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Fair Lending and Community Reinvestment after the Crisis: What Would Gale Cincotta Do?

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In the early 1970s, Gale Cincotta led National People's Action and a growing coalition of people and organizations who persuaded a reform-minded U.S. Senator to finally address the serious national problems of racially discriminatory mortgage lending and urban disinvestment. For decades, banks and savings institutions had unfairly denied credit to many creditworthy and low-income borrowers and viable urban neighborhoods. The results of Gale's organizing and advocacy are familiar today. The Home Mortgage Disclosure Act (HMDA) of 1975 provides essential, annual public information on certain aspects of the supply of mortgage credit by banks, savings and loans, and many other kinds of mortgage lenders. The Community Reinvestment Act (CRA) of 1977 specifies that institutions that seek the money of savings depositors who live in a particular community have an affirmative obligation to serve the borrowing needs of creditworthy people in that community. CRA and HMDA have been amended several times since their passage in the 1970s, but they were weakened considerably by the dramatic restructuring of housing finance that created the risky "subprime" revolution and triggered the worst global financial crisis since the Great Depression. Gale Cincotta died

[1] Thanks to Kathe Newman for valuable comments on an earlier draft, and to Christopher Niedt and Marc Silver for organizing the conference at which these ideas were discussed.

of cancer in August 2001, at a time when urban America was beginning to see the devastating consequences of the first wave of high-risk and predatory subprime lending. As we now know, subprime and predatory abuses got much, much worse from 2001 until the market collapse of 2007-2008.

A generation ago, when people challenged the injustice of banks and savings institutions who denied credit to millions of qualified minority applicants and long-established, stable urban neighborhoods, Gale mobilized the crowds with rallying cries such as, "We've met the enemy, and it isn't us!," "We want it. They've got it. Let's go get it!", and finally, on her deathbed, "Get the crooks!" These words should ring in our ears today, after trillions of dollars have been given to "stabilize" the financial system by bailing out the institutions who wrecked so many lives and communities. Meanwhile, proposals that would not cost a penny of public funds, like allowing bankruptcy judges to modify the terms of first-lien predatory mortgages, are repeatedly killed in Congress because they are supposedly too expensive or too burdensome for the industry.

Gale and her army of grassroots community leaders and organizers were not motivated to develop and pass HMDA and CRA because they were policy wonks infatuated with the finer details of banking and finance. They mobilized because they believed that stable, mixed-income, multi-racial communities were not just a dream, but a real possibility in the real world. Indeed, most of these organizers *knew* that such communities were possible, because they lived in these kinds of neighborhoods at a time when financial institutions, enabled by government policy, were doing things that undermined community stability and multi-racial cooperation. Animating this vision was Gale's deep and abiding conviction that the relationships built in community help us to become fully human. These relationships matter. They're worth the effort to preserve, protect, and defend. To do something that destroys a neighborhood, and the relationships that sustain, nurture, and center people's lives, is wrong. To do so for the sake of greed or racism is a sin of the highest order.

In the aftermath of the Panic of 2007-2008, What Would Gale Cincotta Do?

Much has changed in the world of housing finance since the 1970s. Then, urban America faced *discrimination by racial and geographic exclusion*. Banks and savings institutions dominated the market, and they carefully rationed credit -- often using business practices that (by design or unintentionally) avoided even the most highly qualified racial and ethnic minority individuals and minority urban neighborhoods. Prior to HMDA, it was easy for lenders to dismiss allegations of discrimination, without having to supply any information on their lending practices. CRA was passed specifically to deal with the problem of extractive disinvestment: many banks happily solicited the money of savings depositors from minority and low-income people in central-city and minority neighborhoods, but focused their lending almost exclusively in upper-income, white communities in the rapidly-expanding suburbs. With the subprime revolution, however, a new breed of lenders -- and some traditional banks who saw the profit opportunities -- found new ways to profit by specializing in a new array of high-cost, high-risk credit products made possible by deregulation and the growth of new Wall Street funding sources. The result is a more complex landscape of reverse redlining in which discrimination takes place through racial and geographic segmentation -- targeting minority neighborhoods for risky, exploitative credit.

This new era has not completely erased the old inequalities of exclusion. Some have argued that anybody could get credit at the height of the subprime boom, but in 2006 (the year of the weakest underwriting limits), lenders denied more than 4.65 million people who requested loans; non-Hispanic African Americans were 1.94 times more likely than non-Hispanic Whites to be rejected (FFIEC, 2007). Among people who received loans, the credit was much more likely to be subprime for African American, Latina/Latino, and Native American borrowers, and for applicants in low-income and minority communities. These disparities cannot be fully explained by income and other factors, and they highlight enormous variations in opportunity and exploitation across hundreds of cities and suburbs, big and small, all across America (see Figures 1 and 2). While borrower income and other factors explain most (but not all) of the unequal burden of subprime lending for large suburban Black middle-class communities outside Washington DC and Atlanta, and for the vibrant Latino metropolis of Miami, the same cannot be said for many other places. There are scores of large cities, heavily-populated suburbs, and small-town counties where African Americans are more than four times more likely than otherwise similar Whites to wind up with a subprime loan (Figure 1). These loans were also much more likely to be made by mortgage companies and subsidiaries that do not take deposits, and are thus not subject to CRA and other regulations (Immergluck, 2009). The comparative, “yes/no” simplicity of credit rationing that necessitated CRA in the

1970s has been replaced by a much more competitive and “innovative” environment, in which brokers, originators, and Wall Street financial services firms found ways to profit -- for a while, at least -- from risky transactions that were destined to harm millions of individual homeowners, investors, and communities now left with entire streets and blocks of foreclosures and abandoned properties. CRA and HMDA need to be revised and expanded, and strengthened in light of what we now know about the contemporary dynamics of mortgage market competition and innovation.

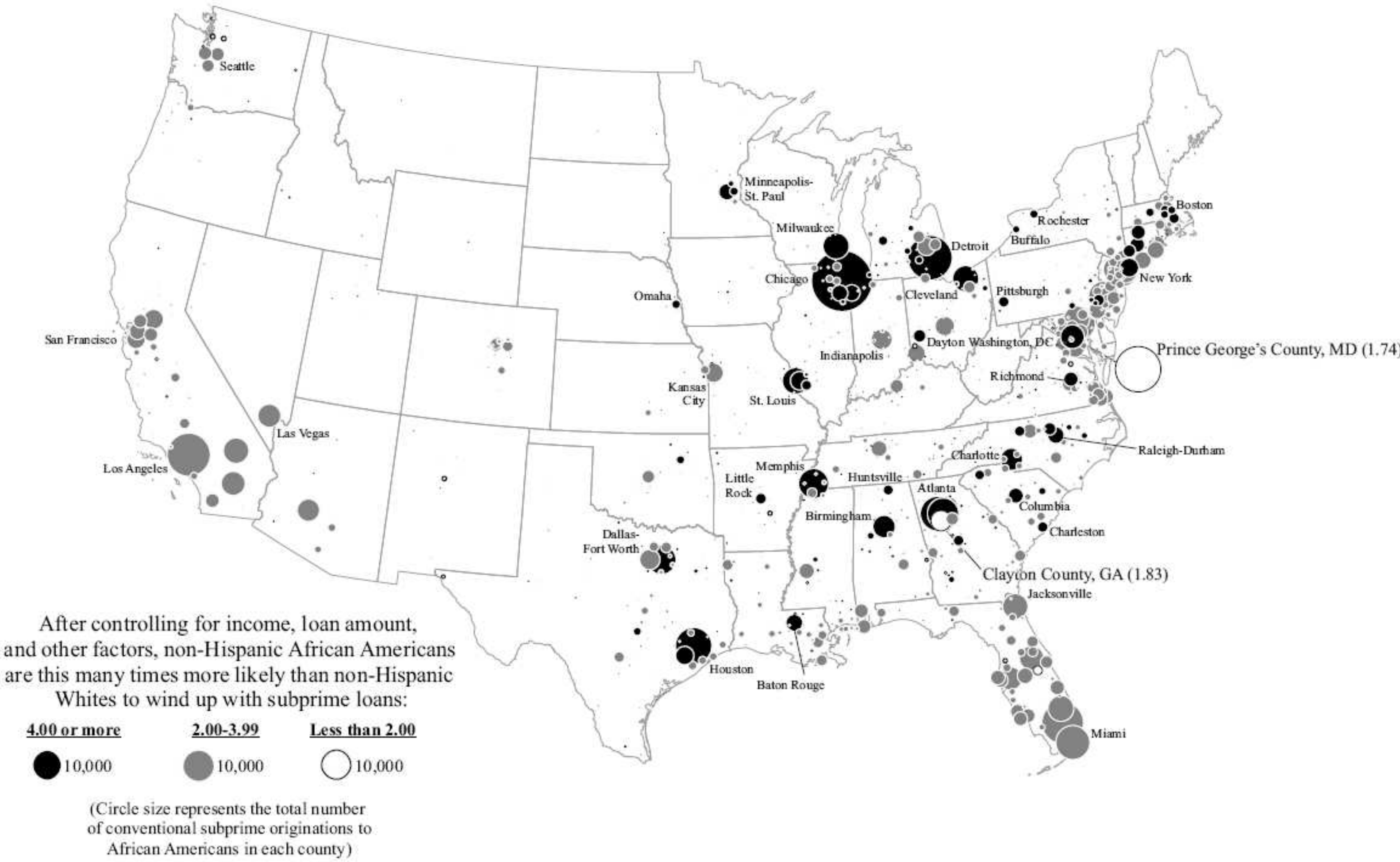

Figure 1. Black-White Inequalities of the Subprime Boom. This map shows disparities between non-Hispanic African Americans and non-Hispanic Whites in the likelihood of receiving a high-cost subprime loan in 2006, after using logistic regressions to control for applicant income, loan amount to income ratio, loan purpose, lender type, and other controls available in the public HMDA. Regressions were estimated to obtain odds ratios for each of the metropolitan counties in the continental U.S. and the District of Columbia for which HMDA records are available. Regressions yielding statistically insignificant coefficients are assigned to the lowest category, “below 2.00.” Data Source: FFIEC (2007).

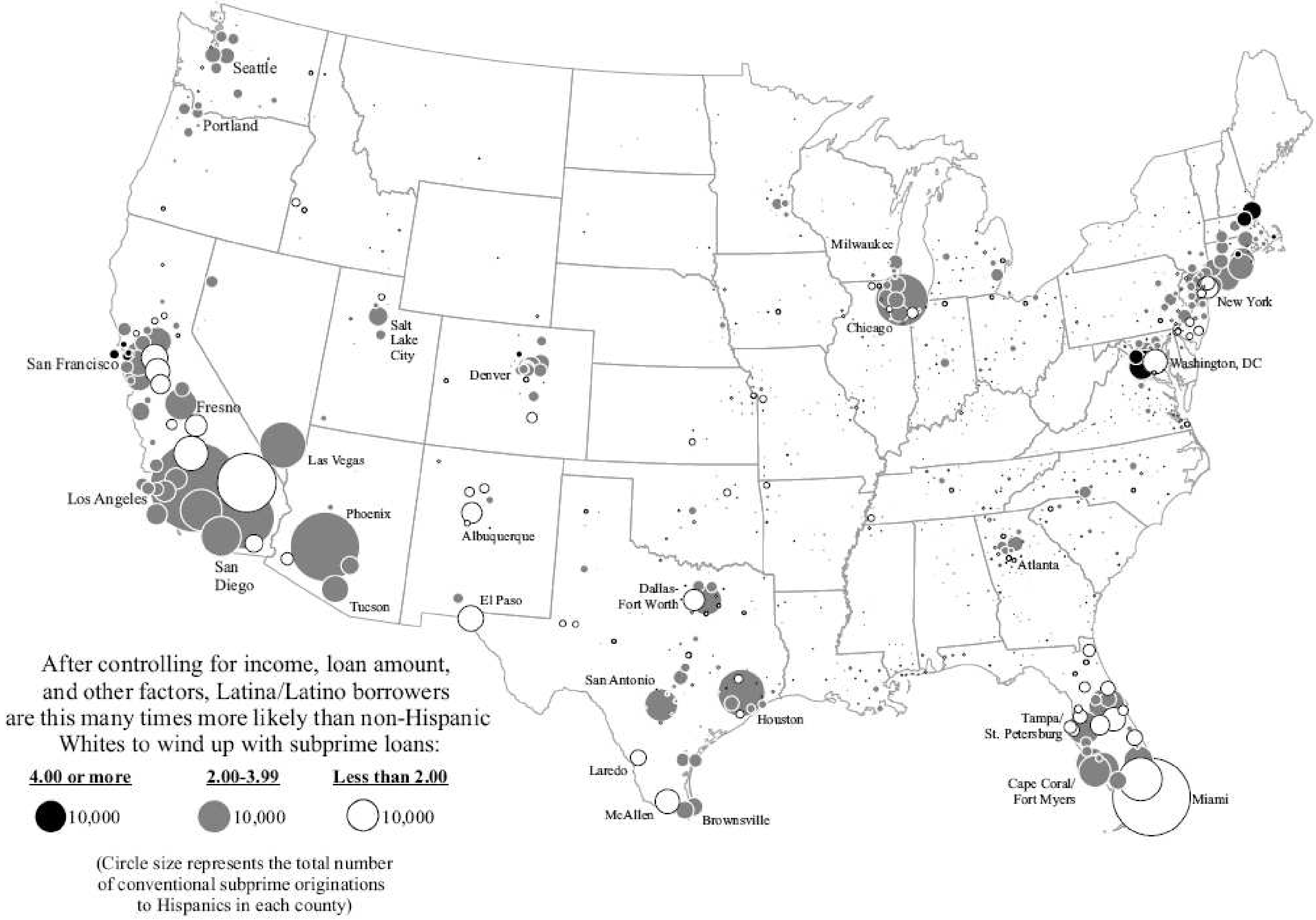

Figure 2. Hispanic-White Inequalities of the Subprime Boom. Data Source: FFIEC (2007).

If Gale Cincotta were with us today, we think she might agree with three simple suggestions to restore and revive the legacy she worked so hard to achieve in the 1970s. First, ordinary people should have access to at least a little bit of the same kinds of information that powerful companies now use to target consumers and communities. Second, the original intention of CRA -- to promote prudent, fair, responsible, and sustainable investment in people and communities -- can and should be restored with a new set of reasonable, easily-understood regulations. Third, when there is persuasive evidence of discrimination by exclusion or segmentation, disagreements between Federal and State laws and regulations should be resolved in ways that maximize the chances for a fair hearing for people and communities who have historically -- and who still today -- face marginalization from American economic and political opportunities.

1. Data to the People! Give the People The Information They Create.

The cliché is that information is power. It's profit, too. The subprime revolution was driven in part by technological and institutional changes that made it easier and quicker for companies and entrepreneurs -- brokers, lenders, appraisers, Realtors, investment banks, credit reporting and credit ratings agencies -- to get more and more detailed information about the behaviors, preferences, and circumstances of individual consumers and potential borrowers. During the boom, many influential experts (including Alan Greenspan) thought this new information was accurate and reliable, and explained how lenders were able to profitably serve riskier market segments. Now, of course, experts question the accuracy of the information that drove the market, and challenge the assumptions of the default models and financial mechanisms used to measure, price, and manage various kinds of risks. Overlooked in this debate is a simple paradox: all of the information that private companies buy and sell when they identify potential customers, design marketing campaigns, evaluate credit history, or monitor loan repayment and prepayment -- all of this information is created primarily by the actions of individual consumers. People, going about their daily lives in a society that requires money at every turn, are also required to provide all kinds of personal information to participate in economic life. All Americans who work, borrow, and spend help to build -- a little bit every day and every month -- the enormous credit reporting and marketing databases that industry lobbyists all praised as the technological foundation of the American Dream during the many years of the housing and credit boom.

But we have very few rights to what we helped to create. In fact, thanks to intellectual property law, trademark protections, and the like, we only have the right to see a few tiny slivers of this huge infrastructure.

For home lending purposes, HMDA is one of the small windows on the market that allows all of us to see a little bit of what's going on. We need to expand HMDA immediately to capture the contemporary dynamics of home lending and consumer finance. Coverage should be expanded to include all financial transactions backed by mortgages -- specifically, any financial transaction that is backed by the legal sanctions of bankruptcy, foreclosure, or contract law -- including, but not limited to, home equity lines of credit, reverse mortgages, and land-installment contracts. The exemptions for small operators who make only a few mortgage loans should be eliminated: many shady operators deftly exploit such disclosure thresholds to stay under the regulatory and legal radar. HMDA should also require the self-reporting of the age of applicants (and, where applicable, co-applicants). It is now widely recognized that racial/ethnic inequalities interact with gender and age to created markets exploited mercilessly by predators: there are several documented cases of lenders or brokers specifically targeting elderly African American widows living in older homes with accumulated home equity for abusive equity-stripping refinance or renovation loans (Ferguson and King, 2006; Loonin and Renuart, 2006; Mayer, 2000)..

HMDA should also be revised to require the disclosure of precisely those pieces of information that industry lobbyists always cite when they claim that HMDA-based studies cannot prove discrimination. If there is no systematic discrimination, lenders will be exonerated if we include borrower profile information such as applicant credit scores,[2] household debt, and household debt to income ratios, as well as loan characteristics such as down payment information, LTV, contract interest rate, initial interest rate, broker and lender fees, fixed- or adjustable-rate status, amortization period, prepayment penalties, balloon payments, and perhaps some of the new kinds of sophisticated innovations the industry will develop in the future. Because the industry "innovates" faster than HMDA regulations are updated, there should be a mandatory review of HMDA requirements

[2] Proposals to include applicant credit records have been controversial for many years. Among many other issues, two stand out. First, the information raises significant privacy concerns, in light of the way that HMDA records can be (partially and inconsistently) matched with other public-records data released at the local level. This is an important issue. But the privacy concerns of HMDA are nothing compared to the highly personal information already held by private data vendors. Adding new information to HMDA will have little effect on marketers and other industry actors who already have access to highly detailed industry datasets -- but it will help communities by giving them access to precisely that information that is used by industry advocates to dismiss concerns about discrimination or predatory exploitation. Second, proposals to add credit scores risk granting a competitive advantage to the company whose proprietary formula is chosen for the reporting requirement. Robert Avery, at the Board of Governors of the Federal Reserve, has suggested that this issue can be resolved by translating each of the credit scores used in the industry to a simple, 0-to-100 score reported for each applicant.

every five years where communities and regulators have the opportunity to suggest changes to HMDA. Most of these existing data fields are already collected and reported -- to powerful and highly profitable private companies -- so it will be quite easy to add the same information to HMDA.

Finally, HMDA should be updated to add a single, crucial piece of new information. Each year, the company responsible for servicing any loan originated and reported in HMDA should report any changes in the status of the loan during the previous calendar year -- whether the loan stayed current, slipped into delinquency, default, or foreclosure, or was repaid/prepaid (in which case, obviously, the reporting requirement ends). Information about any servicing interventions would also be reported here, including information about loan workouts (location of loans, forms of modifications, resulting household debt, loan to value, and income of the borrower). Under current regulations, HMDA submissions already include a unique numerical identifier for each HMDA loan application record (LAR), so this new requirement would simply require any institution selling a loan into the secondary market to provide the LAR identifier to the servicer. The servicer would then submit simple annual disclosures to the interagency group that now collects HMDA data -- the Federal Financial Institutions Examination Council (FFIEC) -- and the performance data would be added to the LAR records publicly disclosed on the FFIEC website. The current structure of bank regulatory fees can be slightly revised to provide a small funding stream to cover the small expenses incurred by servicers for reporting this information; this new funding will reduce the perverse incentives motivating loan servicers, who make nearly all of their profits from service charges and late fees (and who therefore benefit when a payment is mysteriously "lost" for a few days) (see Eggert, 2004, and for a discussion of servicers' current reluctance to do loan modifications, see Goodman, 2009).[3]

As with the loan terms, this information is already collected, bought, and sold by private companies. It's just that you and I can't get access to this information right now, unless we have a lot of money and we are willing to sign a restrictive contract that prohibits us from using the data to inform public discussion and democratic decision-making. If you want to know how many of the loans made by one of the notorious lenders who dominated the headlines in 2007 and 2008 ended in foreclosure in your neighborhood, you can't get this information. You can't even get this information if you go to your local county courthouse and spend months poring over detailed mortgage and foreclosure records. You won't be able to get the right kinds of information, thanks in part to

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[3] Regulations implementing the Equal Credit Opportunity Act (ECOA), the Fair Credit Reporting Act (FCRA) and perhaps other statutes may require strengthening to bar loan servicers from acting on any decisions enabled by their ability to link borrower repayment history with the unique HMDA LAR codes -- and thus the self-reported race, ethnicity, and gender available in HMDA. This possible disclosure could only occur for lenders who hold loans in portfolio, however: since the unique LAR codes are now held confidential by the FFIEC, the only entity able to match repayment history with the unique code (and thus the borrower's self-reported race, ethnicity, and gender) is the entity who submits the original LAR and who retains the servicing rights. Data linkage issues like this do raise important questions of privacy. But it is important to remember that many private databases already include highly detailed personal information -- including Social Security Numbers and other detailed data -- that lenders and marketers routinely use to infer consumers' race, ethnicity, and other social characteristics.

creative legal and corporate maneuvers devised by the industry during the boom -- like "Mortgage Electronic Registration Systems, Inc.," an industry consortium that served as an information-laundering scheme and now claims the right to foreclose on behalf of banks that issued mortgage notes (McIntyre, 2009). The information is out there, and powerful companies are now profiting from it. We have a right to this information (Newman, 2009). It is a compelling public interest. It serves an important public purpose. It belongs in the public domain. Our actions helped to create the information. It's ours. Let's go get it.

2. Fair Access to Fair Credit! Reasonable Revisions to CRA Will Ensure Fair and Sustainable Community Reinvestment.

At the heart of CRA was the recognition that some economic agents -- especially old-school executives and loan officers at tradition-bound savings and loans who specialized in serving upper-income, non-Hispanic Whites in America's suburbs -- were extracting capital from communities that would remain viable and healthy if only their creditworthy borrowers could get loans for which they were qualified. Redlining and discrimination fueled a cycle of disinvestment and decline that exacerbated terrible costs for individuals, cities, and (through premature asset depreciation and the increased burdens on place-based social programs) the national economy (Bradford, 1979). CRA instituted ratings systems, by which examiners analyzed deposit and lending patterns to evaluate how institutions were serving the credit needs of communities where they chose to do business. These ratings systems have been revised several times since 1977, and they need to change now to reflect the growth of non-bank lenders and the supply-side nature of high-risk lending.

First, CRA should be expanded to all entities that report under the revised requirements of HMDA. If the trillions of dollars of devastation in this crisis have taught us anything, it is that the individual decisions by brokers, borrowers, and lenders negotiating financing on particular houses on local streets and avenues in unique neighborhoods across America can add up to something really big -- for communities, State budgets, Federal bailouts, individual 401(k) and mutual fund investors, and Treasury Department officials who find themselves in tense discussions with Chinese central bankers worried about the value of dollar-denominated Treasury bills. This is community reinvestment today, as delivered by the innovations of deregulated American financial services. There is no reason that CRA should be restricted to the deposit-taking institutions that have been losing market share, for many years, to the more lightly-regulated mortgage companies and subsidiaries who engaged in the most risky subprime practices. It is time to include bank holding companies, lenders and the affiliates and subsidiaries of all lenders in an expanded CRA assessment area that covers where all loans are being made, held as investments or serviced.

Gale and NPA’s original vision for CRA, written on a cocktail napkin at a late night staff meeting, was for communities to share with regulators the right and responsibility to hold lenders accountable. Today, the CRA grading system is broken, with the banks that led the charge into subprime mortgages and securitizations receiving “Outstanding” ratings.

Just like grade inflation at the Ivy League schools that many bank executives attended, regulators have been far too generous in handing out A's to bankers who have not performed well at all. Deregulation and industry restructuring in the 1990s further eviscerated the ability of communities to hold lenders accountable in the CRA examination process.

The CRA examination process must force banks to end, once and for all, the practices of race-based denial and race-based loan pricing -- whether these practices come from deliberate intent or disparate impacts that cannot be justified on the basis of prudent, sustainable business necessity. The *quality* of credit to communities should be a prime consideration in the lending and investment tests. There should be real consequences for poor performance, including among subsidiaries and affiliates. Failing institutions should be required to implement reinvestment improvement plans. For those institutions with high or geographically concentrated foreclosures, there should be mandatory foreclosure prevention and neighborhood revitalization efforts.

We've seen what happens when implementation is left up to regulators who are played off one another in a process of "regulatory arbitrage" -- where financial institutions get to choose their regulator, and thus shop around for the easiest rules. The quality of regulators' enforcement ebbs and flows with the tides of political will, as filtered through an electoral process saturated by money. We need to re-open the process, to involve the community in ways intended by the original discussions of CRA in the 1970s. If we hold financial institutions accountable, with public hearings on CRA exams and appeal hearings for grades that local communities regard as unwarranted, we will improve the equity of housing finance even while providing an early-warning system for unsustainable lending practices of the sort that created the current catastrophe.

Second, the bankruptcy code should be immediately revised to permit bankruptcy judges to modify the terms of all mortgage loans for consumers entering the bankruptcy process. The lending record of the institution originating the loan should be made available to, and specified as a factor to be considered in the evaluation of assets and liabilities by bankruptcy judges. This provision was removed from the Helping Families Save Their Homes Act of 2009 after the banking and financial services industry pumped $42 million into lobbying in just the first quarter of 2009, with a substantial portion flowing directly to both Democratic and Republican Senators who voted down the amendment. The measure was expected to prevent 1.69 million foreclosures and save Americans $300 billion in home equity.

Third, CRA should be amended to provide for substantial -- but not unlimited -- assignee liability. Trusts, Special Purpose Vehicles, Structured Investment Vehicles, and all the other new kinds of institutions created by Wall Street over the past twenty years, were all created in large part to minimize corporate tax and legal liabilities. Structured finance breaks the chain of legal liability, and makes it difficult or impossible for aggrieved borrowers to seek justice for deceptive, abusive, and illegal acts committed in the original loan transaction when the loan is sold and assigned to trusts and other entities in the secondary market. Institutions investing in mortgage-backed securities had little incentive to ensure that the loans collateralizing their investments were not the fruit of systematic deception, fraud, abuse, or exploitation. For many years, advocates and organizers fought for assignee liability at the state level, to allow victimized borrowers some recourse against Wall Street institutional investors. These efforts were stymied by the ratings agencies, who threatened to refuse to rate *any* non-prime securities originated in a State that passed such legislation, even narrowly-targeted rules that would impose very limited legal liability for the most dangerous kinds of practices. Right now, in the wake of the massive losses on securities pools blessed with top marks by the ratings agencies, their threats no longer carry the same powerful threat in the marketplace. There is compelling evidence that assignee liability can be designed in ways that do not create excessive litigation uncertainty, and that improve the discipline and efficiency of securities and investor markets (Engel and McCoy 2007).

Fourth, CRA ratings tests should be replaced by a series of standard, probability-based inferential statistical models -- of the kinds currently (if sporadically) used by federal bank examiners -- to measure and monitor disparities that threaten the public interest of equitable and sustainable community reinvestment. Some of these models should follow current practices by testing for racial disparities in lenders' prime denial and subprime segmentation of individual applicants on the basis of protected classes defined under fair housing and fair lending laws. Other models should test for systematic racial-geographic disparities -- to monitor the pervasive targeting of subprime credit to African American and Latina/Latino neighborhoods that cannot be fully justified by the creditworthiness of applicants in these communities. And some of these models should test for systematic problems in long-term loan performance -- measured by the new HMDA disclosures -- that cannot be adequately explained in terms of borrowers' qualifications. All of these models should be adjusted for contextual differences across metropolitan areas, in order to compare lenders to their local peers.[4] Results of periodic evaluations will be used to identify areas where further investigation is warranted. Cases meriting further investigation would be referred to the Department of Justice, the new Consumer Financial Protection Agency recently proposed by the Obama Administration, and State Attorneys General. The results of all evaluations should be made public.

This proposal raises some issues that are simultaneously technical and legal. First, multivariate inferential statistical methods cannot be used when the number of observations becomes very small. Thus, as under current law in employment and other domains, other kinds of evidence become more important when investigating small institutions. But for all but the very smallest lenders, the enhanced HMDA and revised CRA rules will deter systematic disparities and thus restore beneficial, pro-market incentives. Lenders will be encouraged to make better loans to all creditworthy borrowers. Some lenders will do this by making efforts to increase prime lending to qualified racial and ethnic minorities, women, and other protected classes. Other lenders

[4] In other words, the results of these inferential models should be normalized by population characteristics by metropolitan area: the racial coefficients of a denial or segmentation model for loan markets in Los Angeles, Detroit, Miami, and the metros of Puerto Rico, for instance, will differ substantially from those in metro areas across Utah, West Virginia, or Kentucky -- even among lenders who are engaged in fair, legitimate, and sustainable market activity.

committed to specializing in the subprime market might choose to seek market opportunities across all racial/ethnic groups to avoid civil rights violations.

Other incentives, meanwhile, should promote sustainable credit and homeownership among all groups and individuals. We propose the creation of a direct tax credit tied to loan performance. This incentive is motivated by the same principles embodied in the Earned Income Tax Credit (EITC) that enjoys rare bipartisan support for its encouragement of work. Similarly, benefits under a performance-based tax credit would encourage lenders to work carefully and prudently. Originators would receive a partial tax credit for each year of good loan performance on particular kinds of mortgages. This practice mirrors the current use of funds from the Treasury and from the Troubled Asset Relief Program (TARP) to pay servicers to modify the terms of mortgages for borrowers in distress; the funding formula provides for bonuses paid out for each year the restructured loan remains current.

Loans to first-time homebuyers would be an obvious candidate for performance-based tax credits, but credit on good terms for refinance and home improvement that perform well should also merit some tax benefits. These tax benefits will not prohibit lenders from taking risks and making subprime loans that wind up performing poorly due to regional economic shocks and other factors. But the tax preference will gradually strengthen the incentives for lenders to find the genuine, legitimate, and sustainable credit needs that are out there, amongst the millions of hardworking Americans who do honor their financial obligations when they are treated fairly and honestly. Indeed, such a tax credit might restore practices that prevailed in some parts of the subprime market during its first boom, in the 1990s: back then, some subprime lenders withheld a sizable portion of the yield-spread premium (the bonus paid to brokers who found customers willing to pay higher interest rates) for several months until a loan performed well on repayment (Immergluck 2009, p. 103). Additionally, the creation of performance-based tax credits will reduce the incentives for small operators to create and disband tiny lenders as a way of exploiting short-term profits while avoiding regulation and legal liability: it will become more profitable to stay in business *to do good lending.* That's what Gale taught us that community reinvestment is all about.[5]

3. The State of Play Must be Fair! Re-Negotiating Federalism for People, Not Profits.

Our third simple proposal involves a new and long overdue clarification of the relations between the States and the federal government on consumer protection for mortgages and other financial services. In a wide-ranging history of the subprime market, two prominent experts began part of their analysis with two lines that almost seem like unintentional, deadpan humor: "Many factors have contributed to the growth of subprime lending. Most fundamentally, it became legal" (Chomsisengphet and

[5] One possible problem with this proposal is that it could encourage loan servicers to be more aggressive with borrowers in distress, as a way of claiming credits and keeping payments current even in cases of genuine hardship. This problem can be minimized, however, by giving bankruptcy judges more power to modify mortgages, and by giving the Obama Administration's proposed Consumer Financial Protection Agency jurisdiction over loan servicers.

Pennington-Cross 2006, p. 38). But this is no laughing matter. The single most important factor in how and why these new practices became legal involved Washington's assault on the consumer protection laws of the States that had been in place for many years (Mansfield, 2000; McCoy and Engel, 2008).

For twenty-five years, legislators and executive-branch officials in Washington have acted in ways that create a partial, selective, and ultimately dangerous form of federalism. When it came to the rights of mortgage lenders, Washington pre-empted State laws in the interests of fostering an integrated national capital market. When it came to social welfare expenditures required to deal with the rising economic inequalities in an era of global competition, many federal policymakers pushed more responsibilities onto the States, with predictable and costly race-to-the-bottom consequences in the attempt to attract jobs and taxable investments. But when the States tried to respond to the rising wave of predatory lending abuses, all States' rights rhetoric was tossed aside in favor of pre-emption to protect financial services firms. National banks, and eventually their operating subsidiaries, were allowed to shop amongst different regulators for the most de-regulatory policies, and were allowed to "export" the rules of the most de-regulatory state they could find to apply to loans made anywhere in the nation.

First, we propose an end to federal pre-emption of consumer protection laws on all mortgage lending activity. While some of these changes can be accomplished through executive rulemaking, others will require legislation; Congress will need to take explicit action to eliminate the doctrine of regulatory exportation, for instance. The financial terms of all mortgages should be governed -- weakly or strongly, as decided by elected legislators -- by the State where the collateral home is located. This location is where the quality-of-life benefits accrue to owner-occupiers, and where the risks of foreclosure are located for both borrowers and State and local governments.

Second, we propose a buyout and reorganization of the American credit surveillance system. As we noted earlier, every time activists and researchers try to obtain better information to document the market failures that led to the current crisis, conservatives and industry lobbyists cite closely-guarded, detailed proprietary data to dismiss any concerns about discrimination or inequality. Then industry advocates attack any proposal to have government agencies gather the same kind of information as a threat to consumers' personal privacy. The only way out of this Kafka-esque situation is for Congress to clarify the balance between individual privacy and the compelling public interests of accurate and timely information to facilitate efficient credit markets. If the industry is correct in its claims that proprietary data explain all market outcomes, then this information is indisputably a compelling public interest. Moreover, the dramatic failures of the ratings agencies in the subprime crisis demonstrate the limits of the competitive corporate model -- particularly when so many other government policies have built a market for the agencies: many pension funds, local governments, and other institutions are legally prohibited from investing money in instruments that do not earn a specified grade from one of the "Nationally Registered Statistical Ratings Organizations" (NRSROs). Now, after billions of dollars of debt blessed as triple-A by the ratings agencies went into free-fall and led to dozens of lawsuits by investors, Standard & Poor's has retained the celebrated First Amendment attorney Floyd Abrams to defend its ratings on free-speech grounds, as equivalent to things like newspaper editorials (Segal, 2009). Fine. Let the ratings agencies write editorials if they want to. But then we must eliminate their built-in, government-granted monopoly, which was codified by rules issued by the Securities and Exchange Commission in 1975. Free speech isn't free if it's bought on commission. If bond ratings are essential for the objective, transparent assessment of company performance, and if the credit bureaus are crucial to allow lenders to evaluate the honor and integrity of potential borrowers, then these entities are serving fundamentally *public* purposes. All of these companies should be bought out and reorganized as national public utilities. The federal government has established scores of mixed, public-private organizations like this over the last thirty years. Some work better than others, but all of them reflect an understanding that private market competition and profit must be balanced with the public interest in democratic accountability and shared governance.[6]

When the global financial crisis threatened to take entire economies over the cliff in the last months of 2008, several prominent experts suggested that the entire banking sector should be reorganized as a public utility. This was an excellent idea, but it was quickly

[6] Reorganizing the credit bureaus as public utilities need not mean a full public disclosure of all of the detailed personal dossiers held by the credit bureaus. There are many ways to release public information in ways that do not violate confidentiality, as demonstrated by the hundreds of data products created and publicly distributed by the Bureau of the Census. For years, the Government Sponsored Enterprises (GSEs) have disclosed detailed mortgage loan-level information in separate public-use tabulations to provide important details while ensuring individual anonymity.

pushed aside as too expensive and thus politically impossible. By comparison, it would be a bargain to reorganize the dominant ratings agencies and credit bureaus. Current market capitalization suggests a buyout price of less than $30 billion -- about five percent of the authorization under TARP, and about one-sixth of the funds used so far to bail out a single company, the American International Group.[7]

Third, we propose a simple yet powerful reporting change that will enhance the efficiency and effectiveness of current State-federal collaboration. For years, unscrupulous actors sought to stay below the radar screen by organizing themselves to evade regulation or legal scrutiny. One aspect of this problem is addressed by Title V of the Housing and Economic Recovery Act of 2008, also known as the Secure and Fair Enforcement (S.A.F.E.) Mortgage Licensing Act, which establishes a nationwide Mortgage Licensing System and Registry for all mortgage originators (Public Law 110-289, 2008). To facilitate criminal background checks and keep track of enforcement, S.A.F.E. assigns “a unique identifier” to each originator. Our proposal is simple: link this identifier, with appropriate personal privacy protections, to the originator codes in HMDA. This improved public information will enhance transparency and efficient market accountability.

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[7] This figure is based on the current, approximate market capitalizations of Moody’s ($6.1 billion), the McGraw-Hill Companies (of which Standard & Poor’s is a subsidiary)($9.3), Fimalac, S.A. (of which the Fitch Group is a division) ($1.1), Equifax ($3.3), Experian PLC ($7.4), and Fair, Isaac Corp ($0.75). Market capitalization figures are not available for TransUnion, which is a privately-held corporation.

Fourth, Congress should pass necessary legislation to clarify that states have the sovereign right to enforce their own fair housing and antidiscrimination statutes against any offender -- even nationally chartered banks. The existing framework of the Fair Housing Act and other civil rights statutes already provides for coordinated and complementary state and federal enforcement powers. But for the national banks and subsidiaries that have enjoyed dramatic de-regulation over the past twenty years -- a thorough evisceration of State powers -- Congress needs to clarify what federalism means. On the one hand, the Supreme Court's decision in *Watters v. Wachovia* (2007) allowed nationally chartered banks to ignore even minimal state supervision of their operating subsidiaries. On the other hand, in *Cuomo v. Clearing House Association* (2009), the Court rebuffed a trade group that argued against a state attorney general's demand for information from several national banks, and that claimed that a state did not have the authority to enforce its own antidiscrimination laws when it came to nationally chartered banks. *Cuomo* is only a partial resolution, however: the Court upheld a prohibition on a state attorney general's use of executive law enforcement subpoenas, but not judicial enforcement actions. Given how legally technical and complex things have become, it is time for Congress to clear up the confusion and to answer a simple question: when the federal government fails to deal with the criminality of predatory lending, what can states do?

At a Crossroads, Again

A decade ago, the economist Lawrence Lindsey (2000) wrote an essay describing "community development at a crossroads," and drew a sharp contrast between immature, irresponsible protestors, versus mature "professionals" who talked respectfully to political elites and business leaders. Lindsey's condescending tone and his advice for protesters to "grow up" infuriated many in the community reinvestment movement. The two paths he portrayed as separate -- "noisy protest and quiet accomplishment" -- have in fact always been essential and inseparable. For many years, many community reinvestment professionals have worked in offices and boardrooms, negotiating with bankers and public officials or doing the painstaking research to analyze the new breed of dangerous predators that most economists and legislators were ignoring (Lee, 2003; Squires, 2003). But these "quiet accomplishments" would have been impossible without the professionalism of protesters who come out on the streets when their voices, presence, and bodies are necessary to make the case for social justice. Creative, insistent, nonviolent direct action built the entire infrastructure of fair lending that -- for many years -- successfully encouraged fair, responsible, community reinvestment. Congress did not enact laws solely on the basis of polite negotiations or incontrovertible "proof" of problems that could not even be seen before the data were disclosed under HMDA. Laws changed because there was evidence of a problem, some advocates persevered in polite negotiations, *and others -- many others -- marched and protested to demand the right to public information and public accountability.*

Today, after millions of foreclosures, trillions of dollars of losses and bailouts, community reinvestment is once again at a crossroads, at the junction of the rough road to fair lending and the high-speed toll highway of risky, deregulated global capital flows. If anyone needs to grow up, it's the arrogant geniuses in Washington and on Wall Street who spent years reassuring us that unregulated markets would always solve every problem, and that government is always the problem (unless it serves the needs of powerful, well-connected companies). There are bad regulations, and there are good regulations, and both can be found in private companies and private markets as well as democratically-elected systems of government. Anti-government ideologues hate state regulations and powers when it comes to the rights of investors and corporations. But somehow they never object to many thousands of very powerful government interventions that are now taking place every day when the local sheriff's deputies arrive to evict distressed families from foreclosed homes, so often as the result of predatory loans made by large and powerful institutions connected to the lucrative circuits of capital and power flowing through Wall Street and Washington, DC. With millions of families living in fear of foreclosure and eviction, now is the time for lots of quiet accomplishment *and* noisy protest. We have met the enemy, and it isn't us! We want it. They've got it. Let's go get it! Get the crooks!

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