb. 16, 2009, at B1.

important as the limited resources available to counter the crisis are used strategically to have the greatest impact.

We argue for moving beyond just simple targeted policies but also to look at a third possibility. Universal and targeted approaches are false choices. There is a third possibility, what we call "targeted universalism." This is an approach that supports the needs of the particular while acknowledging that we are all part of the same social fabric. Targeting within universalism means being proactive and goal oriented about achievable outcomes. As an initial step, an impact assessment could be employed to gauge how a universal policy would impact particular groups. But an impact assessment alone is not enough. In a complex, real world setting, policies have unintended consequences and resistance that thwart policy intentions. It is critical that targeted universal policies set clear goals and use mechanisms to closely monitor and correct for negative feedback loops and other resistance.

3. Being Goal Oriented and Inclusive in Process

Systems are inherently dynamic and subject to change. For this reason, we cannot allow our fair housing efforts be dominated by process but instead should be goal focused. In the case of the foreclosure crisis, we cannot allow ourselves the luxury of expecting the dynamics producing the crisis to remain stagnant and unchanging. Housing in particular is a very dynamic system; housing prices, interest rates, credit and the economy all interact to influence the environment of the housing market. This has direct implication to fair housing. When market conditions are hot, policies such as inclusionary zoning would be a very successful strategy for expanding affordable housing opportunities in opportunity rich areas, but when the housing market cools, builders are not building as much new housing, and inclusionary zoning suddenly becomes a less successful strategy. If we were goal oriented in this scenario, we would alter our policy approach to focus on other means of providing affordable housing in those communities, such as targeting Section VIII vouchers.

Similar unexpected dynamic changes have already occurred as a result of this crisis. The tightened credit market has diminished the market value of the tax credit and has substantially limited the effectiveness of using Low Income Housing Tax Credits to build affordable housing.[209] The LIHTC program is the primary affordable housing production program in our nation.[210] As production falls due to market dynamics, we must adjust our strategies or we will face an even greater shortage of affordable housing in the future.

In the case of the foreclosure crisis, we must be prepared to change course if system dynamics alter the factors causing foreclosure. For example, traditional assumptions are that unjust loan terms are the principle cause of foreclosure.[211] As a result, many of our policy solutions are targeting modifying loan terms to resolve the crisis. But, given the housing and credit crisis' impact on the economy and the

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[209]The Low-Income Housing Tax Credit (LIHTC) program is run by the IRS and allows companies to invest in low-income housing, while receiving ten years of tax credits. A. Siudzinski, *Field Guide to Low-Income Housing Tax Credits*, REALTOR.ORG, http://www.realtor.org/library/library/fg720.

[210]*See id.*

[211]*See* ROGERS, *supra* note 3.

recession, job losses or loss of income may become the primary factor causing foreclosure in the near future. In this scenario, policies and initiatives set up to alter loan terms would be insufficient to keep borrowers in their homes if most are entering foreclosure due to income loss via joblessness. Thus, we must remain flexible to change our strategies and approaches as the complexities of the system change. By maintaining a goal-oriented approach to fair housing and staying away from a process orientation, we can remain flexible enough to adapt to these changing conditions.

Finally, as we design new approaches to housing, credit, and fair housing in the aftermath of this crisis, we must assure that marginalized communities, in particular communities of color that are most impacted by the crisis, are at the table and included in this redesign. We recommend creating a public/private commission that would look at what it would take to affirmatively address both the housing and credit needs of historically marginal communities. The goal should be not just to stem foreclosures or even end intentional discrimination, but to eliminate the dual housing and credit market and its negative effects. This cannot be done one law suit at a time. The Bush administration was sensitive to the need to affirmatively address the disparities in the housing market; this sensitivity to this need should be applauded.[212]

Unfortunately, the federal government's unregulated market approach did not work. The Ford Foundation, under the leadership of Melvin Oliver and Frank DeGiovanni, also created a program to bring in more people of color and marginal communities into the housing market, through the Community Advantage Program.[213] This program was a relative success. It was not implemented to scale and did not pay enough attention to the importance of place, but proves that sustainable home ownership programs will work in marginalized communities. We need to address these issues pragmatically, paying attention to changes in the market and understanding what programs, policies and credit instruments work and are sustainable.

As we remake the market and credit systems, we should be deliberate not to continue the previous models which used the majority population as a model to frame and design policies. Marginalized communities are differently situated and require different credit instruments to be sustainable. We must embrace an approach and process which is inclusive at all stages, where marginalized people and communities have a direct voice in designing responses to fair housing challenges. In addition, there is a great need to develop, extend, and connect local community development capacity.

In short, everyone should have an opportunity to give voice to the future of their communities. This includes supporting efforts to improve the participation of marginalized groups in policy design, and improving data collection, monitoring and evaluation of local, state and federal programs. Also, this means identifying and lifting up or bringing to scale programs that are working to produce fair housing and credit options in marginalized communities.[214] We cannot design systemic reforms that will produce fair credit, fair housing, and a just society without deliberately

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[212]Steven R. Weisman, *Bush Offers Relief for Some on Home Loans*, THE N.Y. TIMES, Aug. 31, 2007, http://www.nytimes.com/2007/08/31/business/31home.html.

[213]OLIVER & SHAPIRO, *supra* note 136.

[214]POWELL, *supra* note 190.

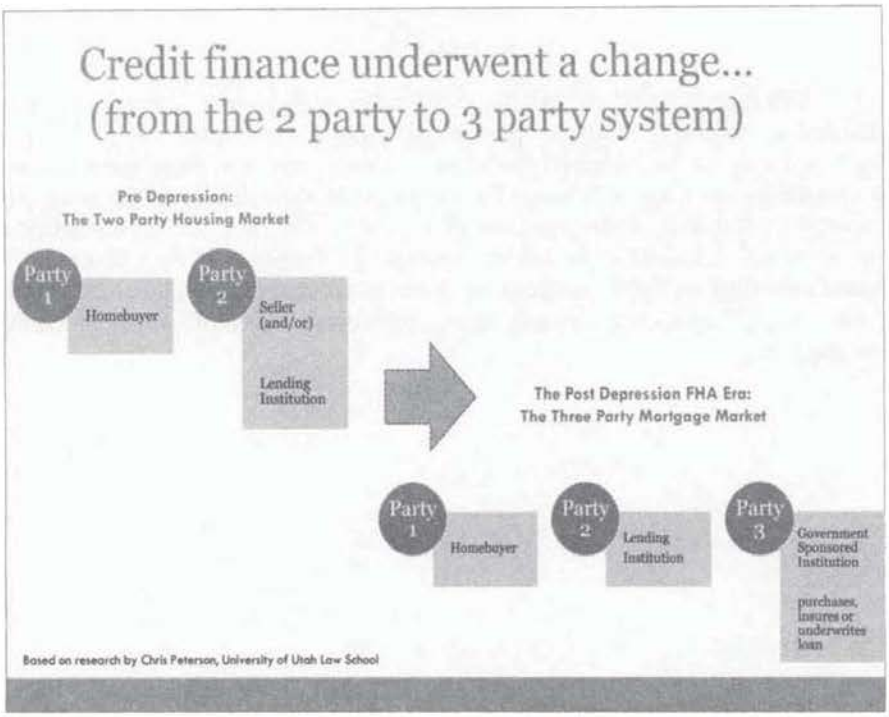
projecting the voice of marginalized communities made vulnerable by the current institutional arrangements.

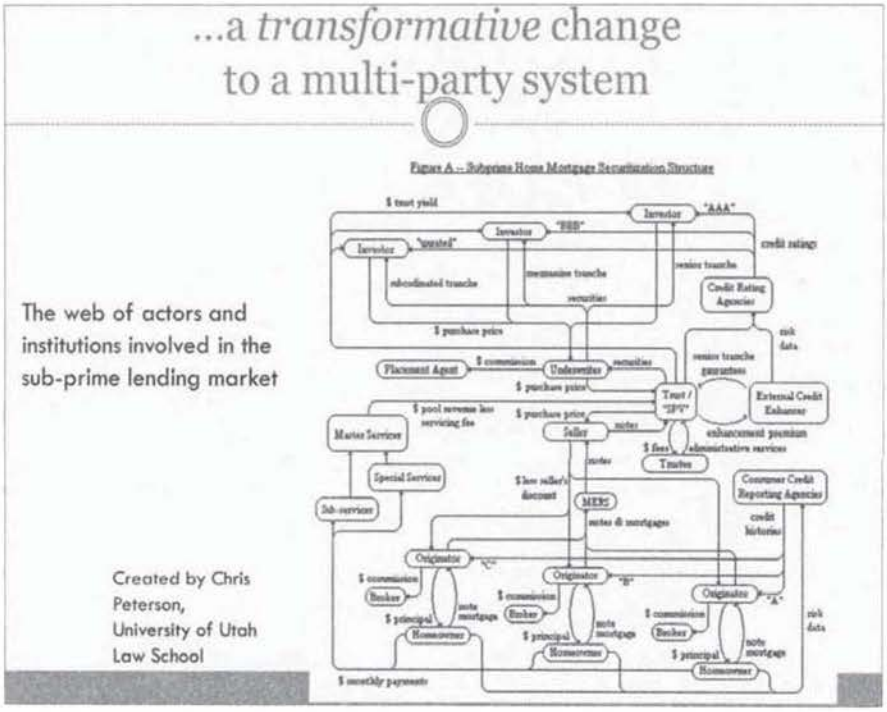
V. CONCLUSION

The world, our credit market, and our society continues to be dynamic and grows increasingly more interconnected every day. A number of complex global systems have emerged in the new global economy, these complex systems requires a new framework to understand our fair housing challenges and to reach fair housing goals. This systemic era requires new ways of thinking, a new paradigm to identify the causes, and solutions to inequity in our society. We must understand how systems (like the global credit market) can produce disparate impacts in our neighborhoods and communities. We must also understand how to identify systematic reforms to address problems and seek critical intervention points to produce transformative change. As we look toward the future of fair housing, we should orient our work around two clear goals. First, we must end the dual credit system, which has further exploited and marginalized communities of color. This provision also means assuring that our response to ending the dual credit system does not exacerbate existing challenges by instituting another era of redlining for marginalized communities. We must assure that in the future, communities of color are brought into and have full (and equal) participation in the credit market. We must implement policies, credit products, and tools which assure that communities of color are provided sustainable credit options. Second, we must continue to work to create a society where fair housing produces affordable housing in communities of opportunity. This opportunity based approach to fair housing must be the fundamental premise guiding all of our fair housing and community development efforts. To have a just and sustainable nation and society, we must assure that fair housing opportunity is available to all.

APPENDIX

Fig. 1: Our housing market has gone from a two or three party system to a very complicated system that very few people understand. Our laws, regulation and oversight is based on the three party system. Source: two and three party system graph created by the Kirwan Institute for the Study of Race & Ethnicity, multiparty system figure created by Chris Peterson at the University of Utah. Figure adapted from presentation delivered at the Kirwan Institute for the Study of Race & Ethnicity National Convening on Subprime Lending, Foreclosure and Race October 2-3, 2008, *available at* http://www.kirwaninstitute.org/events/archive/subprimeconvening/agenda.php.


Credit finance underwent a change...
(from the 2 party to 3 party system)
Pre Depression:
The Two Party Housing Market
Party 1
Homebuyer
Party 2
Seller (and/or)
Lending Institution
The Post Depression FHA Era:
The Three Party Mortgage Market
Party 1
Homebuyer
Party 2
Lending Institution
Party 3
Government Sponsored Institution
purchases, insures or underwrites loan
Based on research by Chris Peterson, University of Utah Law School


...a transformative change
to a multi-party system
The web of actors and institutions involved in the sub-prime lending market
Created by Chris Peterson, University of Utah Law School