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ARTICLES

THE COMMUNITY REINVESTMENT ACT: GUILTY, BUT NOT AS CHARGED

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INTRODUCTION

Since its passage in 1977, the Community Reinvestment Act ("CRA")[1] has charged federal bank regulators with "encourag[ing]" certain financial institutions "to help meet the credit needs of the local communities in which they are chartered consistent with . . . safe and sound" banking practices.[2] Even before the CRA became law—and ever since—it has become a flashpoint. Depending on one's perspective, this simple and somewhat soft directive has led some to charge that it imposes unfair burdens on financial institutions and helped to fuel the subprime mortgage crisis of 2007 and the financial crisis that followed.[3] According to this argument, the CRA forced banks to

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1 12 U.S.C. §§ 2901–2907 (2012).

2 *Id.* § 2901(b).

3 *See, e.g.*, Howard Husock, Op-Ed., *Housing Goals We Can't Afford*, N.Y. TIMES, Dec. 11, 2008, at A49 (asserting that regulatory changes to the CRA helped fuel the subprime mortgage crisis); Charles Krauthammer, Op-Ed., *Catharsis, Then Common Sense*, WASH. POST, Sept. 26, 2008, at A23 (blaming the CRA for encouraging risky lending that led to the financial crisis); 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 pressuring banks to make risky loans).

make risky loans to less-than creditworthy borrowers. Others defend the CRA, arguing that it had little to do with the risky subprime lending at the heart of the crisis.[4]

Early research into the relationship between the mortgage crisis and the CRA generally vindicated those in the camp that believed the CRA had little to do with the risky lending that fueled these crises. Because of the CRA's limitations, this research found that much of this lending was beyond the CRA's scope. For one, the CRA mostly applies to depository institutions. Given that much of the subprime lending undertaken during the mortgage frenzy of the last decade was carried out by stand-alone mortgage lenders who were non-depository institutions, roughly half of this type of risky lending was carried out by institutions that operated beyond the law's reach. But there are other reasons that ultimately placed the overwhelming majority of all subprime lending during the height of the frenzy outside the CRA's protections. In addition to the exclusion of non-depository institutions from the CRA, two other limitations on the CRA mostly placed subprime lending outside of its purview. First, the CRA generally only applies to lending to low- and moderate-income borrowers who reside within a covered institution's CRA "assessment area"—that is, locations where banks have their branches or engage in a substantial amount of lending.[5] Second, it only covers the activities of covered banks' non-depository subsidiaries, in their assessment areas, when the parent bank chooses to have the subsidiary's activities reviewed under the CRA.[6] Because of these exemptions—that the CRA covers only depository institutions, that regulators enforcing the Act look at covered banks' activities within their respective CRA assessment areas, and that the law covers the activities of subsidiaries only at a given parent bank's

[4] *See, e.g.*, Aaron Pressman, *Community Reinvestment Act Had Nothing To Do with Subprime Crisis*, BUS. WK. (Sept. 29, 2008), http://www.businessweek.com/investing/insights/blog/archives/2008/09/community_reinvestment_act_had_nothing_to_do_with_subprime_crisis.html.

[5] 12 C.F.R. § 25.41 (2014); *see also* Memorandum from Glenn Canner & Neil Bhutta, Div. of Research & 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. 1–2 (Nov. 21, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/20081203_analysis.pdf.

[6] Canner & Bhutta, *supra* note 5, at 2.

option—at least ninety-four percent of all subprime lending during the height of the subprime mortgage market was beyond the scope of the CRA.[7]

Despite these facts, researchers affiliated with the National Bureau of Economic Research ("NBER")[8] conducted a recent study and reviewed bank lending patterns from 1999–2009 to conclude that the CRA did cause banks to make riskier loans during this time frame, especially the years 2004–2006.[9] As part of the CRA enforcement scheme, federal regulators conduct regular CRA examinations of banks covered by the law and assess whether those institutions are meeting their CRA obligations.[10] This study analyzed the activities of banks both before and after their CRA examinations during this ten-year time period to determine whether the periodic CRA examinations of particular banks—when regulators review those banks' practices to assess whether the goals of the CRA are being met—tended to lead to increased incidents of riskier lending.

The theory behind the research was that if banks engaged in riskier lending before and after their respective CRA examinations, it would suggest that the CRA examination process—and, hence, the CRA—led to this type of lending. Taking the research to its logical conclusion—which, admittedly, the NBER researchers do not do explicitly—if riskier lending is

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[7] *Id.* at 3. Another relevant point about the CRA is that covered financial institutions can obtain CRA "credit" for a wide range of activities having little to do with home mortgage lending. Thus, while home mortgage lending to certain communities is relevant to the CRA, much bank activity having nothing to do with such lending is also relevant to a given bank's CRA record. *See* Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Notice, 75 Fed. Reg. 11,642, 11,643 (Mar. 11, 2010) [hereinafter Interagency Questions and Answers].

[8] Despite the word "national" in its name, the NBER is not a governmental entity. It describes itself on its website as follows: "Founded in 1920, the National Bureau of Economic Research is a private, nonprofit, nonpartisan research organization dedicated to promoting a greater understanding of how the economy works. The NBER is committed to undertaking and disseminating unbiased economic research . . . among public policymakers, business professionals, and the academic community." *About the NBER*, NAT'L BUREAU ECON. RES., http://www.nber.org/info.html (last visited Aug. 16, 2014).

[9] Sumit Agarwal et al., *Did the Community Reinvestment Act (CRA) Lead to Riskier Lending?* 4, 21 (Nat'l Bureau of Econ. Research, Working Paper No. 18609, 2012), *available at* http://www.nber.org/papers/w18609.

[10] For a description of the elements of a CRA exam, see *infra* Part I.

what led to the present financial crisis, then one could argue that the CRA would have played some role in helping to cause the crisis.

Because the NBER study appeared to find a connection between banks' CRA examinations and some forms of risky lending, particularly during the period between 2004 and 2006 when subprime lending was at its height, these findings have indeed led some to conclude that the CRA had a role in the crisis that followed.[11] As more fully described below, this study has its flaws, however, which include that the study failed to assess only bank lending actually covered by the CRA.

This Article reviews the existing research on the subject of the impact of the CRA on subprime lending to assess the role the CRA played in the mortgage crisis of 2007 and the financial crisis that followed. This Article also takes the analysis a step further, and asks what role the CRA played in failing to prevent these crises, particularly its impact on low- and moderate-income communities—that is, the very communities the law was designed to protect. Based on a review of the best existing evidence, the initial verdict of not guilty—that the CRA did not cause the financial crisis, as some argue—still holds up on appeal. At the same time, as more fully described in this piece, an appreciation for the weaknesses inherent in the law's structure, when combined with an understanding of the manner in which it was enforced by regulators, leads one to a different conclusion; although the CRA did not cause the crisis, it failed to prevent the very harms it was designed to prevent from befalling the very communities it was—and still is— supposed to protect.

The defects in the CRA that emerge from this review, in total, suggest not that the CRA was too strong, but rather, too weak. They also point to important reforms that should be put in place to strengthen and fine-tune the CRA to ensure that it can meet its important goal: ensuring that financial institutions meet the needs of low- and moderate-income communities, communities for which access to capital and banking services on fair terms is a necessary condition for economic development, let alone economic survival.

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[11] J.D. Tuccille, *Study Says Community Reinvestment Act Induced Banks To Take Bad Risks*, REASON.COM (Dec. 21, 2012, 6:37 PM), http://reason.com/blog/2012/12/21/study-says-community-reinvestment-act-in.

With the goals of assessing the state of the research on the CRA and drawing some insights into what reforms this research suggests, this Article proceeds as follows. Part I provides an overview of the CRA's structure and reach. Part II provides an overview of the impact of the financial crisis on low- and moderate-income communities, particularly communities of color. Part III assesses the current state of the research, with particular emphasis on the NBER report described above. Part IV identifies the disconnect between the CRA's reach and its goals given the current state of banking and makes suggestions for reforms to make the CRA more responsive to banking in the twenty-first century.

I. OVERVIEW OF THE CRA

The CRA was passed by Congress to improve financial institution responsiveness to the needs of low- and moderate-income communities.[12] In the 1960s, 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.[13] These statutes make it illegal to reject prospective renters, buyers, and borrowers on account of such grounds as race and ethnicity, among others. In the 1970s, after the exposure of the practice of "redlining"—the decision by banking institutions to exclude certain communities from the

[12] Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 516–17 (2005) (explaining that the CRA was "[p]assed in response to concerns about redlining of minority and low-income areas, and market failures in low-income communities . . . [and it] encourages federally insured banks and thrifts to meet the credit needs of the entire communities that they serve, including low- and moderate-income areas, consistent with safe and sound banking practices").

[13] *See, e.g.*, Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (barring discrimination in the extension of credit) (codified as amended at 15 U.S.C. § 1691(a)–(e) (2012)); Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (barring discrimination in real estate transactions, including, among other things, rental, sale, and mortgage transactions) (codified as amended at 42 U.S.C. §§ 3533, 3535, 3601–3619 (2012)).

provision of bank services, particularly mortgage lending[14]—Congress enacted two statutes, the Home Mortgage Disclosure Act ("HMDA")[15] and the CRA.[16]

Although they were both creatures of civil rights agitation, neither HMDA nor the CRA prohibit any particular conduct, let alone bar discrimination based on race. Instead, HMDA promotes transparency with respect to bank mortgage lending practices by requiring lenders to report certain demographic and economic information about borrowers who apply for and are either granted or denied loans.[17] Similarly, the CRA does not prohibit any particular acts, nor does it bar racial or any other discrimination in financial institution practices. Instead, by its express terms, 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," and this goal is to be carried out "consistent with the safe and sound operation of such institutions."[18] The "local communities" in which banks are chartered are supposed to include "low- and moderate-income [communities]."[19]

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[14] *See* THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 108 (2004) (defining redlining as "declining to lend in minority neighborhoods, discouraging mortgage loan applications from minority areas, and marketing policies that exclude such areas"). On the origins of redlining, see KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES, 197–98 (1985); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 51–52, 197–98 (1993); 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, 189 (2005).

[15] Home Mortgage Disclosure Act, Pub. L. No. 94-200, 89 Stat. 1124 (1975) (codified as amended at 12 U.S.C. §§ 2801–2811 (2012)). 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) (citations omitted).

[16] Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111 (1977) (codified as amended at 12 U.S.C. §§ 2901–2908 (2012)). 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).

[17] 12 U.S.C. § 2803.

[18] *Id.* § 2901(b) (emphasis added).

[19] *Id.* § 2903(a)(1). The CRA regulations define "income levels" of different communities as follows:

> (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.

To carry out this mandate, federal bank regulators[20] enforce the CRA first by undertaking periodic examinations of covered banks' activities in their local communities, including low- and moderate-income communities.[21] At the conclusion of these examinations, banks are given one of four grades based on each bank's relative success in "meeting community credit needs": "outstanding," "satisfactory," "needs to improve," or "substantial noncompliance."[22] Second, regulators then take those grades into account when they consider covered banks' applications to engage in certain types of activities, like requests to merge or open new bank branches.[23]

When conducting the periodic CRA examinations, regulators evaluate different types of banks along different criteria. For large retail banks,[24] regulators conduct a three-part review, assessing such institutions' lending, investment, and service in

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> (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.
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> (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)(1)–(4) (2014) (emphasis added).

[20] According to the statute:

> (1) the term "appropriate Federal financial supervisory agency" means—
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> (A) the Comptroller of the Currency with respect to national banks and Federal savings associations (the deposits of which are insured by the Federal Deposit Insurance Corporation);
>
> (B) the Board of Governors of the Federal Reserve System with respect to State chartered banks which are members of the Federal Reserve System, bank holding companies, and savings and loan holding companies;
>
> (C) 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 State savings associations (the deposits of which are insured by the Federal Deposit Insurance Corporation).

12 U.S.C. § 2902(1)(A)–(C).

[21] *Id.* § 2903(a)(1).

[22] *Id.* § 2906(b)(2)(A)–(D).

[23] *Id.* § 2903(a)(2).

[24] Retail banks with more than $1.202 billion in assets are considered large banks. *See* 12 C.F.R. § 25.12(u)(1).

their respective CRA assessment areas.[25] For wholesale and limited purpose banks, regulators evaluate such banks under the community development test, through which they look at such banks' "community development lending, qualified investments, or community development services."[26] Intermediate, small banks, and small retail banks are assessed under somewhat less rigorous standards.[27]

While the legislative history makes clear that Congress, in passing the CRA, was concerned about the exclusion of minority communities from traditional banking services,[28] the CRA itself only explicitly addresses the extension of banking services to low- and moderate-income communities,[29] and does not specify that the CRA promotes activities in communities of color expressly.

Upon passing the CRA, Congress was attempting to address two related problems: redlining—excluding certain neighborhoods from capital investment by banks—and capital exportation—receiving deposits from one community and investing those funds in other communities.[30] While ensuring that banks covered by the CRA meet the banking needs of low- and moderate-income communities, Congress made quite clear that the CRA did not mandate any particular lending quotas in such communities.[31] At the same time, legislators saw the CRA as an explicit quid pro quo with banks for the governmental support banks receive, like charters and federal deposit insurance.[32]

Further reinforcing the fact that there is a clear connection between the CRA and federal deposit insurance, an essential feature of the CRA is that it only covers "regulated financial

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[25] *Id.* §§ 25.21(a)(1), (b), .22(a)(1), .23(c), .24(a).

[26] *Id.* § 25.25(a).

[27] *See* Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617, 634–35 (2009).

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

[29] 12 U.S.C. § 2903(a)(1) (2012).

[30] *See* Brescia, *supra* note 27, at 630.

[31] SENATOR PROXMIRE, COMM. ON BANKING, HOUS., & URBAN AFFAIRS, HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1977, S. REP. NO. 95-175, at 35 (1977) (rejecting notion that the CRA requires allocation of credit).

[32] For a discussion of this connection between bank benefits and their CRA obligations, see Barr, *supra* note 12, at 616–24; 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).

institutions,"[33] which are described as "insured depository institution[s]."[34] Thus, many stand-alone mortgage lenders—the type of lender that engaged in much of the subprime lending in the last decade—are typically not covered by the CRA.[35] While some non-bank subsidiaries of covered parent banks can be covered by the Act, this is only at each parent bank's discretion.[36] Thus, if a parent bank wants to receive CRA "credit" for the actions of its non-depository subsidiaries, it can choose to have those activities reviewed as part of its CRA examination, or it can choose to place such activities beyond the scope of the CRA. The decision to choose to include or exclude a given parent bank's subsidiary from its own CRA review will likely hinge on whether the parent considers that subsidiary's activities in the parent's CRA assessment areas to be consistent with the purposes of the Act.

This connection between the original goals of the CRA and the scope of CRA coverage is made apparent further by the focus of the CRA on those communities in which banks have their branches and engage in a substantial amount of their lending. Banks covered by the CRA must undergo CRA review based on those banks' activities within their respective "assessment

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[33] 12 U.S.C. § 2901(a)(1), (3).

[34] *Id.* § 2902(2). The CRA adopts the definition of "insured depository institution" set forth in 12 U.S.C. § 1813 (2012), 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).

[35] A question arises about the extent to which it was stand-alone mortgage lenders—not covered by the CRA—or subsidiaries of full-service financial institutions—covered at the discretion of the parent bank—that engaged in the riskiest subprime lending. The Canner & Bhutta study found that roughly half of "higher priced loans"—the Federal Reserve's proxy for subprime loans—were originated by stand-alone mortgage lenders. Canner & Bhutta, *supra* note 5, at 7 tbl.2. That study also identified just six percent of subprime loans that were originated at the height of the subprime mortgage frenzy by covered banks or their subsidiaries acting within their CRA assessment areas. So, fully ninety-four percent of subprime loans during this period were made by stand-alone mortgage lenders, or by banks or their affiliates acting outside of those banks' respective CRA assessment areas. *Id.* at 3. This six percent figure likely overstates the percentage of loans covered by the CRA because loans subsidiaries of CRA-covered institutions are only covered by the CRA at the parent bank's discretion.

[36] 12 C.F.R. § 25.22(c)(1) (2014). For a discussion of the parent bank option to include or exclude the activites of subsidiaries in its CRA review, 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 C.F.R. § 25.22(a)(1), (c)(1)).

areas."[37] The banks determine these assessment areas themselves, but the regulators review the areas for consistency with the purposes of the CRA.[38] For most banks,[39] the assessment area or areas delineated must include the communities "in which the bank has its main office, its branches, and its deposit-taking ATMs," as well as those communities where the bank has "originated or purchased a substantial portion of its loans."[40]

This alignment between the goals of the CRA—preventing redlining and capital exportation by tying CRA coverage of depository institutions acting within their assessment areas—actually reveals, in part, the mismatch between the CRA and the riskiest lending during the subprime mortgage frenzy, as further discussed in Part II.B. Put simply, when financial institutions acting beyond the scope of the CRA carried out so much of the subprime lending in the last decade—either because the lenders were not covered by it, or because the subprime activity was not undertaken in a relevant CRA assessment area—it is hard to argue that the CRA was responsible for the type of risky lending that led to the financial crisis.

These gaps in CRA coverage ultimately exposed many communities to a range of predatory conduct, which ultimately had devastating economic and social effects. Part II outlines the extent to which the communities the CRA was designed to protect are those that have experienced some of the harshest consequences of the fallout from the foreclosure crisis of the late 2000s.

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[37] 12 C.F.R. § 25.21(b).

[38] Regulators review the assessment area delineation simply for its consistency with the purposes of the CRA. *Id.* § 25.41(a).

[39] The rules for wholesale or limited purpose banks are slightly different than those for other types of financial institutions. *See id.* § 25.41(b).

[40] *Id.* § 25.41(c)(2).

II. THE IMPACT OF THE FINANCIAL CRISIS ON LOW- AND MODERATE-INCOME COMMUNITIES AND THE GAPS IN THE CRA THAT FAILED TO PREVENT THIS IMPACT

A. *The Impact of the Financial Crisis on Low- and Moderate-Income Communities*

The subprime mortgage crisis took a particularly hard toll on low- and moderate-income communities and communities of color. Since a disproportionate share of subprime lending was concentrated in communities of color, when the subprime crisis hit, it hit hardest in those communities. And since a disproportionate percentage of low- and moderate-income communities are also communities of color, this disproportionate impact on communities of color also hit communities of lower income harder. In 2005, roughly half of conventional home purchase loans made to black families and Latino families had subprime features, while just 17.2% of conventional mortgages to non-Hispanic whites had such features.[41] A legacy of lending discrimination in such communities meant that subprime lenders could thrive in these communities,[42] where there were fewer traditional banking opportunities.[43] Where there were more subprime loans, there tended to be more foreclosures, and foreclosures have a measurable adverse impact on the communities in which they occur.[44] Home prices that soared came down considerably and foreclosures displaced a large percentage of residents.[45]

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[41] Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, 92 FED. RES. BULL., 2006, at A159–A160 tbl.13.

[42] For a history of housing discrimination, see DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 87–108 (2004). *See also* Gordon, *supra* note 14, at 209–11 (discussing how the regulatory system denied most African-Americans the opportunity to buy homes).

[43] U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF THE TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING 18 (2000), *available at* http://www.hud user.org/Publications/pdf/treasrpt.pdf.

[44] *See* Gregory D. Squires, *Urban Development and Unequal Access to Housing Finance Services*, 53 N.Y.L. SCH. L. REV. 255, 263 (2008-2009) (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).

[45] *See, e.g.*, Lynn Fisher et al., *A Profile of the Mortgage Crisis in a Low-and-Moderate-Income Community* 1, 8 (Fed. Reserve Bank of Bos. Pub. Policy Discussion Papers, Working Paper No. 10-6, 2010), *available at* http://www.bos.frb.org/

Recent studies have attempted to measure the impact of foreclosures on the value of neighboring properties. One study in Chicago in the late 1990s showed a reduction in the value of single-family homes within one-eighth of a mile of a foreclosed home by 0.9% to 1.136% for each such foreclosure.[46] Furthermore, each foreclosed property reduced the value of neighboring properties by between $159,000 and $371,000.[47] Early studies of the current foreclosure crisis predicted a range of losses to homeowners nationally at between $356 billion and $1.2 trillion in home values.[48] A more recent study by the Federal Reserve Bank of Atlanta found that property values in the late 2000s, on average, were reduced by no more than one percent due to nearby foreclosures, and they attributed at least some of that reduction to disinvestment in properties in foreclosure and delays in the foreclosure process.[49]

Now that the evidence, for the most part, is in, it is easier to assess the full impact of the financial crisis on American homeowners, and the reality of the losses far exceeds the early predictions. Indeed, a recent study by the General Accounting Office estimates the loss of homeowner equity in the United States as a result of the crisis at $9.1 trillion.[50] A study of the impacts of foreclosures on African-American and Latino communities indicates that these losses are disproportionately

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economic/ppdp/2010/ppdp1006.pdf (noting the impact of financial crisis on one low- and moderate-income community in Massachusetts).

[46] DAN IMMERGLUCK & GEOFF SMITH, THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES 9 (2005), *available at* http://www.woodstockinst.org/sites/default/files/attachments/TGTN_Report%20%281%29_0.pdf.

[47] *Id.* at 11.

[48] *Compare* THE PEW CHARITABLE TRUSTS, DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 10 (2008), *available at* http://www.pewtrusts.org/en/research-and-analysis/reports/2008/04/16/defaulting-on-the-dream-states-respond-to-americas-foreclosure-crisis (predicting a $356 billion loss in home value due to rise in foreclosures), *with* GLOBAL INSIGHT, U.S. METRO ECONOMIES: THE MORTGAGE CRISIS 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).

[49] Kristopher Gerardi et al., *Foreclosure Externalities: Some New Evidence* 4, 13–14, 33 (Fed. Reserve Bank of Atlanta Working Paper Series, Working Paper No. 2012-11, 2012), *available at* http://www.frbatlanta.org/documents/pubs/wp/wp1211.pdf.

[50] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-180, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT 21 (2013), *available at* http://www.gao.gov/assets/660/651322.pdf.

found in these communities, and, the greater the segregation in such communities—that is, the higher the percentage of residents of color in a community—the greater those impacts.[51]

In addition to the impacts of foreclosures on home prices, the financial crisis has taken a heavy toll on unemployment, particularly among the low-skilled and those with a lower level of educational attainment.[52] Moreover, small business lending contracted after the financial crisis, particularly in low- and moderate-income communities and African-American communities.[53]

Congress clearly passed the CRA to protect low- and moderate-income communities. Yet it is these communities that have suffered some of the harshest consequences of the financial crisis. The severe impacts on such communities raise questions about the effectiveness of the CRA in fulfilling its most critical functions. The following discussion explores some of these phenomena.

B. *The Gaps in the CRA That Failed To Prevent These Impacts*

While some have raised concerns that the CRA played a role in fueling the subprime crisis, a larger question, perhaps, looms in the background: Why did the CRA fail to serve as a bulwark against the very harms it was designed to prevent? So, if the question is what role did the CRA play in the financial crisis, perhaps the appropriate inquiry is not to ask whether it was too strong, but whether it was strong enough. As the following discussion shows, the many gaps in the CRA's coverage, the weak enforcement of it by regulators, and the absence of a private right of action to enforce its terms lead one to the firm conclusion that the CRA was not too strong, but too weak. The main role it may

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[51] Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 644, 645 tbl.5 (2010).

[52] Michael Hirsh & Fawn Johnson, *In the High-Skilled Economy, Low-Skilled Workers Fall Behind*, ATLANTIC (Aug. 3, 2011, 11:15 AM), http://www.theatlantic.com/politics/archive/2011/08/in-the-high-skilled-economy-low-skilled-workers-fall-behind/243012/.

[53] Elizabeth Laderman & Carolina Reid, *The Community Reinvestment Act and Small Business Lending in Low- and Moderate-Income Neighborhoods During the Financial Crisis* 6 (Fed. Reserve Bank of S.F. Cmty. Dev., Working Paper No. 2010-05, 2010), *available at* http://www.frbsf.org/publications/community/wpapers/2010/wp2010-05.pdf.

have played in the financial crisis was that it failed to live up to its promise; it failed to protect low- and moderate-income communities from predatory conduct.

1. Scope of the CRA

Research conducted by the Federal Reserve reveals that in 2005–2006, only six percent of all higher-priced loans—the Federal Reserve's proxy for subprime loans—were subject to the CRA.[54] The reason for this gap in coverage is four-fold. First, as discussed above, the CRA does not cover non-depository institutions.[55] Second, it does not cover lending by covered institutions outside of their designated CRA assessment areas.[56] Third, it only covers the activities of non-depository subsidiaries of covered banks at the discretion of the parent institution.[57] Finally, loans made to borrowers who are not of low or moderate income are also beyond the reach of the CRA.[58] Given these gaps in CRA coverage, the overwhelming majority of the riskiest loans—fully ninety-four percent of them—was beyond its scope, and carried out beyond its protections.[59]

2. Weak Enforcement

Beyond the gaps in CRA coverage, the history of bank regulator enforcement of the CRA indicates that few banks ever received any kind of punishment for failing to honor the CRA's goals. By the late 2000s, roughly ninety-eight percent of banks

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[54] Canner & Bhutta, *supra* note 5, at 3. As the authors of this study note, the six percent figure might actually *overstate* the number of subprime loans that the CRA covers. That study counted loans made by subsidiaries regardless of whether such subsidiaries were included in the parent bank's CRA examination.

[55] *See* 12 U.S.C. §§ 1813(c)(2), 2902(1) (2012). For a comparison 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*, *in* BORROWING TO LIVE: CONSUMER AND MORTGAGE CREDIT REVISITED 110, 122–25 (Nicolas P. Retsinas & Eric S. Belskey eds., 2008).

[56] *Cf.* 12 C.F.R. § 25.41(a) (2014) (describing how a regulated entity's assessment area is established for the purpose of CRA review).

[57] Kathleen C. Engel & Patricia A. McCoy, *The CRA Implications of Predatory Lending*, 29 FORDHAM URB. L.J. 1571, 1588–89 (2002).

[58] 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.

[59] Canner & Bhutta, *supra* note 5, at 3.

received either an "outstanding" or "satisfactory" score as a result of their respective CRA examinations.[60] Apart from these high grades, the chances of a denial of a bank application on CRA grounds were minute, at best. Between 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.[61] Only eight applications of those 692 were denied for any reason, with four percent of the 692 withdrawn by the bank, and one percent returned.[62] Ultimately, just eight applications out of 92,177 were denied on any grounds—or less than .01% of all bank applications—during this fifteen-year period.[63] Of the more than 13,000 applications filed before the Federal Reserve from 1988 through May 2007, only eight of them, less than .06%, were denied on grounds described as "unsatisfactory consumer protection and community needs issues."[64] With so few bank applications denied by bank regulators on CRA grounds, critics of the CRA are hard pressed to show how such weak enforcement could induce banks to do much of anything. In a strict cost-benefit analysis, if the risk of punishment under the Act is so low, classical economic theory suggests that compliance with the law in such circumstances will also be low.[65]

3. No Private Right of Action

In the wake of the financial crisis, federal and state law enforcement officials and private litigants have used the courts and the threat of civil litigation and criminal prosecution to ameliorate some of the harshest consequences of the financial crisis, and to remedy some of the riskiest behavior that led to it. Litigation and enforcement in the wake of the financial crisis

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[60] *The Community Reinvestment Act: Thirty Years of Accomplishments, but Challenges Remain: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 194 (2008) (statement of John Taylor, President and CEO, Nat'l Cmty. Reinvestment Coal.).

[61] Barr, *supra* note 12, at 586.

[62] *Id.*

[63] *Id.*

[64] *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 & Gov't Reform*, 110th Cong. 63–64 (2007) (statement of Sandra Braunstein, Dir., Div. of Consumer and Cmty. Affairs).

[65] For an articulation of this theory, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968).

bears all of the hallmarks of "mass torts" litigation.[66] In particular, legal proceedings have included sweeping enforcement actions and civil litigation that utilize procedural mechanisms to bring relief to wide classes of victims.[67] In the last five years, through court action and its threat, banks have paid out tens of billions of dollars for a range of illegal practices, both in the lead up to and the aftermath of the crisis. In 2008, Bank of America agreed to pay out over $8 billion in damages to borrowers impacted by the predatory subprime practices of its subsidiary, Countrywide Financial.[68] Last year, five of the largest banks agreed to pay $25 billion for flawed foreclosure practices, which included, among other things, fabricating documents and forging court submissions.[69] In a series of cases alleging violations of the Fair Housing Act, banks like Wells Fargo and smaller lenders agreed to damage awards and loan commitments of nearly $500 million.[70] Such outcomes are just the tip of the iceberg, however, as pending actions seek hundreds of billions of dollars in damages against many of the largest banks for improper conduct in the lead up to the financial crisis.[71]

The CRA has been largely outside of this trend towards court and law enforcement intervention regarding the causes of the financial crisis. In the late 1990s, courts foreclosed much hope that private litigants could enforce the CRA through the courts. In *Lee v. Board of Governors of the Federal Reserve System*[72] and

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[66] *See* Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 13 (2009).

[67] *See id.* at 13–17; *see also* Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1596 (1995) (describing hallmarks of mass torts litigation).

[68] Joel Rosenblatt, *Angelo Mozilo Settles Lending Suit for $6.5 Million (Update2)*, BLOOMBERG (Feb. 2, 2011, 7:34 PM), http://www.bloomberg.com/apps/news?pid=20601087&sid=aWdK8sUC0Lf0&refer=home.

[69] Loren Berlin & Emily Peck, *National Mortgage Settlement: States, Big Banks Reach $25 Billion Deal*, HUFFINGTON POST (Feb. 9, 2012, 6:10 PM), http://www.huffingtonpost.com/2012/02/09/national-mortgage-settlement_n_1265292.html.

[70] Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. TIMES, July 13, 2012, at B3.

[71] *See, e.g.*, Nelson D. Schwartz & Kevin Roose, *Federal Regulators Sue Big Banks over Mortgages*, N.Y. TIMES (Sept. 2, 2011), http://www.nytimes.com/2011/09/03/business/bank-suits-over-mortgages-are-filed.html?_r=0 (describing lawsuits by Federal Housing Finance Administration seeking nearly $200 billion in damages for sale of mortgage backed securities).

[72] 118 F.3d 905 (2d Cir. 1997).

Lee v. Federal Deposit Insurance Corporation,[73] both court challenges filed by community members to transactions approved by bank regulators despite CRA-based objections, the courts left little doubt that the CRA in its current form is unenforceable by private litigants through the courts, holding that the plaintiffs had no standing to sue, and that the CRA itself provided few standards for courts to enforce.[74]

A CRA that is narrow in scope, suffered from anemic enforcement, and did not offer private parties the ability to enforce it through the courts, failed to prevent some of the harshest effects of the financial crisis from befalling low- and moderate-income communities. Some critics of the CRA suggest, however, that the CRA was so strong that it led banks to engage in risky lending, the type of lending that ultimately brought about these harms. The following discussion attempts to sort through the best available research on the subject to determine the extent to which CRA-related lending was, in fact, connected to risky lending and its consequences.

III. THE CONNECTION BETWEEN THE CRA AND THE FINANCIAL CRISIS

Several studies have attempted to assess the impact of the CRA on risky lending in the lead up to the financial crisis. Some have also attempted to chart the positive impact the CRA has had on increasing access to capital on fair terms in low- and moderate-income communities. Most of these studies, as described below, have showed a positive impact from the CRA on such communities and little negative impact, if any, from lending pursued under the CRA. Indeed, most studies establish that lending carried out under the CRA tended to perform better than that which was carried out beyond its reach.[75] Additionally, several studies find little connection between CRA-eligible lending and the defaults and foreclosures that helped to fuel the foreclosure crisis and the financial crisis that followed. One recent report tends to contradict these other studies, however. A recent study released by researchers affiliated with the National

[73] No. 95 Civ. 7963(LMM), 1997 WL 570545, at *1, *6–8 (S.D.N.Y. Sept. 15, 1997).

[74] In addition to the cases described above, other courts have reached similar conclusions. *See* Brescia, *supra* note 27, at 654 n.206 (reviewing cases and holdings).

[75] *See infra* Part III.A.

Bureau of Economic Research ("NBER") attempted to test the effect of CRA examinations on risky lending and found a statistically significant increase in riskier lending by banks around the time of their respective examinations. The following Sections review the prior research that tended to find no CRA effect on the financial crisis, as well as the recent NBER research. They also attempt to point out some of the methodological and interpretive flaws in the NBER study.

A. *Prior Studies That Show No Impact of the CRA on the Financial Crisis*

For more than the last decade, several studies establish that the CRA had a positive effect on low- and moderate-income communities by bringing desperately needed financial services to such previously underserved areas.[76] A two-part study carried out jointly by the Brookings Institution and the Joint Center for Housing Studies at Harvard University found 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."[77] Another study carried out by the same Harvard center compared 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 not covered by the CRA.[78] The results of that study showed that the strongest lending carried out in low- and moderate-income communities

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[76] *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) [hereinafter 25TH ANNIVERSARY REPORT], *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/cra02-1.pdf; Douglas D. Evanoff & Lewis M. Segal, *CRA and Fair Lending Regulations: Resulting Trends in Mortgage Lending*, 20 ECON. PERSP. 19, 19, 38 (1996), *available at* http://www.chicagofed.org/digital_assets/publications/economic_perspectives/1996/epnd96b.pdf (showing the CRA and fair lending enforcement increased lending to minority communities).

[77] *See* Barr, *supra* note 12, 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.jchs.harvard.edu/sites/jchs.harvard.edu/files/cra-report-2000.pdf); 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 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. CRA01-1, 2001), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/belschillyezer_cra01-1.pdf.

[78] 25TH ANNIVERSARY REPORT, *supra* note 76, at 48, 53 exhibit 19.

was that done by banks acting within their CRA assessment areas. That is, loans made by banks within their respective assessment areas performed better than loans made by non-CRA banks in those areas, and even better than loans made by the same banks but to borrowers outside of those assessment areas.[79]

Another study that assessed the impact of changes to the CRA regulations in 1995 and stronger CRA enforcement after those changes were made posited that strengthened regulations and enforcement may have reduced the gap in the homeownership rate between blacks and whites between 1995 and 1997.[80]

Research carried out by the Board of Governors of the Federal Reserve System, studying loan performance in 2005–2006, showed that CRA-related loans were half as likely to be delinquent on their mortgage payments as subprime loans not covered by the CRA.[81] This study analyzed the impact of CRA lending on foreclosures in 2008 and found that non-CRA subprime loans were twenty times more likely to end up in foreclosure than loans made through a CRA-related program.[82]

Similarly, the Center for Community Capital at the University of North Carolina ("CCC") compared the performance of a lending program qualifying for CRA credit against the performance of subprime loans during the height of subprime mortgage activity and found that the CRA-related lending performed far better than subprime loans, even though the risk profiles of the borrowers in the program matched those generally of borrowers in the subprime market. In its study *Risky Borrowers or Risky Mortgages: Disaggregating Effects Using Propensity Score Models* ("*Risky Borrowers* study"), the CCC assessed the performance of loans in the Community Advantage Program ("CAP"), a CRA-related lending program developed by

[79] *Id.* at 51–53.

[80] Lewis M. Segal & Daniel G. Sullivan, *Trends in Homeownership: Race, Demographics, and Income*, 22 ECON. PERSP. 53, 53, 68 (1998), *available at* http://www.chicagofed.org/digital_assets/publications/economic_perspectives/1998/ep2Q98_4.pdf.

[81] Canner & Bhutta, *supra* note 5, at 5, 10 tbl.7 (finding that the delinquency rate for loans offered through CRA-related programming was 9.36%, compared to a delinquency rate for subprime loans of nearly twice that, or 18.21%).

[82] *Id.*

the North Carolina fair lending organization Self-Help.[83] The CAP program facilitated loans to borrowers whose credit profiles reflected the credit profiles of borrowers typically found in the subprime market.[84] Given the similarity in profiles between the borrowers in the CAP program and those in the subprime market generally, the study could assess the impact of the CAP program on loan performance,[85] while, essentially, controlling for creditworthiness of the borrowers.[86] The study also looked at loan performance in two groupings of loans, subprime and CAP program loans originated in both the 2003–2004 period and a second group originated in 2005–2006.[87] In the first time period, subprime loans defaulted at a rate four times that of loans in the CAP program.[88] During the second time period, the cumulative default rate for the subprime loans was nearly half of all loans—47.5%.[89] This figure was over 3.5 times the rate for comparable CAP loans during the same time period—13.3%.[90]

Research carried out by the Federal Reserve Bank of San Francisco that looked at lending during the height of the subprime market found results similar to previous studies. First, it found that lending carried out by CRA-covered institutions performed much better than that carried out by non-CRA covered institutions. Second, lending by CRA-covered institutions within their CRA assessment areas proved much more stable than loans made by non-CRA covered institutions, and proved even more stable than loans made by those CRA-covered institutions but outside their CRA assessment areas.[91]

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[83] *See generally* Lei Ding et al., *Risky Borrowers or Risky Mortgages: Disaggregating Effects Using Propensity Score Models*, 33 J. REAL EST. RES. 245, 251 (2011), *available at* http://aux.zicklin.baruch.cuny.edu/jrer/papers/pdf/past/vol33n02/05.245_278.pdf.

[84] *See id.* at 246, 248, 250.

[85] *Id.* at 254.

[86] *Id.*

[87] *Id.* at 252, 263–64.

[88] *Id.* at 265 ("The estimated cumulative default rate for a 2004 subprime loan is 16.8%, about four times that of CAP loans (4.2%).").

[89] *Id.*

[90] *Id.*

[91] Elizabeth Laderman & Carolina Reid, *Lending in Low- and Moderate-Income Communities in California: The Performance of CRA Lending During the Subprime Meltdown* 14–16, 19–20 (Fed. Reserve Bank of S.F. Cmty. Dev., Working Paper No. 2008-05, 2008), *available at* http://www.frbsf.org/publications/community/wpapers/2008/wp08-05.pdf.

Moreover, as stated earlier, the subprime mortgage market was generally overwhelmingly dominated by loans originated beyond the reach of the CRA, either because they were extended by institutions not covered by it, or made outside of covered institution's CRA assessment areas. As one study conducted for the Federal Reserve shows,[92] at least ninety-four percent of subprime loans were originated by financial institutions acting beyond the scope of the CRA, either because they were carried out by stand-alone mortgage lenders not covered by the CRA, or were made by covered banks acting outside their CRA assessment areas or to individuals who were not of low or moderate income.[93] With fully ninety-four percent of subprime loans being originated outside of the CRA, it is hard to argue that the CRA could have had much effect on the type of lending that probably played the most significant part in helping to bring about the foreclosure crisis.

B. *Recent Research Purports To Show an Increase in Risky Lending Due to the CRA*

Despite the consistent findings of the studies described above—that the CRA likely did not lead banks to engage in the riskier lending that helped to lead to the subprime mortgage crisis—a recent study[94] conducted under the auspices of the NBER reached a different conclusion.

1. Overview of the Report and Findings

The NBER study looked at lending by banks between 1999 and 2009. It compared the lending practices of banks that were undergoing periodic CRA examinations with those that were not, specifically looking at bank practices during the six quarters surrounding a CRA examination—three quarters before the examination, and three after.[95] It studied lending by banks to low- and moderate-income communities and low- and moderate-income borrowers. It called these low- and moderate-income communities "CRA-eligible tracts"[96] and the study focused on the lending behavior of banks in such tracts, comparing the lending

[92] *See generally* Canner & Bhutta, *supra* note 5.
[93] *Id.* at 3.
[94] *See generally* Agarwal et al., *supra* note 9.
[95] *Id.* at 16 n.17.
[96] *Id.* at 3.

activity of banks that were having examinations and those that were not.[97] By comparing bank performance in such tracts around the time of their CRA examination to the performance of banks not being examined, the researchers hoped to identify and measure what, if any, effect the CRA examination process had on bank behavior—that is, they sought to explore whether the fact that a bank was undergoing a CRA examination led it to engage in riskier lending around the time of the examination in the hope of improving its performance on the CRA examination.

The researchers found that banks undergoing CRA examinations tended to approve loans at a higher rate in CRA-eligible tracts—a roughly five percent higher rate—than banks not undergoing such examinations,[98] and the period when this was most pronounced was in the 2004–2006 time frame.[99] These discrepancies tended to disappear in banks with assets between $1 billion and $50 billion.[100] The study also showed that the delinquency rate of loans made in CRA-eligible tracts by examined banks was somewhat higher than the rate for loans made by non-examined banks in similar tracts.[101] It must be pointed out, however, that the finding of increased delinquencies is arguably misleading in the following sense. As the researchers point out, the general delinquency rate of the loans in examined banks was slightly more than one percent—1.2% to be precise.[102] Loans by banks undergoing examinations had a delinquency rate that was 0.1% higher than banks not undergoing examinations.[103] Loans in CRA-eligible tracts had a delinquency rate that was 0.4% higher than the general delinquency rate.[104]

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[97] *Id.* at 24.
[98] *Id.* at 14.
[99] *Id.* at 22.
[100] *Id.* at 17.
[101] *Id.* at 18.
[102] *Id.*
[103] *Id.*
[104] To quote the NBER study:

> [L]oans made in the quarter following the initiation of a CRA exam to borrowers in non-CRA-target tracts have a 0.1 percentage point higher 90-day delinquency rate as compared to loans made by control group banks. This effect is economically large, representing an 8.3 percent increase in the average 90-day delinquency rate of 1.2 percent. The equivalent effect in CRA-target tracts is even more pronounced: in these tracts, loans made in the quarter following the initiation of a CRA exam have a 0.4 percentage point higher delinquency rate, representing a 33 percent increase compared to the average 90-day delinquency rate.

Finally, the study showed one discrepancy in loan quality between banks undergoing examinations and banks not undergoing such examinations. While many of the characteristics of loans made by examined banks and unexamined banks were similar—for example, they had similar loan-to-value ratios and borrower credit scores—there tended to be more low-documentation loans in CRA examined banks in CRA-eligible tracts compared to non-examined banks.[105] Based on these findings, the researchers conclude that the CRA led banks to engage in risky lending.[106]

2. Critiques of the Report

According to the researchers, the main conclusions to draw from the research are that larger banks—banks with assets over $50 billion—tended to engage in elevated lending to what the researchers call CRA-eligible tracts in the period surrounding a CRA examination, especially during the 2004–2006 time frame, and that the loans made around the time of the CRA examination tended to default at a higher rate than those loans issued by banks not undergoing CRA examinations. There are several questions raised by the NBER report's methodology, however, and each is discussed, in turn, below.

a. Dubious Time Frame

First, this report attempts to gauge the impact of a CRA examination by looking at lending by banks in a time frame that represents the six quarters surrounding each bank's CRA examination—that is, the three quarters immediately preceding the quarter in which the examination occurs and the three quarters following it.[107] This time frame appears to bear little relation to the time frame bank regulators assess when they conduct CRA examinations, however. For example, there is a lag of up to fourteen months between when a loan decision is made and when banks must report their HMDA data to regulators.[108]

Id. Even this thirty-three percent increase represents an increase in the delinquency rate from 1.2% to 1.6%.

[105] *Id.* at 19.

[106] *Id.* at 24.

[107] *Id.* at 16 n.17.

[108] Financial institutions that must report HMDA data must do so by March 1 of the year after which the data was compiled; thus some data, such as data from

Additionally, there is typically a lag in the release of the analysis of HMDA data as well. It is usually released roughly nine months after the year in which it is reported—that is, up to seven quarters after the first data reported in the previous year is tabulated by the banks.[109] Moreover, regulators typically take a retrospective look at bank records when conducting CRA examinations, including all information regarding bank practices since the bank's last examination. In other words, regulators do not just review recent activities of the banks.[110] It is not a "rolling" process, as the NBER study appears to presume.[111]

Finally, depending on the time lag between an announcement of an examinaton and when the examination is actually conducted, the announcement of a CRA examination cannot result in a retrospective change in bank behavior, as this study seems to contemplate. That is, by assessing bank behavior in the three quarters prior to a CRA examination, the researchers seem to believe that there is at least a three-quarter lag between the announcement of an examination and the examination itself. The study offers no basis for such an assumption. Without the facts to support such an assumption, it is difficult to claim that bank behavior preceding a CRA examination—for three quarters no less—will change once banks are made aware that the regulators have scheduled an examination.

January of the previous year, is not reported until fourteen months after it is compiled by the banks. 12 C.F.R. § 203.5(a)(1) (2014).

[109] *See* Press Release, Fed. Fin. Insts. Examination Council, Federal Financial Institutions Examination Council Announces Availability of 2011 Data on Mortgage Lending (Sept. 18, 2012), *available at* http://www.ffiec.gov/press/pr091812.htm (announcing the release of the 2011 HMDA data).

[110] The examination period typically includes all relevant activities by the examined bank since its last examination. Regulators do not stress the months immediately before or after an announced examination in their assessment. *See, e.g.*, COMPTROLLER OF THE CURRENCY, ADM'R OF NAT'L BANKS, LARGE BANK CRA EXAMINER GUIDANCE 7 (2000), *available at* http://www.occ.gov/news-issuances/bulletins/2000/bulletin-2000-35a.pdf (noting the examination period includes all bank activities since the last examination).

[111] One analysis of a sample of twenty banks showed that the period assessed by the regulators typically closed six months prior to the examination data. CAROLINA REID ET AL., UNC CTR. FOR CMTY. CAPITAL, DEBUNKING THE CRA MYTH – AGAIN 5–6 & n.16 (2013), *available at* http://ccc.sites.unc.edu/files/2013/02/DebunkingCRAMyth.pdf.

Thus, this study attempts to identify some sort of "CRA effect" by assessing bank behavior before and after CRA examinations, but it is unclear that the time frame selected for this review bears any relation to the ways that the scheduling of CRA examinations might impact bank behavior. It is hard to argue that a review of loan origination and performance outside the same time frame that the regulators review in the CRA examination process yields information that might indicate how banks might change their behavior in the shadow of that process.

b. Bank Behavior Analyzed

Second, this study looks only at the "acceptance rates" of loans, not at loan volume.[112] Looking only at the acceptance rate of loans using HMDA data says little about whether a bank has originated more loans. It just means that it has accepted more of the applications that have been made to it. A bank can have a 100% acceptance rate of the loan applications submitted to it, and yet make just one loan. What would be far more instructive when assessing whether there is some CRA effect would be to determine loan volume: both the number of loans and the average and total amount of those loans. Just looking at acceptance rates says little about whether the CRA encouraged more net lending, either in terms of loan volume or loan amount.

c. Loan Quality

Third, just as an elevated acceptance rate, standing alone, says little about loan volume, it also says nothing about loan quality, whether that quality is measured by the terms of the loan, the creditworthiness of the borrower, or the performance of that loan. In other words, even assuming that an elevated acceptance rate reflects more net lending, and there is nothing in the NBER study that appears to support such a proposition, in order for any CRA effect to be harmful, the study would have to indicate that there is something about the elevated acceptance rate to give pause, whether in terms of the quality of this elevated lending or something else. Here, the NBER study reveals shaky evidence, at best, that the elevated lending it

[112] *See, e.g.*, Agarwal et al., *supra* note 9, at 31 tbl.2.

identified was of poorer quality. The study explicitly recognizes that loan terms and borrower characteristics were essentially similar between examined banks and unexamined banks.[113]

The one area where this study appears to find some differences between examined banks and unexamined banks is in terms of loan performance. Here, the findings raise similar doubts about their relevance to the CRA examination process. The study found increased delinquency rates in loans, most notably in loans originated in the period after CRA examinations, and, most particularly in the 2004–2006 time period.[114] But this analysis overlooks several important points about the timing of the examination in relation to the loans actually examined. The CRA examination process "closes" before the examination is conducted in terms of the loans the regulators will review during that examination. In addition, there is a time lag in the availability of HMDA data. Thus, the loan performance of loans issued during or immediately after the CRA examination process could not reflect a change of behavior of the examined banks in relation to the CRA examination itself. In other words, if regulators are not reviewing the lending that takes place simultaneous to the CRA examination, it is hard to argue that such lending has been influenced by the examination process.

d. Relevant Geographic Criteria

Apart from these questions—and regardless of whether they identify methodological flaws or not—the report suffers from a significant flaw, one that raises serious doubts about the study's findings. The study substitutes "CRA-eligible" communities for banks' respective CRA assessment areas. Its research analyzes bank activities in the first, but the CRA only covers bank lending in the second. While it is true that bank practices are assessed under the CRA for their lending in low- and moderate-income communities, it is not accurate to say that all of bank lending in low- and moderate-income communities is assessed under the CRA through the CRA examination process. This report looked at lending in "CRA-eligible" communities, but fails to distinguish whether all such lending took place within each bank's respective CRA assessment areas. All low- and moderate-income

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[113] *Id.* at 3.

[114] *Id.* at 22.

communities are certainly CRA-eligible, but not all such communities are found within every bank's CRA assessment areas. Indeed, a bank can make risky loans in low- and moderate-income communities but, generally, regulators will not take such lending into account in a particular bank's CRA examination if those communities are not located within that bank's CRA assessment areas.[115] Again, a bank's CRA assessment areas are those communities in which that bank has branches, ATMs, or does a substantial amount of its lending.[116] Banks are free to make loans in other low- and moderate-income communities and such lending will play little role in those banks' CRA examinations. With modern banking practices, including internet banking, and with mortgage brokers playing an outsized role in the subprime mortgage market,[117] it is quite easy for a bank to engage in any kind of lending, let alone subprime lending, outside of its particular CRA assessment areas. The NBER research includes an extensive analysis of lending in what the researchers call CRA-eligible communities, but no analysis was done to ensure that all of the loans tested in the study were in each lending bank's respective CRA assessment areas.

This design flaw means that the study includes loans that were likely not a part of the regulators' review of the studied banks' CRA performance. It is difficult to argue that loan performance of non-CRA loans—even if to CRA "eligible" communities—says anything about the impact that the CRA had on bank behavior if lending to those communities was not a part of a particular bank's CRA record. Indeed, without knowing

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[115] Although the regulations permit regulators to take into account some lending to low- and moderate-income borrowers outside of a particular bank's assessment areas, the heavy emphasis in the regulations is towards the lending and services banks provide to their respective assessment areas, consistent with the Act's terms themselves. *See, e.g.*, 12 C.F.R. § 345.22(b) (2014). And the statute and regulations do not capture lending to higher income individuals in low- and moderate-income communities if those communities are not within a given bank's CRA assessment area.

[116] *See supra* notes 39–40 and accompanying text.

[117] *Predatory Mortgage Lending: The Problem, Impact, and Responses: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 107th Cong. 255 (2001) (statement of Neill A. Fendly, CMC, Immediate Past President of Nat'l Ass'n of Mortg. Brokers) (stating that half of subprime loans were originated by mortgage brokers).

which loans were actually a part of banks' CRA activities, it is impossible to tell how the CRA may have affected bank behavior and how it did not.

The failure to identify only bank activities covered by the CRA means the outcomes the study found may bear no relation to the influence the CRA had on banks. While it is entirely possible that the bank lending to CRA-eligible communities the study analyzed was all a part of each bank's CRA examination and activities, it is also just as likely that it was not. And if the bank lending this study reviewed was outside the CRA examination process, that might say a great deal about the impact of the CRA on bank behavior; it would just tell a very different story about the impact of the CRA on banks. Indeed, if it turns out that many of the riskier, non-performing loans were made to CRA-*eligible* communities, yet those loans were not a part of each lending bank's CRA review, it means that banks were engaging in riskier loans outside their CRA activities—beyond the reach of the CRA. That is, banks could have been engaging in riskier practices precisely where the CRA did not touch: low- and moderate-income communities not within each bank's CRA assessment areas. If that were the case, then we would know that the CRA provides protections to certain low- and moderate-income communities, but leaves banks free to impose heavier burdens on communities where CRA review will not occur. As several previously cited studies showed, banks otherwise covered by the CRA do appear to have engaged in riskier lending outside of their CRA assessment areas compared to within them.[118]

Unfortunately, given the flaw in the design of this study, the conclusion that those researchers drew—that the CRA had a negative impact on bank behavior because banks apparently responded, at least some banks, during at least one particular time frame, to the fact that they were being examined under the law by increasing the volume of risky loans in low- and moderate-income communities[119]—is no more likely than the very different, potential conclusion described above. That is, without clarifying whether all so-called CRA-eligible tracts are also tracts within the lending bank's CRA assessment area, it is just as possible

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[118] *See, e.g.*, 25TH ANNIVERSARY REPORT, *supra* note 76, at 48; Laderman & Reid, *supra* note 91, at 14–20.

[119] *See supra* Part III.B.1.

that the CRA led to riskier lending inside CRA assessment areas as it led, perversely, to riskier lending outside of those areas. If the researchers did, in fact, identify some degree of riskier lending in low- and moderate-income communities, in order to identify the CRA as a contributing factor in such lending, one would need to ensure that all such lending took place within each lending bank's respective CRA assessment areas.

If riskier lending did in fact occur, in order to blame the CRA for it, one would need to show that such lending took place in banks' assessment areas, not outside of them. Saying a loan was originated in a low- or moderate-income community is not the same as saying that it was made within a CRA assessment area. Indeed, if risky lending took place inside a low- or moderate-income community, yet that community was not within the lending bank's CRA assessment area, that might suggest that the bank was willing to engage in such risky lending in that community precisely because it is not subject to CRA review—because it is outside that bank's assessment area, and thus, outside of regulator oversight under the CRA. Frankly, because of the methodological flaw in this study, the data fail to point definitely to either conclusion—that is, that the apparent riskier lending the researchers identified occurred in light of the CRA, or despite of it. Indeed, if the CRA led to riskier lending by banks outside of the CRA's purview, it would appear that banks were more willing to engage in riskier lending beyond the scope of the CRA, not within it. Accordingly, by failing to identify only loans within CRA assessment areas, the central finding of the study—that the CRA examination process led banks to engage in riskier lending—is called into question.

A simple metaphor can help illuminate this methodological flaw. Consider if federal highway speed limits only applied to certain highways. Let's call them "federally regulated highways." If the federal government lowered the speed limit on such highways to sixty miles per hour but states were free to permit higher speed limits on non-federally regulated highways, and if a study of traffic deaths after the imposition of these lower speed limits showed increased traffic deaths, one would need to know where such traffic deaths occurred—that is, did they occur on federally regulated highways or not? If one did not differentiate between traffic deaths on federally regulated highways and those that occurred outside of those highways, where the speed limit had not been reduced, one could not say that the lowered speed limit caused more vehicular deaths. Indeed, one could easily argue that the lowered speed limit in federally regulated highways caused reckless drivers to move to non-federally regulated highways and to drive at higher speeds there, resulting in more automobile-related carnage. The NBER study seems to suffer from a similar flaw. By not identifying the extent to which the elevated lending they appear to have identified actually occurred in banks' assessment areas, it is impossible to say whether the CRA caused such lending, or, as is also possible, such lending increased only outside of CRA-covered areas. If the research suggests that the elevated lending was, in fact, riskier, and if such elevated lending took place in areas not covered by the CRA, then an argument could easily be made—as with the federal highway standard example—that CRA coverage in those assessment areas led banks to make riskier loans beyond the CRA's coverage.

e. No Connection Between Default Rate and Loan Originations

Similarly, another weakness in the research is that it does not indicate any connection between an elevated number of loans originated and the elevated default rate. In order to establish a connection between the CRA examination and the elevated default rate—a conclusion the researchers appear to reach[120]—there would have to be some connection between the loans that were made in light of the CRA examination and the elevated default rates. If the researchers believe that certain loans would not have been made in the absence of a pending CRA examination, in order to conclude that the CRA led to riskier lending, there would have to be some connection between the loans that would not have been made in the absence of the CRA and the elevated default rate. In other words, one cannot blame the CRA for risky lending if it is not clear that the loans made to satisfy regulators were more risky than other loans not included in the CRA examination.

To return to the highway regulation metaphor: If there were increases in accidents on federally regulated highways, one would need to know whether drivers involved in such accidents were abiding by the speed limit to determine whether the

[120] *See* Agarwal et al., *supra* note 9, at 3.

lowered speed limit had any effect on traffic safety. To say that a small percentage of loans originated around the time of banks' respective CRA examinations defaulted at a higher rate than the loans made by banks not undergoing CRA examinations, one would need to show that this elevated lending led to greater loan delinquency. The NBER study does not attempt to show this.

f. Connection Between CRA Effect and the Financial Crisis

Putting aside the strength of the findings of the NBER study and their relevance to CRA enforcement, one further question remains. In order to connect the supposed CRA effect to the causes of the financial crisis, one would need to connect the lending identified in this study as purportedly caused by the CRA to the overall lending during the lead up to the financial crisis. Even if one were to assume that all of the lending identified in this study did in fact fall within the rubric of the CRA, the question would then remain: To what extent are the results the researchers found really significant in terms of the "big picture"?

The researchers tended to find that the largest effect, if any, the CRA examination process had on lending was during the 2004–2006 period, and there among only the largest banks—that is, the forty-nine banks with assets above $50 billion.[121] This is less than ten percent of the banks in the country, although they are responsible for forty-nine percent of the nation's lending.[122] Other research shows that no more than six percent of the riskiest subprime lending carried out in the height of the subprime mortgage frenzy was even covered by the CRA.[123] The researchers suggest their findings should lead one to conclude the following: (1) the largest banks appear to have increased their riskiest lending in response to the CRA examination process; (2) such increase in lending represented an actual increase in loan volume; (3) the banks did so in their CRA assessment areas; and (4) such lending led to an increase in delinquencies. Even if these findings were all true and apparent from the research, it is not clear that the lending identified represents a significant percentage of the lending that took place during the subprime market's heyday. That is, if all of the new lending identified was higher risk loans, and within each

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[121] *See id.* at 21–22.
[122] Reid et al., *supra* note 111, at 8.
[123] Canner & Bhutta, *supra* note 5, at 3.

reviewed bank's CRA portfolio, then it is possible that what those researchers have identified is a roughly five percent increase in lending within a group of loans that were only six percent of subprime loans. Thus, accepting this study's findings as reflecting actual CRA lending, it is possible that, at most, they have found that 0.3% of all subprime lending was a result of the CRA. In other words, without making an explicit connection between (1) the identified increase in the loan acceptance rate and the CRA, (2) the loan and the lending bank's respective CRA assessment area, (3) the delinquency of such loans, and (4) the volume of lending actually covered by the CRA in relation to the overall volume of lending during the buildup of the mortgage market, it is impossible to determine the role the CRA actually played, if any, in increasing risky lending. The weight of the evidence seems to suggest, still, that its role was marginal, if it had any role at all.

Moreover, comparing the delinquency rate found by the researchers—that loans to CRA-eligible communities seem to have a ninety-day delinquency rate of, at most, two percent[124]—to the national serious delinquency rate—that is, mortgages more than ninety days past due—of nearly ten percent,[125] the loans the NBER researchers appear to have reviewed, and even those purportedly made in the shadow of the CRA, seem to have performed better than loans generally, and far better than subprime loans, which had their own serious delinquency rate of nearly thirty percent.[126] Given that the loans the NBER researchers identified as being originated as a result of the CRA seem to have performed better than the average loan in the 2000s, and much better than subprime loans generally, it is hard to argue that it is these loans—even assuming all of the loans the study identified were covered by the CRA—were riskier than the typical loan extended in the 2000s. Indeed, it is easy to see that

[124] *See* Agarwal et al., *supra* note 9, at 34 tbl.5.

[125] *See* Press Release, Mortg. Bankers Ass'n, Delinquencies and Foreclosure Starts Decrease in Latest MBA National Delinquency Survey (Aug. 26, 2010), *available at* http://www.mortgagebankers.org/newsandmedia/presscenter/73799.htm (noting national serious delinquency rate of 9.11%).

[126] *See* Shane M. Sherlund, *The Past, Present, and Future of Subprime Mortgages* 2 (Div. of Research & Statistics & Monetary Affairs, Fed. Reserve Bd., Fin. & Econ. Discussion Series, Working Paper No. 2008-63, 2008), *available at* http://www.federalreserve.gov/pubs/feds/2008/200863/200863pap.pdf (noting serious delinquency rate of subprime loans of roughly thirty percent).

such loans appear to have been above average in quality, if one simply compares the delinquency rates of the different classes of loans.

C. *The State of the Research*

Thus, while the weight of the evidence appears to indicate CRA-related lending was far less risky than subprime lending, and that the overwhelming majority of subprime lending took place beyond the scope of the CRA, the evidence against these findings has its methodological flaws. Even if one were to accept the NBER researchers' findings, they seem to indicate a minimal impact on the overall rate of subprime lending during the height of the subprime mortgage frenzy. Still, even accepting those findings, the researchers identified loans that performed much better than the typical loan extended during the mid-2000s. Although the evidence seems to exonerate the CRA on whether it caused the financial crisis, the evidence also seems to indicate that some of the charges against the CRA hold up—that is, that the CRA failed to prevent the crisis from having an adverse impact on the communities it was designed to protect. The lack of enforcement of the CRA and the absence of a private right of action for non-regulators to enforce it likely meant that the CRA had little impact of bank practices during the mid-2000s, especially financial institutions not covered by the CRA. As I wrote elsewhere, the CRA was a financial Maginot line: easily circumvented, lightly defended, and quickly overrun.[127]

IV. POTENTIAL AREAS FOR REFORM

There are a number of areas in which the CRA could be reformed to bring it into the twenty-first century and fulfill its mission of encouraging banks to meet the needs of low- and moderate-income communities. For one, the many gaps in coverage of the CRA need to be filled. Second, giving private and public entities the ability to enforce the statute in the courts

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[127] Brescia, *supra* note 27, at 627. As others have pointed out, one of the main drivers of the housing bubble that ultimately led to the financial crisis was not government policies, like the CRA, but, rather, the growth of the private-label securities market, which, itself, was a product not of over-regulation, but under-regulation. *See* Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1228–52 (2012).

would likely give the examination and transaction approval processes more import. If regulators and financial institutions knew the outcome of those processes could be challenged in the courts, such processes might be different in some instances. Third, regulators can, today, use the CRA to strengthen financial institution practices with respect to mortgage modifications. While current regulator guidance states that bank practices in the area of loan modifications can be take into account in the CRA examination process,[128] regulators can begin to give greater prominence to bank performance in this area in that process. Such an emphasis might improve this performance, which is currently fairly woeful. While the first two areas for reform may be difficult to accomplish without legislative action, and few believe reform of the CRA to make it stronger could pass a divided Congress, the third area of reform—taking modifications seriously—could be done through administrative channels, and might be just the stick that is needed to improve bank performance in this area.

A. *Expand the Scope: What it Covers, Who it Covers*

In March of 2009, Democratic Congresswoman Eddie Johnson of Texas introduced the Community Reinvestment Modernization Act of 2009 ("CRMA").[129] The CRMA attempted a significant overhaul of the CRA, including proposing the following changes: extending CRA obligations to affiliates of covered institutions; enhancing the bank rating process by including more potential grades and requiring a separate CRA grade for each bank's individual assessment area; expanding the definition of assessment area; requiring banks that receive low grades in any assessment area to generate an improvement plan; ensuring that communities of color are explicitly covered under the act; and expanding coverage to securities companies, insurance companies, mortgage banks, and certain credit unions.[130]

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[128] *See* Interagency Questions and Answers, *supra* note 7, at 11,645.

[129] H.R. 1479, 111th Cong. (2009).

[130] For an overview of the CRMA, see Raymond H. Brescia, *A CRA for the 21st Century: Congress Considers the Community Reinvestment Modernization Act of 2009*, 28 BANKING & FIN. SERVICES POL'Y REP., Oct. 2009, at 1–15.

While some of the revisions are likely designed to combat the problems in the mortgage market from the 2000s, there is no doubt that the CRA's emphasis on redlining and capital exportation are really concerns from the 1970s. Efforts to modernize the CRA from its conceptualization of banks as bricks-and-mortar institutions that physically take deposits from here and lend there are as quaint in the twenty-first century as the Bailey Building & Loan of "It's a Wonderful Life." Today, financial institutions are global and digital, extending their services into communities where they have no physical presence because of their virtual reach. A CRA that more accurately reflects how financial institutions operate today is necessary, and some of the CRMA's provisions, like those that expand the definition of CRA assessment areas, are critical. But the chances of passage of the CRMA have dimmed.

The CRMA never came up for a full vote in Congress.[131] And its prospects in the Republican-controlled House of Representatives are non-existent. It is possible that a watered-down version of the legislation, one that makes the CRA examination process easier on financial institutions that score well on their CRA examinations and includes some of the CRMA's modernizing provisions, might enjoy bi-partisan support, but such a bill has yet to be introduced by representatives in either party. Reform today is likely to come from the bank regulators, who can take some action without congressional approval, an issue taken up again in Part IV.C.

B. *Private Right of Action*

The absence of a meaningful way for private individuals to enforce the CRA's protections is particularly salient in the wake of the financial crisis, when private and public litigants have used litigation and the threat of civil and criminal penalties to force banks to take remedial action for some of the worst lending practices during the buildup of the subprime mortgage market. In the lead up to and fallout from the recent financial crisis, risky bank practices clearly had adverse impacts on low- and moderate-income communities, particularly communities of

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[131] *See H.R. 1479 (111th): Community Reinvestment Modernization Act of 2009*, GOVTRACK.US, http://www.govtrack.us/congress/bills/111/hr1479#overview (last visited Aug. 23, 2014).

color,[132] in apparent violation of the spirit of the CRA. If law enforcement officials and private litigants had had the ability to enforce the CRA through the courts, perhaps that would have provided an additional tool to protect low- and moderate-income communities from harmful bank practices. With the federal agencies tasked with enforcing the CRA susceptible to agency capture, a phenomenon that some suggest occurred in the mid-2000s just as the subprime mortgage market was overheating,[133] having more entities in the enforcement mix may have meant that harmful bank practices would have been exposed through channels other than the bank examination process, itself completely in the hands of those very agencies susceptible to capture.

Of course, enforcement of the statute in its current form would likely do little to improve bank practices in low- and moderate-income communities, and would have had little impact on improving the practices that led to the foreclosure crisis. Most importantly, if the CRA covered very little of the lending that led to the crisis, it is hard to argue that a CRA enforceable through the courts would have had much of an impact on financial institution practices not covered by the Act. What's more, the terms of the CRA leave little by way of standards for courts to enforce. As with the enforcement campaign in the wake of the so-called Robo-Sign Scandal, however, certain practices, even if they do not appear to directly violate the letter of a particular statute, were brought under enforcement efforts to pursue common law and general statutory provisions which outlawed "unfair and deceptive practices."[134] Similarly, it is fairly easy to see that practices like predatory subprime loans, with onerous terms that were marketed to and for low- and moderate-income communities, and unquestionably had a harmful effect on such communities, were not consistent with meeting the needs of such communities, nor were they consistent with safe and sound

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[132] *See supra* Part II.A.

[133] *See, e.g.*, Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL'Y REV. 369, 384–89 (2009) (describing the "revolving door" concept in financial regulatory agencies during the mid-2000s).

[134] For a description of the legal claims underlying the Robo-Sign investigation, see Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 ME. L. REV. 17, 27, 34–38 (2011).

banking practices. Indeed, given the ultimate impact of such practices on the health of many financial institutions, it is fairly easy to see that they were the opposite of safe and sound.

Like with the CRMA, however, congressional action is likely necessary to create a private right of action under the CRA. While the prospects for such action might be slim, one avenue for this reform would be to encourage state legislatures to pass amendments to their own state CRA corollaries.[135] If states that have their own CRA statute were able to explore this avenue and amend those statutes to provide for a private right of action, it could give private and public entities, like state attorneys general, an opportunity to inject themselves into state-based community reinvestment reviews where they occur. It would also allow these prospective litigants to explore their role in the compliance process and provide a testing ground for these types of actions, perhaps opening the door for federal action on this front.

C. *Improve Loan Modification Performance*

Finally, one potential area for reform that does not necessarily require congressional intervention would be for the administrative agencies charged with enforcing the CRA to take seriously bank performance in modifying underwater loans. While the extant inter-agency guidance on the CRA recognizes that the regulators can take into account covered banks' practices regarding loan modifications,[136] the poor record of banks modifying loans indicates that regulators are not necessarily using this authority to apply pressure on banks to improve performance in this area. While efforts in Congress to give consumers the ability to modify their mortgages in bankruptcy court have failed,[137] regulators can use the CRA examination process and the application review mechanism to apply more pressure on financial institutions to modify more loans. This can be accomplished through administrative action, and does not require congressional approval. For now, one of the most pressing financial issues facing low- and moderate-income communities is the weight of underwater mortgages. Vigilant

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[135] *See, e.g.*, Banks and Banking—Rules and Regulations—Technical Corrections, 2013 Sess. Law News of N.Y., ch. 227, A. 7213-A, § 28–b (McKinney).

[136] *See* Interagency Questions and Answers, *supra* note 7, at 11,645.

[137] *See* 155 CONG. REC. 31,367–70, 31,414–15 (2009).

enforcement of the spirit of the CRA by regulators in the area of mortgage modification can help fulfill the CRA's goal of encouraging financial institutions to meet the credit needs of the communities the law was designed to protect.

CONCLUSION

As the previous discussion shows, the CRA played no appreciable role in causing the present financial crisis. The true indictment of the statute, however, is that it failed to insulate low- and moderate-income communities from the harshest impacts of the crisis. While modernization of the CRA is necessary so that it can more closely reflect the realities of the financial system of the twenty-first century, any significant overhaul will require congressional action, and it is unlikely that Congress, in its current makeup, will support an effort to strengthen the Act, either by expanding its scope or providing for a private right of action to enforce its terms. At the same time, the administrative agencies charged with enforcing the CRA can take steps today to ameliorate some of the harshest consequences of the crisis and use the CRA examination and application process to apply more pressure on banks to modify more mortgages on terms that are just.