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PERPETUATION OF SEGREGATION: TOWARD A NEW HISTORICAL AND LEGAL INTERPRETATION OF REDLINING UNDER THE FAIR HOUSING ACT

CHARLES L. NIER, III*

I. INTRODUCTION

In his classic *The Souls of Black Folk*, W.E.B. Du Bois commented: "To be a poor man is hard, but to be a poor race in a land of dollars is the very bottom of hardships."¹ His statement is increasingly becoming a prophecy as the income and wealth gaps between blacks and whites continue to increase despite the economic prosperity in the United States.² The inequitable distribution of income has an effect on nearly all segments of American society as evidenced by the fact that the "top 20 percent of earners receive 43 percent of all income while the poorest one-fifth of the population receives a scant 4 percent of the total income."³ In terms of wealth distribution, the statistics are even starker. By 1989, the wealthiest 1% of households accounted for 37.7% of the net worth and controlled 48.2% of all financial assets.⁴

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1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 6 (1903).

2. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 30 (1995). Oliver and Shapiro have distinguished wealth and income in the following manner:

Wealth is the total extent, at a given moment, of an individual's accumulated assets and access to resources, and it refers to the net value of assets . . . less debt held at one time. Wealth is anything of economic value bought, sold, stocked for future disposition, or invested to bring an economic return. *Income* refers to a flow of dollars . . . over a set period, typically one year.

Id.

3. *Id.* at 29.

4. *Id.* at 62. "The top one percent of American households possessed over 25% of total wealth between 1922 and 1972." *Id.* at 61 (quoting Edward Wolff, *The Rich Get Increasingly Richer: Latest Data on Household Wealth During the 1980's*, 5 RES. IN POL. AND SOC'Y 33-68 (1995)).

Beginning in 1972, however, the data indicates a significant decline in wealth inequality. The share of the top percentile declined from 29% to 19%

This social inequality is magnified when race is introduced into the analysis. While progress toward racial equality is undoubtedly being made, the median income figures establish that blacks earn only about 55% that made by whites.⁵ The nearest income parity between blacks and whites is seen in married families where both husband and wife work. "In 1984, such black households earned seventy-seven cents for every dollar taken home by their white counterparts."⁶ However, when the same group is evaluated in terms of wealth, a glaring inequality is revealed: "dual-income black households possessed only nineteen cents of mean financial assets for every dollar their white counterparts owned."⁷ Thus, while progress has been made in terms of income between blacks and whites, the translation of this income into wealth has not been accomplished. The sharp disparities in wealth inevitably lead to the question why.

Oliver and Shapiro state that: "[h]ome ownership is without question the single most important means of accumulating assets" and thus increasing wealth.⁸ One of the explanations for the enormous racial inequality in terms of wealth is directly attributable to mortgage lending discrimination. In particular, the historical practice of racial redlining has foreclosed the opportunity of homeownership to vast numbers of African-Americans. A recent study concluded that "[u]rban redlining has ruined and continues to ruin thousands of minority communities."⁹ The report noted that despite the recent housing boom which has pushed national homeownership to a record high of 65.7%, the private mortgage industry continues to fail to meet the credit needs of urban buyers.¹⁰ In 1995, only 49.0% of center city residents owned a home, compared with 71.5% of their suburban counterparts."¹¹ Due to the high levels of racial segregation in center city areas, such a disparity has increasingly devastating results on the ability of minorities to achieve home ownership. As a consequence, one of the primary explanations for the large racial disparity in terms of wealth is

between 1972 and 1976. While this decline was unexpected, it was not permanent. In fact in the next five-year period, from 1976 to 1981, a sharp renewal of wealth inequality occurred. Between 1976 and 1981 the share of the richest 1% expanded from 19 to 24%. *Id.* The wealth disparities continued to increase throughout the 1980's primarily due to Reagan cuts in taxes on capital gains on existing wealth. *Id.* at 63. "Indeed, . . . wealth concentration in 1989 was more extreme than at any time since 1929." *Id.* at 62.

5. *Id.* at 24.

6. *Id.* at 25.

7. *Id.*

8. *Id.* at 8.

9. THE UNITED STATES CONFERENCE OF MAYORS, AMERICA'S HOMEOWNERSHIP GAP: HOW URBAN REDLINING AND MORTGAGE LENDING DISCRIMINATION PENALIZE CITY RESIDENTS 1 (1998).

10. *Id.* at 2.

11. *Id.* at 3.

mortgage lending discrimination in the form of racial redlining which limits minority access to home ownership.

This article seeks to explore the historical and legal ramifications of racial redlining and suggests a new analytical framework to eradicate the practice. First, this article will examine the historical origins of redlining in the United States, particularly, the racially discriminatory policies of the Home Owners Loan Corporation (HOLC) and the Federal Housing Administration (FHA). Second, this article will examine the applicable laws relating to redlining, including: the Fair Housing Act, the Home Mortgage Disclosure Act (HMDA), and the Community Reinvestment Act (CRA). Third, this article will explore the continued prevalence of racial redlining in urban areas in the United States. Fourth, this article will examine the analytical framework courts have adopted in connection with redlining. Fifth, this article will critique the approaches adopted by the courts to demonstrate the inherent problems in the existing methodology used to eradicate redlining. Sixth, this article will explore a new analytical approach to challenging policies and practices which result in racial redlining of minority communities premised upon a theory of perpetuation of segregation. Finally, this article will examine efforts by the United States Department of Justice to eradicate racial redlining as an example of a legal challenge premised upon the perpetuation of segregation.

II. HISTORICAL ORIGINS OF REDLINING IN THE UNITED STATES

A. Introduction

Prior to the 1930's, the United States had traditionally considered the selection, construction, and purchase of a residence an inherently individual decision.¹² As a result, the federal government favored a "hands-off policy" regarding housing.¹³ The government's role was limited to surveying the slums of large cities in 1892, creating a Federal Land Bank System in 1916, and constructing housing for war workers during World War I.¹⁴

With the Great Depression in 1929 came a shift in attitudes of Americans regarding the government's intervention in housing issues.¹⁵ The economic devastation of the Great Depression inflicted crippling damage to both the homeowner and the housing industry.¹⁶ During the five year span from 1928 to 1933, residential property

12. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 191-92 (1985).

13. *Id.* at 193.

14. *Id.* at 192.

15. *Id.* at 193.

16. *Id.*

construction decreased by 95%, while home repair expenditures dropped 90%.¹⁷ By 1933 half of all the nation's residential mortgages were technically in default, with foreclosures reaching the rate of over 1000 per day.¹⁸

In response to the crisis, the federal government, in an attempt to revive the economy, increase employment in the construction industry, and make home ownership widely available to the American public, introduced a series of programs, including: the HOLC, the FHA, and the Veterans Administration.¹⁹ While these programs had enormous impact upon housing in the United States, they also developed and implemented the practice of racial redlining. As a result, it is necessary to examine each program to ascertain the historical origins of racial redlining.

B. Home Owners' Loan Corporation

In 1933, the Home Owners' Loan Corporation (HOLC) was established to "help families prevent the loss of their homes through mortgage foreclosure."²⁰ In particular, the HOLC was designed to provide "funds for refinancing urban mortgages in danger of default and [to grant] low-interest loans to former owners who had lost their homes through foreclosure to regain their properties."²¹ "The HOLC was the first government-sponsored program to introduce, on a mass

17. JACKSON, *supra* note 12, at 193.

18. *Id.* "In 1926, . . . about 68,000 homes were foreclosed in the United States. In 1930, about 150,000 non-farm households lost their property through foreclosure; in 1931, [the number] increased to nearly 200,000; in 1932, to 250,000." *Id.*

19. DOUGLAS A. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 51-52 (1993). In 1931, President Hoover convened the President's National Conference on Home Building and Home Ownership designed "to support homeownership for men of sound character and industrious habits." JACKSON, *supra* note 12, at 193. The conference made four proposals: "1) the creation of long-term, amortized mortgages; 2) the encouragement of low interest rates; 3) the institution of government aid to private efforts to house low-income families; and 4) the reduction of home construction costs." *Id.* at 194. In 1932, the Hoover administration responded with two programs: the Federal Home Loan Bank Act and the Emergency Relief and Construction Act. *Id.* Both programs, however, proved ineffective and failed to reverse the worsening housing conditions. *Id.* at 194-95.

20. C. LOWELL HARRISS, *HISTORY AND POLICES OF THE HOME OWNER'S LOAN CORPORATION* 1 (1951).

21. MASSEY & DENTON, *supra* note 19, at 51. The HOLC program provided for the exchange of HOLC bonds with federal guarantees for home mortgages in default and cash loans for taxes payment and mortgage refinancing. HARRISS, *supra* note 20, at 1. "The HOLC loans were restricted to mortgages in default . . . and secured by nonfarm properties with . . . not more than four families and appraised by the HOLC not more than \$20,000." *Id.* An HOLC loan could not exceed 80% of the HOLC appraisal and could not exceed \$14,000. *Id.* Loans bore less than 5% interest and were amortized by monthly payments during a 15 year period. *Id.*

scale, the use of long-term, self-amortizing mortgages with uniform payments" which extended over a fifteen-year period.²² American homeowners eagerly responded to the HOLC as approximately 40% of all qualified mortgage properties sought assistance.²³ Between July 1933 and June 1935, the HOLC supplied over three billion dollars for over one million refinancing loans.²⁴

Because the HOLC was dealing with mortgages in default with the possibility of foreclosures, it introduced standardized appraisals of the fitness of particular properties and communities for both individual and group loans.²⁵ As C. Lowell Harriss stated "the success of the HOLC in its over-all program and in its handling of individual cases hinged on its appraisal policies."²⁶

While the appraisal itself was standard in the real estate industry, the HOLC created a "formal and uniform system of appraisal, reduced to writing, structured in defined procedures, and implemented by individuals only after intensive training."²⁷

HOLC appraisers divided cities into neighborhoods and developed forms which required specific answers relating to the inhabitants and housing stock.²⁸ As part of the appraisal process,

22. MASSEY & DENTON, *supra* note 19, at 51. "An amortized loan requires regular equal payments during the life of the loan, of sufficient size and number, to pay all interest due on the loan and reduce the amount owed to zero by the loan's maturity date." BRUCE HARWOOD, *REAL ESTATE: AN INTRODUCTION TO THE PROFESSION* 179 (3d ed. 1983). Prior to the HOLC, "[l]ong term mortgage arrangements were not common . . . because an 1864 amendment to the 1863 National Bank Act prohibited nationally chartered banks from making direct loans for real estate transactions." JACKSON, *supra* note 12, at 362, n.25. "[M]any loans required only the payment of interest, with the entire original amount being due at the expiration of the loan." *Id.* at 362, n.16. As a result, "the typical length of a mortgage was between five and ten years, and the loan itself was not fully paid when the final settlement was due." *Id.* at 196. Thus, the homeowner either had to pay off the loan or renew the mortgage. Such a situation left the homeowner at the mercy of the economic situation because if the mortgage expired at a time when money was tight, it might have been impossible for the homeowner to secure a renewal, thus resulting in foreclosure. *Id.* at 196-97.

23. HARRISS, *supra* note 20, at 1.

24. *Id.* "The HOLC received 1,886,491 applications for \$6.2 billion dollars . . . for an average of \$3,272 per application." *Id.* Nearly half the applications were rejected or withdrawn. *Id.* Approximately one million refinancing loans totaling \$3.1 billion were approved averaging \$3,039 per loan. *Id.*

25. JACKSON, *supra* note 12, at 197. "[I]n some states, over 40% of all HOLC loans were foreclosed . . . after refinancing." *Id.*

26. HARRISS, *supra* note 20, at 41.

27. JACKSON, *supra* note 12, at 197.

28. *Id.* First, the appraiser conducted "an informal appraisal, typically a look at the property from the street" to determine if there was a reasonable prospect that the property would qualify for a loan. HARRISS, *supra* note 20, at 45-48. "If [the informal appraisal] was favorable, a detailed appraisal was ordered." *Id.* The appraisal utilized a form containing 98 terms to be filled in by the appraiser and 11 items to be completed by the reviewers. *Id.* Each report contained a

HOLC developed a rating system to evaluate the risks associated with loans made to specific urban neighborhoods, systematically including in the procedures an evaluation of the racial integration or potential racial integration of the community.²⁹

The rating system established four color-coded categories of quality. The first category (A) was coded green and the areas were described as "new, homogenous, and 'in demand as residential locations in good times and bad times.'"³⁰ Homogeneous was defined as "American business and professional men."³¹ The second category (B) was coded blue and consisted of areas that had "reached their peak," but were "still desirable" and could be expected to remain stable.³² The third category (C) was coded yellow with the neighborhoods described as "definitely declining."³³ The fourth category (D) was coded red and the "neighborhoods were defined as areas 'in which the things taking place in C areas have already happened.'"³⁴

In the process of rating neighborhoods, the HOLC incorporated the notions of ethnic and racial worth.³⁵ Appraisers assumed that

photograph of the building, a location map, dimensions of the lot and any other relevant information concerning the neighborhood and property. *Id.* "In valuing the buildings, the appraiser [considered] the building code classification, . . . the material used, . . . the quality of the structure[,] . . . the number and kinds of rooms, [necessary repairs], and an estimate of reproduction cost less depreciation." *Id.* at 76. The final element considered was the capitalized value of rentals based upon a 10 year average normal rental. *Id.*

29. OLIVER & SHAPIRO, *supra* note 2, at 17; MASSEY & DENTON, *supra* note 19, at 51.

30. JACKSON, *supra* note 12, at 197.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 197-98

35. JACKSON, *supra* note 12, at 199. A widely reproduced list gives a ranking of ethnic groups in order of most desirable to those which had the most adverse effect on property values. HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO 316 (1933). The list was later reproduced in McMichael's Appraising Manual, the "bible of appraising." Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 URB. AFF. Q. 313, 323 (1979). The list ranks the ethnic groups as follows:

- (1) English, Germans, Scotch, Irish, Scandinavians
- (2) North Italians
- (3) Bohemians or Czechs
- (4) Poles
- (5) Lithuanians
- (6) Greeks
- (7) Russians, Jews (lower class)
- (8) South Italians
- (9) Negroes
- (10) Mexicans.

Id. at 322. See also STANLEY L. MCMICHAEL, MCMICHAEL'S APPRAISING MANUAL 160 (4th ed. 1951).

the natural tendency of any area was to decline due to the age of the physical structure and the filtration of the housing stock to families with lower incomes.³⁶ Richard M. Hurd explained that socioeconomic characteristics of a neighborhood were much more important at that time in determining the value of dwelling than structural characteristics.³⁷ In evaluating socioeconomic characteristics, HOLC officials monitored the movement of black families with maps charting the density of black settlement.³⁸ Such philosophical conceptions of property value combined with the anemic racism existing in American society invariably resulted in black neighborhoods being rated in category (D) and “redlined.”³⁹

Strong evidence exists to indicate that the HOLC impartially issued mortgage assistance and made the majority of its obligations in yellow and red neighborhoods.⁴⁰ The funds distributed by HOLC were relatively minor, and the major damage that the agency caused

36. JACKSON, *supra* note 12, at 198. This theory of urban and neighborhood development originated at the University of Chicago, School of Human Ecology by Robert Park and Homer Hoyt. Bradford, *supra* note 35, at 321. The model was premised upon a comparison of urban development and plant biology. *Id.* The model's premise was that just as certain pieces of land are best suited for a particular type of plant, certain urban areas were best suited for particular types of persons. *Id.* When an invading plant takes over an area inhabited by another plant, it drives out the original plant because it is best suited for that environment. *Id.* Such a theory applied to neighborhood development suggested that different groups of people “infiltrated” and “invaded” territory that was held by other groups and, through a Darwinistic survival of the fittest struggle, eventually assumed control over the area completely. *Id.* In 1939, Homer Hoyt elaborated on this theory in “The Structure and Growth of Residential Neighborhoods in American Cities.” *Id.* at 322. Hoyt developed the “filtering” or “trickle-down” model which suggested that as properties and neighborhoods got older they filtered down to poorer and less capable persons until they were transformed into slums. *Id.* Central to this model of neighborhood development was the concept of race. As Frederick Babcock explained:

Most of the variations and differences between people are slight and value declines are, as a result gradual. But there is one difference in people, namely race, which can result in a very rapid decline. Usually such declines can be partially avoided by segregation and this device has always been in common usage in the South where white and negro populations have been separated.

FREDERICK BABCOCK, *THE VALUATION OF REAL ESTATE* 91 (1932). In this manner, the infiltration of inharmonious racial groups became synonymous with neighborhood decline. Bradford, *supra* note 35 at 322.

37. JACKSON, *supra* note 12, at 198.

38. *Id.* at 201.

39. *Id.* at 200. For example, Lincoln Terrace in St. Louis was originally intended for middle class white families. *Id.* at 200. The project, however, was unsuccessful and it developed into a black neighborhood. *Id.* Despite the fact the homes were relatively new and of good quality, the HOLC gave the area a D rating in 1937 and 1940. *Id.* It asserted that the houses had “little or no value today, having suffered a tremendous decline in values due to the colored element now controlling the district.” *Id.*

40. *Id.* at 202.

was serving as a model for other credit institutions.⁴¹ The HOLC system was adopted by private institutions in rendering loan decisions, and the agency's "Residential Security Maps" were broadly distributed throughout the lending industry.⁴² As a consequence, private banks adopted the HOLC's racially discriminatory policies thereby institutionalizing and disseminating the practice of racial redlining. The greatest effect of the HOLC rating system was its influence on the underwriting practices of the FHA and the VA.⁴³

C. *Federal Housing Administration and Veterans Administration*

Kenneth Jackson proclaimed that: "[n]o agency of the United States government has had a more pervasive and powerful impact on the American people over the past half-century than the Federal Housing Administration (FHA)."⁴⁴ The FHA, established in 1934, and the VA, established in 1944, completely altered the residential housing market in the United States by financing suburbanization.⁴⁵ As a consequence, it is necessary to examine the FHA program and its role in perpetuating and institutionalizing racial redlining.

The FHA program was designed to "encourage increased mortgage lending, especially by those financial institutions which were not already required to provide mortgage loans."⁴⁶ In particular, the program was designed "to encourage improvement in housing standards and conditions, to facilitate sound home financing on reasonable terms, and to exert a stabilizing influence on the mortgage market."⁴⁷ The FHA and the VA did not lend money or build houses, rather they offered insurance to lenders to encourage them to invest in residential mortgages while preventing losses on the instruments.⁴⁸

Prior to the FHA program, first mortgages generally were limited to one-half or two-thirds of the property's appraised value.⁴⁹ As a result, a prospective purchaser needed a downpayment of 30% of the value of property. The FHA program guaranteed over 90% of the value of collateral for loans made by private banks which decreased the size of the down payment to 10%.⁵⁰ In addition, the FHA program prolonged the repayment period to twenty-five or thirty years, which resulted in low monthly payments, and insisted

41. MASSEY & DENTON, *supra* note 19, at 52.

42. *Id.*

43. *Id.*

44. JACKSON, *supra* note 12, at 203.

45. *Id.* at 203-06.

46. Bradford, *supra* note 35, at 316; *see also* JACKSON, *supra* note 12, at 204 (noting that during the 1920's, savings and loan associations held one-half of the United States' mortgage debt).

47. JACKSON, *supra* note 12, at 203.

48. *Id.* at 204

49. *Id.*

50. *Id.*

on fully amortized loans.⁵¹ With the loans guaranteed by the FHA, the risk to a bank was virtually eliminated which resulted in lower interest rates for borrowers.⁵²

The FHA's success was remarkable as housing starts and sales exploded from 332,000 in 1936 to 619,000 in 1941. Also the national rate of mortgage foreclosure was reduced from 250,000 non-farm units in 1932 to 18,000 in 1951.⁵³ By the end of 1972, the FHA had assisted eleven million families in buying houses and another twenty-two million families in making home improvements.⁵⁴ For the first time in United States history home ownership became a reality for many Americans. This remarkable success came at a price, as it was largely confined to whites in the suburbs to the detriment of African Americans residing in urban areas.

The administrative dictates in the FHA functioned in several methods which favored the suburbs and neglected the center cities. First, the FHA favored the financing of single-family detached homes over multi-family projects by adopting policies which favored open areas outside the congested center city.⁵⁵ In particular, the FHA established minimum standards for lot size, setbacks, and separation from existing structures which in effect precluded many center city residences from loan eligibility, including row houses and attached dwellings.⁵⁶ Second, the FHA favored new purchases over repair of existing homes by providing only small home improvement loans for short durations.⁵⁷ As a consequence, it was often easier to purchase a new home than to repair an existing one, which prompted people to move out of the city rather than improve their existing residences.⁵⁸ Third, the FHA required an "unbiased" professional appraisal as a requirement to any loan guarantee.⁵⁹ The purpose of the appraisal was to guarantee that throughout the term of the mortgage the market value of the property would surpass the outstanding debt.⁶⁰

While the FHA used the HOLC's appraisal system as a model, it further elaborated on the HOLC's system in its *Underwriting Manual*.⁶¹ The appraisal was based on three elements: the property

51. *Id.*

52. MASSEY & DENTON, *supra* note 19, at 53.

53. See JACKSON, *supra* note 12, at 204-05 (noting that there were 93,000 housing starts in 1933, and that after the FHA was established, housing starts and sales dramatically increased each year: 1937 (332,000), 1938 (399,000), 1939 (458,000), 1940 (530,000), and 1941 (619,000)).

54. *Id.*

55. OLIVER & SHAPIRO, *supra* note 2, at 17.

56. JACKSON, *supra* note 12, at 208.

57. *Id.* at 206.

58. *Id.*

59. *Id.* at 207.

60. *Id.*

61. OLIVER & SHAPIRO, *supra* note 2, at 18.

itself, the mortgagor or borrower; and the neighborhood.⁶² The purpose of the neighborhood evaluation was "to determine the degree of mortgage risk introduced in a mortgage insurance transaction because of the location of the property at a specific site."⁶³ The *Underwriting Manual* stated that "[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes."⁶⁴ Further, appraisers were warned of the dangers of infiltration of "inharmonious racial or nationality groups."⁶⁵ As a means of enforcing this segregation, the *Underwriting Manual* recommended "subdivision regulations and suitable restrictive covenants" as an excellent method to maintain neighborhood stability.⁶⁶ The FHA did not officially change this policy until February 1950, two years after racial covenants were declared unenforceable and contrary to public policy by the United States Supreme Court.⁶⁷ Thus, "[t]he most basic sentiment underlying the FHA's concern was its fear that property values would decline if a rigid black and white segregation was not maintained."⁶⁸

Precise figures detailing the FHA's discrimination against blacks are not available, however, county by county data showed a distinct pattern of "redlining" in center-city counties while loan activity thrived in suburban counties.⁶⁹ Given the importance of the HOLC, FHA, and VA in residential housing markets, by the late 1950's many blacks were denied access to traditional sources of housing finance by institutionalized procedures which resulted in spiral of decline in many large cities. As a result, a dual home

62. JACKSON, *supra* note 12, at 207.

63. *Id.* The FHA utilized eight weighed factors to access the quality of a residential areas: relative economic stability (40%); protection from adverse influences (20%); freedom from special hazards (5%); adequacy of civic, social, and commercial centers (5 %); adequacy of transportation (10%); sufficiency of utilities and conveniences (5%); level of taxes and special assessments (5%); and appeal (10%). *Id.*

64. *Id.* at 208.

65. MASSEY & DENTON, *supra* note 19, at 54.

66. JACKSON, *supra* note 12, at 208. Such covenants were common legal provision written into a deed to prohibit African Americans from occupying the dwelling. *Id.* By the 1940's, it was estimated that 80% of the residential land in Chicago was subject to restrictive covenants. UNITED STATES PRESIDENT'S COMMISSION ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 68 (1947).

67. JACKSON, *supra* note 12, at 208 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

68. OLIVER & SHAPIRO, *supra* note 2, at 18.

69. *Id.* Among a sample of 241 new homes in the St Louis metropolitan area insured by FHA loans between 1935 and 1939, 220 were located in the suburbs. JACKSON, *supra* note 12, at 209. See also Raymond A. Mohl, *Making the Second Ghetto in Metropolitan Miami, 1940-1960*, in *THE NEW AFRICAN AMERICAN URBAN HISTORY* (Kenneth W. Goings & Raymond A. Mohl ed. 1996); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POST WAR DETROIT* (1996).

financing market emerged where mortgage credit was accessible to whites while African Americans were forced to rely on less favorable, often predatory, forms of mortgage financing.⁷⁰ As Kenneth Jackson summarized:

The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities. More seriously, Washington actions were later picked up by private citizens, so that banks and savings-and-loan institutions institutionalized the practice of denying mortgages "solely because of the geographical location of the property."⁷¹

As a consequence, it is necessary to examine the laws which have been enacted to eradicate racial redlining, including the Fair Housing Act, the Home Mortgage Disclosure Act, and the Community Reinvestment Act.⁷²

70. Bradford, *supra* note 35, at 318 (citations omitted). Since traditional sources of mortgage financing were effectively unavailable to African Americans, the most common source of mortgage funds for African Americans was the installment contract. *Id.* at 319 (citations omitted). "Under this arrangement, the owner of property [sold] the property to a buyer who [paid] for it through monthly installment payments to the original owner. There was no mortgage involved, but the contract worked in a [similar] manner as a mortgage loan." *Id.* The buyer, however, often did not gain title to the property until the last installment payment was made. *Id.* Further, the installment contract was often written to ensure that the buyer did not gain any equity in the property over the period of the contract. *Id.* In addition, usury laws and mortgage interest rate ceilings did not apply since the installment contract was a private contract between the parties and a buyer could charge any interest rate that the buyer was willing to pay. *Id.* Thus, African Americans were often charged high interest rates to purchase homes at inflated prices. *Id.* Such a contractual arrangement could obviously be utilized in a predatory manner because if the buyer missed a single payment, the seller could take back the property without foreclosure proceedings and the buyer would lose not only the property but all the payments previously made on the contract. *Id.*

71. JACKSON, *supra* note 12, at 217.

72. The Equal Credit Opportunity Act (ECOA) may also be applicable to redlining. It was enacted in 1975 in response to discrimination against women who sought credit. The ECOA prohibits discrimination in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, and receipt of income from public assistance and good faith exercise of rights under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a)-(f) (1992). See also Susan Blakeley, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655 (1981); Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. MEM. L. REV. 37 (1994); Comment, *Equal Credit Opportunity Act Amendments of 1976*, 12 U. RICH. L. REV. 203 (1977). In addition, civil rights statutes 42 U.S.C. §§ 1981 & 1982 may be applicable to redlining. Section 1981 states:

(a) All persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is

III. FAIR LENDING LAWS

A. Fair Housing Act

After the urban riots of the 1960's, discrimination in housing became a major concern of the federal government.⁷³ In 1968, the Kerner Commission, appointed by President Lyndon B. Johnson to investigate the riots, issued a report which concluded: "[o]ur nation is moving toward two societies, one black, one white - separate and unequal."⁷⁴ The Commission identified segregation as a major cause

enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. § 1981. Section 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

73. The "new era in riots" began to surface in 1964 with a disturbance in Harlem and to a lesser extent in Rochester, New York; Elizabeth and Jersey City, New Jersey; and Philadelphia, Pennsylvania. MARY FRANCES BERRY, *BLACK RESISTANCE WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA* 168 (rev. ed. 1994). The first major explosion of the 1960's occurred in Watts, Los Angeles in August 1965. *Id.* at 169. During the six-day Watts riot, 34 persons were killed, 1032 persons were injured, and 4000 persons were arrested. LERONE BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA* 422 (5th ed. 1982). Two hundred businesses were completely destroyed and more than 700 were seriously damaged with total property damage estimated at thirty-five million dollars. *Id.* In the summer of 1966, there were approximately 43 disorders in a number of cities, including Omaha, Chicago, Dayton, Cleveland, Brooklyn, Jacksonville, Philadelphia, and Atlanta. *Id.* at 423-24. Eleven persons were killed and over 400 persons were injured in the disturbances. *Id.* at 423. In the spring and summer of 1967, there were approximately 150 disturbances, "ranging from minor clashes to widespread arson, looting, and sniping," which resulted in 83 deaths. BERRY, *supra* at 172; BENNETT, *supra* at 424. Major rebellions occurred in Newark with 23 persons killed and 1500 wounded and in Detroit with 43 persons killed and 2000 wounded. BENNETT, *supra* at 424. The seven day Detroit riot caused twenty million dollars in damage, with 7200 arrests, and resulted in the first use of federal troops in an American riot since the Detroit riots of 1943. BERRY, *supra* at 172-73; BENNETT, *supra* at 424.

74. UNITED STATES NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 1 (1968). On July 29, 1967, President Lyndon B. Johnson issued Executive Order 11365 which established the National Advisory Commission on Civil Disorders composed of Otto Kerner, John V. Lindsay, Fred R. Harris, Edward W. Brooke, James C. Corman, William M. McCulloch, I. W. Abel, Charles B. Thornton, Roy Wilkins, Katherine Graham Peden, and Herbert Jenkins. *Id.* at 534. The stated purpose of the Commission was to investigate and make recommendations regarding the origins of the recent major civil disorders; the development of methods and techniques for averting or controlling such disorders; and the appropriate role of the local, state, and Federal authorities in dealing with civil disorders. *Id.*

of the riots explaining: “[w]hat white Americans have never fully understood - but what the Negro can never forget - is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”⁷⁵ As a solution to the problems of the ghetto, the Commission called for a federal fair housing law.⁷⁶ The Commission also recommended that federal housing programs be given a new thrust aimed at overcoming the prevailing patterns of racial segregation.⁷⁷ On April

75. *Id.* at 2. The Commission noted that while the early pattern of African American settlement within metropolitan areas followed that of other immigrant groups, the later phases of settlement diverged sharply from those of the typical white immigrant group. *Id.* at 243-44. In particular, white immigrants were absorbed and dispersed by the larger society resulting in middle class neighborhoods in the cities and suburbs with no distinctive ethnic character, except that they were white. *Id.* at 244. This pattern of dispersal did not occur in African American neighborhoods because they have been effectively precluded from white residential areas by various discriminatory practices. *Id.* The Commission explained that segregation was exacerbated by “white flight” which it defined as “withdrawal from, or refusal to enter neighborhoods where large numbers of Negroes are moving or already residing.” *Id.* The Commission concluded that “[t]he rapid expansion of all-Negro residential areas in central cities and large-scale white withdrawal from them have continued a pattern of residential segregation that has existed in American cities for decades.” *Id.* at 246.

76. *Id.* at 475. The Kerner Commission concluded that in the “Negro ghetto, grossly inadequate housing continues to be a critical problem.” *Id.* at 468. In addition to the enactment of a federal fair housing law, the Commission recommended a number of other proposals, including:

Provision of 600,000 low and moderate-income housing units [within a] year and 6 million units over the next five years.

An expanded and modified below-market interest rate program.

An expanded and modified rent supplement program, and an ownership supplement program.

Federal write-down of interest rates on loans to private builders.

An expanded and more diversified public housing program; an expanded Model Cities Program.

A reoriented and expanded urban renewal program.

Reform of obsolete building codes.

Reorientation of federal housing programs to place more low and moderate-income housing outside of ghetto areas.

Id. at 475; see also 475-82.

77. *Id.* at 474-80. In fact, the FHA had begun shifting its policies in 1966 in an effort to make more mortgage insurance available to inner city properties. JACKSON, *supra* note 12, at 214-15. The FHA’s policy change resulted in a relaxation of underwriting standards and practices to such an extent as to exclude lending in “[o]nly those instances where a property has so deteriorated or is subject to such hazards . . . that the physical improvements are endangered or the livability of the property or the health or safety of its occupants are seriously affected.” Bradford, *supra* note 35, at 326 (citing Letter from the Commissioner of FHA to all approved FHA mortgagees, August 2, 1968). Ironically, these circumstances created a system whereby realtors and mortgage bankers could make high profits by increasing the speed of racial transformation in neighborhoods in several manners. First, it created an increased pool of credit which allowed whites to finance an escape from neighborhoods experiencing

4, 1968, the assassination of Dr. Martin Luther King, Jr. and the ensuing riots provided the final impetus for the establishment of a federal fair housing act.⁷⁸

The Fair Housing Act had two major goals: to expand minority housing opportunities and to foster residential integration.⁷⁹ It was designed to facilitate the replacement of the ghettos "by truly integrated and balanced living patterns."⁸⁰ Further, Senator Walter Mondale, a principal sponsor of the Act, acknowledged the role of past governmental discrimination in establishing and perpetuating the ghetto. He stated: "Negroes who live in slum ghettos, however, have been unable to move to suburban communities and other exclusively white areas An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels."⁸¹

The declared policy of the Fair Housing Act states: "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."⁸² To achieve this policy, the Fair Housing Act including Sections 3604 and 3605, which are applicable to mortgage lending discrimination

racial transformation. JACKSON, *supra* note 12, at 215; Bradford, *supra* note 35, at 327. Second, "the relaxed credit standards for black applicants meant that home improvement companies could buy properties at low cost, make cosmetic improvements, and sell the renovated home at a inflated prices approved by [the] FHA." JACKSON, *supra* note 12, at 215. In addition, the FHA had essentially no enforcement mechanism to supervise the soundness of the FHA-insured loans that were being made by its lenders. Bradford, *supra* note 35, at 328. Such a confluence of circumstances in the FHA program invited fraud and abuse which culminated in massive numbers of foreclosed and abandoned properties as many blacks could not afford the cost of maintenance on their sub-standard properties purchased at inflated prices. JACKSON, *supra* note 12, at 215; Bradford, *supra* note 35, at 328. The result was "a national scandal and the subject of numerous congressional hearings, investigations, and reforms" which further contributed to the problems of the inner city housing market. Bradford, *supra* note 35, at 328.

78. Following a two month manhunt, James Earl Ray was captured by Scotland Yard in London and charged with the murder of Dr. King. Lawrence Van Gelder, *James Earl Ray, 70, Killer of Dr. King, Dies in Nashville*, N.Y. TIMES, Apr. 24, 1998, at A25. Subsequently, Ray pleaded guilty to the charges of murdering Dr. King and was sentenced to 99 years imprisonment with no eligibility for parole. *Id.* The plea, which waived right to a trial, allowed him to avoid the death penalty. *Id.* Later, Ray recanted his confession and maintained his innocence up until his death in 1998. *Id.* See also GERALD POSNER, KILLING THE DREAM: JAMES EARL RAY AND THE ASSASSINATION OF MARTIN LUTHER KING, JR. (1998). The assassination ignited a series of disturbances in 36 states and 138 cities. BERRY, *supra* note 73, at 179. In Washington, D.C., there were 11 deaths and 1113 injuries, in Chicago there were nine deaths and 500 injuries, and in Baltimore there were six deaths and 900 injuries. *Id.*

79. ROBERT SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 10-40 (1990).

80. 114 CONG. REC. 3422 (1968).

81. 114 CONG. REC. 2277 (1968).

82. 42 U.S.C. § 3601 (1994).

and racial redlining, declared unlawful a wide range of discriminatory practices in the housing and real estate industries.

Section 3604 of the Act relates to discrimination in the sale or rental of housing and makes it an unlawful practice to refuse to sell, rent or otherwise make unavailable or deny, a dwelling because of race.⁸³ Section 3605 of the Act addresses discrimination in residential real estate-related transactions. Section 3605 states that it shall be an unlawful practice to discriminate “against any person in making available” or “in the terms or conditions of such a [residential real estate-related] transaction.”⁸⁴ Residential real estate-related transaction” is defined as “[t]he making or purchasing of loans or providing other financial assistance for purchasing,

83. *Id.* § 3604(a). Section 3604 states that it shall be unlawful:

(a) To refuse to sell or rent after making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

Id.

84. *Id.* § 3605(a). Section 3605 was amended in 1988, and prior to amendment, the section stated:

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance . . . or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given

Id. Historical and Statutory Notes.

constructing, improving, repairing, or maintaining a dwelling" and "[t]he selling, brokering, or appraising of residential real property."⁸⁵ As a consequence, the Fair Housing Act contains several provisions which may be utilized to eradicate racial redlining.

B. Home Mortgage Disclosure Act

The Home Mortgage Disclosure Act (HMDA) was enacted in 1975 as a Congressional response to the finding "that some depository institutions have sometimes contributed to the decline of certain geographic areas by their failure pursuant to their chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions."⁸⁶ HMDA is an informational disclosure law designed to assist citizens and public officials in determining whether "depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located."⁸⁷

As originally enacted, HMDA required financial institutions to provide information on the census tracts and income levels of successful mortgage applicants.⁸⁸ In 1990, however, the HMDA was amended requiring financial institutions to file annual reports regarding their mortgage loan applications, including: their rejection and acceptance rates by race, census tract location of properties, and several other statutorily required factors.⁸⁹ As a consequence, beginning in 1991, a series of controversial studies have been published analyzing the HMDA data, concluding that significant differences exist with regards to the rejection rates of black and white mortgage loan applicants.⁹⁰ While the Federal Reserve Board

85. *Id.* § 3605(b).

86. 12 U.S.C. § 2801(a) (1994).

87. *Id.* § 2801(b).

88. *Id.* § 2803(a)(1)-(2).

89. Financial institutions covered by HMDA must collect and report two general types of data: data about the application and data concerning the applicant. Deanna Caldwell, *An Overview of Fair Lending Legislation*, 28 J. MARSHALL L. REV. 333, 334 (1995). The information which relates to the application, includes: "date application received; type of loan . . . ; purpose . . . ; amount of loan requested or granted; owner occupancy status of property; location . . . of the property affected by the application; disposition of the applica[nt] . . . ; and the date action was taken on the application." *Id.* The information which relates to the applicant, includes race, sex, and gross annual income. *Id.* The possible racial classifications include American Indian, Asian or Pacific Islander, Black, Hispanic, White, other, not provided, or not applicable. *Id.* For denied applications, covered reporters have the option of reporting up to three reasons why the application was not approved, including "debt-to-income ratio, employment history, credit history, collateral, insufficient cash, unverifiable information, application incomplete, mortgage insurance denied, and other." *Id.*

90. A Federal Reserve study analyzing the 1990 Home Mortgage Disclosure Act data from 9300 financial institutions revealed loan rejection rates of 12.9% for Asians, 14.4% for Anglos, 21.4% for Latinos, 22.4% for American Indians, and 33.9% for blacks. Glenn B. Canner & Dolores S. Smith, *Home Mortgage*

has indicated that the data is limited and cannot be used as conclusive evidence of discriminatory lending practices, the information acts as a "red flag," warranting additional investigation to determine if unlawful mortgage lending discrimination exists.⁹¹

C. Community Reinvestment Act

The Community Reinvestment Act (CRA) was enacted in 1977 as a Congressional response to redlining. Senator Proxmire, a sponsor of the Act, explained:

[F]or more than 2 years the Banking Committee has been studying the problem of redlining and the disinvestment by banks and savings institutions in older urban communities. By redlining let me make it clear what I am talking about. I am talking about the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will . . . actually or figuratively draw a red line on a map around the areas of their city, . . . sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood.⁹²

The CRA's stated purpose was to encourage financial institutions "to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions."⁹³ It required federal regulatory agencies, in connection with an examination of a financial

Disclosure Act: Expanded Data on Residential Lending, 77 FED. RESERVE BULL. 859, 870 (1991). The Federal Reserve study found even more striking evidence of mortgage lending discrimination in its analysis of home mortgages at the highest income levels. At the highest income levels, the HMDA statistics revealed denial rates of 8.5% for Anglos, 11.2% for Asians, 12.8% for American Indians, 15.8% for Latinos, and 21.4% for blacks. *Id.* at 872. The statistics established that blacks at the highest income levels were being denied mortgage loans at higher rates than whites at the lowest income levels. *Id.* Further studies confirmed that racial disparities in home mortgage lending continued from 1991 through 1994. According to the 1992 HMDA statistics, the denial rates were 35.9% for black applicants, 27.3% for Hispanics, and 15.9% for white applicants. *1992 HMDA Data Show Racial Disparities in Loan Denial Rates*, 9 FAIR HOUS.-FAIR LENDING § 7.5 (1994). According to the 1991 HMDA statistics the denial rates were 37.4% for African American applicants, 26.5% for Hispanics and 17.3% for white applicants. *Id.* Although the 1994 HMDA statistics indicated a sharp increase in the number of mortgage loans granted to blacks, such applicants still had denial rates of 31.2% versus 16.7% for white applicants. *Minority Home Loans Up Sharply In '94*, PHILADELPHIA DAILY NEWS, Feb. 16, 1996, at 71. A Wall Street Journal computer analysis indicated that home loan approvals for blacks rose more than 38% in 1994 from 1993, while approvals for whites rose just under 12%. *Id.* In 1997, the denial rate for African American mortgage applicants rose to 53% an increase of more than 3% from 1996. *1997 HMDA Data Released; Minority Denial Rates Rise*, 9 FAIR HOUS.-FAIR LENDING § 10.4 (1998).

91. Canner & Smith, *supra* note 90, at 859.

92. 123 CONG. REC. 17,630 (1977).

93. 12 U.S.C. § 2901(b) (1998).

institution, to assess the "institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods" and to "take such record into account in its evaluation of an application for a deposit facility by such institution."⁹⁴

In 1989, the CRA was amended to mandate the public disclosure of a written assessment and rating of the CRA performance of financial institutions.⁹⁵ Further, the financial regulatory agencies may use the ratings to block a financial institution's efforts to acquire or merge with other financial institutions or to build or open new branches. Even with the freedom to evaluate financial institutions according to their CRA performance, the CRA was rarely used as a basis to deny mergers and acquisitions.⁹⁶ As a consequence, the CRA is primarily an

94. *Id.* § 2903(a). The term "appropriate federal financial supervisory agency" means:

the Comptroller of the Currency with respect to national banks;
the Board of Governors of the Federal Reserve System with respect to state chartered banks which are members of the Federal Reserve System . . . ;
the Federal Deposit Insurance Corporation with respect to state chartered banks and savings banks which are not members of the Federal Reserve System . . . ; and . . .

(4) the Director of the Office of Thrift Supervision, in the case of a savings association [] and a savings and loan holding company[.]

Id. § 2902(1).

95. Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 243 (1996). The written evaluations consist of a public and confidential section. 12 U.S.C. § 2906(a)(2) (1994). The public section consists of the appropriate Federal financial supervisory agency's conclusions for each assessment factor, the facts and data supporting such conclusions, the institution's rating, and a statement describing the basis for the rating. *Id.* § 2906(b)(1). The institution may be rated as follows: "Outstanding," "Satisfactory," "Needs to improve," and "Substantial noncompliance." *Id.* § 2906(b)(2). "The confidential section of the written evaluation . . . contain[s] all references that identify any customer of the institution, any employee or officer of the institution, or any person or organization that has provided information in confidence to [the] supervisory agency." *Id.* § 2906(c)(1).

96. Hylton & Rougeau, *supra* note 95, at 243 n.33. CRA examinations have been nearly impossible to fail. *Id.* "Of the 26,000 CRA examinations conducted from 1985 to 1989, only 2.4% resulted in poor grades." *Id.* (citing Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, but Strengthened Federal Enforcement is Needed*, 20 FORDHAM URB. L.J. 293, 296 (1993)). In 1992, 10% received an outstanding rating and 80% received a satisfactory rating. *Id.* at 243 n.37 (citing A "Better Than Satisfactory" Grade?: *Fed's Advisors, Lindsey Concur on 5th CRA Rating*, AM. BANKER, June 15, 1992, at 10). Further, in 1993, Carolyn Brown stated that since 1977, 70,000 applications for expansions, mergers, and acquisitions have been reviewed under the CRA, only 20 of which have been rejected for poor CRA compliance. Carolyn M. Brown, *How to Fight Mortgage Discrimination . . . And Win!!*, BLACK ENTERPRISE, July, 1993, at 48.

information tool to document the lending practices of financial institutions.⁹⁷

In conclusion, it is clear that Congress recognized the existence of redlining and identified it as major cause of ghettos and segregation. In its efforts to address the ills associated with redlining, Congress passed the Fair Housing Act, the Home Mortgage Disclosure Act, and the Community Reinvestment Act. Despite the existence of such laws, it appears that the issue of redlining continues to persist depriving minorities of home mortgage loans. While financial institutions no longer draw red lines around minority areas in the classic sense of the word, the practice has evolved to the point where it is characterized by marketing practices and policies that effectively preclude minority areas. Consequently, it is necessary to examine a study demonstrating both the evolution of redlining and confirming its continued existence throughout the United States.

IV. MARKET REDLINING

Numerous studies have examined and confirmed the continued existence of redlining in the provision of home mortgage loans.⁹⁸

97. See generally Molle Bennett, Comment, *Resolving the Community Reinvestment Act Dilemma: Eliminating "Whites Only" Mortgage Lending While Reducing Regulatory Red Tape*, 24 TEX. TECH L. REV. 1145 (1993); Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 FORDHAM URB. L.J. 165 (1993); Lawrence J. White, *The Community Reinvestment Act: Good Intentions Headed in the Wrong Direction*, 20 FORDHAM URB. L.J. 281 (1993); Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291 (1993); Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349 (1993); Andrew Miller, Comment, *The New York Proposal to Revise the Community Reinvestment Act: A Quantitative Step Towards Objectivity and Effectiveness*, 43 CATH. U. L. REV. 951 (1994); Leonard Bierman et al., *The Community Reinvestment Act: A Preliminary Empirical Analysis*, 45 HASTINGS L.J. 383 (1994); Gary M. Swidler, Note, *Making the Community Reinvestment Act Work*, 69 N.Y.U. L. REV. 387 (1994); A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431 (1995); E. L. Balducci, Note, *The Community Reinvestment Act: New Standards Provide New Hope*, 23 FORDHAM URB. L.J. 831 (1996); Laura Turner Beyer, Note and Comment, *The Community Reinvestment Act: A Boost to Low - and Moderate Income Communities, A Set-Back For Minority-Owned Banks*, 1 N.C. BANKING INST. 387 (1997); Joseph Moor, Note and Comment, *The Community Reinvestment Act and Its Impact on Bank Mergers*, 1 N.C. BANKING INST. 412 (1997); Lara L. Spencer, Note and Comment, *Enforcing the Community Reinvestment Act: The Courthouse Doors Are Closed*, 2 N.C. BANKING INST. 169 (1998).

98. Harriett Taggart and Kevin Smith identified three generations of studies regarding redlining. Harriett Tee Taggart & Kevin W. Smith, *Redlining: An Assessment of the Evidence of Disinvestment in Metropolitan Boston*, 17 URB. AFFAIRS Q. 91, 92 (1981). The first group of studies were based on information obtained through property transfer records, census data, annual financial reports of individual banks, and case histories of mortgage application experiences of local residents. *Id.*

A recent study examined the issue of racial redlining by major mortgage lenders in the nation's sixteen largest metropolitan areas.⁹⁹ The study identified the continued prevalence of redlining by identifying sixty-two "worst case lending patterns" whereby lenders excluded minority neighborhoods.¹⁰⁰

Among the more extensive studies of this series were analyses done on Baltimore (Home Ownership Development Program, 1973), Chicago (Bradford et al., 1975; Feins, 1976), Cincinnati (McKee, 1974), Los Angeles (Center for New Corporate Priorities, 1975), New York (Devine et al., 1973), Philadelphia (Northwest Community Housing Association, 1973) and Washington, D.C. (Public Interest Research Group, 1975).

Id. A second group of studies were based upon geographic breakdowns of mortgage loan activity collected pursuant to the Home Mortgage Disclosure Act. *Id.* at 92-93.

These studies included a survey of eight metropolitan areas (Pryzbiliski, 1978), an analysis of several cities in California (California Department of Savings and Loans, 1978), a study of each of the metropolitan areas in Connecticut (Gold, 1977), an analysis of mortgage and deposit disclosure data for metropolitan Boston (Taggart et al., 1977), and a preliminary report on each of the metropolitan areas in New York (New York State Banking Department, 1977).

Id. A third group of studies were based upon individual mortgage applicant and borrower data. *Id.* at 93. Such data was developed through several methods, including: "surveys developed by research personnel posing as applicants; interviews conducted with homebuyers, examination of written applications for mortgage loans; and risk studies designed to analyze lenders mortgage loan activity in urban areas and suburban areas." *Id.* (citations omitted).

99. JONATHAN BROWN, RACIAL REDLINING: A STUDY OF RACIAL DISCRIMINATION BY BANKS AND MORTGAGE COMPANIES IN THE UNITED STATES 4 (1993), reprinted at (visited Mar. 25, 1999) <<http://www.essential.org/pnbcc/redline/redl.html>>. The 16 metropolitan areas were: New York, Boston, Los Angeles, Chicago, Washington D.C., Philadelphia, Detroit, Houston, Miami, Baltimore, Oakland, Atlanta, Dallas, St. Louis, Buffalo, and Pittsburgh. *Id.* at Table 1. "According to the 1990 Census data, the 16 metropolitan areas contained 38.3 percent of the total African American population and 40.4 percent of the total Hispanic population." *Id.* at 14.

100. *Id.* at 5. The study was based upon a computer-assisted analysis of 1,256,982 home purchase loan applications in sixteen metropolitan areas during 1990 and 1991 maintained by the Federal Reserve Board pursuant to the Home Mortgage Disclosure Act. *Id.* at 4-5. The data was analyzed "to identify and select any lenders that were major home purchase loan originators within a metro[politan] area but made comparatively few loans within the metro[politan] area's minority neighborhoods. Then [the study] mapped the home mortgage lending patterns of [those] selected lenders at the metro[politan] area level." *Id.* at 5. Based upon this analysis, the study developed four criteria which had to be met in order for a lender to be designated as "worst case lending pattern." *Id.* The criteria were as follows:

1. The lender had to rank among the top 20 home purchase loan originators within the metro area;
2. The lender had to rank among the lowest of the major home purchase loan originators within a given metro area, in terms of the percentage of a lender's total home purchase loan originations in the metro area made in minority neighborhoods, as determined by HMDA statistics;

The study reached several significant conclusions regarding the practice of redlining. First, it explained that “a lack of loan applications from minority neighborhoods, rather than a low loan application approval rate [was] the immediate cause” of most of the worst lending patterns.¹⁰¹ As a consequence, the issue of redlining was not an issue of disparate treatment of individual applicants but rather the result of a failure to effectively market and solicit applications from minority communities.¹⁰² Such a conclusion is consistent with the continuing legacy of the HOLC and FHA, later adopted by the private lenders which resulted in the complete failure to provide mortgage lending service to minority communities.

Second, the study examined the evolution of redlining by demonstrating that its continued existence was related to the marketing practices espoused by lenders in delineating “effective lending territory.” In particular, the study explained:

[t]he effective lending territories of major lenders do not arise spontaneously. Rather, they are actively shaped by the marketing strategies of lending institutions. Most major lenders do not wait passively for customers to walk into their offices and request loan application forms. Instead, they actively initiate specific marketing strategies that target certain types of customers, often upscale persons, and particular geographic areas. The lending patterns that emerge are thus the end result of a series of choices by mortgage lenders, such as where to locate retail offices; who to hire as agents to solicit mortgage loan applications; which real estate brokers and mortgage brokers to cultivate for business relationships; and what advertising tactics to adopt.¹⁰³

The study demonstrated that the continuing prevalence of redlining was directly related to the effects of the policies and practices adopted by lenders rather than “the underlying preferences

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3. The lender had to originate home purchase loans throughout most of the metro area or at least large segments of it; and
The lender had to exhibit a pattern of excluding or substantially underserving minority areas.

Id. at 16.

101. *Id.* at 8.

102. *Id.*

103. *Id.* at 23. The study noted several lending policies and practices which may have a disparate impact on minorities, including:

- Minimum loan amounts . . . ;
- High down-payment requirements;
- Very low ceilings on monthly-payment-to-income ratios;
- Refusal to engage in FHA insured lending or to develop flexible conventional financing alternatives;
- Refusal to lend on 2-4 family structures in metro areas . . . ; and
- Use of appraisal standards that tend to undervalue 1-4 family structures in minority neighborhoods.

Id. at 27.

and choices of mortgage loan applicants."¹⁰⁴

A third issue addressed by the study related to a frequent explanation offered by lenders relating to the limited demand in minority areas. The study concluded that the "flow of home purchase loans in minority neighborhoods broadly defined was on the average . . . 54% of the flow in moderate income white neighborhoods and 44% of the flow in white neighborhoods in general."¹⁰⁵ The study concluded that while the flow of home purchase loans was markedly less than the flow in white neighborhoods, an active market did exist throughout many minority areas.¹⁰⁶

Thus, the study establishes that redlining continues to exist and that a major cause of redlining is the effect of marketing practices and policies of lenders which operate to exclude minority neighborhoods. It appears such practices are a direct "vestige of discrimination" from the blatantly racially discriminatory practices of the HOLC and FHA which were adopted by private lenders. As a consequence, it is necessary to examine several relevant court decisions in order to access the legal, analytical framework designed to address the racially discriminatory practice of racial redlining.

V. THE LEGAL FORMULATION OF REDLINING

In the thirty years since the passage of the Fair Housing Act, there have been relatively few court decisions regarding the practice of redlining. It was not until 1976 that a court addressed the justiciability of a cause of action premised upon redlining. In *Laufman v. Oakley Building & Loan Co.*, Robert and Kathleen Laufman alleged that their mortgage loan application was denied due to redlining practices in violation of Sections 3604 and 3605 of the Fair Housing Act of 1968.¹⁰⁷ The Oakley Building and Loan

104. *Id.* at 8.

105. BROWN, *supra* note 99, at 25.

106. *Id.* The study examined the HMDA data base in the 16 metropolitan areas to determine if "there were major mortgage lenders that actively served the minority community." *Id.* The study concluded that "[i]n many of these metro areas, there were, indeed, major lenders affirmatively serving minority communities." *Id.* In particular, the study cited "large depository institutions operating in their home markets or the closely related mortgage affiliates of such institutions." *Id.*

107. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 491 (S.D. Ohio 1976). The plaintiff also alleged violations of 42 U.S.C. § 3617 which provides that "it shall be unlawful to . . . interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by sections 3603, 3604, 3605, or 3606 of this title" and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), which provides that no person shall be denied on the basis of race, color, or national origin "the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." *Id.* at 491, 498.

Company sought summary judgment.¹⁰⁸

The court rejected the defendant's contention that Section 3604 of the Fair Housing Act was strictly limited to discrimination in the sale or rental of housing.¹⁰⁹ The court held that Section 3604's explicit application to other situations indicates that it "deals with discrimination in the sale or rental of housing in the broadest possible manner, . . . so that its coverage clearly extends beyond the usual purview of the terms 'sale or rental.'"¹¹⁰ Further, the court held that Section 3605's prohibition of discrimination in financing housing was an explicit prohibition of "redlining."¹¹¹ The court reasoned: "the practice of 'redlining' would seem to fall under the proscription against denial of loans and financial assistance on the basis of race . . . where the purpose of the loan was to finance the purchase of a home in an integrated neighborhood."¹¹²

In reaching its decision, the court examined the legislative history of the Fair Housing Act.¹¹³ The court noted that a primary concern of the legislation was to address "the rioting and civil disturbances that had rocked the central cores of many of the nation's major cities the previous summer."¹¹⁴ Relying upon the final report of the National Advisory Commission on Civil Disorders published in March 1968, the court noted a major cause of the racial disorders of the summer of 1967 was residential segregation and racial slum formation.¹¹⁵ The court stated:

Little imagination is required to understand that the imposition of barriers to occupancy in the form of higher mortgage-interest rates or refusals to make loans in connection with housing in changing neighborhoods works to discourage families, white or black, which could afford to purchase homes in such neighborhoods. The practical effect is to discourage whites—who may freely move elsewhere—from moving into vacancies in "changing" neighborhoods, thereby inducing "massive transition" and, ultimately, "white flight." Thus, according to this view, redlining directly contributes to the decay of our cities.¹¹⁶

108. *Id.* at 491.

109. *Id.* at 492.

110. *Id.* The court noted that Section 3604(b), which prohibits racial discrimination "in the provision of services or facilities," has been interpreted to include "municipal services such as sewage treatment." *Id.* The court also noted that Section 3604(c), which "prohibits racially discriminatory advertising practices in connection with the sale or rental of housing[,] . . . has been interpreted as prohibiting the recorder of deeds in the District of Columbia from accepting for filing instruments that contain racially restrictive covenants." *Id.* at 492-493 (citing *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972)).

111. *Laufman*, 408 F. Supp. at 493.

112. *Id.*

113. *Id.* at 496-98.

114. *Id.* at 496.

115. *Id.*

116. *Laufman*, 408 F. Supp. at 496-97.

The court explained that Congress responded to the riots of 1967 with the "passage of the Civil Rights Act of 1968, including— as recommended by the [National Advisory] Commission—the strong Fair Housing legislation [which was] before the Court."¹¹⁷ The court determined that the provisions of the Fair Housing Act should be given "a generous construction" in order to effectuate the purposes of Congress.¹¹⁸

The court concluded that both Sections 3604 and 3605 proscribed the practice of redlining.¹¹⁹ The court held that "[t]ransactions involving both the sale or rental of a dwelling and real estate loans or other financial assistance in connection with the sale or rental of the dwelling are subject to both provisions."¹²⁰ While the court's decision firmly established the justiciability of a cause of action premised upon redlining, courts found the necessity to address the analytical framework for establishing a cause of action premised on redlining.¹²¹

117. *Id.* at 497.

118. *Id.* (citing *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 204, 212 (1972)).

119. *Laufman*, 408 F. Supp. at 498. The court also noted that the Department of Housing and Urban Development (HUD) and the Federal Home Loan Bank Board (FHLBB), "which share responsibility for administering the Fair Housing Act, have unanimously interpreted its provisions as applicable to racial redlining." *Id.* at 494. The court cited a HUD report on an extensive survey of lending institutions which stated that "redlining of areas in a community in which minority group families are concentrated and the refusal to make loans in these areas . . . are prohibited by Title VIII." *Id.* (quoting HUD (Office of Equal Opportunity), Private Lending Institutions Questionnaire, Initial Report on Returns (Apr. 25, 1972)). The court cited FHLBB regulations which stated:

Refusal to lend in a particular area solely because of the age of the homes or the income level in a neighborhood may be discriminatory in effect since minority group persons are more likely to purchase used housing and to live in low-income neighborhoods. The racial composition of the neighborhood where the loan is to be made is always an improper underwriting consideration.

Id. at 495 (quoting 12 C.F.R. 531.8(c)(6)).

120. *Id.* at 493.

121. The practice of redlining is not limited only to mortgage lending, it is also applicable in the context of property insurance. In *Dunn v. Midwestern Indem. Mid-Am. Fire and Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979), an action was brought against an insurer under the Fair Housing Act alleging "insurance redlining." *Id.* at 1107. On motion to dismiss for failure to state a claim on which relief could be granted, the court held that "insurance redlining," "a discriminatory failure or refusal to provide property insurance on dwellings," violates provisions of the FHA. *Id.* at 1112. In addition, the court held that the allegation that the insurer had determined to cancel a certain business portfolio "based on fact that the portfolio included 'a significant portion of black homeowners and/or persons residing in predominantly black neighborhoods'" stated a claim on which relief could be granted under FHA. *Id.* at 1107, 1112. However, in *Mackey v. Nationwide Insurance Co.*, 724 F.2d 419, 425 (4th Cir. 1984), the Fourth Circuit held that insurance redlining is not prohibited by Section 804(a) or any other provision of the Act.

In an effort to resolve the conflicting opinions, the United States

In *Old West End Association v. Buckeye Federal Savings & Loan*, a white couple attempted to purchase a home in Old West End of Toledo, a neighborhood where blacks exceeded 40% of the population.¹²² After Buckeye Federal Savings and Loan Association rejected the plaintiffs' initial loan application, they filed an action under the Fair Housing Act and several other civil rights statutes alleging that the defendant had engaged in the discriminatory practice of redlining.¹²³ Subsequently, the defendant filed a motion for summary judgment.¹²⁴

In developing an analytical framework to examine redlining, the court modified the analysis enunciated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.¹²⁵ The court

Department of Housing and Urban Development issued regulations which explicitly declared insurance redlining as prohibited conduct. 24 C.F.R. § 100.70(d)(4). In *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), the Seventh Circuit Court of Appeals determined that insurance redlining is covered and prohibited by Section 804(a) of the Fair Housing Act and its "otherwise make unavailable" language. *Id.* at 301. Central to the court's decision was the HUD determination that Section 804(a) covered insurance redlining. *Id.* at 300. The Court explained: "Lenders require their borrower to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance makes housing unavailable." *Id.* at 297. As a result, it appears that insurance redlining is prohibited by the provisions of the Fair Housing Act.

122. Courts have previously held that non-minorities have standing to maintain a discrimination action for injuries caused by racially discriminatory policies. For example, the United States Supreme Court held that a white person had standing under the Fair Housing Act due to the loss of important benefits from interracial associations. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972). The Court, after reviewing the legislative history of the Act, found that "[w]hile members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." *Id.* at 210. In *Harrison v. Heinzeroth Mortgage Co.*, a complaint was filed by "white persons who attempted to purchase a home in an integrated or predominantly black neighborhood, [and] were refused a mortgage loan with terms and conditions equal to those of loans on homes in predominantly white neighborhoods." 414 F. Supp. 66, 67 (N.D. Ohio 1976). The court denied the defendant's motion to dismiss, holding that "[i]t is enough that a complainant demonstrate that he was denied housing opportunities solely on the basis of racial considerations." *Id.* at 67.

123. *Old West End Ass'n v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100, 1102 (N.D. Ohio 1987). The plaintiff also alleged violations of 42 U.S.C. Sections 1981, 1982, 1985(3). *Id.* The sellers and buyers agreed to a purchase price of the Old West End residence as \$78,500. *Id.* The defendant ordered an appraisal which "arrived at a value equal to the sale price. The appraisal also noted the predominant value of properties in the area to be \$70,000.00." *Id.* The defendant denied the loan on the basis that "the property did not qualify for maximum financing, and the property appraisal was unacceptable." *Id.* The defendant approved a second mortgage loan application after the parties agreed to a reduction of the sale price to the amount of \$70,000. *Id.*

124. *Id.*

125. *Id.* at 1103. The court noted that even though *McDonnell Douglas* was an

held that the plaintiffs had made out a prima facie case under both the Fair Housing Act and the Civil Rights Act by establishing that:

- (1) the housing sought to be secured was in a minority neighborhood;
- (2) that an application for a loan to purchase the housing located in a minority neighborhood was made;
- (3) that an independent appraisal concluded that the value of the housing equaled the sale price;
- (4) that the buyers were credit worthy; and
- (5) that the loan was rejected.¹²⁶

Following the establishment of a prima facie case, the Court held that "the defendant must produce admissible evidence which would allow a trier of fact rationally to conclude that the decision to reject the loan had not been motivated by a discriminatory animus."¹²⁷ The defendant produced evidence that the loan was denied because the value of the property exceeded the predominant value in the area and because of Fannie Mae's underwriting guidelines relating to maximum financing.¹²⁸ The court determined that this evidence successfully rebutted the prima facie case.¹²⁹ As a result, the Court held that "the factually inquiry proceeds to a new level of specificity."¹³⁰

The court analyzed the plaintiff's claims under the various civil rights statutes from an intent standard. In assessing the intent, the court noted that "[t]he patterns of defendants' past treatment of loan

employment case, its standards had been applied in Title VIII cases. *Id.* The court explained that under the *McDonnell Douglas* standard, "the plaintiff has the burden of demonstrating by a preponderance of the evidence a prima facie case of discrimination." *Id.* If the plaintiff establishes a prima facie case, the defendant has the burden of production to articulate a legitimate non-discriminatory reason for its action. *Id.* If the defendant meets this burden, the plaintiff must prove that the defendant's legitimate, non-discriminatory reason is in fact a mere pretext for unlawful discrimination. *Id.*

126. *Id.* at 1103.

127. *Id.*

128. *Old West End Ass'n*, 675 F. Supp. at 1103. The defendant testified that "the property did not qualify for maximum financing because 'the value of the property exceeded the predominant value in the area, and therefore, that posed a marketing problem should the borrower default on the loan.'" *Id.* Section 103 of the Fannie Mae guidelines also stated:

When the property has a sales price that approaches the upper price level, the loan is acceptable on maximum terms as long as the lender believes that it does not represent a significant over improvement and that it would appeal to enough qualified purchasers to create an active market. When the property has a sales price that exceeds the upper price level, the loan terms should generally be more conservative since it may not be acceptable to the typical buyer. However, a lender should consider the possibility that a property in an urban area is among those being rehabilitated.

Id. at 1103-04.

129. *Old West End Ass'n*, 675 F. Supp. at 1104.

130. See *id.* (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)).

applications from minority neighborhoods, and departures from standard underwriting or loan acceptance procedures may shed some light on the defendants' purposes."¹³¹ The plaintiffs presented an expert witness testimony which indicated that the defendants' application of the Fannie Mae underwriting guidelines was improper.¹³² The court concluded that reasonable minds could find that the defendant's actions were motivated by an intent to discriminate.¹³³

"In support of their Fair Housing Act claim, plaintiffs argue[d] that Buckeye's underwriting practices have resulted in discriminatory effects."¹³⁴ The plaintiffs produced statistical evidence which established that the defendant treated conventional mortgage applications from white neighborhoods differently than similar applications from integrated or minority neighborhoods.¹³⁵ The court concluded that the plaintiffs produced evidence from which reasonable minds could conclude that defendants' action had a discriminatory effect and thus it denied the defendants' motion for summary judgment.¹³⁶ As a result, the court's decision established an analytical framework to analyze redlining cases.

In *Cartwright v. American Savings & Loan Association*, the court elaborated on the type of evidence necessary to establish and prove a cause of action based on redlining.¹³⁷ American Savings and Loan Association denied a mortgage loan application from Mary and

131. *Id.* at 1105.

132. *Id.* at 1104.

133. *Id.* at 1105.

134. *Id.* The court noted that "[p]roof of a pattern or practice of discrimination is sufficient to sustain a violation of the Fair Housing Act." *See id.* (citing *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977)). Courts have held that a policy that is neutral on its face may have two types of discriminatory effects. *Id.* First, discriminatory effect may result in a "greater or disparate impact on a minority group than on a non-minority group. Second, discriminatory effect may arise from disparate treatment of different racial groups." *Id.*

135. *Old West End Ass'n*, 675 F. Supp. at 1105. The court noted:

Plaintiffs' statistics indicated that from 1981 until January, 1987, slightly over one hundred seventy seven conventional loans were tendered to the [defendant] for purchase. Of these loan applications, only ten applications were submitted from areas with a racial composition of over 20% black. Of these ten applications, four were submitted from neighborhoods comparable to the Old West End in which the composition of blacks exceeded 40%. The tables then calculate the percentage of loans in white areas rejected verses the percentage of the four loans rejected out of the ten submitted from black areas. The resulting figure indicates a rejection rate of 40% of the applications submitted from neighborhoods of over 20% black composition.

Id. at 1106

136. *Id.*

137. 880 F.2d 912 (7th Cir. 1989).

Lawrence Cartwright to finance the construction of a home.¹³⁸ Mary Cartwright filed suit contending that the defendant denied approval of the loan application based upon her race and sex and engaged in "redlining" in the neighborhood where the plaintiff she planned to build a home.¹³⁹ American Savings moved for involuntary dismissal based on the argument that the plaintiff failed to establish a right of relief.¹⁴⁰

The trial court determined that there was no evidence indicating that American Savings rejected or otherwise denied the plaintiff's application.¹⁴¹ Further, the plaintiff failed to provide information on comparable housing for the appraisal which she had volunteered to provide to the defendant.¹⁴² The court concluded that American Savings did not engage in redlining within the meaning of Section 3605 because:

the plaintiffs' evidence failed to offer a comparison between American Savings and other lending institutions; the relevant amount of total mortgage activity in all relevant areas; the number of mortgage applications received by American Savings, and the number of those applications rejected or withdrawn; or a relationship of comparable transactions from areas other than the area where the Cartwrights intended to build.¹⁴³

In addition, the trial court determined that the plaintiff's claims did not "fall within the ambit of § 3604 of the Fair Housing Act, . . . because [it] applies to discrimination in the sale or rental of housing rather than discrimination in the financing of housing."¹⁴⁴

The plaintiff appealed the decision to the Court of Appeals which upheld the trial court's decision.¹⁴⁵ Further, the court elaborated upon the evidence necessary to establish a redlining case. The court noted that the plaintiff presented evidence that American Savings granted two residential mortgage loans from January 1980 through January 1984 in the substantially black census tract containing the plaintiff's property.¹⁴⁶ During the same time period, plaintiff argued that American Savings granted thirty-six residential mortgage loans and twenty-five residential mortgage loans in census tracts with zero to 1% black population.¹⁴⁷

The court concluded this data was obviously flawed because it

138. *Id.* at 913.

139. *Id.* The plaintiff alleged violations of § 3604 and § 3605 of the Fair Housing Act; Equal Credit Opportunity Act; and § 1981 and § 1982 of civil rights statutes. *Id.*

140. *Id.* at 913-14.

141. *Id.* at 916.

142. *Id.* at 917.

143. *Cartwright*, 880 F.2d at 917.

144. *Id.*

145. *Id.* at 925.

146. *Id.* at 922.

147. *Id.*

failed to identify any relevant statistical evidence of the number of applications received from qualified borrowers in a particular census tract and how many of those applications were rejected.¹⁴⁸ The court stated: "Such proof lies at the very heart of any redlining allegation, as it is absurd to allege a discriminatory refusal to approve loan applications in a particular area without proof that qualified borrowers actually applied and were rejected."¹⁴⁹ The court proclaimed that American Savings could not be considered responsible for redlining a geographical area when the evidence established that it granted every application submitted to it for homes located in the census tract.¹⁵⁰ The court also noted that the Fair Housing Act does not require that a lender disregard its legitimate business interests or make a bad investment.¹⁵¹ The court implied that it was a legitimate business interest to consider the property value of the surrounding dwellings in accessing a loan.¹⁵² The court concluded by citing the implementing regulations of the Fair Housing Act which state that "lenders may legitimately consider 'the present market value of the property offered as security . . . and the likelihood that the property will retain an adequate value over the term of the loan.'"¹⁵³ The court's decision imposed significant additional burdens upon a plaintiff attempting to establish a redlining case.

VI. CRITIQUE OF COURT'S ANALYTICAL APPROACH TO REDLINING

The legal approach adopted by the courts to address redlining is premised upon the intentional discrimination model articulated in *McDonnell Douglas v. Green*.¹⁵⁴ Courts, however, have noted such an approach may be problematic in certain circumstances as "clever

148. *Id.* The court noted that the trial record included American Savings' Loan Application Registry Summary containing a breakdown of all residential loan applications received from American Savings from November 1, 1980 through 1985, including the amount of the loan requested and whether the application was granted, denied, or withdrawn. *Id.* at 922, note 17. The court stated, however, the LARS report did not disclose the number of loan applications received for property located in particular census tracts or identifiable geographical areas. *Id.*

149. *Cartwright*, 880 F.2d at 922.

150. *Id.* at 923.

151. *Id.*

152. *Id.* The court commented:

It seems obvious that a lender must be concerned, for example, about financing a new, \$90,000 home in a residential area comprised of homes valued at \$60,000 or less. If the borrower defaults on the loan, the lender must foreclose and may be unable to recoup its investment, as potential buyers might be reluctant to pay \$90,000 for the home . . . in light of the surrounding property values.

Id.

153. *Id.* (quoting 12 C.F.R. § 31.8(c)(7)).

154. 411 U.S. 792 (1973).

men may easily conceal their motivations”¹⁵⁵ and that “intent, motive and purpose are elusive subjective concepts[.]”¹⁵⁶ Such concerns are particularly relevant in the area of mortgage lending discrimination. An applicant may be denied a mortgage loan on the basis of any number of stated reasons, including: debt-to-income ratio, employment history, credit history, collateral, insufficient cash, unverifiable information, insufficient appraisals or mortgage insurance denial. An analysis of the variables involved in rendering a decision with regard to mortgage application requires a sophisticated level of understanding of the mortgage process, which the typical applicant may not possess. As a consequence, a mortgage loan denial based on discriminatory intent is often easily hidden among the maze of variables an applicant must navigate to obtain a mortgage loan.

The historical origins of redlining also mitigate against the adoption of an intent standard. Historically, the practice of racial redlining was institutionalized by both private and public financial institutions. The effects of such a historic process denied minority areas access to credit because such services are simply not marketed in redlined areas. As a consequence, persons in minority areas often resorted to other types of financing arrangements. Thus, any focus upon the treatment accorded applicants from minority areas may be of limited value, as the historical impact of redlining has been to eliminate applicants from minority areas. Indeed, if a financial institution excels at the practice of redlining it would not receive any applications from persons in minority areas.

The problems inherent in an intent approach were demonstrated in *Cartwright v. American Savings & Loan Association*.¹⁵⁷ The court’s conclusions are premised upon a fundamental lack of understanding of the purposes of the Fair Housing Act and the historical origins of racial redlining. The court erected a requirement that a plaintiff must establish that “qualified borrowers actually applied and were rejected.”¹⁵⁸ The court, relying on the testimony of Louis Green, stated that the “residential loan applications granted in census tract 207 [were] low because applications were few and far between, and not because American Savings practiced credit discrimination.”¹⁵⁹ The court failed to consider the possibility that perhaps the reason applications were “few and far between” was because the defendant was effective at the practice of redlining. The court failed to consider the possibility

155. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979) (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974)).

156. *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1172 (5th Cir. 1972) (per curiam).

157. 880 F.2d 912 (7th Cir. 1989).

158. *Id.* at 922.

159. *Id.* at 922-23.

of discriminatory effects of redlining which have resulted in producing few applications. Thus, placed in the historical context, it is hardly "absurd" to allege a discriminatory refusal to approve loan applications in a particular area when there is no proof that qualified borrowers actually applied and were subsequently rejected. Thus, it is necessary to examine discriminatory effects as an alternative analytical framework for addressing racial redlining.

VII. PERPETUATION OF SEGREGATION CLAIMS

Courts have held that Title VIII prohibits certain actions that have the effect of perpetuating housing segregation in a community.¹⁶⁰ Generally, these cases involved municipalities allegedly using their zoning or other land use powers to block construction of integrated housing developments in white areas.¹⁶¹ The perpetuation of segregation claims may be prompted by a particular action or decision of the defendant or an across-the-board policy or practice.¹⁶² Such an analytical framework may be applicable to racial redlining as such a practice has undoubtedly contributed to the perpetuation of housing segregation.

In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the court established an analytical framework for evaluating perpetuation of housing segregation claims.¹⁶³ The plaintiffs brought a Fair Housing Act claim under Section 3604(a) based on the defendants refusal to rezone plaintiffs' property to permit the construction of federally financed and racially integrated low-cost housing.¹⁶⁴

160. See, e.g., *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988); *Keith v. Volpe*, 618 F. Supp. 1132 (C.D. Cal. 1985), *aff'd*, 858 F.2d 467 (9th Cir. 1988); *In re Malone*, 592 F. Supp. 1135 (E.D.Mo. 1984), *aff'd without opinion*, 794 F.2d 680 (8th Cir. 1986); *Betsey v. Turtle Creek Ass'n*, 736 F.2d 983 (4th Cir. 1984); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

161. SCHWEMM, *supra* note 79, at 10-39.

162. *Id.*

163. 558 F.2d 1283 (7th Cir. 1977).

164. *Id.* at 1285. "The Clerics of St. Viator are a religious order who owned eighty acres of property in Arlington Heights." *Id.* at 1285-86. In 1970, the Clerics contacted the Metropolitan Housing Development Corporation (MHDC), a nonprofit developer, in an effort to utilize the vacant land for low and moderate income housing. *Id.* at 1286. On November 7, 1970, the Clerics sold MHDC fifteen acres of land for \$300,000, contingent upon securing of proper zoning from the Village and an agreement from the federal government to provide financial assistance. *Id.* The land was zoned R-3 for detached single family homes and MHDC intended to build 190 connected townhouse units in 20, two-story buildings, accordingly MHDC could not proceed unless the land was rezoned R-5 for multiple family dwellings. *Id.* The MHDC filed a petition for rezoning which described the proposal as a racially integrated development for people of low and moderate incomes. *Id.* On September 28, 1971, the Village Board of Trustees

Initially, the court sought to determine if an action taken without discriminatory intent could violate Section 3604(a).¹⁶⁵ The court commented on the legislative history of the Fair Housing Act which was "intended to promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.'"¹⁶⁶ The court noted that "[c]onduct that has the necessary and foreseeable consequences of perpetuating segregation can be as deleterious as purposefully discriminatory conduct."¹⁶⁷ The court stated that an intent standard would place a burden on the plaintiff that is often impossible to satisfy, particularly with regard to municipal entities.¹⁶⁸ While the court refused to adopt a per se rule that every action which produces a discriminatory effect is illegal, it held that in certain circumstances "a violation of Section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent."¹⁶⁹

The court determined that it was necessary to examine four critical factors in assessing whether the conduct produces an illegally

voted to deny the petition for rezoning. *Id.* The MHDC and three black individuals filed suit seeking declaratory and injunctive relief on the basis that the Village's denial was racially discriminatory and violated the Equal Protection Clause, 42 U.S.C. §§ 1981-83, and the Fair Housing Act. *Id.*

165. *Id.* at 1288. Prior to the disposition of the Fair Housing Act claim, the case was litigated as an Equal Protection clause action because the plaintiffs did not pursue it or did not view it differently from their constitutional claim. *Id.* at 1286. Initially, the district court held that the Village's action did not violate the Equal Protection Clause because the plaintiffs failed to establish that the zoning decision would adversely affect members of racial minorities, as opposed to poor people. *Id.* Further, the district court held that the decision was motivated by a desire to protect property values, not by racial discrimination. *Id.* The Seventh Circuit reversed the district court's decision on the grounds that the Village's zoning decision "constituted a greater deprivation of housing opportunities for black people than for white people." *Id.* at 1286. The court of appeals explained that "black people in the Chicago metropolitan area . . . constituted forty percent of the group eligible [for federal housing assistance] but only eighteen percent of the area's total population." *Id.* Further, the court noted that "only twenty-seven out of the Village's 64,884 residents, compared to eighteen percent of the residents of the entire Chicago metropolitan area, were black." *Id.* at 1286-87. In this context, the Village's refusal to permit the development and inability to present a compelling justification for the decision constituted a violation of the Equal Protection Clause. *Id.* at 1287. The United States Supreme Court reversed the decision, holding that a showing of discriminatory intent was a prerequisite to establishing a violation of the Equal Protection Clause. *Id.* Since the district court had determined there was no discriminatory intent, the Court held there was no violation of the Equal Protection Clause. *Id.* "The Court then remanded the case for a determination of whether the Village's conduct violated the Fair Housing Act." *Id.*

166. *Id.* at 1289 (quoting *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973)).

167. *Id.* at 1289.

168. *Id.* at 1290.

169. *Arlington Heights*, 558 F.2d at 1290.

discriminatory effect. The first factor was the strength of the plaintiff's showing of discriminatory effects.¹⁷⁰ In assessing this element, the court explained that there are two types of racially discriminatory effects:

The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.¹⁷¹

The second factor seeks to ascertain if there is some evidence of discriminatory intent.¹⁷² While the court noted that the equitable argument for relief is stronger if some direct evidence of intentional discrimination exists, it concluded that this criterion is the least important.¹⁷³ The third factor measures the defendant's interest in

170. *Id.*

171. *Id.* The court stated the case of discriminatory effects in the first sense was relatively weak because "the class disadvantaged by the Village's action was not predominantly nonwhite [as] sixty percent of the people in the Chicago area eligible for federal housing subsidization in 1970 were white." *Id.* at 1291. The court noted that the argument for racial discrimination was not as strong as in *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987 (E.D. Pa. 1976), where the plaintiffs demanded the construction of public housing in a predominantly white neighborhood in Philadelphia. Since 95% of the persons on the waiting list for public housing in Philadelphia were minorities, the refusal to construct additional public housing had a much larger disparate impact on nonwhites than on whites. *Arlington Heights*, 558 F.2d at 1291. The court concluded, however, that this alone was not an obstacle to relief under the Fair Housing Act. *Id.*

The court proceeded to examine the discriminatory effect from the second vantage relating to the perpetuation of segregation. *Id.* The court noted that in both *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) and *Kennedy Park Homes Assoc., Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), local zoning ordinances prevented the construction of low-income housing projects in overwhelmingly white municipalities. These courts found a racially discriminatory effect because the municipal action precluded the possibility of ending racial segregation in housing in those areas.

In this case, it was unclear whether the Village's refusal to rezone would perpetuate segregation. The court stated that the development would increase racial integration. *Arlington Heights*, 558 F.2d at 1291. The Village, however, asserted that a substantial amount of land, which was properly zoned for multiple family dwellings, would face no objection to construction of the development. *Id.*

172. *Arlington Heights*, 558 F.2d at 1292. Initially, the court analyzed Section 3604, which states in part that "it shall be unlawful . . . to make unavailable or deny . . . a dwelling to any person because of race, color, religion, or national origin." *Id.* at 1287. The court noted a narrow view of the phrase is that a party cannot commit an act "because of race" unless he intends to discriminate between races. *Id.* at 1288. The broader view is that a party commits an act "because of race" whenever the natural and foreseeable consequence of that act is to discriminate between the races, regardless of intent. *Id.*

173. *Id.* at 1292. The court noted the difficulties of conclusive proof of

taking the action that allegedly results in the discriminatory effect.¹⁷⁴ The court stated that if the action involved a private individual attempting to protect private rights, "the courts cannot be overly solicitous when the effect is to perpetuate segregated housing."¹⁷⁵ In addition, the court stated that "if the defendant is a governmental body acting outside the scope of its authority or abusing its power, it is not entitled to the deference which courts must pay to legitimate government action."¹⁷⁶

Finally, the court examined whether the plaintiff was attempting to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.¹⁷⁷ The court commented that requiring "a defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing [was] a massive judicial intrusion."¹⁷⁸ Courts were "far more willing to prohibit even nonintentional action by the state which interferes with an individual's plan to use his own land to provide integrated housing."¹⁷⁹

The court found that only two of the four criteria pointed toward relief, as there was no evidence of discriminatory intent and the governmental entity was acting within the scope of its authority.¹⁸⁰ Nevertheless, since the Fair Housing Act was subject to liberal interpretation, the court concluded that close cases must be decided in favor of integrated housing.¹⁸¹ As a consequence, the case turned on the discriminatory effect of the zoning decision. The court held that "if there [was] no land other than the plaintiffs' property within Arlington Heights which [was] both properly zoned and suitable for federally subsidized low-cost housing, the . . . refusal to rezone

discriminatory intent, explaining that "[t]he bigoted comments of a few citizens, even those with power, should not invalidate an action which in fact has a legitimate basis." *Id.*

174. *Id.* at 1293.

175. *Id.* See *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) (observing that "a thoughtless housing practice can be as unfair to minority rights as a willful scheme").

176. *Arlington Heights*, 558 F.2d at 1293.

177. *Id.*

178. *Id.*

179. *Id.* The court cited the Second Circuit, which "relied on the distinction between requiring affirmative action [from] the defendant and preventing the defendant from interfering with the plaintiff's attempt to build integrated housing in deciding whether to grant relief under the Fair Housing Act." *Id.* See *Citizens Comm. for Faraday Wood v. Lindsay*, 507 F.2d 1065, 1069 (2d Cir. 1974); *Acevedo v. Nassau County*, 500 F.2d 1078, 1081 (2d Cir. 1974) (examining cases where cities were prohibited from thwarting integration efforts by private organizations).

180. *Arlington Heights*, 558 F.2d at 1293-94.

181. *Id.* at 1294.

constituted a violation of Section 3604(a).¹⁸²

The analytical standard for a perpetuation of segregation claim was further elaborated on in *Huntington Branch NAACP v. Town of Huntington*.¹⁸³ In this case, plaintiffs alleged that “the Town violated Title VIII by restricting private construction of multi-family housing to a narrow renewal area and by refusing to rezone the parcel outside [the] area where the [plaintiffs] wished to build multi-family housing.”¹⁸⁴ The court declined to adopt the precise formulation of *Arlington Heights*.¹⁸⁵ In particular, the court declined to include an intent aspect in its analysis of disparate impact under Title VIII.¹⁸⁶ The court adopted a two-part test requiring the plaintiff to establish a *prima facie* case by showing the discriminatory effect of an action.¹⁸⁷ The burden then shifts to the defendant to “present bona fide and legitimate justifications for its action with no less

182. *Id.*

183. 844 F.2d 926 (2d Cir. 1988).

184. *Id.* at 928.

185. *Id.* at 935.

186. *Id.* at 934. The court’s decision not to require proof of discriminatory intent was based upon several factors. *Id.* First, the court noted that the Fair Housing Act’s purpose required a discriminatory effects standard because “an intent requirement would strip the statute of all impact on *de facto* segregation.” *Id.* (citing Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398, 406 (1979)). The court also noted that the Senate, in considering the Fair Housing Act, rejected an amendment which would have required “proof of discriminatory intent to succeed in establishing a Title VIII claim.” *Id.* at 934 (citing Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977)). Second, the court explained that since Title VII and Title VIII are “part of a coordinated scheme of federal civil rights laws,” which must be construed broadly to achieve the goal of ending discrimination, “the two statutes require similar proof to establish a violation.” *Id.* at 935. Since the United States Supreme Court held that Title VII is violated by establishing discriminatory effect, the court then reasoned that a Title VIII violation can be established absent proof of discriminatory intent. *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-36 (1971)). Finally, the court noted that practical concerns dictated against an intent aspect, as facially neutral rules often “bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied.” *Id.* See also Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 159 (1976) (citing case law holding that Title VIII should be generously construed to encourage “integrated and balanced living patterns”); Frederic S. Schwartz, *The Fair Housing Act and “Discriminatory Effect”: A New Perspective*, 11 NOVA L.J. 71, 73 (1987) (analyzing the *Griggs* decision and other housing cases based upon it with respect to the necessity of an intent element).

187. *Huntington NAACP*, 844 F.2d at 936. The court relied upon *Arlington Heights* for the proposition that a policy may have a discriminatory effect in two contexts: as an adverse impact on a particular minority group or as a generalized harm to the community through the perpetuation of segregation. *Id.* at 937. The court noted that the lower court concentrated its analysis “on the harm to blacks as a group, and failed to consider the segregative effect of maintaining a zoning ordinance that restricts private multi-family housing to an area with a high minority concentration.” *Id.*

discriminatory alternatives available."¹⁸⁸

In this case, the court held that the refusal to rezone resulted in disproportionate harm to blacks and a segregative impact on the entire community which created a strong prima facie case of discriminatory effect.¹⁸⁹ The defendant argued that its actions were justified by traffic considerations, safety concerns, and a belief that such a policy would encourage investment in the deteriorated area.¹⁹⁰ The court found the defendant's justifications were weak since the defendant's actions were more likely to result in developers investing elsewhere and because less discriminatory means existed to accomplish such a goal, such as tax incentives.¹⁹¹ As a result, the court held that "the Town violated Title VIII by refusing to amend the zoning ordinance to permit private developers to build multi-family dwellings outside the urban renewal area."¹⁹²

Under either the *Arlington Heights* or the *Huntington* standard, the primary focus of the analysis is upon the size of the segregative effect caused by the defendant's actions and the legitimacy of the defendant's justifications for the actions. If an action does not have a segregative effect, it is certain the plaintiff will not prevail on the perpetuation of segregation claim. As a consequence, it is necessary to examine the applicability of the perpetuation of segregation claims to a redlining cause of action.

VIII. NEW LEGAL APPROACH TO REDLINING

Several court decisions have implied that a perpetuation of segregation claim may be a viable analytical model in the context of redlining causes of actions. In *Old West End Association v. Buckeye Federal Savings & Loan*, the court briefly addressed the issue of discriminatory effect in its discussion of the Fair Housing Act claims.¹⁹³ Relying on *Arlington Heights*, the court held that a financial institution's underwriting practices could result in a

188. *Id.* at 939. The court noted that in considering a defendant's justifications, it was guided by Title VII analysis. *Id.* at 936. The United States Supreme Court explained that after "an employer's facially neutral rule is shown to have a racially disproportionate effect on job applicants, that rule must be shown to be substantially related to job performance." *Id.* (citing *Griggs*, 401 U.S. at 424). The court noted such an analytical framework was more difficult in a Title VIII case because "there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related." *Id.* For example, a zoning decision is often based upon a variety of circumstances. *Id.* Nevertheless, the court stated: "The complexity of the considerations, however, does not relieve a court of the obligation to assess whatever justifications the town advances and weigh them carefully against the degree of adverse effect the plaintiff has shown." *Id.* at 936-37.

189. *Huntington NAACP*, 844 F.2d at 938.

190. *Id.* at 940.

191. *Id.* at 939-41.

192. *Id.* at 941.

193. 675 F. Supp. 1100, 1103 (N.D. Ohio 1987).

racially discriminatory effect.¹⁹⁴ The court declined to dismiss the case in light of statistical evidence which indicated that defendant treated conventional loans from white neighborhoods differently than similar applications from integrated or minority neighborhoods.¹⁹⁵

Similar support for the discriminatory effects test in the context of a redlining case may be found in *Steptoe v. Savings of America*.¹⁹⁶ In that case, the court held that evidence that Savings of America "low-balled" the appraisal of a home that an African-American couple wanted to purchase in a racially mixed neighborhood was sufficient to establish a prima facie case of unlawful discrimination under the Fair Housing Act.¹⁹⁷ The court in *Steptoe* explained that "in a discrimination case brought pursuant to the FHA, a plaintiff need not prove that the defendant acted with a racially discriminatory motive; a prima facie case can be made out by showing that the defendant's actions had a racially discriminatory effect."¹⁹⁸

The court noted that even if defendant's actions were not racially motivated, the plaintiffs had provided sufficient evidence from which a jury could infer that Savings of America's actions had a racially discriminatory effect.¹⁹⁹ The evidence established that Savings of America did not follow its standard appraisal procedure.²⁰⁰ Further, the plaintiffs' statistical comparison of Savings of America's lending pattern in the minority area where the home was located to a predominantly white area supported their position.²⁰¹ The court concluded that the plaintiffs had established a "prima facie case that [Savings of America's] conduct had, at the very least, a racially discriminatory effect on the Steptoes and, possibly, all other potential borrowers who wished to purchase homes in the [area]."²⁰²

The court also recognized "the importance of not mechanically applying the *McDonnell Douglas* criteria, as adopted by the *Buckeye* court."²⁰³ The court noted that since "[a]n appraisal sufficient to support a loan request is a necessary condition precedent to a

194. *Id.* at 1106.

195. *Id.*

196. 800 F. Supp. 1542 (N.D. Ohio 1992).

197. *Id.* at 1545-47.

198. *Id.* at 1546 (citing *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-37 (2d Cir. 1979)).

199. *Id.* at 1546.

200. *Id.* at 1546-47.

201. *Id.* at 1547.

202. *Steptoe*, 800 F. Supp. at 1547. The court also held that plaintiff's assertion that financial institution's discriminatory actions denied them the benefits of the Community Reinvestment Act and the Home Mortgage Disclosure Act was insufficient to establish a cause of action under Title VI. *Id.* at 1548. There was no proof in the record that the financial institution received any federal funding which it provided to potential mortgagors. *Id.*

203. *Id.* at 1546.

lending institution making a home loan[, a] potential defendant in an FHA case could always insulate itself from liability under the *Buckeye* criteria by purposefully lowballing an appraisal and then doing nothing more."²⁰⁴ The court explained that the prospective purchaser or borrower would then be faced with two choices: "(1) hope that he can renegotiate the purchase price to conform with the lowballed appraisal, or (2) withdraw his loan application as to that particular piece of property."²⁰⁵

The decisions in *Old West End Association* and *Stephoe* establish two main points relevant to perpetuation of segregation claims. First, while the decisions recognized the analytical model premised upon the *McDonnell Douglas* intentional discrimination formula, both courts identified the inherent difficulties of applying the formula in the context of a redlining case. Second, the decisions implied that a discriminatory effect approach may be the more appropriate analytical methodology for examining a redlining case. Unfortunately, the decisions did not elaborate on the specific analytical framework for establishing discriminatory effects in a redlining case. Nevertheless, in *Old West End Association* the court relied upon *Arlington Heights* in its discussion of discriminatory effects, and in *Stephoe* the court refused to dismiss the case based upon evidence which suggested discriminatory effects. This appears to indicate that the perpetuation of segregation is viable in the context of a racial redlining case. In addition, several recent Department of Justice lawsuits appear to use the disparate impact theory as a methodology to challenge marketing policies and practices which have the effect of redlining African American communities. As a result, it is necessary to examine the Department of Justice efforts to eradicate redlining.

IX. DEPARTMENT OF JUSTICE AND MARKETING DISCRIMINATION

A. Policy Statement

The Clinton administration, spearheaded by the Department of Justice, Civil Rights Division, launched an aggressive assault on the problems associated with mortgage lending discrimination, including redlining. On April 6, 1994, the federal agencies responsible for enforcing the FHA and ECOA issued a joint policy statement on lending discrimination.²⁰⁶ The policy statement was designed to

204. *Id.*

205. *Id.*

206. The federal agencies included: Department of Housing and Urban Development; Office of Federal Housing Enterprise Oversight; Department of Justice; Office of the Comptroller of the Currency; Office of Thrift Supervision; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Federal Housing Finance Board; Federal Trade Commission; and the National Credit Union Administration. *Discrimination in Lending*, 59 Fed.

explain the general principles that the federal agencies will use to identify various types of lending discrimination, including disparate impact.²⁰⁷ The policy statement explained: "When a lender applies a policy or practice equally to credit applicants, but the policy or practice has a disproportionate adverse impact on applicants from a group protected against discrimination, the policy or practice is described as having a 'disparate impact.'²⁰⁸ While the policy statement acknowledged that the "the precise contours of the law on disparate impact as it applies to lending discrimination are under development," it explained possible practices that may constitute a violation of the FHA or ECOA.²⁰⁹ It stated:

The existence of a disparate impact may be established through review of how a particular practice, policy or standard operates with respect to those who are affected by it. The existence of disparate impact is not established by a mere assertion or general perception that a policy or practice disproportionately excludes or injures people on a prohibited basis. The existence of a disparate impact must be established by facts. Frequently this is done through a quantitative or statistical analysis. Sometimes the operation of the practice is reviewed by analyzing its effect on an applicant pool; sometimes it consists of an analysis of the practice's effect on possible applicants, or on the population in general. Not every member of the group must be adversely affected for the practice to have a disparate impact. Evidence of discriminatory intent is not necessary to establish that a policy or practice adopted or implemented by a lender that has a disparate impact is in violation of the FHA Act or ECOA.²¹⁰

Reg. 18,266 (1994). The federal agencies were motivated by a concern that "prospective home buyers and borrowers may be experiencing discriminatory treatment in their efforts to obtain loans." *Id.* at 18,267. Such a conclusion was based upon the 1992 Federal Reserve Bank of Boston study of "lending discrimination, Congressional hearings, and agency investigations [which] indicated that race is a factor in some lending decisions." *Id.* The policy statement proclaimed:

Discrimination in lending on the basis of race or other prohibited factors is destructive, morally repugnant, and against the law. It prevents those who are discriminated against from enjoying the benefits of access to credit. The Agencies will not tolerate lending discrimination in any form. Further, fair lending is not inconsistent with safe and sound operations.

Id.

207. *Id.* The policy statement is applicable to "all lenders, including mortgage brokers, issuers of credit cards, and any other person who extends credit of any type." *Id.* The purpose of the policy statement was to "provide guidance about what the agencies consider in determining if lending discrimination exists[,] and [t]o provide a foundation for future interpretations and rulemakings by the Agencies." *Id.*

208. *Id.* at 18,269.

209. *Id.*

210. *Id.*

Finally, the policy provided a two-pronged defense for allegations of disparate impact. The first step is determining whether a disparate impact exists; the second is identifying whether there exists a justification by "business necessity."²¹¹ If a lender could justify the practice with a "business necessity" and establish that there is no less discriminatory alternative, there is no violation of the FHA or the ECOA.²¹² Lenders could use factors such as cost and profitability to establish a business necessity.²¹³ In addition, Deval L. Patrick, then Assistant Attorney General, Civil Rights Division, provided additional evidentiary guidance relating to the disparate impact of marketing discrimination stating: "the means of service the lender has chosen and how it operates in practice; the loan products that it offers; its efforts to reach out to minority real estate professionals and loan applicants as compared to its efforts to solicit business from whites; and . . . its success in extending credit to its market without racial impact."²¹⁴

The Department of Justice initiated a series of lawsuits to combat lending discrimination. Several of the lawsuits, including those against Chevy Chase Federal Savings Bank and Albank Federal Savings Bank, represented a discriminatory impact analysis of the financial institutions marketing efforts which resulted in redlining of minority areas. Such an approach recognizes and acknowledges the historical and institutionalized effects of redlining. While both cases settled pursuant to consent decrees it is necessary to examine the allegations of the complaints and the contents of the consent decrees to provide guidance for additional enforcement activities relating to redlining and marketing discrimination.

B. Chevy Chase Federal Savings Bank

On August 22, 1994, the Department of Justice, Civil Rights Division filed a complaint in conjunction with a consent decree against Chevy Chase Federal Savings Bank and B.F. Saul Mortgage Company alleging that their "policies and practices are intended to deny, and have the effect of denying, an equal opportunity to

211. *Id.*

212. 59 Fed. Reg. at 18,269. The policy statement explained that the lenders should examine whether widespread and common practices and requirements "have an unjustifiable disparate impact." *Id.* at 18,269-70. In particular, lenders should pay particular attention to requirements that are "more stringent than customary." *Id.* at 18,270. The policy statement acknowledged that the relevancy of various factors related to a credit decision, including: "the adequacy of the borrower's income to carry the loan, the likely continuation of that income, the adequacy of the collateral to secure the loan, the borrower's past performance in paying obligations, the availability of funds to close, and the existence of adequate reserves." *Id.* at 18,269.

213. *Id.* at 18,269.

214. Deval L. Patrick, Remarks at the Independent Bankers Association of America Annual Convention (Feb. 14, 1995).

residents of African American neighborhoods, on account of racial identity of the neighborhood, to obtain mortgage financing and other types of credit transactions."²¹⁵ Prior Department of Justice lawsuits against lenders had generally focused upon disparate treatment accorded African American and white loan applications.²¹⁶ The Chevy Chase lawsuit was unique because it focused on the marketing practices of the bank and the discriminatory effect of those practices upon the pool of African American applicants. As Attorney General Janet Reno proclaimed: "To shun an entire community because of its racial makeup, is just as wrong as to reject an applicant because they are African American."²¹⁷

Initially, the Department of Justice utilized census data to demonstrate the high levels of racial segregation which existed in Washington D.C. metropolitan area. According to the 1990 Census, over 74.3% of the African American population resided in the District of Columbia and Prince George's County.²¹⁸ In particular, "approximately 90.3[%] of the 395,213 African American residents of the District of Columbia reside[d] in 126 majority African American census tracts, most of which [were] located in the Northeast, Southeast, and Southwest quadrants of the city"²¹⁹

Upon establishing the demographics of the Washington D.C. area, the Department of Justice analyzed the business practices and

215. Complaint, *United States v. Chevy Chase Fed. Sav. Bank*, Civ. Action No. CV-94-1824JG, para. 31 (D.D.C. 1994) [*hereinafter* Chevy Chase complaint]. According to the complaint, Chevy Chase Federal Savings Bank is a federally chartered savings and loan association which conducts business in the District of Columbia, Maryland and Virginia. *Id.* at para. 3. Further,

Chevy Chase offers the traditional services of a financial depository institution, including the receipt of monetary deposits, the financing of residential housing, business, commercial and consumer loans[.] . . . As of March 31, 1993, Chevy Chase had over \$3.8 billion in total deposits, and consolidated assets of \$4.7 billion which made it the largest savings institution based in the Washington, D.C. metropolitan area.

Id. B.F. Saul Mortgage Co., established in 1975, "has been a wholly owned subsidiary of Chevy Chase since 1984." *Id.* at para. 4. B.F. Saul "solicits and originates real estate-related financing transactions, both residential and commercial, in the District of Columbia and in the States of Virginia and Maryland." *Id.*

216. See Complaint and Consent Decree, *United States v. First Nat'l Bank of Vicksburg*, Civ. Action No. 5:94 CV 6(B)(N) (S.D. Miss. 1994); Complaint and Consent Decree, *United States v. Blackpipe State Bank*, Civ. Action No. 93-5115 (D.S.D. 1993); Complaint and Consent Decree, *United States v. Shawmut Mortgage Co.*, Civ. Action No. 3:93 CV-2453AVL (D. Conn. 1993); Complaint and Consent Decree, *United States v. Decatur Fed. Sav. & Loan Ass'n*, Civ. Action No. 1:92 CV-2198CAM (N.D. Ga. 1992).

217. Department of Justice Press Release, *Justice Department Obtains Unprecedented Settlement From D.C. Area Bank For Allegedly Failing To Service Predominantly Black Areas*, August 22, 1994, reprinted at (visited Mar. 22, 1999) <http://usdoj.gov/opa/pr/Pre_96/August94/484.txt.html>.

218. Chevy Chase complaint, *supra* note 215 at para. 11.

219. *Id.*

polices of Chevy Chase and B.F. Saul Mortgage. The Department of Justice alleged that Chevy Chase and B.F. Saul Mortgage located nearly all their branches in white census tracts as opposed to African American census tracts.²²⁰ In addition, in 1989, Chevy Chase dropped the District of Columbia in its entirety from its Community Reinvestment Act service area.²²¹ Following criticism from the Office of Thrift Supervision, Chevy Chase revised its delineated service area to include the portion of the District of Columbia with the highest percentage of white residents.²²² The Department of Justice identified several additional polices which had the effect of servicing white residential areas, including: utilizing a commission structure that provided incentives to solicit and originate mortgage loans on higher-priced homes; employing few African Americans as loan officers or originators; and rarely or never utilizing newspapers, radio stations, or other media outlets that were oriented to the African American community to advertise its mortgage products.²²³

The Department of Justice proceed to demonstrate the racial impact of these polices and practices by comparing statistics revealing the number of home mortgage loan applications received by Chevy Chase and B.F. Saul in white census tracts and African American census tracts. "During 1991, Chevy Chase and the B.F. Saul Mortgage Company received 3,515 mortgage loan applications from the Washington D.C. metropolitan area. Of these applications, 3,432 (97.6%) were received from applicants in white census tracts, and 83 (2.4%) were received from applicants residing in African American census tracts."²²⁴ Further, "[d]uring 1993, Chevy Chase and the B.F. Saul [] received 7,311 mortgage loan applications from the Washington, D.C. metropolitan area. Of these applications, 6,947 (95.0 percent) were received from applicants in white census tracts, and 364 (5.0 percent) were received from applicants in majority African American census tracts."²²⁵ In addition, the Department of Justice analyzed the market share of Chevy Chase and B.F. Saul in white census tracts and African American census

220. *Id.* at para. 13-14. The Department of Justice alleged that as of June 29, 1993, Chevy Chase located 70 of the then existing 74 branches in white census tracts. *Id.* at para. 13. Further, two of the branches located in African American census tracts were acquired as part of a purchase of another institution. *Id.* A third branch was located in a census tract which was white when the branch first opened. *Id.* The remaining branch in a majority African American census tract was located outside the Washington D.C. metropolitan area. *Id.* As of June 29, 1993, B.F. Saul Mortgage located 17 of its 18 mortgage offices in white census tracts. *Id.* at para. 14. In May, 1993, B.F. Saul opened its only location in a primarily African American census tract. *Id.*

221. *Id.* at para. 16.

222. *Id.*

223. *Id.* at para. 18.

224. Chevy Chase complaint, *supra* note 215, at para. 20.

225. *Id.* at para. 21.

tracts. “[F]rom 1990 through 1992, [Chevy Chases’] share of all purchase money mortgages originations in white census tracts ranged from 1.5 percent to 2.1 percent. During that same period, the defendants’ share of such mortgages originated in majority African American census tracts ranged from 0.2 percent to 0.4 percent.”²²⁶

The Department of Justice argued that the sharp distinctions in home mortgage loan activity between white and African American census tracts demonstrated the disparate impact of Chevy Chase and B.F. Saul marketing policies and practices which were not supported by a business necessity. The Department of Justice concluded: “[t]he totality of the policies and practices described herein amount to a redlining of African American residential neighborhoods of the Washington D.C. metropolitan area as off-limits for the defendants’ business.”²²⁷

The Department of Justice and Chevy Chase and B.F. Saul entered into a consent decree to settle the claims of alleged unlawful discrimination. The consent decree required Chevy Chase and B.F. Saul to “implement an aggressive marketing program designed to improve [their] performance in meeting the credit needs of the African American community in the Washington D.C. metropolitan area.”²²⁸ The consent decree required Chevy Chase to invest at least seven million dollars in the form of subsidized special mortgage loans which would result in approximately 140 million dollars in special financing to residents of African American census tracts that were redlined.²²⁹ Further, Chevy Chase agreed to open additional bank branches or mortgage office locations in African American neighborhoods in the Washington D.C. metropolitan area and enact an advertising program which included special provisions to target residents of predominantly African American neighborhoods.²³⁰ The objective of the consent decree was to achieve “a market share of home mortgage loans in majority African American census tracts that is reasonably comparable to the Bank and Mortgage Company’s market share in white residential areas”²³¹

C. *Albank Federal Savings Bank*

The Department of Justice’s efforts to combat redlining in the form of marketing discrimination continued with a lawsuit against

226. *Id.* at para. 26. The Department of Justice explained that such “disparities in market share of loan originations [were] statistically significant . . . and [could not] be explained by random, non-racial variations in the defendants’ marketing and loan solicitation practices.” *Id.*

227. *Id.* at para. 31.

228. Consent Decree, *United States v. Chevy Chase Fed. Sav. Bank*, Civ. Action No. CV-94-1824JG (D.D.C. 1994) at 16. [*hereinafter* Chevy Chase Consent Decree].

229. *Id.* at 27.

230. *Id.* at 19.

231. *Id.* at 16.

Albank Federal Savings Bank.²³² Albank provided direct mortgage lending and indirect mortgage lending through correspondents.²³³ The Department of Justice alleged that “[s]tarting in the late 1980’s, Albank began informing, and explicitly instructing, correspondents that it would not accept loans originating in specific geographic areas of Connecticut and Westchester County, New York.”²³⁴ Such restrictions were without “sound business justification” and were adopted to preclude “residents of identifiably minority urban areas from seeking mortgage loans from the defendants, without regard to the qualifications of such persons for credit.”²³⁵

In Connecticut, Albank agreed to fund mortgage loans through correspondent bankers and brokers in western Connecticut but explicitly prohibited such loans from five cities: Hartford, New Haven, New Britain, Waterbury, and Bridgeport.²³⁶ African Americans and Hispanics comprised a majority of the population in three of these cities, and a quarter of the population in the other two.²³⁷ During the time period of 1992 through 1996, Albank accepted only three loan applications from these cities, two of which were from whites and one from an Asian American.²³⁸ Albank had additional restrictions which affected Stamford and Norwalk, two

232. “In early 1997, the OTS [Office of Thrift Supervision] conducted a special examination of the practices of Albank to evaluate its compliance with the Fair Housing Act and the ECOA [Equal Credit Opportunity Act].” Complaint at 8, *United States v. Albank, FSB, and Albank Financial Corporation*, 97-CV-1206, Complaint para. 8. [*hereinafter* Albank Complaint]. The OTS’s investigation determined that “Albank had engaged in a pattern or practice of discrimination against African American and Hispanic borrowers by instructing its correspondents not to submit loan applications from specified geographic areas where there [were] high concentrations of these minority homeowners.” *Id.* On May 12, 1997, OTS referred the matter to the Department of Justice which then conducted a supplemental investigation. *Id.*

233. According to the Department of Justice complaint, “Albank made approximately 60% of its home mortgage loans through correspondents.” *Id.* at para. 11. Albank and correspondents entered into contractual arrangements to fund adjustable rate mortgages that meet requirements specified by Albank. *Id.* at para. 12. Albank participates in the underwriting process by receiving and reviewing preliminary information to determine if it deviates from Albank requirements. *Id.* Following Albank’s approval of a prospective loan, the correspondent arranges the consummation of the loan with Albank acting as the mortgage lender at closing. *Id.*

234. *Id.* at para. 14. Founded in 1820, Albank initially operated only in the Albany, New York area before expanding into other parts of New York and Connecticut, Massachusetts, Vermont, Kentucky, and Ohio.” *Id.* at para. 9.

235. *Id.* at para. 14. To refute any potential arguments regarding the demand for such products in minority areas, the Department of Justice contended that the adjustable-rate mortgage was an appealing product that the correspondents desired to sell, and some of the correspondents repeatedly asked Albank to eliminate the geographic restrictions. *Id.* at para. 15.

236. *Id.* at para. 16.

237. *Id.*

238. Albank Complaint, *supra* note 232, at para. 16.

cities in Connecticut which had an African American and Hispanic combined populations of approximately 25%.²³⁹ From 1992 through 1996, in Stamford, Albank took sixteen loan applications of which fourteen were from whites, one from an African American and one from a Hispanic.²⁴⁰ The Department of Justice concluded that, as a result of the geographic restrictions, "Albank took purchase and refinance home mortgage loan applications in Connecticut almost exclusively from white customers, and almost exclusively from properties in white residential areas."²⁴¹

The Department of Justice alleged that Albank instituted a similar policy in Westchester County, New York. Beginning in the mid-1980's, Albank "prohibited its correspondent mortgage bankers and brokers from offering loans to Albank for properties located in any portion of Westchester County lying below Interstate 287."²⁴² According to the census data, "the excluded area contained 76.7% of the county's African American population and 66.5% of its Hispanic population."²⁴³ As a result, "[f]rom 1992 through 1996, Albank took 203 loan applications from Westchester County, of which only seven were from African American and Hispanic applicants."²⁴⁴ Further, "[o]nly 10 of the 203 applications were from [c]ensus tracts that were not majority white."²⁴⁵

The Department of Justice allegations concluded that "Albank had engaged in discriminatory redlining through its geographic restrictions in Connecticut and Westchester County."²⁴⁶ The geographic restrictions were essentially a marketing policy which had "both the purpose and effect of denying residents of identifiable African American and Hispanic communities an equal opportunity to obtain mortgage financing on account of the minority composition of these communities."²⁴⁷

Herbert G. Chorbajian, Chairman, President, and Chief Executive Officer of Albank, "categorically" denied the Department of Justice's allegations and cited Albank's "[o]utstanding" rating on

239. *Id.* at para. 17. "Albank did not explicitly exclude loans from Stamford and Norwalk . . ." *Id.* Rather, it informed some correspondents that it "would not accept loans from the 'Long Island Sound area.'" *Id.* Albank defined this area as the corridor along Interstate 95, which included Stamford and Norwalk. *Id.*

240. *Id.*

241. *Id.* at para. 18.

242. *Id.* at para. 19.

243. *Id.*

244. Albank Complaint, *supra* note 232 at para. 20.

245. *Id.* The Department of Justice also alleged that "[w]hen Albank made exceptions to its policy . . . , it did so almost exclusively for white borrowers living in white areas." *Id.* at para. 21. From 1992 through 1996, Albank took 39 Westchester county loan applications on property located south of I-287, of which none was from an African American or Hispanic, and only four originated from a non-white majority tract. *Id.*

246. *Id.* at para. 22.

247. *Id.*

each of its last three bi-annual Community Reinvestment Act examinations.²⁴⁸ Mr. Chorbajian explained that the criteria utilized by Albank with regards to loans from its correspondents was based upon "credit quality considerations" and the "desire to stay within markets similar to [Albank's] upstate New York lending area."²⁴⁹ He also noted that "Albank has never directly originated mortgage loans in Connecticut and Westchester County" and that "[t]hese areas were not part of [Albank's] primary lending market area or CRA delineated service area."²⁵⁰ Nevertheless, Albank agreed to enter into a consent decree in order to avoid litigation with the understanding that the consent decree was not an admission or a finding of any violation of law.²⁵¹

According to the terms of the consent decree, Albank agreed to provide at least fifty-five million dollars in mortgage loans at below the prevailing interest rate to the areas redlined.²⁵² Further, Albank agreed to conduct target advertising and public information campaigns on mortgage loan opportunities and contribute at least \$350,000 to a home ownership counseling program.²⁵³ Attorney General Janet Reno stated: "Today's settlement will help ensure that residents of the redlined areas will have a chance to obtain credit. We commend Albank for moving promptly to resolve this matter in a way that will provide new home ownership opportunities for so many people."²⁵⁴

D. Analysis of Department of Justice Legal Actions

Several commentators have been critical of the Department of Justices' actions in the Chevy Chase and Albank lawsuits.²⁵⁵ In

248. John J. Spina, *Notes & Comments: United States v. Albank FSB: Is "Justice" Being Served in the Enforcement of Fair Lending Laws?* 2 N.C. Banking Inst. 207, 213 (1998).

249. *Id.*

250. *Id.*

251. Consent Decree, *United States v. Albank*, 97-CV-1206, at 4 [*hereinafter* Albank Consent Decree].

252. *Id.* at 6, para. 1-2. The consent decree provided that Albank would make at least \$20 million in below-market loans to the areas south of Interstate 287 in Westchester County, New York and \$35 million in below-market loans within the cities of Hartford, New Haven, New Britain, Waterbury, Bridgeport, Stamford, and Norwalk and on properties located in 25% or greater non-white census tracts. *Id.* at 9-10, para.8-9. Under the consent decree, the total cost of Albank's below-market loan program was \$3.3 million for Westchester County and \$4.9 million for Connecticut. *Id.* at 10, para. 10.

253. *Id.* at 7, para. 4.

254. Department of Justice Press Release, *Albank to Make \$55 Million in Discounted Loans for Allegedly Engaging in Redlining, Under Justice Department Settlement*, Aug. 13, 1997, at 2 reprinted at (visited Mar. 22, 1999) <<http://www.usdoj.gov/opa/pr/1997/August97/334cr.htm>>.

255. See, e.g., Craig E. Marcus, Note, *Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low- and Moderate-Income Lending*, 96 COLUM. L.

particular, the critics contend that the Department of Justice overstepped its authority by expanding the fair lending laws to include low and moderate-income community disinvestment issues.²⁵⁶ In addition, such commentators contend that the Department of Justice failed to satisfy the requirements of the disparate impact analysis by providing only evidence of uneven marketing strategies and community disinvestment.²⁵⁷ Such criticism is rebutted, however, by the historical and legal interpretation of redlining under the perpetuation of segregation analysis.

First, the critics have failed to analyze the historical context of mortgage lending discrimination and its effects on marketing practices currently utilized by financial institutions. The discriminatory practices of the HOLC and FHA were institutionalized by the private sector resulting in its failure to provide home mortgage loan services to redlined minority areas. Such a historical legacy currently manifests itself in the marketing practices maintained by financial institutions which focus on white residential areas. Such a conclusion is supported by numerous studies which continue to confirm the existence of racial redlining. As a consequence, the Department of Justice's actions may be seen as an appropriate response to widespread marketing practices which have resulted in continued abandonment of minority areas by financial institutions.

Second, the critics have failed to adequately examine the perpetuation of segregation claims in the disparate impact analysis. Under either the *Arlington Heights* or the *Huntington* standard, the primary focus of the analysis is upon the size of the segregative effect caused by the defendant's actions and the legitimacy of the defendant's justifications for the action.

The Department of Justice evaluated the financial institutions Home Mortgage Disclosure Act data and Community Reinvestment documents in conjunction with the census tract data for the metropolitan statistical area and demonstrated that the financial institutions marketing practices resulted in a discriminatory effect as reflected in its lending patterns. Such evidence established that the lending practices had a greater adverse impact on one racial group than on another and it perpetuated segregation by preventing interracial association. The Department of Justice's action may be seen as perpetuation of segregation claims which established the discriminatory effects of redlining.

REV. 710 (1996) (detailing perceived shortcomings of the *Chevy Chase* case); Spina, *supra* note 248 at 223-29 (claiming that the *Chevy Chase* and *Albank* suits reflected that the Department of Justice was "basing its enforcement of fair lending laws on uncertain legal ground.")

256. Marcus, *supra* note 255, at 729 n.105.

257. *Id.*

The Department of Justice's actions in Chevy Chase and Albank provide an innovative response to the continued problem of redlining. In particular, the complaints challenge the disparate impact of marketing policies and practices which preclude minority areas from credit. As Isabelle Katz Pinzler, Acting Assistant Attorney General for Civil Rights, stated: "We are not telling banks where to do business, or that they cannot use economic factors to decide where and how to market loans . . . , [b]ut loan marketing decisions should be based on credit risk and other legitimate business considerations, and not on the racial or ethnic makeup of a community."²⁵⁸

X. CONCLUSION

Orlando Patterson has identified several areas that act as constraints on individual agency, including Acts of History.²⁵⁹ Mr. Patterson defined Acts of History, often referred to as institutional discrimination, as "the accumulated patterns of discrimination over long periods of time against particular groups of people that create not only generalized disabilities of a collective nature but also generalized advantages to those who benefit from the discrimination."²⁶⁰ As the historical analysis of the Home Owners' Loan Corporation and the Federal Housing Administration indicated, racial redlining represents a dramatic example of an Act of History which has had the effect of maintaining segregation and contributing to the "ghettoization" of the city. As a recent report noted: "[t]he long and infamous history of housing and lending discrimination in this country scarred the lives of millions of families seeking to realize the dreams and aspirations of all Americans—to own a home."²⁶¹ President Clinton's Advisory Board on Race concluded:

Many poor minority residents live in segregated, isolated and stigmatized neighborhoods. Racial segregation, limited job opportunities, and discrimination continue to serve as a basis for persistent minority poverty. As a result, efforts to remove these barriers to prosperity are important, although not easy, and will require commitment from government, business, the nonprofit community and local communities.²⁶²

The courts must adopt a pragmatic analytical framework for

258. Department of Justice Press Release, *Albank to Make \$55 Million in Discounted Loans for Allegedly Engaging in Redlining, under Justice Department Settlement*, Aug. 13, 1997, at 3.

259. ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* 121 (1997).

260. *Id.*

261. THE UNITED STATES CONFERENCE OF MAYORS, *supra* note 9, at 1.

262. *Word for Word/1968 and 1969; The Fire Wasn't This Time: Two Race Reports*, N.Y. TIMES, Oct. 4, 1998, § 4 at 7.

interpreting racial redlining that functions as an effective tool to eradicate the historic pattern of mortgage lending discrimination perpetrated upon minority communities. The perpetuation of segregation claims, as demonstrated by the Department of Justices' actions presents a promising framework to evaluate redlining cases in light of its historical origins and the goals of the Fair Housing Act. In addition, such a standard would serve to foster the goals of the Fair Housing Act to promote open, integrated residential housing patterns and to prevent the increase of segregation of racial groups.

