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Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act

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PART OF THE DISEASE OR PART OF THE CURE: THE FINANCIAL CRISIS AND THE COMMUNITY REINVESTMENT ACT

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I. INTRODUCTION

The Community Reinvestment Act of 1977[1] (CRA) has been called many things. For some, it represents a lifeline, as community reinvestment advocates, working in conjunction with banks, have generated trillions of dollars in desperately needed capital investment in communities that historically have been excluded from mainstream banking and community development activities. For others, it is a burden, reflecting misguided judgments about the proper role of regulatory oversight in capital allocation. Still others believe it is an abomination, one that spurred the mortgage crisis and the financial fallout that has followed.

Born out of the Civil Rights Movement, Congress adopted the CRA at a time when many low- and moderate-income communities, often communities of color, were denied basic banking services such as home lending and small business investment. Advocates argued that when the federal government guaranteed bank deposits through federal deposit insurance, it created a social compact. That compact served as a justification for expecting that institutions accepting such insurance should have to meet the needs of the communities making those deposits. Federal deposit insurance made bank customers confident in their bank's holdings, which in turn made the business of banking—lending—possible and became a justification for the adoption of the CRA.

In the thirty years since the CRA's adoption, the banking industry has been transformed. Banks are global in their reach and their outlook. Banks, in all of their forms, are no longer brick-and-mortar institutions on Main Street that take deposits from the grocer and lend to the baker. Instead, they manage investments from Dubai and China and use those funds to build roads in North Africa, set up cell phone service in Argentina, and construct oil rigs in Siberia. And the CRA, which Congress designed to ensure that banks would meet the credit needs of the low- and moderate-income communities—the communities of the grocer and the baker—proved a weak bulwark against the subprime mortgage crisis; unsafe and unsound lending practices have decimated the same communities that the CRA was supposed to protect. These practices promise to set many communities back decades economically and socially, leaving a wake of foreclosed homes—a true nightmare on Elm Street, and Maple Street, and Pine Street.

As the subprime mortgage meltdown has spurred the wider financial crisis, some commentators have blamed the CRA, passed in 1977, for the events that began to unfold twenty-five years later. According to the theory, the CRA

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1. 12 U.S.C. §§ 2901–2907 (2006).

forced banks to engage in risky loans to risky borrowers in risky neighborhoods—predominantly in low-income and minority communities. If it were not for this decades-old law and aggressive efforts by community advocates promoting compliance with it, commentators posit that events in the earlier part of this decade, where questionable loans were extended on unfavorable terms to borrowers that could not afford them, might have turned out differently. Were it not for this law and the power of community-based groups that championed it, the argument goes, long-standing underwriting principles would not have given way to exotic loans made to borrowers who had no business owning a home. While this theory might offer cold comfort to those who believe that banks, left to their own devices, will act with prudence, the theory cannot stand up to any sober assessment of the subprime mortgage meltdown and the financial crisis that has followed.

In fact, this argument is hard to reconcile under any reading of the statute's terms and after any assessment of the CRA's true reach. In this Article, while I address the question of whether the CRA is to blame for the subprime mortgage crisis because it somehow forced banks to engage in risky behavior, I also take a slightly different tack. Although I explain why these critics are wrong about their assessment of the CRA's role in the subprime mortgage crisis, I recognize that the CRA has limitations. Several facts expose the true role of the CRA in the subprime mortgage crisis, however. For example, the CRA was not too strong, but rather too weak. The CRA's limitations gave banks and their regulators broad discretion to carry out the CRA's goals. This fact, coupled with the approach of federal bank regulators towards subprime lending generally and the failure of the courts to serve as a check on administrative neglect under the CRA, meant that instead of causing the subprime mortgage crisis, the CRA simply failed to prevent the crisis. The CRA was not strong enough, and it allowed banks and regulators free rein to ignore the central premise of the Act: that banks must meet the needs of the communities they serve consistent with safe and sound banking practices.

It is within this phrase, the key statutory directive under the CRA—"to encourage [banks] to help meet the credit needs of the local communities . . . consistent with the safe and sound" banking practices,[2] which is the articulated letter and spirit of the law—that we recognize the seeds of the subprime debacle that has swept the globe. First, at the height of the housing bubble that saw the explosive growth of subprime lending, banks covered by the CRA rarely made subprime loans in such a way that would give them CRA credit; instead, in the overwhelming majority of cases, institutions not covered by the CRA issued the subprime loans. Second, the geographic location of the "communities"[3] the

2. *Id.* § 2901(b).
3. *Id.*

banks served could easily be manipulated, so when traditional banks did engage in subprime lending, it was typically outside of the communities they served for the purposes of the CRA. Third, risky lending all too often carried out in low- and moderate-income communities and communities of color by nonbank lenders—precisely because borrowers in such communities tended to be unsophisticated and unwary—could hardly be considered "consistent with the safe and sound"[4] banking practices. Yet, regulators regularly turned a blind eye to this conduct, considering it beyond the scope of the CRA and even stepping in to prevent regulatory efforts to rein it in at the state level. Tragically, the CRA's structure itself created gaping loopholes in coverage, which made it possible for subprime lenders to operate freely—beyond the scope of the federal oversight contemplated by the Act, and inconsistent with the Act's letter and spirit.

This Article is structured as follows: In Part II, I offer a brief overview of the subprime mortgage crisis and its impacts. In Part III, I provide an overview of the CRA, including the legislative history, the structure, and the enforcement mechanisms Congress adopted to carry out the CRA's core purpose. I also assess the impact the CRA has had on promoting sound community lending and investment practices in its thirty-year history. In Part IV, I attempt to determine how the CRA and the manner in which it was enforced may have contributed to the subprime mortgage crisis. I focus on the gaps in the CRA's coverage, the federal regulators' position with respect to the CRA and subprime lenders, and lending practices. In Part V, I examine the failure of the courts to serve as a check on weak regulatory enforcement of the CRA. Finally, in Part VI, I develop a series of principles to inform efforts to modernize the CRA to bring it in line with the nature of banking in the twenty-first century. While such CRA modernization might not correct the worst abuses of the subprime mortgage market from the past, it might help to avoid similar crises in the future.

II. THE SUBPRIME MORTGAGE MELTDOWN

As I have explained elsewhere,[5] key features of the subprime mortgage crisis—a series of sparks that led to the conflagration that has swept up markets

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4. *Id.*

5. *See* Raymond H. Brescia, *Capital in Chaos: The Subprime Mortgage Crisis and the Social Capital Response*, 56 CLEV. ST. L. REV. 271, 282–300 (2008) (providing an overview of the subprime mortgage crisis and listing several of its causes) [hereinafter Brescia, *Capital in Chaos*]; Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 168–75 (2009) (assessing the disproportionate impact of the subprime mortgage crisis on black and Hispanic communities). For several sources of particularly helpful historical information on the subprime mortgage crisis, see generally *Possible Responses to Rising Mortgage*

across the globe and has far reaching effects in a wide range of sectors—include the following. First and foremost, the mortgage industry operated with little accountability.[6] This lack of accountability led to a heavy emphasis on generating more and more mortgage loans, regardless of their quality or their risk, for repackaging into securities and selling to voracious investors.[7] These phenomena created perverse incentives, which were ultimately fueled by a lack of regulatory oversight and by ratings agencies willing to endorse any debt.[8] Second, information asymmetries existed between prospective borrowers and brokers because the industry representatives had greater information than the borrowers about the mortgage market, the impact of exotic loan terms, and the risks associated with expectations of perpetual growth in housing values.[9] Third, as brokers and originators sought to continue the flow of mortgages into the securitization stream, underwriting standards were weakened significantly in the later years of the housing boom to bring in as many potential borrowers as possible, regardless of the relative risk.[10] The spigot needed to flow with the same force in order to meet the ever-present demand for subprime securities and to maintain profit levels for the brokers, the originators packaging the loans, and the entities securitizing them.[11] In the end, little regard was paid to the quality of

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Foreclosures: Hearing Before the H. Comm. on Financial Servs., 110th Cong. 19–21 (2007) (statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation) [hereinafter Bair Testimony] (assessing trends in securitization of subprime mortgage debt within the past ten years); *Mortgage Market Turmoil: Causes and Consequences: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs,* 110th Cong. (2007) (testimony of Roger T. Cole, Director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System) [hereinafter Cole Testimony] (discussing the impact of subprime lending); EDWARD M. GRAMLICH, SUBPRIME MORTGAGES: AMERICA'S LATEST BOOM AND BUST 1–35 (2007) (providing analysis of trends in homeownership from the 1940s to the 2000s); Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market,* 88 FED. RES. BANK OF ST. LOUIS REV. 31, 32–40 (2006) (explaining subprime loans and providing a history of subprime lending); Allan N. Krinsman, *Subprime Mortgage Meltdown: How Did It Happen and How Will It End,* J. STRUCTURED FIN., Summer 2007, at 13, 13–16 (providing an overview of the origins of the subprime mortgage market). For more recent assessments of the subprime mortgage market's collapse and its impact on the current financial crisis, see ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT 29–38, 87–113 (2008); MARK ZANDI, FINANCIAL SHOCK: A 360° LOOK AT THE SUBPRIME MORTGAGE IMPLOSION, AND HOW TO AVOID THE NEXT FINANCIAL CRISIS (2008).

6. *See* Brescia, *Capital in Chaos*, *supra* note 5, at 291.
7. *See id.*
8. *See id.* at 301.
9. *Id.* at 291–92.
10. *See id.* at 312.
11. *See* Cole Testimony, *supra* note 5.

these mortgages, and many borrowers undertook obligations they did not understand and, ultimately, could not afford.[12]

Not all borrowers were completely blameless, it is true. Some were speculators who purchased investment properties with no money down and who were equally responsible for banking on ever-increasing housing values.[13] Others knew the representations they made on loan applications were inflated or completely fabricated.[14] Brokers and originators encouraged these borrowers to continue making these representations.[15] For too many borrowers, however, exotic loan terms were beyond comprehension (or, as was more likely, lenders never fully explained the terms),[16] and the cataclysm that ensued has enveloped global markets and brought about a crisis that rivals only the Great Depression in living memory.

Yet, a brief review of the features of the subprime market that ultimately led to the market's demise does not explain the disproportionate impact of the distortions of that market on black and Hispanic communities. Such a review, therefore, fails to give a complete picture of one of the most deeply disturbing aspects of the crisis—one that is likely to have lasting impacts for years to come.

In 2006, the national homeownership rate hit an all-time high of nearly 69%.[17] The expansion in the homeownership rate leading to this record high was fueled in great part by an increase in homeownership in black and Hispanic communities—communities that, traditionally, had lower homeownership rates than white communities.[18] Subprime loans fueled much of this expansion. In 2005, more than 50% of the conventional home purchase loans made to black families had subprime features, and 46.1% made to Hispanic families had such

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12. *See id.*; *The Role of the Secondary Market in Subprime Mortgage Lending: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs.*, 110th Cong. 104–05 (statement of Warren Kornfeld, Managing Director, Moody's Investors Services); SHILLER, *supra* note 5, at 6–7; Krinsman, *supra* note 5, at 14–16 (citing Bair Testimony, *supra* note 5, at 19; STANDARD & POOR'S, STANDARD & POOR'S WEIGHS IN ON THE U.S. SUBPRIME MORTGAGE MARKET 5 (2007)); John Kiff & Paul Mills, *Money for Nothing and Checks for Free: Recent Developments in U.S. Subprime Mortgage Markets* 4 (Int'l Monetary Fund, Working Paper No. 07/188, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1006316&download=yes.

13. *See* Cole Testimony, *supra* note 5.

14. *See* Kiff & Mills, *supra* note 12, at 8–9.

15. *See* U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 38–39 (2000), *available at* http://www.huduser.org/Publications/pdf/treasrpt.pdf [hereinafter HUD-TREASURY REPORT].

16. *See id.* at 40.

17. Kiff & Mills, *supra* note 12, at 4 fig.1.

18. *See id.* at 4 n.4.

features of conventional mortgages (compared to the 17.2% of conventional mortgages for non-Hispanic whites).[19]

In many ways, these communities were prime targets for the subprime mortgage market's expansion, providing dry kindling for the sparks. The well-documented history of lending discrimination in these communities[20] meant minorities had fewer banking alternatives and had less familiarity with the mortgage market.[21] These factors led many minority borrowers to accept loans on less favorable terms than they would have received on the open market in the absence of predatory conduct.[22] Instead, brokers and originators targeted minority communities precisely because these communities provided an untapped market for mortgages, as well as a customer pool with less sophistication and fewer channels for receiving sensible, informed counseling and advice.[23]

A growing body of data shows that these forces steered many minority borrowers to loans on unfavorable and more costly terms regardless of whether these borrowers would have qualified for loan terms in the prime market. Of mortgage refinance loans made in 1998, 39% of residents from upper income black neighborhoods used subprime products when refinancing their existing mortgages, compared to just 6% of residents of upper income white

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19. Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, FED. RES. BULL. (Fed. Reserve Bd., Wash., D.C.), Sept. 8, 2006, at A123, A160 tbl.13, *available at* http://www.federalreserve.gov/pubs/bulletin/2006/hmda/bull06hmda.pdf.

20. For a history of discrimination in the home mortgage market in particular and in the housing market in general, see DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 87–108 (2004); *see also* Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L. J. 186, 209–11 (2005) (discussing how the regulatory system denied most black Americans the opportunity to buy homes).

21. *See* HUD-TREASURY REPORT, *supra* note 15, at 18.

22. *See id.*

23. *See id.* at 17 (noting reasons predatory lenders can flourish in communities of color); Kathleen C. Engel & Patricia A. McCoy, *The CRA Implications of Predatory Lending*, 29 FORDHAM URB. L.J. 1571, 1583–85 (2002) (citations omitted) (arguing that predatory lenders flourish in markets underserved by traditional lenders). *See generally* ALVARO CORTES ET AL., EFFORTS TO IMPROVE HOMEOWNERSHIP OPPORTUNITIES FOR HISPANICS: CASE STUDIES OF THREE MARKET AREAS 93–94 (2006), *available at* http://www.huduser.org/Publications/PDF/hisp_homeown2.pdf (studying practices of Hispanic communities in three urban settings and finding that the lack of information about the mortgage process was the most significant barrier to homeownership and access to home mortgage financing); Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 534–40 (2005) (providing overview of economic reasons for failure of the mortgage market to serve certain communities).

neighborhoods.[24] At the same time, residents of low-income white neighborhoods refinanced their homes using subprime products only 18% of the time.[25] This data reveals that, at least in 1998, upper income residents of black neighborhoods were more than twice as likely as low-income residents of white neighborhoods to utilize subprime refinance products.[26] More recent research on lending patterns found similar results and concluded that such disparities were no accident but rather were likely the result of intentional—and illegal—steering.[27]

Analysis of the 2006 Home Mortgage Disclosure Act (HMDA) data revealed similar discrepancies between loans to whites and loans extended to blacks and Hispanics.[28] For example, higher priced subprime lending occurred in 53.7% of the conventional home-purchase loans made to blacks in that year, compared to only 17.7% of similar loans made to non-Hispanic whites.[29] Controlling for some borrower and lender characteristics, subprime lending occurred in 30.3% of the conventional loans made to blacks and 17.7% of loans made to non-Hispanic whites—black borrowers were nearly twice as likely to receive subprime loans as whites, even after taking borrower and lender differences into account.[30] Controlling for these same factors, Hispanics were likely to enter into a subprime conventional home purchase loan 24% of the time.[31]

In terms of mortgage refinance agreements, again controlling for some lender and borrower characteristics, subprime refinance loans were extended to

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24. HUD-TREASURY REPORT, *supra* note 15, at 48.

25. *Id.*

26. *Id.*

27. CAL. REINVESTMENT COAL. ET AL., PAYING MORE FOR THE AMERICAN DREAM: THE SUBPRIME SHAKEOUT AND ITS IMPACT ON LOWER-INCOME AND MINORITY COMMUNITIES 4–5 (2008), *available at* http://nedap.org/resources/documents/MultistateHMDAReport-Final21.pdf (analyzing activity of subprime lenders in seven metropolitan areas and finding that over 40% of the loans by these entities were in predominantly minority neighborhoods while only 10% of their loans were in predominantly white neighborhoods, "suggest[ing] that these neighborhoods were targeted by high-risk lenders"). Another investigation showed a majority of subprime borrowers were otherwise qualified for prime loans but ultimately agreed to enter into subprime loans. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy: As Housing Boomed, Industry Pushed Loans to a Broader Market*, WALL ST. J., Dec. 3, 2007, at A1 (reporting that 61% of subprime loans originated in 2006 "went to people with credit scores high enough to often qualify for conventional [i.e., prime] loans with far better terms").

28. Robert B. Avery et al., *The 2006 HMDA Data*, FED. RES. BULL. (Fed. Reserve Bd., Wash., D.C.), Dec. 21, 2007, at A73, A95, *available at* http://www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final.pdf.

29. *Id.*

30. *Id.* at A96 tbl.11.

31. *Id.*

blacks 33% of the time and to non-Hispanic whites 25.7% of the time (an unexplained difference of 7.3%),[32] while Hispanics received subprime refinance loans 29.7% of the time.[33]

Finally, the recently released 2007 HMDA data actually shows these discrepancies improved slightly, perhaps as a result of the collapse of dozens of subprime mortgage lenders and the radical changes in the market during 2007. First of all, the data for 2007 reveals a 22% reduction in loan applications from 2006, and a 25% decrease in loan originations from just the previous year.[34] One hundred sixty-nine institutions that reported loans under HMDA in 2006 ceased operations in 2007 and did not merge into other institutions.[35] These 169 institutions represented 7% of the aggregate loans originated in 2006.[36] What is striking about these institutions is that the percentage of higher priced loans originated to blacks and Hispanics was much higher than the percentage of higher priced loans originated to these groups by all lending institutions: 73.9% for blacks and 63.4% for Hispanics by these now-defunct lenders, compared to 50.7% and 37%, respectively, by all other lenders.[37]

Because these lenders left the market, there was a significant overall reduction in the incidence of lending in the higher priced segment of the market. As this segment of lenders focused on lending to black borrowers, higher priced lending to this population dropped significantly—from 53.7%[38] in 2006 to 29.5% in the second half of 2007.[39] Higher priced lending to non-Hispanic whites dropped to 9.2%.[40] Controlling for certain borrower and lender characteristics, just as in previous years, still left an 11.1% difference between

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32. *Id.*

33. *Id.* Other studies confirm a disproportionate share of subprime loans going to minority borrowers, even controlling for creditworthiness and other factors. *See, e.g.*, PAUL S. CALEM ET AL., THE NEIGHBORHOOD DISTRIBUTION OF SUBPRIME MORTGAGE LENDING 12 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=478581&download=yes (using regression analysis and concluding that even after controlling for other variables, "the percent of African American homeowners is strongly, positively correlated with subprime share of neighborhood loans"); Paul S. Calem et al., *Neighborhood Patterns of Subprime Lending: Evidence from Disparate Cities*, 15 HOUSING POL'Y DEBATE 603, 618 (2004) (analyzing statistical data and determining that subprime lenders target minority neighborhoods).

34. Robert B. Avery et al., *The 2007 HMDA Data*, FED. RES. BULL. (Fed. Reserve Bd., Wash., D.C.), Dec. 23, 2008, at A107, A108–09, *available at* http://www.federalreserve.gov/pubs/bulletin/2008/pdf/hmda07final.pdf.

35. *Id.* at A109. All but two of these institutions were independent mortgage companies, thus, entities functioning beyond the scope of the CRA. *Id.* at A125.

36. *Id.* at A109–10.

37. *Id.* at A126 tbl.12.

38. *Supra* note 28 and accompanying text.

39. Avery et al., *supra* note 34, at A139.

40. *Id.*

black borrowers receiving higher priced loans and non-Hispanic whites receiving such loans.[41] The numbers for Hispanics were similar: controlling for certain borrower and lender characteristics still left a 6.2% difference between higher priced loans being made to Hispanics and similar loans made to non-Hispanic whites.[42]

Some commentators have attempted to look to the root causes of the subprime mortgage crisis and blame the CRA for the meteoric rise and precipitous fall of the U.S. housing market.[43] According to these commentators, the CRA forced banks to make risky loans to unworthy borrowers—particularly minority borrowers—who were not able to make their mortgage payments. Responding to misplaced, unfair criticism and public and political pressure, banks made these risky loans; the failure of these loans caused potentially irreparable damage to the global financial system. As the following discussion shows, however, these arguments have the distinct misfortune of being gang tackled by the facts.

The rest of this Article is dedicated to answering the following two questions: First, did the CRA cause the subprime mortgage crisis, as some commentators would suggest? Second, why did the CRA fail to prevent the subprime mortgage crisis? In answering these questions, I will look to the structure, history, and purposes of the CRA since its adoption by Congress in 1977. I will review the track record of the regulators enforcing the CRA and the

41. *Id.*

42. *Id.*

43. *See, e.g.*, Howard Husock, Op-Ed., *Housing Goals We Can't Afford*, N.Y. TIMES, Dec. 10, 2008, at A49 (arguing that because of the 1995 changes to the CRA, banks were "judged not on how their loans performed but on how many . . . loans [to low-income borrowers] they made," therefore undermining "the regulatory emphasis on safety and soundness"); Terry Jones, Editorial, *Congress Lies Low to Avoid Bailout Blame*, INVESTOR'S BUS. DAILY, Sep. 18, 2008, *available at* 2008 WL 17760567 (claiming that the financial crisis stems from the Carter era and the creation of the CRA, which "forced banks to lend to uncreditworthy borrowers, mostly in minority areas," throwing banking prudence "out the window"); Charles Krauthammer, Op-Ed., *Catharsis, Then Common Sense*, WASH. POST, Sep. 26, 2008, at A23 (blaming the CRA for putting "tremendous pressure on Fannie Mae and Freddie Mac—which in turn pressured banks and other lenders—to extend mortgages to people who were borrowing over their heads"); Russell Roberts, Op-Ed., *How Government Stoked the Mania: Housing Prices Would Never Have Risen So High Without Multiple Washington Mistakes*, WALL ST. J., Oct. 3, 2008, at A21 (blaming the CRA for "encourage[ing] banks to serve two masters—their bottom line and the so-called common good" and for "pressuring banks to serve poor borrowers and poor regions of the country" so that "politicians could push for increases in home ownership and urban development without having to commit budgetary dollars"); Martin Hutchinson, *Despite the G20's Latest Missteps, Reason for Economic Optimism Remains*, MONEY MORNING/THE MONEY MAP REPORT, Nov. 19, 2008, http://www.moneymorning.com/2008/11/19/g20-meeting (claiming the CRA "forced banks to lend large sums of money to [those] who couldn't pay it back—creating the subprime-mortgage market").

role courts have played—or not played—in ensuring compliance with the CRA's terms. The answers to the two questions set forth above can be found in several important aspects of the CRA that many critics do not seem to grasp.

First and foremost, the CRA covers just a small percentage of subprime loans, and the overwhelming majority of subprime lending took place well outside the scope of the CRA and its regulations.[44] Next, the regulatory culture that has dominated CRA enforcement for at least the last eight years has meant that regulators have failed to check predatory subprime lending a number of times: first, when they were asked, yet failed, to close some regulatory loopholes that exempted much of the subprime lending from CRA review;[45] second, when they moved to preempt state efforts to rein in abuses in the subprime market;[46] and third, when their review of bank activities under the CRA became little more than a rubber stamp of approval.[47] Finally, courts have placed judicial review of the regulators' conduct in enforcing the CRA beyond the reach of advocates looking to pressure regulators to take a harder line on CRA enforcement.[48]

The following Sections review these phenomena. From this review, it is easy to see that the CRA did not cause the subprime mortgage crisis—mostly because the CRA was practically irrelevant to subprime lending. At the same time, given the manner in which regulators charged with ensuring compliance with the CRA enforced it, the CRA was powerless to prevent the subprime crisis. Designed to fight the last war, the CRA became the financial equivalent of the Maginot Line: easily circumvented, lightly defended, and quickly overrun.

III. THE CRA: HISTORY, PURPOSE, AND IMPACT

The Civil Rights Movement, informed by evidence of widespread discrimination in the housing and lending contexts, helped to usher in a wave of statutes designed to combat discriminatory practices with respect to renting and selling real estate, including discrimination in mortgage lending.[49] These

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44. *See* discussion *infra* Part IV.A.
45. *See* discussion *infra* Part IV.B.
46. *See* discussion *infra* Part IV.C.
47. *See* discussion *infra* Part IV.D.
48. *See* discussion *infra* Part V.
49. *See, e.g.*, Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (barring discrimination in real estate transactions, including, *inter alia*, rental, sale, and mortgage transactions) (codified as amended at 42 U.S.C. §§ 3533, 3535, 3601–19 (2006)); Equal Credit Opportunity Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (barring discrimination in the extension of credit) (codified as amended at 15 U.S.C. §§ 1691–1691f (2006)). The Home Ownership and Equity Protection Act (HOEPA) is also intended to provide some protections against predatory

statutes combat rejection of renters, buyers, and borrowers on account of such grounds as race and ethnicity, among others. Additionally, the statutes prohibit the imposition of burdensome terms in the housing and mortgage lending contexts on such grounds. In the 1970s, after the exposure of the practice of "redlining"—the decision by banking institutions to exclude certain communities from the provision of bank services, particularly mortgage lending—Congress enacted two statutes, the Home Mortgage Disclosure Act (HMDA)[50] and the CRA,[51] which were designed, respectively, to measure bank lending practices and to ensure that banking entities properly serve low- and moderate-income communities.

While the Fair Housing Act[52] (FHA) and the Equal Credit Opportunity Act[53] (ECOA) bar affirmative acts of discrimination like the denial of housing accommodations,[54] the denial of the extension of credit,[55] as well as the imposition of discriminatory terms on housing[56] and credit,[57] the HMDA does not prohibit any particular conduct. Rather, the Act promotes transparency by requiring covered lenders to report on their lending activities by disclosing certain demographic and economic information about their loan extensions and denials.[58]

Like HMDA, the CRA does not itself bar discrimination; instead, as described below, it mandates that covered banks meet the needs of the communities they serve—including low- and moderate-income communities[59]—consistent with safe and sound lending practices.[60] Like

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lending by requiring certain loan term disclosures. *See* 15 U.S.C. §§ 1639, 1648 (2006). HOEPA's protections are only triggered when a mortgage's interest rates are extremely high—even higher than most of the worst subprime loans. *See* GRAMLICH, *supra* note 5, at 28. During the height of the subprime market, HOEPA's disclosure requirements applied to only about one percent of subprime loans. *Id.* Recent data reveals that as of 2007 and with the collapse of the subprime market, the percentage of loans covered by HOEPA has actually fallen to 0.2% of all loan originations. Avery et al., *supra* note 19, at A120. Because HOEPA's coverage is so limited, I will not discuss it at any length here.

50. Home Mortgage Disclosure Act, Pub. L. No. 94-200, 89 Stat. 1124 (1975) (codified as amended at 12 U.S.C. §§ 2801–2811 (2006)). For an overview of this act and its legislative history, see Nat'l State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981, 984, 986 (3d Cir. 1980).

51. Community Reinvestment Act, Pub. L. No. 95-128, 91 Stat. 1111 (1977) (codified as amended at 12 U.S.C. §§ 2901–2908 (2006)). For an overview of the CRA and its legislative history, see RICHARD D. MARSICO, DEMOCRATIZING CAPITAL: THE HISTORY, LAW, AND REFORM OF THE COMMUNITY REINVESTMENT ACT 11–28 (2005).

52. 42 U.S.C. §§ 3601–3631 (2000).

53. 15 U.S.C. §§ 1691–1691f (2006).

54. 42 U.S.C. § 3604(a).

55. 15 U.S.C. § 1691(a).

56. 42 U.S.C. § 3604(b).

57. 15 U.S.C. § 1691(a).

58. 12 U.S.C. § 2803 (2006).

59. The CRA regulations define "income levels" of different communities as follows:

HMDA, the CRA does not create a private right of action for a violation of its provisions; rather, federal bank regulators enforce the CRA by grading covered banks on their overall CRA performance and then taking that record into account when those banks seek approval of certain transactions.[61] The CRA does not prohibit any particular discriminatory conduct.[62] Furthermore, although the legislative history indicates that Congress was concerned about the exclusion of minority communities, as well as other communities,[63] from traditional banking services,[64] the language of the CRA only explicitly addresses bank lending in low- and moderate-income communities.[65]

Looking to the language of the statute, the CRA does not mandate that banks meet lending quotas for the low- and moderate-income communities they serve.[66] The CRA explicitly establishes congressional findings that motivated the Act's adoption, as well as the Act's purpose:

> (a) The Congress finds that—(1) regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business; (2) the convenience and needs of communities include

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> (1) *Low-income*, which means an individual income that is less than 50 percent of the area median income, or a median family income that is less than 50 percent, in the case of a geography.
> (2) *Moderate-income*, which means an individual income that is at least 50 percent and less than 80 percent of the area median income, or a median family income that is at least 50 and less than 80 percent, in the case of a geography.
> (3) *Middle-income*, which means an individual income that is at least 80 percent and less than 120 percent of the area median income, or a median family income that is at least 80 and less than 120 percent, in the case of a geography.
> (4) *Upper-income*, which means an individual income that is 120 percent or more of the area median income, or a median family income that is 120 percent or more, in the case of a geography.

12 C.F.R. § 25.12(m) (2008).

60. 12 U.S.C. § 2901 (2006).

61. *Id.* § 2903(a).

62. *See* Barr, *supra,* note 23, at 534.

63. The legislative history indicates that regulators were concerned with banks failing to meet the credit needs of different communities, including low- and moderate-income communities, minority communities, urban and inner city areas, older communities, and rural and small towns. *See* MARSICO, *supra* note 51, at 13 (citations omitted).

64. *See* 123 CONG. REC. 17,630 (1977) (statement of Sen. Proxmire).

65. 12 U.S.C. § 2903(a). For an argument for revising the CRA to include provisions taking into account race explicitly, see Stella J. Adams, *Putting Race Explicitly into the CRA*, *in* REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 167 (Prabal Chakrabarti et al., eds., Fed. Reserve Banks of Boston & S.F. 2009), *available at* http://www.frbsf.org/publications/community/cra/revisiting_cra.pdf.

66. *See* MARSICO, *supra* note 51, at 11.

> the need for credit services as well as deposit services; and (3) regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.
> (b) It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such 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.[67]

The heart of the CRA is the language, found in § 2901(b), that the federal bank regulators are to use their authority "to *encourage* [financial] institutions to help meet the credit needs of the local communities in which they are chartered," but this goal is to be carried out "consistent with the safe and sound operation of such institutions."[68]

The CRA as originally enacted had twin purposes: to defeat redlining (the practice of excluding certain neighborhoods from capital investment by banks) and to defeat capital export (the practice of receiving deposits from a community and investing those funds in other communities). Senator William Proxmire, one of the sponsors of the CRA,[69] described these practices as follows:

> [B]anks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will invest them elsewhere, and they will actually or figuratively draw a red line on a map around the areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood.[70]

In a statement of remarkable prescience, Senator Proxmire also highlighted the need for loans in low-income communities and other communities underserved by banks. He juxtaposed that need against the practice of banks engaging in risky lending practices and decried those banks that, instead of serving the communities that provided their deposits, made "speculative loans"

67. 12 U.S.C. § 2901(a)–(b).
68. *Id.* § 2901(b) (emphasis added).
69. *See* Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 59, 82 n.116 (2007).
70. 123 CONG. REC. 17,630 (1977) (statement of Sen. Proxmire).

to risky ventures, including the predecessors of today's securitized mortgages: Real Estate Investment Trusts (REITs).[71]

The legislative history of the CRA also makes clear that Congress was hesitant to impose strict lending requirements on regulated institutions for fear that such requirements would amount to forced "credit allocation"—government dictating how banks should invest their funds based on quotas or other factors.[72] Several Senators rose in opposition to the CRA, arguing that its terms would require banks to meet lending quotas within certain communities and such requirements would lead to risky loans.[73] On passing the CRA, the Senate Report supporting the bill made clear that the CRA, which explicitly emphasized safe and sound banking practices, did not require specific lending quotas; instead, the Report noted the duty banks owe to the communities in which they are chartered: "Charters have never constituted licenses to ignore local credit needs. Therefore, the Committee rejects the assertion that this Title allocates credit. It simply underscores the long-standing obligation to an institution's local service area implicit in existing law."[74]

Moreover, legislators believed that because covered banks received benefits from both the federal government and the communities from which they received their deposits, these benefits justified the passage of the CRA.[75] In fact, the legislators saw the CRA as an explicit quid pro quo with banks for the benefits banks received from the federal government, including federal charters (that granted certain exclusive rights to banks), low interest loans, and federal deposit insurance.[76] Going further, the Senate Report on the CRA highlighted the link between meeting credit needs and lending in the same community from which a bank receives deposits, stating that a bank that received deposits from a

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71. *Id.*

72. *See id.* at 17,630–31.

73. *See, e.g.*, *Community Credit Needs: Hearing on S. 406 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. 153 (1977) (statement of Sen. John Tower) ("This proposal would . . . provide for a scheme of credit allocation in our financial institutions."); 123 CONG. REC. 17,628 (1977) (statement of Sen. Morgan) ("I feel legislation of this nature is a significant step in the direction of credit allocation by the Congress of the United States."); *id.* at 17,633 (statement of Sen. Lugar) (describing the CRA as an "attempt to provide credit allocation"); *id.* at 17,636 (statement of Sen. Schmitt) ("[T]he [CRA] is a step in the direction of credit allocation by Government agencies.").

74. S. REP. NO. 95-175, at 35 (1977).

75. *See* 123 CONG. REC. 1,958 (1977) (statement of Sen. Proxmire).

76. *See id.* For a discussion of the link between these benefits and the CRA, see Barr, *supra* note 23, at 616–24 (citations omitted); Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, but Strengthened Federal Enforcement Is Needed*, 20 FORDHAM URB. L.J. 293, 293 (1993) (citing JONATHAN BROWN, ESSENTIAL INFORMATION/BANKING RESEARCH PROJECT, COMMUNITY BENEFIT REQUIREMENTS FOR BANKING INSTITUTIONS: THE U.S. EXPERIENCE 1 (1991)).

particular community yet lent 99% of those funds outside of that community would not be "serving community convenience and needs."[77]

The link between the application of the CRA and the federal benefits banks enjoy is most apparent from the types of banking entities that the CRA covers. According to the statute, the Act only covers "regulated financial institutions,"[78] which the statute describes as an "insured depository institution."[79] A wide range of nondepository institutions, such as mortgage lenders that do not receive deposits, are thus not covered by the Act. As the discussion in Part IV.A. makes clear, because a large percentage of subprime lending was conducted by nondepository institutions, such lending remained beyond the scope of CRA review. While covered banks are permitted to include the activities of nonbank affiliates in their CRA examinations, the banks may do so at their own discretion.[80]

The concept of a bank's assessment area demonstrates the link between the CRA's goals and the relationship banks should have with the communities where they have branches and receive deposits. The record of banks covered by the CRA are reviewed based on the banks' activities within their assessment areas.[81] The banks determine these assessment areas themselves, but the regulators review the areas for consistency with the purposes of the CRA.[82] For most banks,[83] the assessment area or areas delineated must

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77. S. REP. NO. 95-175, at 34.

78. 12 U.S.C. § 2901(a)(1) (2006).

79. *Id.* § 2902(2). The CRA explicitly adopts the definition of "insured depository institution" set forth in 12 U.S.C. § 1813, which provides that such an institution is "any bank or savings association the deposits of which are insured by the [Federal Deposit Insurance] Corporation." *Id.* § 1813(c)(2) (2006).

80. 12 C.F.R. § 25.22(c)(1) (2008). For a discussion of this option, see Richard D. Marsico, *Subprime Lending, Predatory Lending, and the Community Reinvestment Act Obligations of Banks*, 46 N.Y.L. SCH. L. REV. 735, 738–39 (2003) (citing 12 CF.R. § 25.22(a)(1), (c)(1)).

81. 12 C.F.R. § 25.21(b) (2008).

82. 12 C.F.R. § 25.41(a) (2008). Under the regulations in effect prior to the changes from the mid-1990s, the delineation of a bank's assessment area was a separate criterion for determining a bank's CRA record. Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,170–71 (May 4, 1995) (codified at 12 C.F.R. pts. 25, 203, 228, 345, 563e). Under the new regulations, as described above, the regulators now review the assessment area delineation simply for its consistency with the purposes of the CRA, but it is not a separate criterion on which a bank's CRA performance is based. 12 C.F.R. § 25.41(a).

83. The definition of assessment areas for wholesale or limited purpose banks

> must consist generally of one or more MSAs . . . (using the MSA . . . boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns, in which the bank has its main office, branches, and deposit-taking ATMs.

12 C.F.R. § 25.41(b).

> (1) Consist generally of one or more [Metropolitan Statistical Areas, or MSAs] (using the MSA . . . boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns; and (2) Include the geographies in which the bank has its main office, its branches, and its deposit-taking ATMs, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans (including home mortgage loans, small business and small farm loans, and any other loans the bank chooses, such as those consumer loans on which the bank elects to have its performance assessed).[84]

The two critical elements then are (1) the geographic location of its main office, branches, and deposit-taking ATMs and (2) where a substantial portion of its loans are purchased or originated. Thus, the community or communities the bank is supposed to serve under the CRA include the areas where the bank is physically located and receives deposits, as well as where a substantial amount of the bank's lending occurs. The CRA, therefore, does not require banks to meet the needs of communities where the banks are not physically located or where only a small percentage of loans are originated or purchased. As also discussed in Part IV.A, the narrow focus of the CRA to only those areas where a bank is physically present or where a bank does much of its lending, consistent with the twin purposes of the CRA,[85] leaves a large gap in CRA coverage, permitting banks free rein to engage in lending and other banking activities in many communities despite those activities' potential inconsistency with the needs of those communities.

The CRA charges four federal regulating agencies to apply the Act's requirements to the banks the agencies supervise.[86] The "stick" that is supposed to help carry out the CRA's goal is that the regulators must take into account the regulated institution's record of meeting the credit needs of their communities whenever the institution wishes to engage in a range of activities (mostly having

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84. *Id.* § 25.41(c).

85. *See supra* notes 69–71 and accompanying text.

86. The CRA charges the following federal banking agencies to apply the Act's provisions to the banks the agencies supervise: the Office of the Comptroller of the Currency applies the law 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 and bank holding companies;" the Federal Deposit Insurance Corporation "with respect to State chartered banks and savings banks which are not members of the Federal Reserve System and the deposits of which are insured by the Corporation"; and the Office of Thrift Supervision with respect to savings association, "the deposits of which are insured by the Federal Deposit Insurance Corporation" and savings and loan holding companies. 12 U.S.C. § 2902(1) (2006).

to do with expansion) such as a merger with or acquisition of another financial institution. Here, too, we see the connection between deposit insurance and the scope of the CRA. The language of the CRA requires regulators to take into account a covered bank's CRA record whenever the bank applies to its regulator for a "deposit facility,"[87] which the statute defines to include an application for any of the following: "a charter for a national bank or Federal savings and loan association; . . . deposit insurance in connection with a newly chartered . . . bank"; the establishment of a branch or other facility that will accept deposits; the relocation of a home or branch office; or the merger, consolidation, or acquisition of another regulated financial institution in certain circumstances.[88]

During the examination process, regulators periodically review bank activities covered by the CRA. In 1995, changes to the regulations implementing the CRA established a new approach to CRA examinations. Prior to these changes, regulators focused on twelve factors which often used a process oriented analysis of banking practices rather than an objective assessment of the lending activities of banks in low- and moderate-income communities.[89] Regulators now evaluate large retail banks[90] under a three-part review, which includes a lending test, an investment test, and a service test.[91] Wholesale and limited purpose banks are evaluated according to a community development test, which looks at a bank's "community development lending, qualified investments, or community development services."[92] "Intermediate

87. *Id.* § 2903(a)(2).

88. *Id.* § 2902(3).

89. Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,157 (May 4, 1995) (codified at 12 C.F.R. pts. 25, 203, 228, 345, 563e). The regulations covering the activities of the different regulating agencies are codified at 12 C.F.R. pt. 25 for the Office of the Comptroller of the Currency, 12 C.F.R. pt. 228 for the Federal Reserve, 12 C.F.R. pt. 345 for the FDIC, and 12 C.F.R. pt. 563e for the Office of Thrift Supervision. 60 Fed. Reg. 22,156. Because the regulations are virtually identical, for simplicity's sake I shall only refer to those regulations found under 12 C.F.R. pt. 25.

90. Retail banks with more than $1.061 billion in assets are considered large banks. *See* 12 C.F.R. § 25.12(u)(1).

91. *Id.* § 25.21(a)(1). The lending test includes an analysis of a bank's performance in "home mortgage, small business, small farm, and community development lending." *Id.* § 25.22(a)(1). The investment test includes an analysis of the dollar amounts of a bank's investments, the bank's innovativeness, its responsiveness to community needs, and whether such investments meet needs other banks do not routinely meet. *Id.* § 25.23(c). The service test includes a review of the "availability and effectiveness of a bank's systems for delivering retail banking services and the extent and innovativeness of its community development services." *Id.* § 25.24(a). All of these tests are carried out in light of a given bank's "performance context," which includes, *inter alia*, a review of market factors, the bank's capacity, its past performance, and the performance of other "similarly situated" lenders. *Id.* § 25.21(b). For a discussion of these tests, see MARSICO, *supra* note 51, at 78–81; Barr, *supra* note 23, at 525.

92. 12 C.F.R. § 25.25(a).

small banks," with assets between $250 million and $1.061 billion,[93] are reviewed under a community development test that takes into account bank loans, investments, and services to low- and moderate-income customers.[94] Small retail banks[95] must meet a lending test, which takes into account, among other things, loan-to-deposit ratios, a bank's record of lending to low income borrowers, and the percentage of loans made in a bank's CRA assessment area.[96] Through these examinations, banks are given one of four "grades," based on the evaluations conducted, which signifies the bank's relative success in "meeting community credit needs": "outstanding," "satisfactory," "needs to improve," or "substantial noncompliance."[97] These grades do not have any impact at the time they are given, but the regulators take them into account when reviewing a particular bank's record in the context of a CRA-covered transaction.[98]

Individuals and community groups can request these review records[99] and may comment on a particular bank's CRA activities.[100] More importantly, citizens and community groups can file CRA "challenges" or "protests" at the time a bank applies to its regulators to consummate a transaction the approval of which requires CRA consideration.[101] The regulators rule on these challenges, and as described below, such decisions historically have been immune from judicial review. Richard Marsico describes the CRA challenge process as follows:

> A bank submits its expansion application to the federal banking agency that regulates it. At approximately the same time, the bank publishes a notice in its local newspaper announcing the application and the opportunity for public comment. Notices are also published in agency bulletins and websites. The notice includes a deadline for filing comments. A community group that believes the bank has a poor record of meeting the credit needs of the community contacts the bank to express its concerns about the bank's CRA record and its plans for the future. The community group makes a proposal for the bank to

93. *Id.* § 25.12(u)(1).

94. *Id.* § 25.26(c).

95. The regulations define small banks as institutions having less than $1.061 billion in assets. *Id.* § 25.12(u)(1).

96. *Id.* § 25.26(b).

97. 12 U.S.C. § 2906(b)(2) (2006).

98. *Id.* § 2903(a)(2).

99. 12 C.F.R. § 25.43(a)(2).

100. *Id.* § 25.43(a)(1).

101. *See* Richard D. Marsico, *The New Community Reinvestment Act Regulations: An Attempt at Implementing Performance-Based Standards*, 49 CONSUMER FIN. L.Q. REP. 47, 48 (1995).

> agree to increase its lending in [low- and moderate-income] and minority neighborhoods. The bank and the community group negotiate over the proposal. As the deadline for filing a challenge to the merger approaches, the pressure on the bank to forestall the challenge grows, and the parties may reach a lending agreement. If not, the community group may file a challenge, but the negotiations might continue while the challenge is pending. While the challenge is pending, the federal banking agency considering the application might conduct a private meeting with the parties or conduct a public hearing. If the community group and bank did not reach a lending agreement before the challenge was filed, they could reach an agreement after it was filed but before the agency issues a decision.[102]

Marsico has identified four factors that motivate banks to take their CRA records and the community group challenges to their applications seriously.[103] First, although this is extremely rare, banks fear that the regulators will deny their application. Second, a delay of a bank merger application can ultimately result in the failure of the merger. Third, a challenge can be costly to fight in terms of legal fees and other costs. Fourth, the bad publicity a bank receives from a challenge or from a poor CRA rating can harm customer relations, drive potential customers away, and send stock values down.

Many have criticized the CRA since its inception. Conservative critiques include the argument that the CRA is unnecessary because there is little evidence of discrimination in the home mortgage market to justify imposing the CRA's burdens on banks.[104] Others claim that the CRA is an inefficient means to combat any discrimination that might be present in credit markets.[105] Furthermore, some commentators argue that the CRA's goal of encouraging banks to meet the credit needs of low- and moderate-income communities contradicts the CRA requirement that any lending in those communities must

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102. MARSICO, *supra* note 51, at 134 (citations omitted).

103. *Id.* at 133.

104. *See, e.g.*, Charles W. Calomiris et al., *Housing-Finance Intervention and Private Incentives: Helping Minorities and the Poor*, 26 J. MONEY, CREDIT & BANKING 634, 634 (1994) (arguing with empirical data that there is a lack of evidence of discrimination in the mortgage market); Jeffrey M. Lacker, *Neighborhoods and Banking*, ECON. Q., Spring 1995, at 13, 13–14 (same).

105. *See, e.g.*, Michael Klausner, *Market Failure and Community Investment: A Market-Oriented Alternative to the Community Reinvestment Act*, 143 U. PA. L. REV. 1561, 1580 (1995) (arguing that CRA is an inefficient response to lending discrimination); Jeffery W. Gunther, *Should CRA Stand for "Community Redundancy Act"?*, REG., Fall 2000, at 56, 56, *available at* http://www.cato.org/pubs/regulation/regv23n3/gunther.pdf (arguing with empirical data that CRA is unnecessary to broaden access to credit markets by minorities).

also be consistent with safe and sound lending practices.[106] In other words, requiring that banks make loans with arguably greater risk is inherently inconsistent with bank safety and soundness.

From the left, commentators have echoed some of these critiques, albeit from a different perspective, arguing that the loose standards under the law and regulations are unenforceable and that regulators consistently fail to carry out the spirit of the law. Some question the ability of the CRA to improve lending in underserved markets because the Act does not mandate loans in particular neighborhoods.[107] Others argue that the CRA's vague language and regulators' hands off approach have led to weak enforcement of the CRA's goals.[108] Still others argue that the CRA's underlying premise—that banks should be encouraged to bring their products to underserved communities—ratifies corporate elites' vision of equality while undermining community empowerment.[109]

Proponents for reform of the CRA have suggested that the CRA should move to a system of tradeable obligations,[110] similar to the approach used in some environmental contexts. Another scholar suggests a performance-based approach—"safe harbor" provisions that would shield from CRA challenges banks with a demonstrated track record of meeting CRA obligations.[111]

Professor Michael Barr has defended the CRA from these attacks, arguing that the CRA's standards-based approach—one that allows regulators to take into account a particular bank's market, community, and business strategy—is

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106. *See, e.g.*, Calomiris et al., *supra* note 104, at 654 (suggesting that "CRA compliance involves making unprofitable loans"); Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 295 (1993) (arguing that the CRA "encourages banks to make unprofitable and risky investment and product-line decisions").

107. *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. REV. 710 (1996) ("[A]n alternative to the CRA [must require] banks to become responsible for ensuring that they originate a sufficient level of profitable loans in their surrounding low- and moderate-income communities.").

108. *See, e.g.*, MARSICO, *supra* note 51, at 89–130 ("[T]he federal banking agencies have continued to enforce the CRA in a way that undermines the CRA's potential for democratizing capital." (citations omitted)).

109. *See, e.g.*, Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1467–69 (1994) (arguing that programs like the CRA "turn[] the aspirations of disempowered groups into mere special interest pleadings (citing 12 U.S.C. §§ 2901–2906 (1988 & Supp. IV 1992) (current version at 12 U.S.C. §§ 2901–2906 (2006)))).

110. *See, e.g.*, Klausner, *supra* note 105, at 1586–88 ("In contrast to the current CRA regime, a system of tradable obligations would promote specialization.").

111. *See* Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349, 349–50 (1993).

the correct approach for spurring investment without dictating how banks should allocate resources.[112] As a result, he argues, the CRA as currently conceptualized is best structured to promote the goals of the CRA in the most efficient and effective way possible:

> Different firms have different cost structures, scope and scale, and operate in markets with different demographics and competitive structures. Firms make loans at different times under different market conditions. Setting a single rate (or rates) of lending in advance would likely cause some firms to be unable to meet the standard despite their best efforts, cause others to make uneconomic loans, and cause still others to meet the rule without any serious effort to lend to low-income borrowers. Moreover, such a rule would become stale over time, and would not easily be adapted to changing market conditions.
>
> By contrast, the CRA standards permit banks to respond to local needs based on their own institutional organization, market assessments, and business plans, without being judged on the basis of national norms. Rather, examiners look to local context and business strategy. The flexibility provided by the performance context assessment is one of the most critical aspects of the CRA regulation. It permits the locally based decisionmaking contemplated by Congress in enacting CRA. Standards also diminish the extent to which regulators need fear that CRA would lead to "credit allocation," since the bank makes the judgment about whether, and to whom, to extend a loan. The CRA standard can evolve with changes in the market at relatively low cost.[113]

Numerous studies conducted over the last ten years provide tangible evidence that the CRA has worked effectively to bring credit to communities that banks and other financial institutions previously underserved.[114] A two-part

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112. *See* Barr, *supra* note 23, at 600.

113. *Id.* (footnote call numbers omitted). Barr also argues that the standards-based approach with provisions for community input permits banks and the community to engage in a process that increases the "accuracy and legitimacy" of bank efforts to meet community needs. *Id.* at 601. Furthermore, the use of standards "conveys social meaning and affects enforcement," and in this way "the law helps create social norms, reveals instances in which actors transgress those norms, and contributes to compliance even absent legal consequences." *Id.* at 603.

114. *See, e.g.*, JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., THE 25TH ANNIVERSARY OF THE COMMUNITY REINVESTMENT ACT: ACCESS TO CAPITAL IN AN EVOLVING FINANCIAL SERVICES SYSTEM iv (2002), *available at* http://www.jchs.harvard.edu/publications/governmentprograms/cra02-1.pdf (reviewing home mortgage data from the 1990s and showing increased lending to minority and low-income borrowers); Barr, *supra* note 23, at 563, 565 (calculating lending data from 1993 to 1999 and showing increased home mortgage lending to

study commissioned by the U.S. Department of the Treasury and carried out by the Brookings Institution and the Joint Center for Housing Studies at Harvard University revealed that the CRA was likely responsible for "nearly $620 billion in home mortgage, small business, and community development loans to low- and moderate-income borrowers and communities."[115] Another study conducted by the Joint Center for Housing Studies at Harvard University looked at the performance of CRA-covered banks acting within their CRA assessment areas, CRA-covered banks acting outside of their CRA assessment areas, and financial institutions beyond the reach of the CRA.[116] The study found that prime mortgage lending carried out in minority communities was the strongest when carried out by banks acting within their CRA assessment areas.[117] Looking specifically at the impact of the CRA on home mortgage lending, one study posited that the 1995 changes to the CRA regulations and the resulting stronger CRA enforcement may have led to a reduction in the homeownership rate gap between blacks and whites between 1995 and 1997.[118]

Looking at the CRA agreements—deals struck between community groups and financial institutions to resolve CRA challenges—the impact of the CRA is even more profound. The National Community Reinvestment Coalition tracks the results of agreements reached through CRA challenges and has concluded that from the inception of the CRA until early 2008, the CRA challenge process has resulted in banks making commitments to lend approximately $6 *trillion* in

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minorities during this period); Douglas D. Evanoff & Lewis M. Segal, *CRA and Fair Lending Regulations: Resulting Trends in Mortgage Lending*, ECON. PERSP., Nov.–Dec. 1996, at 19, 38, *available at* http://www.chicagofed.org/publications/economicperspectives/1996/epnd96b.pdf (showing the CRA and fair lending enforcement increased lending to minority communities); Michael LaCour-Little, Does the Community Reinvestment Act Make Mortgage Credit More Widely Available? Some New Evidence Based on the Performance of CRA Mortgage Credits 14, 21 (May 4, 1998) (unpublished manuscript, on file with author) (showing evidence from case study that lenders improved lending to minority communities due to the CRA).

115. Barr, *supra* note 23, at 566 (citing ROBERT E. LITAN ET AL., U.S. DEP'T OF THE TREASURY, THE COMMUNITY REINVESTMENT ACT AFTER FINANCIAL MODERNIZATION: A BASELINE REPORT, at ES-5, ES-14, ES-16 (2000), *available at* http://www.novoco.com/low_income_housing/resource_files/research_center/crareport.pdf). The authors of the Baseline Report admitted that a host of factors may have led to the increased lending identified in their study, including growth in the economy, enforcement of fair lending laws, and changes in the HMDA reporting requirements. LITAN ET AL., *supra*, at ES-11. *See also* ERIC S. BELSKY ET AL., THE EFFECT OF THE COMMUNITY REINVESTMENT ACT ON BANK AND THRIFT HOME PURCHASE MORTGAGE LENDING 1 (2001), *available at* http://www.jchs.harvard.edu/publications/governmentprograms/belschillyezer_cra01-1.pdf (discussing other studies with results similar to those of the Baseline Report).

116. JOINT CTR. FOR HOUS. STUDIES, *supra* note 114, at 48, 53 exhibit 19.

117. *Id.*

118. Lewis M. Segal & Daniel G. Sullivan, *Trends in Homeownership: Race, Demographics, and Income*, ECON. PERSP., 2d Quarter 2008, at 53, 68.

low- and moderate-income communities.[119] Several studies have assessed the impact of CRA agreements, and all have found that the presence of a CRA agreement typically results in improved lending to low- and moderate-income communities.[120]

One might be tempted to argue that this increase in lending was precisely the product of these agreements—obtained through undue pressure on banks facing trial in the court of public opinion—which led to risky loans and the subprime crisis. But lending programs that flow from CRA agreements are typically programs that the CRA ultimately covers—the programs involve lending that assists low- and moderate-income communities, the loans are made within banks' CRA assessment areas, and regulators review the programs in the CRA examination process of those banks.[121] All of these features are inconsistent with the overwhelming majority of risky subprime lending carried out in the middle of this decade.[122]

Moreover, history and research show that CRA lending programs are generally profitable[123] and comparable in risk to most depository institutions' other lending portfolios.[124] More recent research carried out by the Board of Governors of the Federal Reserve System studying the performance of CRA-related lending in 2005–2006 compared to other types of lending during that period—including higher priced subprime lending—showed that borrowers connected to CRA-related loans were half as likely to be delinquent on their

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119. NAT'L CMTY. REINVESTMENT COAL., CRA TOOLKIT: PROTECTING AND PRESERVING THE COMMUNITY REINVESTMENT ACT 2 (2008), *available at* http://www.ncrc.org/images/stories/cra/cra toolkit_v8_remarks_joint_statement.pdf.

120. *See, e.g.*, RAPHAEL W. BOSTIC & BRECK L. ROBINSON, WHAT MAKES CRA AGREEMENTS WORK? A STUDY OF LENDER RESPONSES TO CRA AGREEMENTS 14, 26 tbl.2 (2003), *available at* http://www.chicagofed.org/cedric/files/2003_conf_paper_session5_bostic.pdf (showing increased lending activities in low- and moderate-income communities during periods agreements were in effect); GREGORY D. SQUIRES & SALLY O'CONNOR, COLOR AND MONEY: POLITICS AND PROSPECTS FOR COMMUNITY REINVESTMENT IN URBAN AMERICA 166 (2001) (finding increased lending to minority and low- and moderate-income communities by banks entering into CRA agreements compared to those without such agreements); Alex Schwartz, *Bank Lending to Minority and Low-Income Households and Neighborhoods: Do Community Reinvestment Agreements Make a Difference?*, 20 J. URB. AFF. 269, 280–82 & tbl.5 (1998) (finding a higher percentage of conventional home mortgage lending to black borrowers among banks with CRA agreements compared to banks without such agreements).

121. For an overview of the terms of CRA lending agreements, see generally NAT'L CMTY. REINVESTMENT COAL., CRA COMMITMENTS (2007), *available at* http://www.ncrc.org/images/stories/whatWeDo_promote/cra_commitments_07.pdf.

122. For a discussion of the scope of the CRA with respect to subprime loans, see discussion *infra* Part IV.A.

123. BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE PERFORMANCE AND PROFITABILITY OF CRA-RELATED LENDING 45 (2000), *available at* http://www.federalreserve.gov/boarddocs/surveys/craloansurvey/cratext.pdf.

124. *Id.* at 48.

mortgage payments as subprime borrowers.[125] And measuring foreclosures in the second quarter of 2008, subprime borrowers were twenty times more likely to end up in foreclosure than borrowers in a CRA-related program.[126]

The *Risky Borrowers or Risky Mortgages: Disaggregating Effects Using Propensity Score Models* study (*Risky Borrowers* study), generated by the Center for Community Capital at the University of North Carolina, compared the performance of subprime loans with the performance of loans made through the Community Advantage Program (CAP), a CRA-related lending program developed by the North Carolina fair lending organization Self-Help.[127] Through CAP, lenders made loans on prime terms to borrowers with credit profiles that matched those of borrowers typically found in the subprime market.[128] Because the profiles of the borrowers were the same in the CAP market as in the subprime market, the study could compare the loan performance of the borrowers in the CAP program to the performance of borrowers receiving subprime loans.[129] The study even measured the performance of CAP borrowers against borrowers with subprime loans, controlling for different features typically found in the subprime market such as adjustable-rate mortgages, prepayment penalties, and broker-originated loans.[130] The researchers were able to address a question often posed about the causes of the subprime meltdown: Was it risky borrowers that caused the crisis or risky loan terms? The results, set forth below, show that the fault may have been the latter: risky loans.

The *Risky Borrowers* study compared loan performance of one group of loans—originated in the subprime markets and through the CAP program in 2003–2004—and a second similar group originated in 2005–2006.[131] For loans originated during the first time period, subprime loans had a cumulative default

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125. Memorandum from Glenn Canner & Neil Bhutta, Div. of Research and Statistics, Bd. of Governors of the Fed. Reserve Sys., to Sandra Braunstein, Dir., Consumer & Cmty. Affairs Div., Bd. of Governors of the Fed. Reserve Sys. 10 tbl.7 (Nov. 21, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/20081203_analysis.pdf.

126. *Id.*

127. Lei Ding et al., Risky Borrowers or Risky Mortgages: Disaggregating Effects Using Propensity Score Models 7 (Dec. 2008) (unpublished working paper, *available at* http://www.ccc.unc.edu/documents/RiskyMortg_Final_Dec11.pdf).

128. The borrowers had identical characteristics in terms of the lien status of the loans, the amortization period of the loans, the loans' purpose, occupancy status of the borrowers, documentation supplied, time period of origination, and geographic area. *Id.* at 8. The samples differed slightly in terms of debt-to-income ratio (DTI), loan-to-value ratio (LTV), credit score, loan amount, and other loan features. *Id.* The credit scores of the CAP participants were slightly higher than the scores of the subprime borrowers in the study. *See id.* at 25 fig.2.

129. *See id.* at 8.

130. *See id.*

131. *See id.* at 16.

rate of 16.3%, approximately four times the CAP program's default rate of 4.1%.[132] During the second time period, the cumulative default rate for the subprime loans was 47.0%—over 3.5 times the rate for comparable CAP loans (13.3%).[133] Taking into account specific subprime features, including adjustable rates, broker originations, and prepayment penalties, the subprime loans in the first time period defaulted at a rate of 21.8%, compared to 4.1% for CAP loans; in the second time period, the subprime loans defaulted at a rate of 53.8%, compared to 13.3% for the CAP loans.[134]

While the CRA has unquestionably led to an increase in beneficial lending in low- and moderate-income communities,[135] risky subprime lending in many of these same communities has helped to spur the subprime mortgage crisis and the wider financial crisis that has followed.[136] The next sections take up the questions posed earlier: Did the CRA cause these crises, and why did the CRA not prevent them?

IV. THE CRA AND SUBPRIME LENDING: REGULATIONS, REGULATORS, AND THE COURTS

A. *The Scope of the CRA*

Simply put, the CRA, as enforced by the regulators, did not cause the subprime mortgage crisis, nor could the CRA have prevented the crisis, given the law's current incarnation and the way the regulators have interpreted and enforced the Act. The overwhelming majority of subprime lending in minority communities took place *outside* the scope of the CRA[137]—the CRA did not in any way pressure subprime lenders to make the loans that they did. The CRA simply does not cover most subprime lending. At the outset, it is important to note that nearly two-thirds of all mortgages are beyond the scope of the CRA because nondepository institutions originate these mortgages.[138] Looking deeper

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132. *Id.*

133. *Id.*

134. *Id.* at 17.

135. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of the Treasury, Treasury Department Releases CRA Study (Apr. 19, 2000), *available at* http://www.treas.gov/press/releases/ls564.htm.

136. *See, e.g.*, Ding et al., *supra* note 127, at 2 (noting that the rapid rise in subprime mortgage delinquency and foreclosure has caused the subprime mortgage meltdown).

137. *See* Canner & Bhutta, *supra* note 125, at 3.

138. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Community Affairs Research Conference, Washington, D.C.: The Community Reinvestment Act: Its Evolution and New Challenges (Mar. 30, 2007), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20070330a.htm; *see also* LITAN ET AL., *supra* note 115, at 19, 102 chart 14 (analyzing HMDA data from 1993 through 1998 and finding that two-thirds of the

into subprime lending reveals there are several other reasons why most subprime lending took place outside of the CRA's protections. Indeed, the overwhelming majority of subprime lending was generally well beyond the scope of the CRA, and the information collected over the last five years on subprime mortgage originations establishes just that.

A study analyzing data compiled before the height of the subprime mortgage market revealed that the CRA covered only 3% of first lien home loans and 4% of refinance loans analyzed.[139] A more recent assessment conducted by the Federal Reserve, reviewing loans made in 2005–2006 (the height of the subprime market), determined that the CRA covered only 6% of

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increase in subprime lending to low- and moderate-income communities during this period was from subprime lenders not covered by the CRA whereas only 15% of these loans were originated by CRA-covered institutions). Recent speeches by regulators and even one banking industry representative echo former Chairman Bernanke's defense of the CRA. *See, e.g.*, Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp., Remarks Before the Consumer Federation of America 1 (Dec. 4, 2008), *available at* http://www.naahl.org/portals/11/fdic-bair defends cra.pdf (arguing that the CRA is not to blame for the financial crisis because instead of forcing FDIC-insured banks into business with borrowers who cannot repay it encourages the banks to lend to low- and moderate-income areas so long as the loans are consistent with the safe and sound operation of such institutions); John C. Dugan, Comptroller of the Currency, Remarks Before the Enterprise Annual Network Conference 4 (Nov. 19, 2008), *available at* http://www.occ.treas.gov/ftp/release/2008-136a.pdf (arguing that the CRA, while not perfect, has made nothing but positive contributions to community revitalization across the country, encouraging "sound community development lending, investment, and service initiatives by regulated banking organizations"); Randall S. Kroszner, Governor, Bd. of Governors of the Fed. Reserve Sys., Speech at the Confronting Concentrated Poverty Policy Forum: The Community Reinvestment Act and the Recent Mortgage Crisis (Dec. 3, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/kroszner20081203a.htm (arguing that there is a lack of empirical evidence to support claims blaming the CRA for the financial crisis because during implementation of the law over the past thirty years, the CRA has not been shown to contribute to the erosion of safe and sound lending practices, and that in fact, it is an important model for designing incentives that motivate private sector involvement to help meet community financial needs); Kenneth D. Lewis, Chairman and Chief Executive Officer, Bank of Am., Remarks to the Executives' Club of Chicago: Banking on Main Street (Nov. 20, 2008), *available at* http://newsroom.bankofamerica.com/index.php?s=speeches&item=213 (arguing that the CRA is not to blame for the financial crisis because the riskiest subprime lending of the past ten years was unrelated to the CRA, as "75% of high-priced loans made by mortgage companies and bank affiliates in recent years were not covered by CRA," and that the only reason CRA loan portfolios are under stress right now is because "[l]ow-to-moderate income families and neighborhoods are economically vulnerable and are always the first and hardest hit in an economic downturn").

139. William C. Apgar & Mark Duda, *The Twenty-Fifth Anniversary of the Community Reinvestment Act: Past Accomplishments and Future Regulatory Challenges*, 9 FED. RES. BANK N.Y. ECON. POL'Y REV., June 2003, at 169, 180–81 (noting that in 2000, only 3% of subprime loans were made by CRA-covered institutions in their assessment areas, and 96% of subprime refinance loans were made by independent mortgage companies and covered institutions lending out of their CRA assessment areas).

all higher priced loans (the Federal Reserve's proxy for subprime loans).[140] Therefore, fully 94% of all home mortgage and refinance loans made during this two-year period were beyond the scope of the CRA altogether.[141] Furthermore, less than 2% of all subprime loans originated by independent banking entities were then purchased by CRA-covered institutions.[142]

This phenomenon has occurred for several reasons. First, the CRA does not cover most subprime lenders because they are not federally regulated depository institutions.[143] Also, federally regulated banks that the CRA covers may engage in subprime lending outside their CRA assessment area; when they do this, such lending is beyond CRA review.[144] In addition, some federally regulated banks might engage in subprime lending through affiliates and subsidiaries, and, at the bank's discretion, such activities can be excluded from CRA review (provided that the subsidiary or affiliate is not itself a covered depository institution).[145] Finally, loans made to borrowers who are not of low or moderate income are also beyond the reach of the CRA.[146]

In sum, rather than causing the subprime mortgage crisis, the CRA was powerless to stop the crisis precisely because of the way Congress drafted the Act and regulators enforced it: the CRA only covers certain institutions (it

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140. Canner & Bhutta, *supra* note 125, at 3.

141. *See id.* It is also important to note that the 6% figure might actually *overstate* the number of subprime loans that the CRA covers. The analysts preparing the report did not differentiate between loans made by CRA-covered institutions and loans made by their affiliates. Thus, this percentage includes the lending carried out by affiliates of CRA-covered entities. *See id.* As stated above, the lending of these affiliated may be placed beyond CRA review at the covered institution's discretion. *See supra* note 80 and accompanying text.

142. Canner & Bhutta, *supra* note 125, at 4. The Federal Reserve's analysis also attempted to inquire whether this small percentage of CRA-covered loans performed better or worse than other subprime loans in order to determine whether there was any disproportionate impact from the CRA on foreclosures. They found that loan performance across different types of loans, whether covered by the CRA or not, was comparable. *Id.* at 4–6. Indeed, looking at one type of CRA-covered loan (loans generated by the NeighborWorks campaign), the Federal Reserve analysis found that these loans performed, on average, significantly better than subprime loans generally (with 9% resulting in delinquency, compared to 18% for subprime loans) and led to far fewer foreclosures (a 0.21% foreclosure rate, compared to a 4.26% foreclosure rate for subprime loans). *Id.* at 10 tbl.7.

143. Many subprime lenders are "nondepository institutions" and thus are exempt from the CRA. *See* 12 U.S.C. §§ 1813(c)(2), 2902(1) (2006). For an overview of the different regulatory structures for depository and nondepository institutions, see PATRICIA A. MCCOY & ELIZABETH RENUART, THE LEGAL INFRASTRUCTURE OF SUBPRIME AND NONTRADITIONAL HOME MORTGAGES 19–23 (2008) (citations omitted), *available at* http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08-5_mccoy_renuart.pdf.

144. *Cf.* 12 C.F.R. § 25.41(a) (2008) (describing how a regulated entity's assessment area is established for the purpose of CRA review). For a critique of the limitations of using an assessment area approach to CRA review, see Marsico, *supra* note 80, at 177–78.

145. *See* Engel & McCoy, *supra* note 23, at 1588–89; MARISCO, *supra* note 51, at 747.

146. *See* Kroszner, *supra* note 138.

excludes nondepository institutions, which predominated in the subprime lending market); the Act only monitors the conduct of covered banks in their self-identified assessment areas; and subsidiaries of covered banks (those affiliated entities that often engaged in subprime lending) are often left out of the CRA assessment process at the banks' choice. Indeed, because of these loopholes, only 6% of subprime loans originated in 2005–2006 were within the CRA's purview.[147]

B. Efforts to Change the Regulations and Broaden the CRA's Scope

The first overhaul of the CRA's regulations ushered in the current approach to CRA examinations.[148] When the regulators amended the CRA regulations, they declared that they would review those regulations in 2002.[149] The review process began in July 2001 when the federal banking agencies charged with enforcing the CRA issued a Joint Advance Notice of Proposed Rulemaking.[150] The process took over four years, and a complete analysis of the various proposals that unfolded during that process is beyond the scope of this Article.[151] For purposes of this discussion, I will focus on two critical issues that came up during the course of the regulators' review of the CRA regulations: whether to include nondepository bank affiliates of covered institutions as part of the CRA examination process, and whether to include the lending of CRA-covered banks that occurs outside of those banks' assessment areas as part of the examination process. The issues raised—the failure of the CRA to cover bank affiliates and lending outside the scope of banks' assessment areas—were key features of the CRA that placed much subprime lending beyond the CRA's reach.

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147. *See supra* note 141.

148. *See supra* notes 89–98 and accompanying text.

149. Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,177 (May 4, 1995) (codified at 12 C.F.R. pts. 25, 203, 228, 345, 563e).

150. Community Reinvestment Act Regulations, 66 Fed. Reg. 37,602 (proposed July 19, 2001) (codified at 12 C.F.R. pts. 25, 203, 228, 345, 563e).

151. For a timeline of the review process, see Richard D. Marsico, *The 2004–2005 Amendments to the Community Reinvestment Act Regulations: For Communities, One Step Forward and Three Steps Back*, 39 CLEARINGHOUSE REV. 534, 534 n.2 (2006). Marsico describes the process as "controversial, tortuous, and divisive." *Id.* at 534. According to the agencies, they received over four hundred comments after issuing the Advance Notice of Proposed Rulemaking, and these comments indicated a "profound split over the need for, and appropriate direction of, change" in the CRA regulations. Community Reinvestment Act Regulations, 69 Fed. Reg. 5,729, 5,729 (Feb. 6, 2004) (codified at 12 C.F.R. pts. 25, 203, 228, 345, 563e) ("Community organizations advocated 'updating' the regulations with expanded requirements to match developments in the industry and marketplace; financial institutions were concerned principally with reducing burden consistent with maintaining or improving the regulations' effectiveness.").

1. Covering Bank Affiliates

As described above, the federal bank regulators do not review the activities of non-bank lenders who are affiliated with covered institutions during the CRA examination process unless the covered institution asks for their affiliates' inclusion in that process.[152] Because these noncovered institutions carried out much subprime lending,[153] the banks themselves placed a great deal of subprime lending beyond the reach of the CRA. During the CRA regulation review process, advocates asked the regulators to reconsider this loophole and proposed that the CRA examination process include the activities of banks' affiliates.[154]

While the regulations ultimately adopted by the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) did clarify the extent to which these regulators would take into account evidence of discrimination or other illegal lending practices when considering a bank's CRA record (a significant victory for community groups pressing for such changes), in the end, the regulations still maintained that covered banks had the discretion to include their affiliates' lending in the CRA examination process.[155] The final regulations even limited

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152. *See supra* text accompanying note 145.

153. *See* Canner & Bhutta, *supra* note 125, at 3.

154. *See* Community Reinvestment Act Regulations, 69 Fed. Reg. at 5,731, 5,739.

155. 12 C.F.R. § 25.22(c)(1) (2008). A representative regulatory provision on the issue of illegal lending practices, reflecting the 2004–2005 amendments, provides as follows:

> (c) Effect of evidence of discriminatory or other illegal credit practices.
>
> (1) The OCC's evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance. In connection with any type of lending activity described in § 25.22(a), evidence of discriminatory or other credit practices that violate an applicable law, rule, or regulation includes, but is not limited to:
>
> (i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;
>
> (ii) Violations of the Home Ownership and Equity Protection Act;
>
> (iii) Violations of section 5 of the Federal Trade Commission Act;
>
> (iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and
>
> (v) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission.
>
> (2) In determining the effect of evidence of practices described in paragraph (c)(1) of this section on the bank's assigned rating, the OCC considers the nature, extent, and strength of the evidence of the practices; the policies and procedures that the bank (or affiliate, as applicable) has in place to prevent the practices; any corrective action that the bank (or affiliate, as applicable) has taken or has committed to take, including voluntary corrective action resulting from self-assessment; and any other relevant information.

Id. § 25.28(c).

the regulators' ability to take into account documented evidence of illegal lending practices by affiliates; if a covered bank exercises its discretion to remove that affiliate's lending from CRA review, the regulators are powerless to take such illegal practices into account.[156]

2. *Covering Lending Outside a Bank's CRA Assessment Area*

When reviewing the CRA regulations, the regulators also considered extending the CRA examination process to cover bank lending that occurred outside a covered bank's CRA assessment area (those neighborhoods where banks have branches and take deposits).[157] Not only is the assessment area conception of the CRA antiquated in the modern era of global and Internet banking, but it is also an invitation to banks to engage in risky subprime lending outside their CRA assessment area without subjecting such lending to CRA review. This is precisely what happened—when banks otherwise covered by the CRA did engage in subprime lending, they often did so outside of their CRA assessment areas, so that the CRA examination did not analyze this lending as part of the bank's regular review.[158] Community advocates pushed for a new approach to bank assessment areas:

> Community organizations contended that substantial portions of lending by institutions covered by CRA are nonetheless not subject to CRA evaluation because of institutions' increasing use of nonbranch channels (including agencies, the Internet, and telephone) to provide credit outside of their branch-based assessment areas. . . . [M]any commenters proposed that an institution's assessment areas include all areas in which the institution has more than a specified share (many suggested 0.5 percent) of the lending market or deposit market.[159]

Not surprisingly, banks resisted any expansion of the scope of the CRA examination process beyond banks' traditional CRA-defined assessment areas, i.e., where the CRA confines the assessment area to the communities in which

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156. *See id.* §§ 22.28(c)(1)–(2), 25.22(c)(1); *see also* Community Reinvestment Act Regulations, 69 Fed. Reg. at 5,740 ("[T]he proposed revisions would clarify that an institution's CRA evaluation also can be adversely affected by evidence of discriminatory, other illegal, and abusive credit practices *by any affiliate*, if *any* loans of that affiliate have been considered in the CRA evaluation pursuant to [12 C.F.R. 25.22(c)(1)–(2)]." (footnote call number omitted)). In other words, the regulators only consider the potentially illegal activities of affiliates in the context of a CRA examination if the bank elects to have the regulators review that affiliate's activities.

157. *See* Community Reinvestment Act Regulations, 69 Fed. Reg. at 5,731, 5,739.

158. *See* Brescia, *Capital in Chaos*, *supra* note 5, at 286.

159. Community Reinvestment Act Regulations, 69 Fed. Reg. at 5,735.

banks take their deposits.[160] Indeed, "[s]ome questioned whether such an expansion would be consistent with the [CRA itself]."[161]

In the end, the regulators determined that the current approach of the CRA with respect to bank assessment areas, though not perfect, was the most appropriate, given the alternatives. While recognizing that "[n]o definition of 'assessment area' will foresee every conceivable bank or thrift business model," and that "limitations in the current definition of 'assessment area' might grow in significance as the market evolves," such limitations were not "so significant or pervasive that the current definition is fundamentally ineffective."[162] From the regulators' perspective, the alternatives failed to "improve the existing definition sufficiently to justify the costs of regulatory change."[163] At the same time, some of these alternatives "raised fundamental questions about the scope and purpose of CRA and entail political judgments that may be better left to elected officials in the first instance."[164]

C. *Federal Regulators, State "Sheriffs," and Predatory Lending*

In addition to resisting efforts to bring lending by bank affiliates and lending outside of bank CRA assessment areas within the purview of the CRA, over the last twelve years, two federal regulatory agencies—the Office of Thrift Supervision (OTS) and the OCC—have taken the lead in attempting to preempt state banking laws related to predatory lending. Laying the groundwork for this attack on state laws was the OTS's adoption of regulations pursuant to the Home Owners' Loan Act[165] (HOLA) that preempted state laws that affected "the operations of federal savings associations."[166] The OTS adopted these regulations with the expressed purpose of "enabl[ing] federal savings associations to conduct their operations in accordance with the best practices of thrift institutions,"[167] and the regulations operated to preempt state laws affecting OTS-regulated entities with respect to licensing, disclosure requirements, and interest rates, among other areas.[168] By its express terms, the regulation's intended effect is to "occup[y] the entire field of lending regulation

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 5,735–36.
165. 12 U.S.C. §§ 1461–1470 (2006).
166. 12 C.F.R. § 560.2(a) (2008).
167. *Id.*
168. *Id.* § 560.2(b). The regulation exempts from preemption those state laws that incidentally affect the operations of OTS-regulated entities and are more traditionally relegated to state law, such as contract, real property, and criminal law. *Id.* § 560.2(c).

for federal savings associations."[169] In 2003, several years after the issuance of this regulation, in a series of sweeping actions, the OTS issued a host of letters declaring that federal laws and regulations preempted state predatory lending laws in Georgia,[170] New York,[171] New Jersey,[172] and New Mexico,[173] nullifying the state laws' effects on OTS-regulated entities.

In January 2004, the OCC issued a series of regulations that preempt state efforts to curb predatory lending. The first regulation focuses on state laws addressing mortgage lending of national banks and their subsidiaries, preempting laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers."[174] This regulation preempts state laws that relate to the terms of mortgages, escrow account requirements, insurance requirements, loan-to-value ratios, and a range of other mortgage-related matters.[175] As a result, this regulation hampers the ability of the states to curb many predatory lending abuses because predatory lending practices often arise in these areas.

In a second regulation, the OCC amended its examination powers, declaring that it has the exclusive powers to visit, examine, and inspect the banks it regulates.[176] The regulation goes even further, asserting that the OCC has the exclusive authority to enforce federal laws and state laws regarding bank activities authorized by federal law or any bank functions carried out pursuant to federal enabling statutes.[177] In a twist that has created a clear legal vacuum, subsidiaries of OCC-regulated entities are now exempt from state predatory

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169. *Id.* § 560.2(a); *see also* Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1339–40 (2006) (citation omitted) (describing 1996 Home Owners' Loan Act amendments and subsequent preemption letters); Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda,* 78 TEMP. L. REV. 1, 96–97 (2005) (describing the preemption efforts of the OTS and OCC as consistent with a deregulatory philosophy).

170. Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-1, Preemption of Georgia Fair Lending Act (Jan. 21, 2003), *available at* http://files.ots.treas.gov/56301.pdf.

171. Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-2, Preemption of New York Predatory Lending Law (Jan. 30, 2003), *available at* http://files.ots.treas.gov/56302.pdf.

172. Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-5, Preemption of New Jersey Predatory Lending Act (July 22, 2003), *available at* http://files.ots.treas.gov/56305.pdf.

173. Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-6, Preemption of New Mexico Home Loan Protection Act (Sept. 2, 2003), *available at* http://files.ots.treas.gov/56306.pdf. For further discussion of these preemption letters, see Forrester, *supra* note 169, at 1339–40 (citations omitted).

174. 12 C.F.R. § 34.4(a) (2008).

175. *Id.*

176. *Id.* § 7.4000(a).

177. Bank Activities and Operations, 69 Fed. Reg. 1,895, 1,897 (Jan. 13, 2004) (codified at 12 C.F.R. 7.4000) (citing 12 U.S.C. § 36(f)(1) (2006)).

lending laws[178] while also exempt from the CRA (provided the parent bank chooses to exclude the subsidiary from CRA review).[179] This last issue—the application of federal preemption principles to the activities of the subsidiaries of federally regulated banks—ultimately reached the United States Supreme Court, and the Court endorsed the federal regulators' view that even subsidiaries of OCC-regulated banks are exempt from state lending and banking rules.[180]

In *Watters v. Wachovia Bank*,[181] the Supreme Court considered the application of preemption principles to state banking registration and the examination requirements enforced by the state of Michigan against a subsidiary of Wachovia Bank.[182] In accordance with Michigan law, Wachovia Mortgage Corporation, a wholly owned subsidiary of Wachovia Bank, was registered and licensed to engage in lending operations in Michigan.[183] As the Supreme Court noted, consistent with state law, "Wachovia Mortgage was required, *inter alia*, to pay an annual operating fee, file an annual report, and open its books and records to inspection by [state] examiners."[184] The Court construed the National Bank Act[185] (NBA) and determined that an analysis of the regulations was not necessary because the NBA authorized the activities of national banking subsidiaries:

> The NBA is thus properly read by OCC to protect from state hindrance a national bank's engagement in the "business of banking" whether conducted by the bank itself or by an operating subsidiary, empowered to do only what the bank itself could do. The authority to engage in the business of mortgage lending comes from the NBA, § 371, as does the authority to conduct business through an operating subsidiary. That Act vests visitorial oversight in OCC, not state regulators. . . . North Carolina law [Wachovia Bank's home state], all

178. In amending its regulations with respect to preemption, the OCC made clear that the amendments pertained to both OCC-regulated entities as well as their subsidiaries. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1,904, 1,913 (Jan. 13, 2004) (codified at 12 C.F.R. §§ 7.4007–7.4009, 34.3).

179. *See supra* note 80 and accompanying text.

180. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 21 (2007).

181. *Id.* at 1.

182. *Id.* at 7.

183. *Id.* at 7–8.

184. *Id.* at 8 (citing MICH. COMP. LAWS ANN. §§ 445.1657–.1658, .1671 (West 2002), 493.54, .56a(2), (13) (West 2005)). Wachovia Mortgage was subject to these requirements because it did not have a main office or branch office within the state; had it had such office or offices it would have been exempt from these requirements. *Id.* (citing MICH. COMP. LAWS ANN. §§ 445.1656(1), 445.1679(1)(a) (West 2002), 493.52(a) (West 2005) (amended 2007), 493.53a(d) (West 2005)).

185. Ch. 106, 13 Stat. 99 (1864) (codified as amended in scattered sections of 12 U.S.C.).

> agree, governs incorporation-related issues . . . . And the laws of the States in which national banks or their affiliaties are located govern matters the NBA does not address. But state regulators cannot interfere with the "business of banking" by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits and surveillance under rival oversight regimes.[186]

One of the premises behind the Court's decision was the belief that subsidiaries of national banks are "subject to the same terms and conditions" as national banks.[187] Yet, one significant gap in coverage between federally regulated banks and their subsidiaries is the fact that parent companies have the discretion to include their affiliates in the parent companies' examination under the CRA[188]—a relevant point when assessing state regulators' abilities to supervise and to combat predatory lending.

The point of this brief review is not to question the validity of federal regulations that assert preemptive authority over state regulations to police predatory lending or to criticize the Court's decision in *Watters*. I leave that to others.[189] In the words of one state attorney general, however, the decision to

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186. *Watters*, 550 U.S. at 21 (citations omitted).

187. *Id.*

188. *See supra* note 80 and accompanying text. The Court's use of the term "subsidiary" does not seem to undercut this assessment. Under the OCC's CRA regulations, the term "affiliate" would appear to include a subsidiary:

> (a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company. The term "control" has the meaning given to that term in 12 U.S.C. 1841(a)(2), and a company is under common control with another company if both companies are directly or indirectly controlled by the same company.

12 C.F.R. § 25.12 (2008).

Furthermore, the OCC's own guidance suggests that the term affiliate is meant to include subsidiaries. *Compare* COMPTROLLER OF THE CURRENCY, RELATED ORGANIZATIONS: COMPTROLLER'S HANDBOOK 5 (2004), *available at* http://www.occ.treas.gov/handbook/RelatedOrg.pdf ("Generally, an 'affiliate' is an entity that controls a bank, that is controlled by a bank, or that is under common control with a bank."), *with id.* at 7–18 (citations omitted) (defining three types of subsidiaries—operating, financial, and statutory—as being owned or controlled, at least in part, by a regulated institution).

189. *See, e.g.*, Elizabeth R. Schiltz, *Damming* Watters*: Channeling the Power of Federal Preemption of State Consumer Banking Laws*, 35 FL. ST. U. L. REV. 893, 916 (2008) ("[The *Watters* Court] not only affirmed the substance of the Preemption Regulation, but it also unequivocally adopted the OCC's theoretical framework for the broadest possible preemption powers for national banks."); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225 (2004) (arguing that the OCC's preemption rules "will do great harm to the state banking system"); Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274, 2275 (2004) (criticizing federal regulators' exercise of preemptive authority over state predatory lending laws).

preempt state predatory lending laws, as endorsed by the Court, "took 50 sheriffs off the beat at a time when lending was becoming the Wild West."[190]

D. The Lack of CRA Oversight

The examination process, the first line of defense under the CRA, has become little more than ceremonial, as over 98% of banks now receive either an "outstanding" or "satisfactory" score.[191] As data compiled by the National Community Reinvestment Coalition shows, in 1990, just under 10% of banks received either a score of "needs to improve" or "substantial noncompliance."[192] From 1990 through 1994, this figure was nearly halved, dropping to just over 5%.[193] In one year, it was halved again, to 2.6%.[194] By 2002, it was halved again, to 1.1%.[195] During the height of the subprime mortgage market, the figures were 0.7% for 2003, 0.8% for 2004, and 1.0% for 2005.[196]

A review of the CRA challenge process—when groups can interject their views on bank activities and ask regulators to block proposed bank applications—further exposes the regulators' hands off approach to oversight of CRA matters in general. CRA challenges are virtually nonexistent, and when groups do file challenges, regulators often overrule the challenges and rubber stamp the applications. Challenges to bank applications on CRA grounds are relatively rare, and denials of bank applications on CRA grounds are virtually nonexistent.[197] According to an analysis by the Treasury Department, from 1985 through 1999, less than 0.8% (692 out of 92,177) of bank applications subject to the CRA received any adverse comment, either on CRA or other grounds.[198] Regulators denied only 8 applications of the 692 for any reason, with 4% of those 692 withdrawn by the bank and 1% returned.[199] At the end of the day, regulators denied 8 out of 92,177 bank applications on any grounds (or less than

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190. Jo Becker et al., *White House Philosophy Stoked Mortgage Bonfire*, N.Y. TIMES, Dec. 21, 2008, at A1.

191. *The Community Reinvestment Act: Thirty Years of Accomplishments, but Challenges Remain: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 194 (2008) (statement of John Taylor, President and Chief Executive Officer, National Community Reinvestment Coalition).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *See* Barr, *supra* note 23, at 586 n.342 (citing TREASURY DEP'T, APPLICATIONS SUBJECT TO CRA THAT WERE PROTESTED ON CRA GROUNDS (2000)).

198. *Id.*

199. *Id.*

.01% of all bank applications) during this fifteen-year period.[200] More recent evidence from the Federal Reserve reveals that that body received 13,500 bank applications from 1988 through May 2007, and only 8 of them, less than .06%, were denied on grounds described as "unsatisfactory consumer protection and community needs issues."[201]

Even when groups or individuals raise CRA challenges, the regulators' near indifference to CRA concerns is apparent. Richard Marsico examined decisions by the Federal Reserve and the OCC from 1997 through 2003 in which regulators reviewed a bank applicant's CRA record. This analysis revealed, at best, a cursory analysis of CRA issues.[202] Marsico summarized his findings as follows:

> The decisions did not use a fixed set of evaluative criteria and used subjective standards for evaluating bank lending. The decisions generally listed facts about the bank's lending, emphasized strengths and excused weaknesses, and did not disclose the reasoning they employed in reaching their conclusions. In some decisions, the agency acknowledged the accuracy of critical public comments about bank lending, but approved the applications without explaining the reason the criticism was not sufficient to deny the application. Finally, the agencies did not take the opportunity when considering the applications to encourage banks to improve weaknesses in their lending records.[203]

Whether banks deserved the grades they received or whether regulators should have approved the overwhelming number of bank applications are questions beyond the scope of this Article. Nevertheless, these processes have become less than meaningful measures of banks' conduct, safety, and soundness. If the processes had been meaningful, perhaps at least some of the most harmful effects of the subprime crisis would not have transpired.

V. JUDICIAL REVIEW OF THE CRA

One may believe that the CRA is too amorphous, that the Act leaves banks with little guidance on what practices they should undertake, that community

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200. *Id.*

201. *Foreclosures at the Front Step of the Federal Reserve Bank of Cleveland: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Government Reform*, 110th Cong. (2007) (statement of Sandra Braunstein, Director, Division of Consumer and Community Affairs).

202. *See* MARSICO, *supra* note 51, at 107–13 (citations omitted).

203. *Id.* at 107. One way regulators could have taken into account subprime lending would have been to assess such lending for safety and soundness.

groups are unable to apply the pressure necessary to leverage more significant gains under the Act, or that the standard-setting approach of the Act is just right. There is no question, however, that from the perspectives of the courts—based on the loose terms contained in the CRA and the attenuated chain of harms that might flow from a bank's failure to comply with those terms—the CRA is all but beyond judicial review. And the inability on the part of advocates to have regulators' conduct reviewed in court leaves regulators with unfettered discretion to make the CRA say what they want it to say and do what they want it to do. This boundless discretion has weakened enforcement of the CRA, leaving such enforcement solely in the hands of the regulators. The following is a recounting of the few cases from the past ten years in which federal courts have reviewed regulators' decisions to reject CRA challenges. After the courts soundly rejected a series of actions in the late 1990s, few community advocates have sought judicial review of these regulators' decisions, certainly because such actions seemed futile.

While there have been a handful of cases in which individuals or community groups have attempted to challenge regulators' approval of bank applications despite challenges under the CRA, two cases stand out as examples of the typical case a community group might bring and the allegations it might raise in such a legal challenge: *Lee v. Board of Governors of the Federal Reserve System* (*Lee I*)[204] and *Lee v. Federal Deposit Insurance Corporation* (*Lee II*).[205] The results of both cases demonstrate that courts have imposed serious hurdles before individuals and groups seeking to obtain judicial review of agency decisions under the CRA.[206]

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204. 118 F.3d 905 (2d Cir. 1997).

205. No. 95 Civ. 7963(LMM), 1997 WL 570545 (S.D.N.Y. Sept. 15, 1997).

206. The *Lee* cases involved community leaders and community-based organizations filing CRA challenges with the regulators and then seeking to have those challenges reviewed in federal court. *Lee I*, 118 F.3d at 909; *Lee II*, 1997 WL 570545, at *1. Other cases under the CRA have arisen in different contexts, and the holdings in those decisions are likely unique to the particular circumstances of each case. *See, e.g.*, Kaimowitz v. Bd. of Governors of Fed. Reserve Sys., 940 F.2d 610, 611–12 (11th Cir. 1991) (per curiam) (holding that the petitioner did not have standing to challenge the bank acquisition based on his allegation of reputational harm; the petitioner had represented to minority clients that the bank had poor CRA records, but the regulators granted the bank's application despite those allegedly poor CRA records); Exch. Bank v. Dir. of the Office of Thrift Supervision, 29 F. Supp. 2d 1272, 1276 (N.D. Okla. 1998) (holding that a bank did not have standing to file a judicial challenge to a rival bank's application under the CRA because purpose of the CRA was to promote, not thwart, competition); Washington v. Office of the Comptroller of the Currency, 1987 U.S. Dist. LEXIS 11474, at *10–12 (S.D. Ga. Nov. 24, 1987) (rejecting a community group's challenge to a bank application's approval where the group failed to document the bank's allegedly poor CRA record and where the OCC's decision to grant approval "was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law"); Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 571 F. Supp. 396, 403–04 (E.D. Ark. 1983) (reviewing a bank's judicial challenge to the approval of a rival bank's application and

These two cases arose in the context of a complex transaction involving the 1996 merger of two banking giants, Chase Manhattan Corporation and Chemical Banking Corporation.[207] Matthew Lee, a long-time CRA advocate and executive director of the grassroots community group, Inner City Press (ICP), together with individual members of ICP and the organization acting in its own capacity, filed a challenge under the CRA to different aspects of the merger application before the regulators, including the Federal Reserve, the FDIC, and the OTS.[208]

In *Lee I*, Lee and the other plaintiffs filed a series of CRA challenges before the regulators, arguing that the bank applicants had failed to live up to their obligations under the CRA, and as a result, the regulators should deny both banks' applications.[209] The plaintiffs based their arguments both on Chase's and Chemical's records pertaining to their lending practices in the South Bronx (plaintiffs alleged that Chase and Chemical illegally excluded borrowers from that community from their home mortgage lending) and Chase's practice of requiring banking customers to have high minimum deposit requirements before Chase would waive certain bank fees (which, plaintiffs argued, discriminated against low-income customers).[210] Plaintiffs also asserted that the United States Trust Corporation's (UST) failure to comply with HMDA's disclosure requirements made it impossible for the regulators to evaluate UST's lending practices.[211] Therefore, an accurate CRA review was impossible.[212] Additionally, plaintiffs argued that UST had improperly excluded low- and moderate-income neighborhoods in New York City from its service area.[213]

In *Lee II*, the plaintiffs challenged Greenpoint Bank's (Greenpoint) application to purchase branches of Home Savings of America, FSB on the grounds that Greenpoint had excluded the Bronx from its CRA service area, was lending only to more affluent borrowers in the Bronx, was charging higher interest rates to minority borrowers, and was planning to engage in capital export of deposits through a newly acquired mortgage bank.[214] These arguments became the bases of the judicial challenges ultimately filed in both cases.

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holding that the regulators complied with the CRA in approving the application), *aff'd*, 736 F.2d 479 (8th Cir. 1984).

207. *See Lee I*, 118 F.3d at 909; *Lee II*, 1997 WL 570545, at *1. *Lee I* also involved the application of Chase to purchase a portion of the United States Trust Corporation. 118 F.3d at 908. *Lee II* also involved a legal challenge to a covered transaction by Greenpoint Bank, together with certain aspects of the Chase–Chemical merger. 1997 WL 570545, at *3.

208. *Lee I*, 188 F.3d at 909.

209. *Id.*

210. *Id.* at 915.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Lee II*, No. 95 Civ. 7963(LMM), 1997 WL 570545, at *3 (S.D.N.Y. Sept. 15, 1997).

Any legal challenge to a regulator's decision under the CRA must be filed under a different law because there is no private right of action under the CRA.[215] Accordingly, the plaintiffs had to challenge the decisions approving different aspects of the merger through various routes. In *Lee I*, two actions were filed in the United States Court of Appeals for the Second Circuit[216] under section 9 of the Bank Holding Company Act[217] (BHCA) and section 10(j) of HOLA,[218] both of which create private rights of actions for an "aggrieved party" to challenge bank applications.[219] The two actions filed in the court of appeals sought to overturn three decisions of the Federal Reserve and one of the OTS.[220] By the express terms of those statutes, plaintiffs must file such challenges in the circuit court where the "aggrieved party" maintains its business.[221] *Lee II* was filed under the Administrative Procedure Act,[222] challenging orders of the FDIC and the OCC approving a series of bank applications over the objection of the plaintiffs.[223]

Prior to reaching the merits of the plaintiffs' challenges, the court of appeals in *Lee I*, at the request of the banks, took up the issue of the plaintiffs' standing to sue.[224] A critical question for the court was whether the plaintiffs could link any past harm they had suffered to the regulators' decisions, and whether the relief sought—overturning the regulators' decisions—would in some way redress such past harm.[225] The court divided the plaintiffs into three overlapping categories: "(1) individual residents of the South Bronx; (2)

215. *Lee I*, 118 F.3d at 913.

216. *Id.* at 908 (citing 12 U.S.C. §§ 1467a(j), 1848 (2006)).

217. 12 U.S.C. § 1848.

218. § 1467a(j).

219. *Lee I*, 118 F.3d at 910 (citing 12 U.S.C. §§ 1467a(j), 1848).

220. *Id.* at 908.

221. *Id.* at 910 (citing 12 U.S.C. §§ 1467a(j), 1848).

222. 5 U.S.C. §§ 701–706 (2006).

223. *Lee II*, No. 95 Civ. 7963(LMM), 1997 WL 570545, at *1 (S.D.N.Y. Sept. 15, 1997).

224. 118 F.3d at 910. At the time, the most recent pronouncement by the Supreme Court of the constitutional requirement of standing could be found in *Bennett v. Spear*, 520 U.S. 154 (1997). There, the Court found that there were three elements that comprised the "irreducible constitutional minimum" of standing:

> (1) that the plaintiff ha[s] suffered an "injury in fact"—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 167 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). The courts in both *Lee I*, *see* 118 F.3d at 910 (quoting *Bennett*, 520 U.S. at 167) and *Lee II*, 1997 WL 570545, at *3 (quoting *Bennett*, 520 U.S. at 167), made reference to this standard.

225. *Lee I*, 118 F.3d at 910–14.

customers of Chemical (and now, presumably, Chase); and (3) various community organizations."[226] The court then described the bases for plaintiffs' arguments concerning standing as follows:

> First, [plaintiffs] contend that their "extensive participation" below confers the right to challenge the outcomes of the various proceedings. Next, [plaintiffs] allege that some unidentified members of ICP "have . . . been denied credit from the banks in their community" and "are likely to seek credit from banks in their community" in the future. Because the [Federal Reserve] and OTS ignored the banks' allegedly poor CRA performance, the argument goes, these individuals will be less likely to obtain desired financial services. ICP and Lee also contend that, as customers of Chemical, they stand to suffer from the anti-competitive effects of the merger of Chase and Chemical.[227]

The court addressed each of these contentions, in turn, rejecting all of them. The court first rejected the argument that participation alone before the regulators was a sufficient ground to confer standing when the plaintiff simply alleges procedural irregularities in the administrative proceedings below.[228] Rejecting the plaintiffs' analogy to a claim brought under the National Environmental Policy Act of 1969[229] (NEPA), the court found that even assuming some procedural defects below (which the court did not concede), the plaintiffs would still have to show some cognizable injury, as participation in the administrative proceeding below "is only a starting point" in the analysis.[230]

Turning next to the question of the other harms alleged by the plaintiffs, the court described such harms as follows:

> [Plaintiffs] vaguely allege that some unidentified members of ICP have been denied credit in the past and that still other unidentified members intend to apply for credit in the future. Notably absent from

226. *Id.* at 910.

227. *Id.* at 910–11.

228. *Id.* at 911 (citing *Lujan*, 504 U.S. at 572–73 nn.7–8).

229. 42 U.S.C. §§ 4321–4370f (2000).

230. *Lee I*, 118 F.3d at 911 (quoting *Lujan*, 504 U.S. at 578; Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 448–49 (10th Cir. 1996)). The Court determined that a decision out of the District of Columbia Circuit only held that participation in the proceedings was a prerequisite to review and not sufficient by itself for review. *Id.* (citing Jones v. Bd. of Governors of Fed. Reserve Sys., 79 F.3d 1168, 1171 (D.C. Cir. 1996)). A subsequent decision of the D.C. Circuit, in another judicial challenge brought by Matthew Lee and others, confirmed the D.C. Circuit's view that mere participation in the bank application process does not confer Article III standing to challenge that application in federal court. Inner City Press v. Bd. of Governors of Fed. Reserve Sys., 130 F.3d 1088, 1089 (D.C. Cir. 1997).

> either petition is an allegation that any of the banks involved in this proceeding have been or will be involved in [plaintiffs'] plans. For example, despite petitioners' allegations of racial discrimination and their indictment of the [Federal Reserve] and OTS for their complicity in such acts, not one member of ICP has come forward with so much as an allegation, much less evidence, that he or she has suffered from such discriminatory practices.[231]

The court concluded that these allegations failed to meet the injury in fact requirement of standing: the plaintiffs failed to allege that such harm was "actual or imminent."[232]

Turning to standing's second and third elements—causation and redressability—the court concluded that causation and redressability for the harms alleged were even harder burdens for plaintiffs to bear because they were attempting, through the litigation, to influence the actions of third parties (the banks) and not the regulators.[233] The court then turned to the text of the CRA and found that the Act failed to offer courts an avenue to remedy the plaintiffs' alleged harms. The court described the statute as "amorphous" and "precatory" and determined that the language of the statute—covered banks have a "'continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered'"—does not constitute "a directive to undertake any particular program or to provide credit to any particular individual."[234] Given the language of the Act, which as the court further described, "sets no standards for the evaluation of a bank's contribution to the needs of its community," the plaintiffs could not meet the causation and redressability prongs of the standing requirement.[235]

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231. *Lee I*, 118 F.3d at 912.

232. *Id.* at 912 (internal quotation marks omitted) (quoting *Lujan*, 504 U.S. at 564). Petitioners relied on what the Second Circuit determined was dicta from the Eleventh Circuit. *Id.* at 911–12 (citing Kaimowitz v. Bd. of Governors of Fed. Reserve Sys., 940 F.2d 610 (11th Cir. 1991) (per curiam)). In *Kaimowitz*, the court rejected a legal challenge to a Federal Reserve Board decision to grant a bank application despite a CRA challenge to it, finding that the petitioner in that action did not have standing. *Kaimowitz*, 940 F.2d at 611, 614. The court reached this conclusion because the petitioner was not an individual who stood to benefit from an improved CRA performance by the bank in question: he was not a minority or low- or moderate-income person that might benefit from an improved CRA performance of the applicant bank, did not reside in a low- or moderate-income census tract, and had not sought or was not likely to seek a loan from that bank. *Id.* at 613.

233. *Lee I*, 118 F.3d at 912–13.

234. *Id.* at 913 (quoting 12 U.S.C. § 2901(a)(3) (2006)).

235. *Id.* (citing H.R. REP. NO. 95-634, at 76 (1977) (Conf. Rep.)). The court also rejected petitioners' other arguments related to standing—that the Chase–Chemical merger would have anti-competitive effects—due to petitioners' failure to proffer facts that would establish standing under such a theory. *Id.* at 913–14.

Despite its rejection of the plaintiffs' standing to sue, the court assessed the merits of the plaintiffs' contentions and found them insufficient to warrant the relief plaintiffs sought.[236] For the most part, the court's decision on the merits of plaintiffs' claims was procedural and consistent with the proper scope of review of administrative determinations.[237] The court found that the record showed that the regulators had considered the plaintiffs' arguments and had determined that the arguments lacked a sufficient basis for rejecting the banks' applications.[238]

Soon after the Second Circuit reached its decision in *Lee I*, the district court in *Lee II*, which was entertaining the second legal challenge to other aspects of the Chase–Chemical merger and the Greenpoint application, reached its decision. The district court relied heavily on the Second Circuit's prior decision on standing, even though the plaintiffs had refined their standing arguments and had interposed supplemental allegations in response to the *Lee I* holding.[239]

Those supplemental allegations included the argument that several ICP members had sought and been denied credit from Chase and had "'concrete plans to reapply'" for such credit.[240] The court considered such "'concrete plans'" to be speculative, and further noted that the plaintiffs had "fail[ed] to allege that such future applications will likely be denied," and that such a failure prohibited the plaintiffs from showing that they suffered "'injury in fact.'"[241]

Regarding the UST application, the plaintiffs alleged that they were able to identify members of ICP who lived in residential buildings in the South Bronx and institutions "'like UST'" that had denied loans to such members' landlords.[242] As a result, plaintiffs alleged that those residents had to "'endure the deterioration and unsafe conditions caused by the owners['] inability to obtain refinancing or capital.'"[243] The plaintiffs also claimed that they could identify members of ICP "'who live in buildings whose owners would apply for credit from UST if it served the Bronx.'"[244]

The court rejected these arguments as too speculative "to support a claim of 'injury in fact'" because the ICP members were not alleging that they would patronize UST if it served the Bronx, but that their landlords would; therefore, the landlords were the ones suffering the harm.[245] Furthermore, the court found

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236. *Id.* at 914.

237. *See id.*

238. *See id.* at 914–16.

239. No. 95 Civ. 7963(LMM), 1997 WL 570545, at *5 (S.D.N.Y. Sept. 15, 1997) (citing *Lee I*, 118 F.3d 910–14).

240. *Id.*

241. *Id.*

242. *Id.* at *6.

243. *Id.*

244. *Id.*

245. *Id.*

such allegations as "contingent" in nature (if UST served the Bronx, the landlords would apply and be denied) and determined that the plaintiffs' claims were "too tenuous to demonstrate concrete and imminent injury" sufficient to satisfy the first prong of standing.[246]

In terms of the challenged application of Greenpoint, the plaintiffs were on even rockier terrain. The plaintiffs alleged that Greenpoint's application should be denied on CRA grounds because the bank failed to serve the low- and moderate-income borrowers in the South Bronx by excluding the Bronx from its service area and lending only to borrowers of higher income.[247] Thus, based on these allegations, the plaintiffs could not produce anyone from a low- or moderate-income community in the South Bronx who had been denied a loan. Instead, the plaintiffs argued that they had standing to challenge the regulators' decision with respect to the Greenpoint application because ICP members had been denied loans from other banks and had definite plans to seek credit from Greenpoint were it to serve the Bronx.[248] Plaintiffs argued further that Greenpoint's practices did, or had the potential to, impact adversely "'the physical environs of *all* the residents of the South Bronx, rather than just those who have been denied mortgage credit from Greenpoint or another retail bank,'" and thus anyone "'forced to endure the negative consequences of Greenpoint's practices'" had standing to challenge the underlying orders.[249]

The district court dispensed with these arguments in short order, finding that the "unspecified 'potential' of adversely impacting the 'environs' where ICP members reside is not the type of 'real or immediate' threat of injury necessary to support an 'injury in fact.'"[250] The court went on to echo the analysis by the court of appeals in *Lee I*, finding that the language of the CRA itself offered little to plaintiffs for the establishment of causation and redressability:

> Thus, it is difficult to discern what effect, if any, an order of this Court directing the FDIC and the OCC to comply with the CRA would have. Even the allegations in plaintiffs' supplemental memorandum of law fail to allege that the alleged individual denials of credit can be traced to the FDIC's and OCC's failure to properly regulate the respective financial institutions, nor that such denials would have been granted

246. *Id.*
247. *Id.* at *3.
248. *Id.* at *6.
249. *Id.*
250. *Id.* (citing City of L.A. v. Lyons, 461 U.S. 95, 111 (1983)).

had the FDIC and OCC properly taken such institutions' records "into account."[251]

Finally, the district court concluded that the plaintiffs' allegations that their members would be more likely to obtain credit if the regulators were to enforce the CRA and require the applicant banks' compliance with its terms was a "wholly conclusory assertion [that was] insufficient and too speculative to support either causation or redressability."[252] Because the plaintiffs failed to show that the harm alleged could be "traced to the OCC's and FDIC's alleged regulatory failures" or that the harm "would be redressed if the OCC and FDIC took the applicant financial institutions' records into account," they could not meet the causation and redressability requirements of standing.[253] Unlike the court of appeals, the district court did not address the merits of the plaintiffs' complaint, dismissing the claim for lack of standing.[254]

As discussed previously, CRA examinations have become rote affairs, and CRA challenges to bank applications are almost nonexistent.[255] This is especially true since the decisions in *Lee I* and *Lee II*. In the end, the lack of judicial review of agency action under the CRA diminished the ability of community groups and advocates to monitor agency conduct under the Act. Given the critical role the regulators play in enforcing the Act, the absence of judicial review of examiner conduct, in turn, likely weakened the ability of the CRA to meet its goals. At the end of the day, during a period of extreme banking, regulators were unwilling to assess risky bank practices for their likely impact on the communities the CRA was designed to protect. At the same time, courts refused to review this lack of will. Given these twin failures, the CRA proved a weak weapon against subprime lending's impacts on low- and moderate-income communities.

VI. A CRA FOR THE 21ST CENTURY

The importance of the CRA's goal—ensuring that financial institutions meet the needs of low- and moderate-income communities—has not diminished in light of the present financial crisis. If anything, the failure of the banking system to engage in sound lending practices with respect to these communities was one of the events that triggered the crisis. Accordingly, the importance of strengthening the CRA to protect against a repeat performance of such conduct

251. *Id.* at *8 (citing *Lee I*, 118 F.3d 905, 913 (2d Cir. 1997)).
252. *Id.*
253. *Id.*
254. *See id.* at *8–9.
254. *See supra* Part IV.D.

cannot be overstated. At the same time, the central and irreplaceable role banks play in our financial system and the extent to which that role has evolved since the CRA's passage require that the CRA must be revised to respond to the challenges of the day, and those of tomorrow. Where deposit insurance served as an important justification for the original CRA, the taxpayer rescue of the financial system renews and deepens the federal commitment to banks, and those banks' commitment to vital national interests, including the preservation and enhancement of the financial life of all communities. With these sentiments in mind, the following are several principals that could inform efforts to revise the CRA for the twenty-first century.

A. Broadening the CRA's Reach

It is obvious that Congress must broaden the CRA's reach. At present, the CRA applies to only a fraction of home mortgage lending generally,[256] let alone subprime lending (although subprime lending itself may be completely dead, at least for the time being). An expansion of the scope of the CRA to cover all financial institutions—not just depository institutions—and all bank loans—whether made in the same communities from which the institutions take their deposits or not—is necessary. With globalization in the banking and finance markets, the connection between a given bank's deposits and its investments has been severed, and tethering the CRA's reach to a bank's deposits is no longer the only justification for the CRA.[257]

Indeed, the Treasury Department's bank bailout, which to date has cost U.S. taxpayers hundreds of billions of dollars, has reaffirmed the federal government's commitment to a strong and secure banking system. Just as

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256. *See* JOINT CTR. FOR HOUS. STUDIES, *supra* note 114, at 135 (finding that less than 30% of home purchase loans in 2000 were made by institutions covered by the CRA in their CRA assessment areas).

257. Several commentators have discussed the transformation of the global banking industry and potential legislative and regulatory responses. *See, e.g.*, Thomas C. Baxter, Jr. & James H. Freis, Jr., *Fostering Competition in Financial Services: From Domestic Supervision to Global Standards*, 34 NEW ENGLAND L. REV. 57, 58–66 (1999) (citations omitted) (discussing the United States' legislative reaction to the globalization of banking); Allen N. Berger et al., *Globalization of Financial Institutions: Evidence from Cross-Border Banking Performance*, 2000 BROOKINGS-WHARTON PAPERS ON FIN. SERVICES 23, 28–29 (discussing the correlation between the rise of global trade and global financial services); Joe Peek & Eric S. Rosengren, *Implications of the Globalization of the Banking Sector: The Latin American Experience*, NEW ENGLAND ECON. REV., Sept.–Oct. 2000, at 45, 47–60 (providing a history of banking crises in Latin America and detailing the response of foreign banks to these crises); Jean-Claude Trichet, President, European Cent. Bank, The Role of Central Banks in a Globalised Economy (June 18, 2007), *available at* http://www.bis.org/review/r070621b.pdf (explaining the role of central banks in light of the proliferation of domestic free trade regimes in the last twenty years).

federal deposit insurance was used decades ago to justify the adoption of the CRA, the deepening of the federal commitment to the safety of the U.S. banking industry strengthens the support for a deeper commitment of banks to the communities they do serve or should serve. The deepening of this federal commitment also justifies a strengthening of the CRA to bring it in line with the current state of the banking industry. Receipt of funds through the Troubled Asset Relief Program[258] (TARP) or other bailout funds should trigger an examination when a bank engages in lending and other practices, not just when the bank receives deposits. The Community Reinvestment Modernization Act of 2007,[259] introduced in the House but never passed, proposed to expand the scope of coverage of the CRA by expanding the definition of "assessment area" in many contexts to include any community in which a financial entity covered under the Modernization Act held 0.5% of the market share of the activity within that community.[260] This is a good place to start.

B. Permitting State Enforcement

Federal involvement in the banking system has intersected with states' efforts to regulate banks since the dawn of the Republic[261] with the First Bank and Second Bank of the United States (which were ultimately dissolved—the Second as a result of Andrew Jackson's presidency).[262] After a brief interruption in federal involvement in banking, it returned in the throes of the Civil War and strengthened first after the Panic of 1907 and again during the Depression.[263] At the same time, states maintained their own oversight role of financial institutions doing business within their borders that were beyond the oversight of federal supervisory agencies.[264] This dual banking system has important functions, not the least of which is permitting state bank regulators to ensure

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258. For a review of the activity of the Treasury Department's TARP program, see CONG. OVERSIGHT PANEL, ACCOUNTABILITY FOR THE TROUBLED ASSET RELIEF PROGRAM 7–13 (2009), *available at* http://cop.senate.gov/documents/cop-010909-report.pdf. A review of this report might lead one to suggest a topic for discussion, like one that Mike Myers's character, Linda Richman of "Coffee Talk," *see Saturday Night Live: Kirstie Alley with Tom Petty & the Heartbreakers* (NBC television broadcast Oct. 12, 1991), might introduce: The Troubled Asset Relief Program does not seem to be dealing with troubled assets, may be offering little relief, and might not really be a program. CONG. OVERSIGHT PANEL, *supra*, at 3–5.

259. H.R. 1289, 110th Cong. (2007).

260. *Id.* §§ 105(b)(1), 106(b)(1), 107(b)(1).

261. For an overview of the federal role in banking, see Jerry W. Markham, *Banking Regulation: Its History and Future*, 4 N.C. BANKING INST. 221 (2000).

262. *See id.* at 223–26.

263. *See id.* at 228–37.

264. *See id.* at 224–28.

that local oversight priorities are met, that gaps in federal oversight are filled, and that experimentation and innovation are encouraged.[265]

In fact, state attorneys general have been at the forefront of policing predatory conduct, even in the face of OTS and OCC preemption. Most recently, state officials in eleven states brought litigation against Countrywide Financial Corporation. This litigation was ultimately settled by Bank of America, which had purchased Countrywide in the interim.[266] These actions were settled, leading to a commitment by Bank of America to dedicate $8.4 billion towards refinancing predatory loans entered into by Countrywide during the height of the subprime mortgage frenzy.[267]

In order to ensure that the benefits of the dual banking system are realized, the Obama Administration must revisit regulatory preemption in the banking industry. Real estate practices and values on the Upper East Side of Manhattan are very different than in eastern Mississippi. A one-size-fits-all approach to banking regulation is simply misguided. Now more than ever, the need is apparent for more regulation, not less; stronger oversight, not weaker; and more cops on the beat, not fewer. Accordingly, the OTS and the OCC, now under new management, should review the preempting regulations to find the proper balance between innovation, efficiency, and local priorities.

C. *Judicial Review and Performance-Based Standards*

With respect to judicial oversight of the regulatory process, first and foremost, Congress has to make clear that regulator conduct under the CRA should be subject to judicial review. This can easily be accomplished by granting an explicit right of review of agency decisions under the judicial review provisions of the Administrative Procedure Act.[268] Opponents of such a move would argue that permitting judicial review would discourage banks from

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265. Several commentators have presented overviews of the benefits of the dual banking system. *See, e.g.*, Tamar Frankel, *The Dual State–Federal Regulation of Financial Institutions—A Policy Proposal*, 53 BROOK. L. REV. 53, 54–56 (1987) (discussing the benefits of the dual banking system, including the reinforcement of checks and balances and the encouragement of state-by-state innovations in bank regulation); Wilmarth, *supra* note 189, at 257–65 (arguing that the history of congressional banking legislation evinces an intent by Congress to preserve and promote the dual banking system and noting that the dual banking system promotes competition between states in banking regulation, promotes efficiency, and protects against regulatory hegemony); Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1255 (1990) (arguing that the dual banking system has fostered innovative and responsive banking regulation).

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

267. *See id.*

268. *See* 5 U.S.C. §§ 701–706 (2006).

pursuing bank transactions that might otherwise lead to greater efficiencies and to expanded banking services in the CRA's target communities for fear that such transactions might be held hostage to litigation. But bank transactions are always subject to the threat of litigation by aggrieved parties looking to overturn such acts.[269] And while standing is a requirement that still must also be met, community groups have the right to bring actions challenging bank decisions under the CRA, either under the same provisions as the *Lee I* litigation or under the APA, as in *Lee II*.[270] Congress should make federal judicial review explicit under the CRA by making certain agency decisions reviewable under the APA and in federal district courts rather than in circuit courts.[271]

If concerns still existed that the mere threat of litigation might discourage banks from entering into covered transactions, another potential avenue for review would be to make only the outcome of CRA examinations subject to review. Therefore, there would be no threat that a judicial challenge would hinder an otherwise beneficial bank transaction. Moreover, looking to whether the CRA and its regulations would offer judges any bases to review agency action, the regulators have provided a great deal of guidance to banks and to the community on how the regulators conduct their CRA examinations.[272] Judicial review of the examination process would open that process up to greater transparency, perhaps leading to more thorough and defensible reviews. As it stands now, whether one can establish a correlation between the *Lee* decisions, the surprising record of the regulators giving passing grades to nearly all banks examined and the near irrelevancy of the CRA challenge process is subject to debate. But making judicial review more available to community members and groups could send a clear signal to regulators that their decisions are subject to

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269. *See, e.g.*, *Lee I*, 118 F.3d 905, 913 (2d Cir. 1997) (challenging bank applications under the BHCA and HOLA); *Lee II*, No. 95 Civ. 7963(LMM), 1997 WL 570545, at *1 (S.D.N.Y. Sept. 15, 1997) (challenging a bank application under the Administrative Procedure Act).

270. *See supra* text accompanying notes 204–28.

270. Prosecuting these actions in the appellate courts is cumbersome. It also detracts from the appellate docket of those courts. *Cf.* Massachusetts v. Missouri, 308 U.S. 1, 43–44 (1939) (refusing to exercise original jurisdiction over an action by one state to collect taxes from citizens of another state since doing so would place an enormous burden on the Court and interfere with its appellate duties). For a critique of the original jurisdiction of the United States Supreme Court as inefficient and burdensome, see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1590–92 (2001) (noting that when the Supreme Court exercises original jurisdiction it threatens its ability to efficiently and effectively execute its functions as an appellate court). *See also* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) (discussing the original jurisdiction of the Supreme Court).

272. *See* Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment, 74 Fed. Reg. 498, 499 (Jan. 6, 2009) (to be codified at 12 C.F.R. pts. 25, 203, 228, 345, 563e).

outside review, which hopefully would generate thorough reviews of CRA issues during the examination process.[273]

Another innovation that might raise the stakes in the examination process, and thus make it more of a focus of community group advocacy and more amenable to judicial review, would be to make the outcome of the examination process explicitly relevant to bank transactions through the adoption of "performance-based" mechanisms within the CRA.[274] One way to do this might be to make banks with outstanding CRA scores subject to a streamlined process for approval of the covered applications and those with unsatisfactory scores subject to another review within a short period of time. If the unsatisfactory bank failed to improve after that second review, this approach would subject the

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273. A number of scholars have argued that judicial review of agency conduct is valuable. *See, e.g.*, Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 787 (1999) (describing judicial review of agency rules and actions as one of the democratic constraints on agency discretion); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 394–95 (arguing that agency decisions often favor private interests over the public interest); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 525 (describing arguments in support of aggressive judicial review of agency action, including the argument that such review may improve the legality and regularity of agency decisions); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 289 (1986) (arguing that judicial review can decrease the risk of an agency acting in its own interests or in the interest of private groups); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 655, 678–79 (1985) (citing Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973)) (arguing that judicial review is justified by "fears of factional influence over governmental processes" and that judicial review of agency action is appropriate where an agency's pattern of inaction amounts to an abdication of that agency's statutory authority). *But see* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1314 (1999) (arguing that judicial review of agency action favors special interests over the public interest).

274. For an overview of performance-based regulatory regimes, see Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry*, 56 DUKE L.J. 1403, 1411–29 (2007). Sugarman and Sandman describe the performance-based regulatory approach (PBR) as follows:

> PBR does not merely lie back and wait for the market to bring about the socially desired change. Instead, PBR selects the party it thinks is responsible for the problem and well situated to solve it, and then imposes on that party the obligation to do so. PBR is not simple. It requires deciding who the appropriate subject of regulation is and what level of performance is necessary. On top of that, it is also necessary to figure out how to measure compliance and what penalties to impose for noncompliance. Yet, most of these elements are broadly similar to the requirements of command-and-control regulation. There, too, the regulator has to decide, for example, which polluters to target, what to order them to change, how to decide whether they have done so, and what to do about it if they have not. Hence, although some aspects of the regulatory process may be more problematic than others depending upon the approach, the central difference is best captured by the distinction between regulating inputs and outcomes.

Id. at 1413.

bank to a more rigorous approval process for any CRA-covered transactions they might pursue.[275] This may seem like a move towards a "safe harbor" for certain banks that score high on their CRA examination, the type of approach favored by Professor Peter Swire[276] and opposed by Professor Michael Barr.[277] But giving the CRA examination greater weight in the approval process and sending a signal to community groups that the examination process matters (and is subject to judicial review) will likely improve citizen participation in the process[278] and improve the ability of the CRA to have what Barr has described as a stronger "expressive effect" on bank and community involvement in the Act's enforcement.[279] It is also possible that different regulators could explore using performance-based approaches in particular regions—like one or more of the Federal Reserve System's Federal Reserve Districts[280]—or with particular banks on a volunteer basis. Results from such experimental or voluntary efforts could be reviewed to determine if such an approach leads to conduct that is

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275. There are already performance-based mechanisms within the CRA, ushered in by the Gramm-Leach-Bliley Act (GLB). Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 and 15 U.S.C.). First, in the approach carried out by the regulators with respect to banks with assets of over $250 million, the CRA examinations typically occur every thirty-six months. Office of the Comptroller of the Currency, Frequently Asked Questions About the Intermediate Small Bank Examination, http://www.occ.treas.gov/cdd/summer06/faq.html (last visited April 14, 2009). Under the GLB, however, if a small bank receives a CRA rating of "satisfactory," the next CRA examination will not occur for forty-eight months. 12 U.S.C. § 2908(a)(2) (2006). If a small bank receives an "outstanding" score on its CRA examination, it will not be reviewed for another 60 months. *Id.* In addition, the GLB granted new powers to banks to create "financial holding companies," *see* 12 U.S.C. §§ 1841(p), 1843(l)(1) (2006), which could engage in certain activities like insurance and securities underwriting, *id.* § 1843(k)(1)(A), (k)(4)(B), (k)(4)(E), but only if any of the bank's subsidiaries that are depository institutions received at least a "satisfactory" rating on their last CRA examination. *Id.* § 1843(l)(2).

276. Swire, *supra* note 111, at 349.

277. Barr, *supra* note 23, at 521.

278. *Id.* at 601.

279. *Id.* at 604. Barr describes the expressive effect of the CRA as follows:

> Because interpretation of CRA's standard requires community input, CRA expresses an inclusive ideal of participation in rulemaking that should be counted among the law's benefits. The expressive effects of law should be considered alongside the operational effects. Even welfare economists acknowledge that expressive factors, like other non-consequentialist factors, may be included in concepts of utility or well-being that aggregate to social welfare. Thus, under either an expressive or a utilitarian theory of value, to the extent that CRA's norms of inclusion resonate with low-income, moderate-income, and minority borrowers, such expression ought to be regarded as a benefit of CRA. CRA conveys that borrowers who have been left out of the economic mainstream ought to be treated with respect by lenders and regulators alike. This expressive function of CRA can bring real benefits, as attested to by members of these communities.

Id. (footnote call number omitted).

280. For an overview of the Federal Reserve District system, see Federal Reserve Board, The Structure of the Federal Reserve System, http://federalreserve.gov/pubs/frseries/frseri3.htm (last visited Jan. 25, 2009).

consistent with the needs of low- and moderate-income communities and safe and sound banking practices.

Standing is a thornier issue, no doubt. But Congress has the power to create cognizable harms, and the Supreme Court's jurisprudence on standing seems to have evolved since the Court's decision in *Lujan v. Defenders of Wildlife*[281]—the basis for the rulings in both *Lee I* and *Lee II*.[282] Indeed, in April 2007, the Court issued *Massachusetts v. EPA*,[283] a decision concerning global warming that may indicate that standing jurisprudence has itself begun to thaw.

In this case, Massachusetts and several other plaintiffs brought an action to compel the Environmental Protection Agency (EPA) to promulgate regulations of so-called greenhouse gas emissions under the Clean Air Act (CAA).[284] Massachusetts alleged that the EPA's failure contributed to global warming and endangered the Massachusetts coastline, which was, in part, owned by the Commonwealth itself.[285] Under the CAA, the EPA has authority to issue regulations concerning control of "air pollutants."[286] The EPA had chosen not to issue rules with respect to these gases[287] despite the plaintiffs' express request that the EPA generate such rules.[288] In seeking compliance with the CAA's terms, Massachusetts was seeking first that the EPA make a determination that greenhouse gas emissions are in fact pollutants, and second, assuming that the EPA found that they are, that the EPA issue regulations pertaining to their emissions.[289] Massachusetts claimed that the failure to make this determination and issue these rules threatened the coastline of the Commonwealth.[290]

Diving into the standing issue, Justice Stevens, writing for the majority, recognized that Congress had authorized the type of suit in question: a challenge to a failure on the part of the EPA to issue regulations under the CAA.[291] Quoting Justice Kennedy's concurring opinion from *Lujan* at length, he went on to review the broad power of Congress to, in effect, confer standing under many circumstances:

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281. 504 U.S. 555 (1992).

282. *See supra* note 224 and accompanying text.

283. 549 U.S. 497 (2007).

284. *Id.* at 505.

285. *Id.* at 515 (quoting Massachusetts. v. EPA, 415 F.3d 50, 65–66 (D.C. Cir. 2005) (Tatel, J., dissenting), *rev'd*, 549 U.S. 497 (2007)).

286. *Id.* at 528 (citing 42 U.S.C. § 7521(a)(1) (2006)).

287. *Id.* at 513–14 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930–33 (Sept. 8, 2003)).

288. *Id.* at 510.

289. *See id.* at 505.

290. *Id.* at 522–23.

291. *Id.* at 516.

> "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." We will not, therefore, "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."[292]

While the majority recited the *Lujan* standing elements of actual or imminent injury, traceable to the defendant and redressable by the court,[293] the opinion stressed,

> [A] litigant to whom Congress has "accorded a procedural right to protect his concrete interests,"—here, the right to challenge agency action unlawfully withheld—"can assert that right without meeting all the normal standards for redressability and immediacy." When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.[294]

The majority went on to recognize that Massachusetts met the "injury in fact" element. Because the Commonwealth owned "'a substantial portion of the state's coastal property,'" it had "alleged a particularized injury in its capacity as a landowner."[295] Turning to causation, the Court noted that the EPA did not argue that there is no causal connection between greenhouse gas emissions and

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292. *Id.* at 516–17 (citations omitted) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

293. *Id.* at 517 (citing *Lujan*, 504 U.S. at 560–61).

294. *Id.* at 517–18 (citations omitted) (quoting *Lujan*, 504 U.S. at 572 n.7) (citing 42 U.S.C. § 7607(b)(1) (2006)). Admittedly, the Court did note the "special position and interest of Massachusetts" and the "considerable relevance" to the standing discussion of the fact that the party seeking review was a sovereign state, *id.* at 518, meaning that the state was entitled to "special solicitude" in the standing analysis. *Id.* at 520. At the same time, the Court noted that the fact that Massachusetts owned "a great deal" of the coastline affected by the allegedly arbitrary action of the EPA "only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Id.* at 519. Furthermore, the Court went on to note that keeping Massachusetts's status as a sovereign state in mind, "it is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process." *Id.* at 521. This language, all taken together, seems to indicate that the Court was accepting that a lower showing was required of the state to establish standing, but that Massachusetts had shown that it owned property affected by the challenged action such that the "most demanding" standing test could also be met.

295. *Id.* at 522.

global warming, but instead that the particular relief sought—to have the EPA review such gases as pollutants and consider specifically whether to issue regulations about new vehicles' emission of the gases—contributed "insignificantly" to the harms plaintiffs were alleging.[296] The Court rejected the EPA's contentions, however, indicating that even "a small incremental step" to mitigate an injury gives rise to judicial review.[297] Finally, with respect to redressability, the Court noted that even with expected increases in global emissions from other parts of the world, a "reduction in domestic emissions [of greenhouse gases] would slow the pace of global emissions increases, no matter what happens elsewhere."[298]

Thus, the Supreme Court ruled that a state that is also a landowner (and, in some ways, precisely *because* it is a landowner) can challenge the following conduct of a federal government agency: when a federal agency fails to promulgate regulations, and that failure contributed—however insignificantly—to the plaintiff's injuries.[299]

Admittedly, the literal ruling of the Court was that a state can bring such a challenge, but that does not end the discussion. In *Massachusetts*, the Court was addressing "procedural harms" and the power of Congress to confer standing to challenge agency action that implicates those harms.[300] The Court has also

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296. *Id.* at 523.

297. *Id.* at 524.

298. *Id.* at 526.

299. For an assessment of the likely impact of the Court's discussion of standing in *Massachusetts v. EPA*, see for example Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After* Massachusetts *and* Hein, 20 REGENT U. L. REV. 175, 194–95 (2008) ("Massachusetts expands the ability of states, and perhaps individuals, to invoke federal jurisdiction for fairly broad, undifferentiated harms . . . [and] provides for further judicial oversight of executive compliance with relevant legal requirements."); Robert V. Percival, Massachusetts v. EPA*: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 159 (2007) ("[T]he Court's decision may help plaintiffs establish standing premised on the harms caused by climate change . . . ."); Tyler Welti, Note, Massachusetts v. EPA's *Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*, 94 VA. L. REV. 1751, 1751–52 (2008) (arguing that *Massachusetts v. EPA* creates a theory of standing that is "potentially highly restrictive" of individual and state standing).

300. For a discussion of procedural harms giving rise to standing, see for example Zachary D. Sakas, *Footnotes, Forests, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-Based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 176 (2006) (discussing procedural injury cases and exploring a circuit split over whether a programmatic rule, rather than a "site-specific agency rule," provides plaintiff's standing in procedural injury cases); Christopher T. Burt, Comment, *Procedural Injury Standing After* Lujan v Defenders of Wildlife, 62 U. CHI. L. REV. 275, 277 & n.7 (1995) (exploring the different methods courts have used in analyzing procedural injury standing, noting possible methods that courts could use and evaluating these methods while considering the effects of *Lujan*); Miriam S. Wolok, Note, *Standing for Environmental Groups: Procedural Injury as Injury-in-Fact*, 32 NAT. RESOURCES J. 163, 164 (1992) (reviewing the development and application of procedural injury to create

recognized this power in other opinions.[301] Even Justice Scalia recognized Congress's power to confer this standing in *Lujan*, which rejected the standing of individual plaintiffs who failed to allege that agency inaction would harm them specifically—there was no nexus between those particular plaintiffs and the harm sought to be prevented (there, the impact of environmental policies in a foreign country that no one was alleged to have plans to visit).[302] Regardless of the failure of a nexus between the conduct challenged and the alleged harm in *Lujan*, Justice Scalia recognized the viability of a plaintiff's standing to sue for procedural harm, provided that there is still some concrete injury flowing from that harm, like owning property adjacent to the land affected by the disputed agency conduct:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.[303]

Similarly, many low- and moderate-income communities have been and will continue to be harmed by bank practices carried out during the height of the subprime mortgage frenzy. The reduction in property values, of both foreclosed properties and neighboring properties, is severe.[304] One study of the impact of foreclosures in Chicago in the late 1990s showed that the property value of single family homes within one-eighth of a mile of a foreclosed home were

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standing for environmental groups (citing Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *rev'd*, 504 U.S. 555 (1992))).

301. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

302. *Lujan*, 504 U.S. at 564.

303. *Id.* at 572 n.7.

304. *See* Eric C. Seitz, *U.S. Subprime Crisis: HR 3915—A Far-Sighted Solution to the Mortgage Crisis*, 14 L. & BUS. REV. AM. 759, 764 (2008) (citing Luke Mullins, *Nightmare on Main Street*, U.S. NEWS AND WORLD REP., Mar. 10, 2008, at 42). Foreclosed properties are often sold at less than market value—this obviously impacts the appraised valuation of those properties—but appraisals of neighboring properties also take into account the reduced property values of nearby foreclosed homes, and thus the price from the "short" sale of the foreclosed home impacts neighboring property values directly. *See id.*

reduced from 0.9% to 1.136% in value per foreclosure,[305] and that each foreclosed property reduced the value of neighboring properties by between $159,000 and $371,000.[306] That study estimated that, in 1997 and 1998, foreclosures in Chicago reduced property values in the city as a whole by between $598 million and $1.39 billion.[307] Studies of the current foreclosure crisis predict a range of losses to homeowners nationally at between $356 billion and $1.2 trillion in home values.[308]

Because foreclosures are concentrated in certain communities and states,[309] the impact of foreclosures is devastating, creating a vicious cycle where the reduction in property values places pressure on homeowners who wish to sell their properties but do not wish to do so at a loss. Such potential sellers take their homes off the market, and as a result, the only homes for sale in certain communities are bank-owned properties, which will likely be sold at significant losses, creating even greater downward pressure on neighboring property values. Homeowners, watching home values plummet, may question the wisdom of holding onto their homes that may be worth less than the debt they are carrying, which can also lead to default and even more foreclosures.

Litigation is already underway in several cities challenging bank practices that occurred during the height of the subprime frenzy, using antidiscrimination and public nuisance theories.[310] This litigation may reveal information about the causal connection between lax oversight and unsound bank practices. Congress should explore this issue and establish the connection between the scope of the CRA, regulatory enforcement (or lack of enforcement) of its terms, bank conduct in response, and the community impact that has resulted from all three. If Congress was to create an explicit right of action for residents of communities

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305. DAN IMMERGLUCK & GEOFF SMITH, WOODSTOCK INST., THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES 9 (2005), *available at* http://www.nw.org/foreclosuresolutions/reports/documents/TGTN_Report.pdf.

306. *Id.* at 11.

307. *Id.* at 13.

308. *Compare* THE PEW CHARITABLE TRUSTS, DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 10 exhibit 1 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/defaulting_on_the_dream.pdf (predicting a $356 billion loss in home value due to rise in foreclosures), *with* GLOBAL INSIGHT, THE MORTGAGE CRISIS: ECONOMIC AND FISCAL IMPLICATIONS FOR METRO AREAS 2 (2007), *available at* http://www.usmayors.org/metroeconomies/1107/report.pdf (predicting a $1.2 trillion total loss in home values due to the subprime mortgage crisis).

309. *See* Gregory D. Squires, *Urban Development and Unequal Access to Housing Finance Services*, 53 N.Y.L. SCH. L. REV. 255, 263 (2008) (citing David Cho & Nell Henderson, *Where the Wolf Comes Knocking; Areas Already in Economic Distress Feel Rise in Housing Foreclosures Most*, WASH. POST, Mar. 15, 2007, at D1).

310. *See* Donna Leinwand, *Cities Suing Lenders in Strategy Against Foreclosures*, USA TODAY, May 16, 2008, at 15A.

adversely impacted by bank practices, and was to establish the link between risky lending practices, neighborhood instability, and regulatory inaction, plaintiffs could meet the requirements of harm, causation, and redressability. As Justice Kennedy made clear in his concurrence in *Lujan*, language quoted with approval by Justice Stevens in the majority opinion in *Massachusetts v. EPA*,[311] Congress can "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[312] And Congress should do just that in this context.[313]

During the legislative debates concerning the original passage of the CRA, the power of the regulators to deny bank applications, in addition to other informal mechanisms regulators could use, were seen as methods by which the regulators could "nudge," "influence," and "persuade" banks to lend in low- and moderate-income communities.[314] Congress should explore this interplay between formal and informal mechanisms for influencing banks to meet the needs of low- and moderate-income communities. The connection between enforcement of the CRA's goals (or lack thereof) and the fallout from the subprime mortgage crisis offers an area ripe for congressional investigation and intervention.

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311. 549 U.S. 497, 516 (2007).

312. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment). For a discussion of Congress's power to confer standing, within Article III limitations, see for example Sean Connelly, *Congressional Authority to Expand the Class of Persons with Standing to Seek Judicial Review of Agency Rulemaking*, 39 ADM. L. REV. 139, 161, 163 (1987) (citing Sierra Club v. Morton, 405 U.S. 727, 738 (1972)) (stating that Congress can define injuries that satisfy Article III requirements and arguing that Congress has the ability to expand standing to cover any person whose rulemaking request has been rejected by a federal agency); James Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court "Standing" Decisions*, 13 VT. L. REV. 675, 678 (1989) (citing U.S. CONST. art. I) (explaining "how Congress may use th[e] authority [to define the judicial power of the federal courts] in the area of standing," arguing "that Congress may utilize that power to overcome standing hurdles in the areas covered by each [constitutional] amendment," and arguing "that under article I Congress may create 'legislative courts' entirely free of the 'case or controversy' restrictions imposed on article III courts"); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1226 (1993) ("If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional [because] Article III limits congressional power . . . ."); Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 G. WASH. L. REV. 1548, 1563 (1993) (citing Kevin A. Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CAL. L. REV. 1061, 1083 (1988)) ("Congress . . . is limited to overriding the prudential considerations of standing. The Article III requirements must always be present.").

313. Although I am aware of no reported decision where a community group challenged the results of a bank's CRA examination, there is no reason Congress could not explicitly state that "any person" could challenge the results of those examinations and describe the impact of those examinations and the benefits of judicial review of such examinations, thereby satisfying the causation and redressability elements of standing.

314. 123 CONG. REC. 17,630 (1977) (statement of Sen. Proxmire).

Another unexplored issue is the possibility that community groups engaged in advocacy to help stem the tide of foreclosures in their communities might allege the harms the organizations themselves suffer. Under the *Havens Realty Corp. v. Coleman*[315] line of cases, the Supreme Court has recognized that a group itself can suffer cognizable harm that goes beyond any political goal of that group if the group devotes agency resources to combating the challenged conduct.[316] Thus, a community group or association may sue on its own behalf if the group meets the same standing test that applies to individuals.[317] In other words, the group must demonstrate a "concrete and demonstrable injury to the organization's activities."[318] The *Havens* Court held that a perceptible impairment of a housing organization's "ability to provide counseling and referral services" constitutes an actionable injury in fact, reasoning that this impairment meets the injury in fact test because a concrete drain on resources is a more plausible injury than a conjectural "setback" to an organization's abstract social interests.[319]

As a result of *Havens*, circuit courts generally agree that an organization meets Article III standing requirements where the organization can show that the defendant's alleged violations caused it to divert resources from other projects or devote additional resources to a particular project in order to combat the alleged discrimination.[320] In the wake of the subprime mortgage crisis,

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315. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Ass'n of Cmty. Orgs. for Reform Now v. Fowler, 178 F.3d 350 (5th Cir. 1999); Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993).

316. *Havens Realty*, 455 U.S. at 379; *see also Fowler*, 178 F.3d at 350; *Ragin*, 6 F.3d at 898.

317. *Havens Realty*, 455 U.S. at 378. An association also has standing to sue on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

318. *Havens Realty*, 455 U.S. at 379.

319. *Id.*

320. *See, e.g.*, Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers, 141 F.3d 71, 78 (3d Cir. 1998) ("In deciding organizational standing questions after *Havens*, appellate courts have generally agreed that where an organization alleges or is able to show—depending on the stage of the proceeding—that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement."); *Ragin*, 6 F.3d at 905 (citing *Havens Realty*, 455 U.S. at 379) (stating that an organization's devotion of resources to investigating and attempting to remedy discriminatory advertisements was sufficient harm to create standing to sue on the organization's behalf). One issue the circuits do not agree on is whether the expense of bringing litigation to combat particular illegal acts (the very litigation in which the standing issue has arisen) is sufficient to confer group standing under *Havens*. *Compare* Walker v. City of Lakewood, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001) ("We will not consider the time and money the [housing organization] has expended in prosecuting this suit in deciding if the [organization] has standing . . . ."), *with* Vill. of Bellwood v. Dwivedi, 895 F.2d

housing counseling groups, legal services organizations, religious institutions, and other charitable organizations are devoting significant amounts of time and energy towards combating the effects of the crisis: increased foreclosures, financial stress, evictions, and homelessness.[321] Such groups could explore the possibility of bringing actions on their own behalf to combat predatory conduct because of the drain on organizational resources from responding to such conduct.[322]

VII. CONCLUSION

The subprime mortgage crisis was brought about by a series of forces that coalesced in a perfect storm that is wreaking havoc in communities and markets. It will have deep and long lasting effects. Some of those effects will be felt most deeply and painfully in low- and moderate-income communities, the communities that were supposed to stand to benefit from the motives behind the CRA: to bring much needed capital investment to communities too often left behind by finance and credit. Tragically, when that credit ultimately came to those very communities, the credit was all too often dangerous and ultimately harmful. The CRA was not to blame for the introduction of that harmful product, however. Rather, the CRA was powerless to prevent the crisis, given the way the Act has been interpreted and enforced.

The benefits that banks receive from the federal government, most notably federal deposit insurance, were offered as the original justifications for the CRA. Yet financial institutions look very different now than they did in 1977, and the connection between bank deposits and bank lending is not always clear. The fact that nondepository institutions carried out much of the riskiest subprime lending is a perfect example of this phenomenon.

1521, 1526 (7th Cir. 1990) (finding that the mere fact that the organization lost the opportunity to provide additional or increased counseling because it had directed its resources toward the lawsuit constituted a cognizable injury).

321. *See, e.g.*, J. Craig Anderson, *Demand for Assistance Soars as Foreclosures, Layoffs Take Toll: Charities Struggle to Provide for Those Left Homeless for the 1st Time*, ARIZ. REPUBLIC, Dec. 27, 2008, (noting increased demand for assistance from nonprofit groups in wake of financial crisis and increase in foreclosures).

322. For a discussion of organizational standing after *Havens Realty*, see for example Jeanne A. Compitello, *Organizational Standing in Environmental Litigation*, 6 TOURO L. REV. 295, 297, 304–05 (1990) (arguing that because public policy is implicated in environmental concerns and disputes, courts should extend organizational standing in the context of environmental litigation); Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1008 n.70 (1993) (reviewing organizational standing); Wolok, *supra* note 300, at 163 n.40 (1992) (citations omitted) (reviewing organizational standing generally).

The federal government's renewed commitment to a sound and secure banking industry, exemplified by the hundreds of billions of dollars in relief currently being channeled to that sector (which the government believes will ultimately benefit all communities), represents a newer, indeed broader, basis upon which to ensure that banks, and all financial institutions, meet the needs of all communities. A CRA for the twenty-first century will strengthen the banking industry, not weaken it, and will ensure that the renewed federal commitment to the banking industry will reflect a commitment not just to the banks, but also to the communities—all communities—those banks are supposed to serve.