To be Free: Liberty, Citizenship, Property, and Race

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Voltaire once described history as a pack of tricks that the present plays on the past. He failed to mention that the people of the past have their own dissembling pranks. The most troublesome for historians is the tendency to change without notice the meaning of words. Whole new concepts can take shape behind an unvarying set of terms.¹

INTRODUCTION

"Nothing is static or uncontested and the relevance of the Founders (or of the eighteenth or nineteenth centuries altogether) to current conflict is sometimes opaque. Still there are patterns and even structures—sometimes weighty, sometimes just nightmares weighing upon us."² Although the issue is still debated, some scholars believe one such "weighty pattern" is the wedding of American law to the secure guarantee of property and liberty. A number of Founders believed equal access to property was necessary to enable individuals to exercise liberty and become self-sufficient. Without property, they believed people would be cast into a dependent status unable to fully exercise the rights and opportunities of citizenship as guaranteed by the Constitution. Although far removed from the historical ideal of productive property, a present day manifestation of this is property in the form of home ownership. Owning a home is the essence of the "American dream."

However, another "weighty pattern" also emerges—the failure to provide to all members of society an equal opportunity to secure the rights and privileges of citizenship which come with property ownership. Overwhelming evidence documents current and persistent inequality in access to property ownership for some in our society.³

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³ The gap between African American home ownership and white home ownership is
Despite a dramatic increase in home ownership rates, academics and housing experts continue to document discriminatory housing and lending practices. An enduring history of housing and lending discrimination in this country scarred the lives of millions of families seeking the dreams and aspirations of most Americans—to own property and to have a home. Unfortunately, such practices remain with us and are continued not only through intentional acts of discrimination, but through non-intentional institutional practices which reflect our learned history. The discriminatory practices are particularly problematic for African Americans.

This Article explores how legal and social constructions—the ownership of productive property as central to a person’s independence—of a racially segmented system of property ownership and access to credit have discriminated against African Americans. Such discrimination thereby ensured their exclusion from the rights and opportunities of republican citizenship.

Part I explores the interpretation of the republican vision of citizenship which focuses on ownership of productive property as central to one’s independence and self-sufficiency. Within this interpretation, the definition of productive property includes the ownership of land, tools, equipment, and workplaces that create use and exchange values. Hence, liberty and the ability to obtain the full benefits of republican citizenship were linked intrinsically to productive land ownership and the right to become a co-creator in the shaping of the country’s public life. This interpretation provided support for attempts to seek wide distribution of such property ownership among the citizens. Part I also traces the development of legislative acts and case law reflecting signs of the republican citizenship vision and thereby showing how the acts and cases protect open access to property and define the bundle of rights that constitute and protect ownership.

Part II explores the erosion of this interpretation of republican citizenship that occurred within the developing capitalist market economy in the United States. This Part argues that as the material means for universal productive property ownership diminished for most citizens, elements of the republican vision, emphasizing wide distribution of productive property as the basis for self-sufficiency and liberty, would continue to influence public policy debates and political struggles. In particular, since the Great Depression and the New Deal, the republican vision underwent a neo-republican citizenship synthesis, which integrated home ownership, employment and access to credit as a new foundation for independence, self-sufficiency and participation.

Part III details the history of the social and legal constructions of a system of property ownership and access to credit which has discriminated against African Americans. This system ensured their exclusion from the rights and opportunities of republican citizenship and its neo-republican synthesis.

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statistically significant at all levels of household income. Scholars have suggested that the primary reason for the disparity is racial discrimination in real estate and lending practices. See Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth 109 (1995).
Part IV considers the extent to which a system of racial segregation and discrimination still endure, despite the existence of the Fair Housing Act and the Equal Credit Opportunity Act, both of which were designed to remedy those flaws. Part V questions the country’s commitment to dismantling the racially segmented system of access to property and credit by exploring federal circuit and Supreme Court interpretations of provisions of these statutes and the standards of proof required to establish a claim. In Part VI, the Article concludes with suggestions for reforms which may assist in alleviating obstacles to enjoyment, by African Americans, of the promise envisioned in this interpretation of the neo-republican vision of citizenship.

I. CITIZENSHIP AND PROPERTY

A. Liberty, Republican Citizenship, and Property

Contemporary scholars are engaged in a conversation about the nature and meaning of property in the political discourse existing during the formative period of the nation’s history. One particular focus of this conversation is the interpretation of the republican and liberal visions of citizenship, property, the role of the state and the relationship between republican and liberal thought. John Jay said, “The people who own the country ought to govern it” and “power always follows property.” He felt that only property ownership guaranteed independence of judgment and action. John Trenchard wrote, “[A]ll Men are animated by the Passion of acquiring and defending Property, because Property is the best Support of that Independency, so passionately desired by all Men.”

Although debate on the most fruitful interpretations of the European republican tradition continues, the ownership of productive property and the protection of property rights play a central role. Specifically, the European ruling class saw the ownership of productive property as the
basis for self-sufficiency and independence. Moreover, ownership of productive property was believed essential to "public happiness," participation in republican citizenship and becoming co-creators of the public life of the country. Some writers suggest that this concept of ownership was so essential to the meaning of republican citizenship that a structure was required to guarantee every citizen the right to acquire property. In some interpretations of republicanism, that guarantee meant ensuring an equality of condition and stabilizing the property ownership patterns that had been established. In other interpretations, it meant ensuring minimal universal access to the ownership of productive property to all citizens. State intervention through legislation and regulation to achieve these ends was considered a necessity to ensure this opportunity. Participants in the debates leading to the ratification of federal and state constitutions in the 1780s and 1790s had other thoughts on these questions. For example, Thomas Jefferson supported the wide distribution of property and the protection of existing property rights. Gouverneur Morris argued that opportunities to acquire property needed to be created and protected. "Give the votes to people who have no property, and they will sell them to the rich, who will be able to buy them." In a draft of the Virginia Constitution, Thomas Jefferson proposed that:

Every person of full age neither owning nor having owned [50] acres of land, shall be entitled to an appropriation of [50] acres or to so much as shall make up what he owns or has owned [50] acres in full and absolute dominion, and no other person shall be capable of taking an appropriation.

During the Constitutional Conventions, others asserted the importance of the connection between property, liberty and citizenship. John Adams said, "Property must be secured, or liberty cannot exist." In the Federalist Papers, Alexander Hamilton predicted that Congress would be largely composed of "proprietors of land, of merchants, and of members of the learned professions." Under English law, only property owners participated in political affairs. Consequently, some of the delegates to the Constitutional Con-

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10. See generally Abraham, supra note 2 and Horwitz, supra note 5.
11. For a full discussion of the tension and contradictions in the concepts of property in the republican vision, see Alexander, supra note 4.
12. Id.
15. Supra note 13, at 362.
17. Quoted from A Discourse on Davillia, in THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1851).
vention favored establishing a property requirement for suffrage and membership in Congress.\textsuperscript{20} In the end, the Constitution left this determination to the states to decide.\textsuperscript{21} Subsequently, almost every state imposed some qualifications on the right to vote and hold office. Some states made real property ownership a requirement of suffrage while others required a real property holding in order to qualify to seek public office. The rationale went beyond a philosophical view that property\textsuperscript{22} constituted a safeguard of liberty. The acquisition and protection of private property was essential to the future economic growth and stability of the country.\textsuperscript{23}

The authors of the \textit{National Experience}\textsuperscript{24} noted that in the eighteenth century only property owners had the right to participate in the democratic process of voting. If the major purpose of government was to protect property, then a man without property was thought to have little stake in society. Some also believed that “only property could free a man from the control of employers or landlords.”\textsuperscript{25} Clearly, property was the integral link to liberty of action and freedom, for without it, one could be subject to control or manipulation. This belief in the role of property fueled advocacy for a wide distribution of property. The sentiment was, “if America were to become like Europe, with a mass of propertyless workers and peasants, liberty would fall with equality and authority concentrated in the hands of a few [and it] would turn into tyranny.”\textsuperscript{26}

B. Productive Property and Republican Citizenship: Potential Contradictions

Power always follows property. Property widely distributed among the people holds the line against pernicious concentration of power.\textsuperscript{27}

One challenge to the republican vision revolves around the embodiment of seemingly contradictory themes. Contrast the protection of private property, capital accumulation, and economic growth with the creation and preservation of a rough equality of condition among all citizens through productive property ownership. Professor Gregory Alexander argues that republicanism was full of such “unreconciled dialectical tensions between individual rights and societal goals, stability of ownership and wealth distribution, historical continuity and change.”\textsuperscript{28} The attempts at reconciling these “contradictions” would play out over the next 200 years in many arenas. It would be debated in the legislatures, courts and through the struggles of citizens in their everyday lives.

\textsuperscript{20} Supra note 16.
\textsuperscript{21} Id.
\textsuperscript{22} See, e.g., James W. Ely, Jr., \textit{The Guardian of Every Other Right} 47 (1992).
\textsuperscript{23} Clinton Rossiter, 1787 \textit{Grand Convention} 42–57 (1966).
\textsuperscript{25} Id. at 131.
\textsuperscript{26} Id.
\textsuperscript{28} Alexander, \textit{supra} note 4, at 273.
C. The Infrastructure of Republican Citizenship: Universalizing Opportunities for Property Ownership

"The success of the American experiment rested on the property-holding success of many individuals."29 Freedom to pursue opportunities for land acquisition and economic advancement was deeply entrenched as a founding principle of our developing state and national government. Although not everyone prospered in colonial society, the potential dream of economic advancement and land acquisition was placed within the reach of most colonists, whether they migrated as free persons or indentured servants. However, some groups were excluded from this vision.30

Economic advancement has been exalted as essential to the full participation of Americans as citizens. The availability of millions of acres of land in the new nation and the initially small freeholder population gave rise to a series of legislative and legal decisions, which encouraged and promoted the ownership of homesteads and the easy transfer of property.31 At the center of this strategy of the prerevolutionary state, postrevolutionary state, and federal government was the passage of legislation to facilitate the divestiture of millions of acres of public land. For example, during the colonial period, servants (indentured or not) were given "freedom dues" at the end of service.32 These dues included clothing, food, tools and, until 1663, fifty acres of land.33

In furtherance of this strategy, Congress passed 375 land laws in approximately-fifty years. Included were laws "adjusting the size of lots for sale, shifting the price per acre, altering the requirement for cash payments, adding the option of credit, and granting the rights of preemption in specific regions."34 Significant enactments, beginning with the Northwest Ordinance of 1787, provided the framework for the development of lands west of the original states. The purpose of the ordinances was to

29. Limerick, supra note 27, at 58.
30. This Article does not seek to explore the specific ways that land was acquired by the state, national government and individuals. The governmental accumulation of land came through conquest and expropriation of lands held in various forms of ownership by indigenous populations. There is a substantial body of research documenting the process of disenfranchisement, expropriation, denial and limitations placed upon property ownership for different groups.

For a discussion of women and issues of status under the law, see Sandra L. Rierson, Race and Gender Discrimination, 1 Duke J. Gender L. & Pol'y 89, 91 (1994). On women as property, see Loraine P. Eber, The Battered Women's Dilemma, 32 Hastings L.J. 895 and Bettina Aptekeker, Woman's Legacy 123 (1982).

On the process of disenfranchisement of those of Mexican descent, see Guadalupe T. Luna, Agricultural Underdogs and International Agreements, 26 N.M. L. Rev. 9, 12 (1996).

On the plight of the American Indian and land retention, see generally Arthur H. De Rosie, Jr., The Removal of the Choctaw Indians (1st ed. 1970) and Grant Foreman, Indian Removal (1972).

33. Id.
34. Limerick, supra note 29, at 61.
divest public land and to create a process leading to statehood.\textsuperscript{35} This divestiture of public land culminated in the 1862 Homestead Act.\textsuperscript{36} By the end of the nineteenth century, hundreds of millions of acres of federally held, public land were sold or given away to state governments, settlers, railroads, squatters and land companies.\textsuperscript{37}

D. A New Property Rights Framework

Coinciding with the universalizing elements of public land divestiture was the development of legislation and common law that facilitated the transformation of land into a special commodity with provisions that gave squatters the right to possession and protected homesteads from creditors.\textsuperscript{38} For example, the development of the homestead exemption protected specific items from seizure for debts.\textsuperscript{39} The mechanics’ lien protected those who added tangible value to real assets and provided an alternative line of credit to small property owners.\textsuperscript{40} Similarly, adverse possession acts adopted and streamlined by a number of states reduced the statutory period of time necessary to establish possession.\textsuperscript{41}

While the process of commodification and divestment proceeded, providing opportunities for thousands of citizens to acquire property, this same infrastructure also enabled speculators and those with wealth to substantially enlarge their holdings. For example, under the provisions of federal statutes, the railroads came into possession of approximately 130 million acres of land in the nineteenth century.\textsuperscript{42} Public policy and new laws which created a framework supporting the concept of republican citizenship also created the framework that led to the increased concentration of wealth in a new institution: the corporation. In addition, this disbursement of land accelerated the development of a market economy and reduced the number of citizens who could own productive property.\textsuperscript{43}

II. DEVELOPMENT OF A NEO-REPUBLICAN VISION OF CITIZENSHIP

A. The Erosion of the Republican Citizenship Ideal: The Decoupling of Productive Property from Citizenship

With the further development of the market economy in the United States and the creation of new methods of production utilizing the capitalist form of ownership and production, increasing numbers of house-

\textsuperscript{35} Gates, supra note 31, at 72–75.
\textsuperscript{37} Id.
\textsuperscript{38} See Horwitz, supra note 31 and Henry W. Farnam, Chapters in the History of Social Legislation in the U.S. to 1860, at 148 (1938).
\textsuperscript{39} For example, tools and livestock were protected. See Farnam, supra note 38, at 148–52.
\textsuperscript{40} Id. at 152–56.
\textsuperscript{41} See Friedman, supra note 32, at 413.
\textsuperscript{43} See generally Dick, supra note 36 and Gates, supra note 31, at 765–75, on the tensions between various interests to control land. On the development of the corporation in law and its importance, see Horwitz, supra note 31, 109–39.
holds were forced to enter wage work.\textsuperscript{44} Boom-and-bust economic cycles, as well as undercutting price methods used by independent producers, reduced the cost of goods and services in many sectors. Increased competition forced the individual suppliers out of business, increasing the number of wage workers in the United States.\textsuperscript{45}

The transformation was so dramatic that by the end of the nineteenth century fewer than one-third of households held productive property as compared to estimates of sixty to eighty percent at the beginning of the century.\textsuperscript{46} "The village blacksmith shop was abandoned, the roadside shoe shop deserted, the tailor left his bench; many such mechanics left their rural homes and went to the cities, where large factories had been erected."\textsuperscript{47} Increasing numbers of households could not generate enough income to sustain themselves, and they were driven into factories or agricultural wage labor to generate income.\textsuperscript{48} The country was becoming exactly what the framers cautioned against—a nation made of primarily propertyless citizens.

With a growing population of wage employees working in or upon property owned by another, significant tensions and fundamental questions arose about the rights of citizens with property and the rights of citizens without productive property.\textsuperscript{49} Wage employees sought to organize themselves for protection and bargaining leverage in the new environment, but the courts often ruled that such actions constituted an invasion of the property rights of business.\textsuperscript{50} Although the number of wage workers was rapidly increasing, interpretations of property law highly favored owners of productive property rather than the development of new rights for wage employees.\textsuperscript{51}

B. Wage-Employment, Property, and Citizenship

While the rights of those who owned productive property were strengthened and expanded, those of wage employees were subsumed under the law of contracts.\textsuperscript{52} In this view, wage employees did not have a property interest in their jobs and no bundle of property rights laws protected their relationship with employers. Important aspects of employment such as wage rates, working conditions and working hours became "property


\textsuperscript{45} GORDON \textit{et al.}, supra note 44, at 48–162.

\textsuperscript{46} These figures exclude slaves, indentured servants and women headed households. See, e.g., JACKSON TURNER MAIN, \textit{The Social Structure of Revolutionary America}, 1965, at 68–196, 270–87; see generally ALICE HANSON JONES, \textit{The Wealth of a Nation to Be} (1980) (providing a detailed analysis of wealth and land ownership).

\textsuperscript{47} TERENCE V. POWDERLY, \textit{Thirty Years of Labor}, 1859–1889, at 20–21 (1889).


\textsuperscript{50} See, e.g., FORBATH, supra note 49 and Seymour v. Delany, 3 Cowers 445, 533 (1824).

\textsuperscript{51} FORBATH, supra note 49, at Appendix A, B, C.

\textsuperscript{52} See, e.g., Godcharles v. Wigeman, 113 Pa. 431, 6 A. 354 (1886) and Johnson v. Goodyear Mining Co., 27 Cal. 4, 11–12, 59 Pac. 304 (1899).
rights" of the industries' owners and businesses and were not subject to external intervention by the state.

In contrast, the courts found the workers' attempts to influence the terms and conditions of employment through collective action to be an infringement of the owners' property rights. The seminal case articulating this view was the decision by the Supreme Court in *Lochner v. New York*. One consequence of this case was confirmation of the gulf between liberty and the ownership of productive property with attendant implications for access to the republican ideal of liberty and citizenship for a growing majority of citizens. The primary means by which most citizens were to earn an income—wage labor—was not invested with rights comparable to ownership of property. At the same time, access to ownership of productive property was declining dramatically. The republican vision of citizenship, Jefferson's vision of the citizen-producer, had become a national folk ideal, but in practice, for a growing majority of citizens, this vision had become an impractical hope. The definition of republican citizenship was changing. Instead of an owner of the productive homestead, the male citizen was now pictured as owning the "home," where he was "free" from direct interference in his consumption and use of space and his control over others in his household. The ideal citizen, a producer/owner who both created value and used the newly created wealth, was replaced by the wage employee who produced use-exchange values for someone else. Independent, self-sustaining income from the ownership of use-exchange values was replaced by income derived from wage work. Therefore, building home equity became the primary way that most working and middle-class households could hope to accumulate property.

Home acquisition became the project of a lifetime and could only be achieved through the extension of credit. To buy a home, most households obtained mortgages from savings and loans, banks and credit unions. However, before the collapse of the housing industry during the Great Depression and the development of the New Deal programs, it was difficult for working and middle-class families to obtain mortgages without onerous terms. Loan terms were reportedly as low as one, five or ten years and down payments as high as thirty-three percent. It is also clear that the lending institutions practiced extensive and varied discrimination in lending. Even so, the total amount of mortgage debt held by lending institutions was estimated to have grown from $5.01 billion to $24.5 billion between 1913 and 1931.

In addition, the Great Depression threw millions of people out of work. Many were pushed further into debt and, for some, it meant the

54. 198 U.S. 45 (1905). The Court struck down a New York law that regulated working conditions in bakeries, stating that it violated the due process clause of the 14th Amendment.
55. See, e.g., Dick, supra note 36.
56. Savings and loans, banks, and credit unions were relatively unregulated, compared to current standards, and they practiced various kinds of discrimination in lending. See *Harvey Green, The Uncertainty of Everyday Life*, 1915–1945, at 92–100 (1992) and Abrams, *The Revolution in Land* 97–115 (1939).
57. Id.
58. Abrams, supra note 56.
loss of their equity and/or their homes.\textsuperscript{59} The status of the citizen as yeoman independent-producer was moving further from an ideal and closer to a practical fiction.

C. The Reconstruction of the Republican Citizenship Idea: The Neo-Republican Synthesis

Thus, property performs the function of maintaining independence, dignity, and pluralism in the owner . . . . The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis, the Bill of Rights depends on the existence of private property.\textsuperscript{60}

According to the neo-republican citizenship synthesis, despite the demise of widely dispersed productive property in America, stable, working and middle-class homeowners resting on their residential property holdings could still be the bedrock of the nation. They were citizens who took pride in their community, worked hard, paid taxes and were members in good standing in their homeowners' associations. Three central premises undergirded this synthesis: availability of employment, access to credit and the right to buy and sell property.

The first premise was the availability of employment. Work must be available to pay a living wage with income and benefits sufficient to provide the households both self-sufficiency and a surplus to be invested in the purchase of a home or other income-producing investments. Unlike the original notion of productive property, the new synthesis acknowledged the replacement of ownership of productive property with wage employment that provided an income stream. Equally important was the second premise: access to credit. With the historic end of the divestiture of public land and the transformation of property rights, the principal way that a citizen/household could acquire equity was through the purchase of a home, and access to credit would be the single-most important element in that process. The third premise was the right to buy and sell property anywhere in the country.

The neo-republican citizenship synthesis offered a new way to realize the framers' notion of the ideal citizen.\textsuperscript{61} In the face of social structures that denied the majority access to productive property essential to republican citizenship, the synthesis represented an effort to modify past conceptions of the property-liberty linkage to make possible the attainment of independence and self-sufficiency by a majority of citizens.

Public policy and legislation, from the depression era through the G.I. Bill of Rights, provided the financing and public policy infrastructure of the synthesis.\textsuperscript{62} In both public and private sectors of the economy, strong

\textsuperscript{59} Id. at 230–70.

\textsuperscript{60} Charles Reich, \textit{The New Property}, 73 YALE L.J. 733 (1964).


\textsuperscript{62} During the depression, the federal government initiated an almost bewildering number of programs and legislative initiatives to address the collapse of the real estate
invocations of the virtues of the middle-class homeowner, fueled by massive public investments in low-interest credit (e.g., loans for housing and college), dramatically increased the number of people who became homeowners. Similar to the legislative enactments that ended with the Homestead Acts in the 1860s, the G.I. bills and depression era housing acts had a profound impact on the development of the new suburbs and inner-city development in the modern period. By the end of the 1950s, the new modern “yeoman farmer” equivalent was firmly in place in the culture as the model “average” citizen homeowner.

A home ownership opportunity for every household, stable decent-paying employment and the chance to live anywhere that was affordable became the new homestead strategy. However, the implementation of this strategy was not uniform. A significant exception was the sustained and intentional public and private discrimination against African Americans.

III. THE SOCIAL AND LEGAL CONSTRUCTION OF DISCRIMINATION IN PROPERTY AND ACCESS TO CREDIT: THE AFRICAN AMERICAN STORY

An intellectual, social, and legal framework developed to support the universal opportunity for millions of households headed by white males to own residential productive property and to invest such men with property rights anywhere in the country they could afford to locate. But the African American experience was radically different. First, having begun life in America as property for other Americans, the citizenship
status of "free" African Americans was continuously problematic. Second, in the wake of post-emancipation anxiety, intellectual and theological theories and social practice soon established the "inherent inferiority" of African Americans in law and culture. This provided the significant rationale for the segregation of African Americans from whites in all spheres of social life and would prove difficult to dislodge for generations to come.

A. Slavery and Anti-Liberty

Until emancipation, the overwhelming majority of African Americans were enslaved and treated as property, not citizens or immigrants eligible for citizenship. Therefore, they could not own property and had no legal title to anything they acquired. African Americans also were clearly perceived as inferior, and the Supreme Court in Dred Scott v. Sandford supported this view as fundamental law.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute, and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Less than three percent of African Americans were "free." The situation for "free" African Americans was somewhat more complex, given their ambiguous citizenship status. Citizenship in the United States was interpreted by the courts and legislature to be located in the states, not nationally. States, therefore, had wide discretion as to how they treated and recognized persons living inside their borders. In a number of states, laws were passed to restrict the ability of African Americans to buy and own property. African Americans did not fare any better with the federal government.

68. See, e.g., NIEMAN, supra note 66, at 24.
69. 60 U.S. 393 (1856).
70. Id. at 407.
71. See GATES, supra note 31 and DICK, supra note 36.
72. See SCHWENINGER, supra note 65, at 144-66 and NIEMAN, supra note 66, at 20-29.
73. See NIEMAN, supra note 66, at 20-29.
74. See HARRIS, supra note 65, at 8 and SCHWENINGER, supra note 65, at 61-141.
At the federal level, specific legislation was enacted to deny African Americans the rights of republican citizenship. For example, in 1790, Congress established regulations for immigrants to become naturalized citizens, but African Americans were excluded.\textsuperscript{75}

In the act that created the Oregon territory, African Americans were denied the right to claim federal land there.\textsuperscript{76} State and federal provisions severely limited the opportunities for African Americans to participate in the republican vision.

B. Universalizing Land Ownership: The Divestment of Federal Land

Given the exceedingly small numbers of “free” African Americans, the confusing state of their citizenship and the property status of the rest, it is not surprising that few African Americans were able to take advantage of the important public land divestitures.\textsuperscript{77} Most of the African Americans who migrated West, to attempt to participate in the land programs, had minimal or no resources to access the “free” land.\textsuperscript{78} Those who were able to put together some savings often could not acquire credit to assist in making the payments.\textsuperscript{79} Those who did purchase property were subject to mob action for being too “uppity.”\textsuperscript{80}

By 1870, after the most significant period of public land divestiture in the history of the United States, the percent of free African Americans who owned real estate was approximately 11%,\textsuperscript{81} while more than 97% of African Americans in the United States remained the property of another.\textsuperscript{82}

C. Forty Acres and a Mule: African American Attempts at the Construction of a Republican Citizenship

[I]f the strict law of right and justice is to be observed, the country around me is the entailed inheritance of the Americans of African descent, purchased by the invaluable labor of our ancestors, through a life of tears and groans, under the lash and yoke of tyranny.... The way we can best take care of ourselves is to have land, and till it by our labor....\textsuperscript{83}

With the end of the Civil War and the passage of the Thirteenth Amendment, the question of what to do with freed African Americans was at the center of the debate about the repatriation of the Confederate States and the disposition of confiscated property. For African Americans, there were no questions: redistribute the land, provide them the opportunity to become property owners free from landlords and former slave

\begin{itemize}
\item \textsuperscript{75} Nieman, supra note 66, at 20.
\item \textsuperscript{76} Limerick, supra note 27, at 278.
\item \textsuperscript{77} Dick, supra note 36, at 167.
\item \textsuperscript{78} Id. at 254, 259.
\item \textsuperscript{79} Schweninger, supra note 65, at 61-96.
\item \textsuperscript{80} Donald L. Grant, The Way It Was in the South 146-48 (1993) and Schweninger, supra note 65, at 79-80, 151-52.
\item \textsuperscript{81} See Schweninger, supra note 65, at 147-48.
\item \textsuperscript{82} For an extensive review of the land acts through the end of the 19th century, see Gates, supra note 31 and Dick, supra note 36.
\item \textsuperscript{83} Howard Zinn, A People’s History of the United States 192-93 (HarperPerennial 1995) (1980).
\end{itemize}
owners and protect their newly gained freedom of movement.84 The freedman believed that owning land would bring independence. Special Field Order No. 15, tax foreclosure sales and the 1866 Southern Homestead Act all demonstrated the brief promise of property distribution open to African Americans during Reconstruction.

In 1865, William T. Sherman issued Special Field Order No. 15, which designated within South Carolina the entire southern coast land and thirty miles inland for exclusive settlement by former slaves. Each freedman’s holding would be limited to no more than forty acres of land. By May, nearly 49,000 former slaves had moved to the area and taken up initial stakes. By the winter of 1865, President Johnson, who had pardoned former Confederates and had ordered that they must have their property and property rights fully restored, rescinded Sherman’s order and sent troops to remove the former slaves.85 Consequently, the Freedman’s Bureau, which was authorized under the confiscation laws86 during the war to take possession of land and lease it to the former slaves, was ordered by President Johnson to surrender the land to owners who had received pardons and to stop any further seizure of land, vitiating some of the gains made by the freedmen.87

A second opportunity for redistribution was provided by tax foreclosure sales. For example, in 1863, over 16,000 acres of land became available on the South Carolina South Sea Islands from tax foreclosure. Hundreds of former slaves sought to purchase property there, but the cost was prohibitive. Consequently, only 2000 acres were secured by former slaves.88

A third example was the 1866 Southern Homestead Act. The Act reserved all public lands in Alabama, Mississippi, Louisiana, Arkansas and Florida for homesteading.89 Forty-seven million seven hundred thousand acres were made available first to citizens who were loyal to the Union and then to others.90 Homesteads ranging from 80-acre tracts up to 160-acre tracts were approved under the Act.91

While there were multiple motivations for passing of the Act, a number of legislators hoped the Act would provide property ownership and independence for the freedmen.92 However, this did not occur. Almost all the land was considered refuse and had little promise as “productive property.” Most of the desirable public land was sold in the public land sales before the war.93 Also, homesteading entailed start-up costs that most freedmen could not afford.94 The Act was repealed in 1876, with only an

85. See FONER, supra note 84, at 70–71, 153–64.
86. Id.
87. See NIEMAN, supra note 66, at 60 and FONER, supra note 84.
88. See ZINN, supra note 83, at 192.
89. GATES, supra note 31, at 413–14, 443–47.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
estimated 4,000 freedman households having acquired homes of their own.95

In effect, the new freedmen had been articulating a republican citizenship theory. However, the policy of the former Confederate States and federal government to deny the emancipation of the slaves was ultimately intended neither to redistribute Confederate land to African Americans nor establish an independent Jeffersonian citizen class of African Americans. Rather, the policies and intent of these governments were designed in a complicated fashion to establish both a free wage labor or a new enthralled status for African Americans and to reestablish the status of former Confederate landowners by giving their lands back to them.96

Freedman continued to try to purchase property,97 but opportunities were severely limited by the imposition of segregation.98 Legislation and war enactment orders that initially provided former slaves access to property ownership tools and equipment were either overturned, repealed, or let to lapse out of existence.99 By the end of the nineteenth century, segregation in housing and education was the legally sanctioned law of the land. Any attempts by freed-persons and their allies to create a republican citizenship for the new African American citizens had been aborted by powerful actors and events that did not happen.100

D. The Social Construction of Racial Discrimination in Real Estate Transactions and Mortgage Lending

The segregation of African Americans that marked the post-reconstruction period imposed severe restrictions on where they could live, the kinds of work they could do and their ability to become owners of productive property.101 These restrictions were enforced by a complex web of racist doctrine, local legislation and property covenants.102 The denial

95. Id.
96. On the general subject of the freedmen and work, see, e.g., William Cohen, At Freedom’s Edge (1991) and Robert Higgs, Competition and Coercion (1977). On the legislative and administrative acts to repatriate former confederate landowners, see Blum et al., supra note 24, at 357-79 and Foner, supra note 84, at 70-71, 153-64.
97. “A small number did, however, obtain land through other means, squatting on unoccupied real estate in sparsely populated states like Florida and Texas, buying tiny city plots, or cooperatively purchasing farms and plantations . . . . These, however, were isolated instances.” Foner, supra note 84, at 106.
98. See, e.g., Schweninger, supra note 65, at 97-141 and Nieman, supra note 66, at 114-47.
99. Zinn, supra note 83. See also W.L. Rose, Rehearsal for Reconstruction (Oxford 1976) (1964) for a more elaborate exploration of freemen and land and Foner, supra note 84, at 70-71, 153-64.
100. Nieman, supra note 66, at 114-47; Foner, supra note 84, at 70-71, 153-64; and Du Bois, supra note 84, at 580-636.
and imposition of onerous conditions for credit at major lending institutions was also a factor.\textsuperscript{100} Like the overwhelming majority of citizens in the country, most African Americans needed access to credit to purchase a house, land, equipment or other investment instruments. They were only a generation out of slavery and were denied the ability to accumulate much wealth. Few had the ability to secure property on a cash basis.\textsuperscript{104} Some were able to secure favors from white sponsors,\textsuperscript{105} and some were able to secure credit from African American savings and loan associations of various kinds.\textsuperscript{106} The segregation of cities and towns continued and even increased geographically with the mass immigration of African Americans to states outside the South.\textsuperscript{107}

1. "Too Inferior to Be Their Neighbor"\textsuperscript{108}

The intent of this developing structure of discrimination was to "ghettoize" the African American population, particularly in cities and towns.\textsuperscript{109} Municipal racial zoning ordinances were passed in more than a dozen cities.\textsuperscript{110} The Baltimore Ordinance, for example, stated that it was necessary for "preserving peace, preventing conflict and ill feeling between white and colored races in Baltimore City, and promoting the general welfare of the city by providing, so far as practicable, for use of separate blocks by white and black people for residences, churches and schools."\textsuperscript{111}

These ordinances were to be ruled unconstitutional in the landmark case of Buchanan v. Warley,\textsuperscript{112} decided in 1917. Especially significant in the holding of the Court was that racial zoning ordinances were not unconstitutional because of their segregative intent, but because they denied the property rights of homeowners to sell their property to whomever they chose.\textsuperscript{113}

In Buchanan, the U.S. Supreme Court rejected an attempt by the municipal government of Louisville, Kentucky to restrict African Americans from purchasing property and white Americans from selling property in a block designated for whites only.\textsuperscript{114} The Court focused on the restriction of property transfers and held that the municipalities' designations were unconstitutional restrictions on an owner's right to transfer property.

The formidable battle by African Americans to acquire property and to access the resources necessary continued on other fronts. The Buchanan
decision only registered a blow to discrimination by prohibiting one’s right to contract and transfer property. It did not meaningfully affect discrimination, which remained rampant in the form of restrictive property covenants; practices in the real estate industry, particularly the property appraisal guidelines; credit allocation and the racial inferiority doctrines that undergird them. Together, these factors were continuing impediments to obtaining property and kept African Americans primarily in segregated communities.\textsuperscript{115}

2. Race Doctrine and Property Values

The incorporation of doctrines of African American racial inferiority into the valuation of property by the real estate industry has had a long and influential history.\textsuperscript{116} A sampling of the language used in textbooks and other publications used by the industry is revealing:

It is a matter of common observation that the purchase of property by certain racial types is very likely to diminish the value of other property in the section . . . .\textsuperscript{117}

The prospective buyer might be a bootlegger who would cause considerable annoyance to his neighbors, a Madame who had a number of call girls on her string, a gangster who wants to screen for his activities by living in a better neighborhood, a colored man of means who was giving his children a college education and thought they were entitled to live among whites . . . . No matter what the motive or character of the would-be purchaser, if the deal would instigate a form of blight, then certainly the well-meaning broker must work against its consummation.\textsuperscript{118}

A realtor should never be instrumental in introducing into a neighborhood . . . members of any race . . . whose presence will clearly be detrimental to property values in the neighborhood.\textsuperscript{119}

The colored people certainly have a right to life, liberty, and the pursuit of happiness, but they must recognize the economic disturbance which their presence in white neighborhoods causes, and forego their desire to split off from the established district where the rest of their race lives.\textsuperscript{120}

In 1923, a publication that became a “bible” of the industry, written by an economist in language that gave it an “objective” and “scientific” designation, stated, “If the entrance of a colored family into a white

\begin{footnotes}
\item[115] See generally ABRAMS, supra note 63.
\item[116] Id. at 150–68.
\item[117] Ernest McKinley Fisher, Principles of Real Estate Practice 116 (1923), quoted in ABRAMS, supra note 63, at 155.
\item[118] Quoted in EQUALITY OF OPPORTUNITY IN HOUSING. NEW YORK, National Community Relations Advisory Council, June 1952, at 15, as cited in ABRAMS, supra note 63, at 156.
\item[119] Nathan William MacChesney, The Principles of Real Estate Law 586 (1927), quoted in ABRAMS, supra note 63, at 156.
\item[120] Stanley L. McMichael & R.F. Bingham, City Growth and Values 182 (1923), cited in ABRAMS, supra note 63, at 159.
\end{footnotes}
neighborhood causes a general exodus of the white people, such dislikes are reflected in property values. Except in the case of Negroes and Mexicans, however, these racial and national barriers disappear when the individuals . . . rise in the economic scale or conform to the American standard of living.”

Hoyt goes on to incorporate a ranking of thirteen “races and nationalities” based on their “impact” on property values from the most favorable to the least. It reads:

1. English, Germans, Scotch, Irish, Scandinavians
2. North Italians
3. Bohemians or Czechoslovakians
4. Poles
5. Lithuanians
6. Greeks
7. Russians, Slavs of the Lower Class
8. South Italians
9. Negroes
10. Mexicans

This “infiltration of undesirable races” theory became the doctrine of the American Institute of Real Estate Appraisers. The rule of property value was framed around the “100% American community” and its racial inferiority doctrines drove the analysis.

This racist theory of value is not only taught in many schools and colleges and incorporated into texts published by responsible publishers, but is widely circulated in real estate magazines, newspapers, and home magazines. It is made the subject of state examinations in which an applicant who might take a democratic position on the racial issue would be marked wrong.

Worse still, the theory became part of the unwritten official policy in government appraisals. Here it helped deprive minorities of government-aided housing. It set up thousands of FHA neighborhoods inhabited by “homogeneous” groups who had been sold both the racist line and their houses on the representation that their neighborhoods would be forever secure against pollution if they would only cooperate.

Thus, not only were African Americans limited in their opportunities to buy and sell residential real estate, but the value of the real estate they could purchase was sharply constrained by racist theory and practice.

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121. HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO 314 (1933).
122. Id.
123. Id. at 158.
124. Id.
E. The Failure to Extend the New Republican Citizenship to African Americans: The Role of the Federal Government

The economic collapse during the Depression disproportionately fell on the backs of African Americans, and the New Deal initiatives aimed at saving homeowners and mortgage lenders did not produce a significant difference for African Americans. The agencies of the federal government directly and indirectly involved in financing or underwriting the construction and rehabilitation of housing adopted and integrated "the racist theory of value" used by the real estate industry. This ensured that the government's attempt to reconstruct property and home ownership as a central theme of the New Deal would not be extended in any significant way to African Americans. In fact, the housing agencies' adoption of such guidelines ensured that, for the first time in the country's history, a federal agency openly supported segregation and instituted administrative decisions to ensure its implementation.

FHA's declarations had gathered together all the humbug of half-informed pseudo-experts—realtors-sociologists, appraiser-psychologists, behaviorist-lobbyists—and codified them into official dogma. It made the forbidden fruit bias the required fare of the market.

These policies and the Federal Housing Administration strongly supported the use of racially restrictive covenants and provided federal funds for their introduction and proliferation across the country. This had a devastating impact on African Americans. Consequently, the federal government's largest homestead strategy since the Homestead Acts of the eighteenth and nineteenth centuries, which made it possible for millions of households to attain home ownership anywhere in the United States they could afford, was systematically denied to African Americans.

F. The Role of the Supreme Court in Maintaining Racial Restrictions on the Right to Buy Property by African Americans

Although attempts to limit the ability of citizens to buy and sell property to whomever they wished had been declared unconstitutional in Buchanan v. Warley, the court made no decision on the use of racial covenants to deny African Americans the ability to buy and sell property. In 1926, in Corrigan v. Buckley, the Supreme Court ruled that such covenants did not deny individuals the liberty to buy and sell property without due process of law. These were ruled private agreements that did not

125. Id. at 227-43.
126. See Abrams, supra note 56, at 230-70 for an analysis of the New Deal Initiatives.
127. Abrams estimates that "[o]f the nine million new homes built between 1935 and 1950, less than 1 per cent were open to them" and "[a]s of 1952, only about 50,000 out of almost three million dwellings insured by FHA were available to non-whites." See Abrams, supra note 63, at 243.
128. Id. at 229-43.
129. Id. at 234.
130. Id. at 229-43.
131. 245 U.S. 60 (1917).
132. 271 U.S. 323 (1926).
come within the prohibitions of the Fifth and Fourteenth Amendments.\textsuperscript{133} The case legitimized the use of restrictive covenants and, coupled with the emerging racist policies of the federal government and the real estate industry, completed the intellectual, legal and social segregation of African Americans.\textsuperscript{134}

In 1948 in \textit{Shelley v. Kraemer},\textsuperscript{135} restrictive covenants were held lawful between the parties, but their enforcement by the courts was illegal, making it possible for willing sellers to avoid the impact of such a covenant without fear of enforcement. African Americans and their allies began to remove the most invidious vestiges of the racist theory of value. By then, there had been almost 100 years of intentional segregation, and the civic culture of the United States had been greatly affected.\textsuperscript{136}

\textbf{IV. THE CONSTRUCTION OF A NEW ANTI-DISCRIMINATION LEGAL FRAMEWORK IN LENDING AND REAL ESTATE PRACTICES (1954 TO PRESENT)}

During the 1950s and 1960s, a confluence of significant events dramatically impacted the dismantlement of legal segregation in the United States.\textsuperscript{137} Among the most significant: (a) In 1954, the United States Supreme Court ruled unanimously that the doctrine of separate but equal was unconstitutional.\textsuperscript{138} (b) In 1955, the Montgomery bus boycott launched the modern civil rights movement and began a massive struggle for citizenship equality by African Americans that challenged the entire infrastructure of segregation in both the public and private sectors of the country.\textsuperscript{139} (c) The growing anticolonial struggles in Africa coupled with the continuing tensions between the United States and the Soviet Union made the existence of a racial apartheid system in the United States a major embarrassment in the United States government’s attempts to win the “cold war.”\textsuperscript{140} Considerable pressure from organizations leading the civil rights movement and the assassination of President John F. Kennedy gave rise to the unexpected decision by newly appointed President Lyndon Johnson to push through the Civil Rights Act of 1964 and the Voting Rights Act of 1965.\textsuperscript{141}

While the passage of the civil rights and voting rights acts re-established basic citizenship rights in African Americans, the core elements of neo-republican citizenship (i.e., employment, access to credit and the opportunity to buy real estate anywhere one could afford) were basically

\begin{footnotesize}
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\item \textsuperscript{133} Id. at 330.
\item \textsuperscript{134} \textit{See generally} Abrams, \textit{supra} note 63.
\item \textsuperscript{135} 334 U.S. 1 (1948).
\item \textsuperscript{136} The ongoing impact of the racial theory of valuation continues into the present with racial steering in real estate markets and blockbusting still prevalent. \textit{See, e.g.,} Leonard Downie, \textit{Mortgage on America} (1974).
\item \textsuperscript{138} \textit{See} Richard Kluger, \textit{Simple Justice} (Vintage Books 1975) (1977) for a history of the \textit{Brown} decision.
\item \textsuperscript{139} \textit{See} Branch, \textit{supra} note 137, at 143–205.
\item \textsuperscript{140} Id. at 397–411, 684–85.
\item \textsuperscript{141} \textit{See} Bennett, \textit{supra} note 84, at 386–433.
\end{enumerate}
\end{footnotesize}
untouched by these two pieces of legislation. A growing body of evidence continued to show significant discrimination in the areas of unemployment, real estate and lending. Efforts by African Americans to enter employment areas that paid decent, living wages were often met by resistance from unions and businesses. Attempts to purchase property in previously segregated white neighborhoods were often met with massive resistance, including violence. The real estate and lending industries continued to use racial valuation and deny African Americans loans to purchase property. Not to be outdone, the Federal Government’s own policies often multiplied the impact of this discriminatory behavior by realtors and banks. The Federal Government’s own policies to conduct “urban renewal” and transportation policy often led to the massive displacement of thousands of already existing African American homeowners. While the suburbianization of the country with programs for home ownership for whites continued to underwrite and fuel this decentralization, African Americans found themselves limited to de facto segregated geographies by public and private discrimination. A new attempt had to be made to dismantle this discriminatory infrastructure that continued to deny significant numbers of African Americans any chance at neo-republican citizenship status.

Beginning in the late 1960s, in the shadow of the civil rights movement and the 1964 and 1965 civil rights acts, Congress began passing a series


143. A number of contemporary scholars following the pathbreaking work of Charles Abrams in The Revolution in Land and Forbidden Neighbors have revisited the development of the neo-republican citizenship synthesis and the current manifestations of racial discrimination in property and lending. While there is still some debate on the degree of racial discrimination in the lending and property acquisition areas, a growing number of scholars agree that segregation and discrimination is still significant. See, e.g., Martha Mahoney, Law and Racial Geography, 42 STAN. L. REV. 1251 (1990) (documenting and analyzing the history of racial discrimination and segregation in federal public housing); James A. Kushiner, Apartheid in America, 22 HÖW. L.J. 547 (1979); JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM (1994); and DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID (1993) (analyzing racial residential segregation in the United States). Two striking findings stand out in their research in Table 8.1: 78% of northern cities and 67% of southern cities are segregated in the United States. Statistically persuasive data on the systematic and continuing discrimination in housing sales to African Americans has been developed by Margery Austin Turner, Limits on Neighborhood Choice, in CLEAR AND CONVINCING EVIDENCE, at 117–52 (Michael Fix & Raymond J. Struyk eds., 1993). Also see George C. Galster, Use of Testers in Investigating Discrimination in Mortgage Lending and Insurance, in CLEAR AND CONVINCING EVIDENCE (Michael Fix & Raymond J. Struyk eds., 1993); Richard Thompson Ford, The Boundaries of Race, 107 HARV. L. REV 1843 (1994); and Peter Swire, The Persistent Problem of Lending Discrimination, 73 TEX. L. REV. 787 (1995).


148. See, e.g., DOWNE supra note 136, at 60–68 and SCHUCHTER, supra note 145, at 84–85.

149. SCHUCHTER, supra note 145, at 98–175.

150. Supra note 142.
of federal statutes aimed at creating sanctions against those who discriminated in real estate, lending and employment. This set of legislative enactments constituted a new anti-discrimination framework that would seek to level the playing field, provide protections and insure all citizens the equal opportunity to secure credit to purchase property and to be unlimited in where they could live. The passage of this new legislation to combat the racial theory of valuation and discrimination in real estate lending practices and employment set the stage for the next debate through policy legislation and case law on the questions of discrimination in these areas. It was unclear whether the new legislation would successfully end discrimination in those areas, and more fundamentally, assist African Americans in becoming fully invested citizens of the United States.

A. Federal Anti-Discrimination Legislation

It can no longer be doubted that banks are discriminating against blacks who try to get home mortgages in city after city across the United States. In many cities, high income blacks are denied mortgage loans more frequently than low income whites. This is a persuasive index of bias, whether conscious or not.

Laws designed to eradicate discrimination in lending and real estate have increased significantly. Implementation of these laws will either provide or fail to provide an avenue for the previously disenfranchised to take part in the republican vision of citizenship—the ownership of property. An analysis of legislation and case law in this area will raise questions and provide some answers regarding this legislative approach and the court’s capacity to level the playing field for those encountering long-standing racial and economic hurdles.

Without access to credit, attainment of the neo-republican vision will remain out of reach. As a financing tool, mortgages continue to be the vehicle most used to obtain property. Congress attempted to address the inequality in access to property by enacting a number of federal statutes to specifically address discrimination in the mortgage-lending process. The enactments include The Fair Housing Act, the Equal Credit Opportunity Act, the Community Reinvestment Act, and the Home Mortgage Disclosure Act. The Fair Housing Act (FHA), or Title VIII of the


Civil Rights Act of 1968,157 prohibits discrimination in most real estate transactions, including the selling, renting, or financing of a dwelling based on race, color, religion, sex, handicap, family status or national origin.158 The Act was amended in 1974 to include sex as a protected class.159 Family and disability statuses were added in a 1988 amendment to the Act.160 The Act also prohibits discrimination against members of a protected class with regard to financing and insuring real estate.161

The Equal Credit Opportunity Act (ECOA) was enacted to address reports of spiraling discriminatory practices in extending credit to women.162 As amended in 1976, the ECOA made it unlawful for any creditor to discriminate against a much broader group of applicants on the basis of race, color, religion, sex, national origin or age.163 To obtain more complete data on the extension of credit for home mortgages, Congress enacted the Home Mortgage Disclosure Act (HMDA).164 The HMDA requires institutions to keep detailed records showing census data and income levels of applicants approved for mortgages.165 The amended version of the HMDA substantially strengthened the Act by requiring the inclusion of data regarding the race and sex of all applicants either approved or denied a mortgage.166

Finally, the Community Reinvestment Act (CRA) was enacted in 1977 and later amended in 1988. The CRA was designed to address the allegations of redlining in primarily minority communities.167 Until this enactment in 1977, many financial institutions were not making loans in neighborhoods in which they were located and were accepting deposits. The Act established a review process to determine whether the institutions were serving the "convenience and needs" of the communities where they were chartered.168 The institutions were encouraged "to help meet the credit needs of the local communities in which they [were] chartered consistent with safe and sound operation of such institutions."169 As a result, institutions were evaluated and then rated according to their success in meeting credit needs.

The regulations in the CRA set out a list of factors that are used to evaluate institutions' performance. Each institution's CRA rating reflects the extent to which it has met the needs of its "community."170 The rating

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157. Supra note 153.
158. Id.
162. The act was first designed to remove barriers to credit for women. See Susan Blakely, Credit Opportunity for Women, 1981 Wis. L. Rev. 655 (1981).
163. Supra note 154.
164. Supra note 156.
170. See id.
determines whether an application for an expansion, purchase or merger should be approved.\textsuperscript{171} In theory, institutions with low ratings encounter difficulty in getting their applications approved by the requisite federal agencies; however, some applications have been approved despite inadequate CRA ratings.\textsuperscript{172}

The FHA and the ECOA\textsuperscript{173} are the centerpieces of the federal effort to combat discrimination in lending.\textsuperscript{174} The FHA prohibits discrimination in the financing of housing on the basis of race, color, religion or national origin. Additionally, the FHA prohibits any person or entity who engages in "residential real estate transactions" from discriminating in any of its transactions on any prohibited basis.\textsuperscript{175} Applicable transactions include the creation or purchase of a loan to secure residential real estate where the purpose is to purchase, construct, improve, repair or maintain a dwelling. The Act applies to all providers of mortgage services, including banks, savings and loans, credit unions and insurance companies.\textsuperscript{176}

The FHA is enforced through the auspices of HUD, the Attorney General and actions by private individuals. HUD investigates all complaints, but can only initiate "pattern or practices cases" and must institute any civil actions referred by the Attorney General.\textsuperscript{177} Individuals with standing have two alternative ways to seek redress of an injury. First, they may seek an administrative review through HUD, or, second, they may choose to file a civil action in federal or state court.\textsuperscript{178}

While the Act provides for a private cause of action, the individual bears the burden of identifying the discriminatory practices or patterns of behavior. The Act, although comprehensive on its face, fails to state methods by which to identify the discriminatory practices or patterns of behavior. Discrimination may occur at any point between the pre-screening and mortgage denial stage. In essence, the Act requires a very sophisticated consumer to assess the actions of the mortgage provider and to determine discrimination on a prohibited basis. Even if the consumer suspects discrimination, the burden of proof poses a significant challenge. In most instances, this type of discrimination only becomes clear with disparate impact data, which would indicate the disproportionate impact on a group protected under the statute derived from a practice or policy which is neutral on its face.

Enactment of the HMDA assisted in identifying evidence of disparate impact. Through the HMDA, mortgage providers are required to disclose overall approval and rejection rates, the total number and dollar value of

\textsuperscript{171} See id.
\textsuperscript{172} See id.
\textsuperscript{175} 42 U.S.C. § 3601.
\textsuperscript{176} 42 U.S.C. §§ 3601–3619.
\textsuperscript{177} Id.
loans originated or purchased and information on applicants' race, sex, income level and census tract.179 Crucial, but missing from the information required to be disclosed, is the reason for denial. Knowing why an applicant is denied is one of the first steps in aiding a determination of whether similar applicants are being treated in a different manner. Although the HMDA is extremely helpful to fair-housing advocates, the private individual still has a formidable challenge to prove disparate impact.180 Consequently, the difficulty that a private individual has in proving that the Fair Housing Act has been violated undermines the congressional attempt to level the playing field in the area of property acquisition. Challenges under the ECOA are equally difficult.

B. Difficulties in Implementation of Anti-Discrimination

As a centerpiece in the federal effort to address discrimination, provisions of the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA) offered great promise. But the manner of enforcement has proven to be of far greater importance and much less precise. In furtherance of the republican vision of citizenship, the Act was designed to redress acts of discrimination. However, the harder question, which remains unanswered, is whether these will be effective tools to correct the effects of past discrimination that have become institutionalized, even though actors may or may not be racially motivated to act in certain ways.

Most consumers today purchase property with a mortgage. One theory is that the importance of remedying discrimination and providing access to property must be measured against the lender's desire to make a profit on the mortgage. Mortgages are instruments employed to make a profit. Approval of a loan application is a determination that a lender will more likely than not obtain a desired return from the extension of the mortgage.181 Extending credit through a mortgage instrument is a calculated risk, even though the loan amount is fully secured by the value of the property. The lender decides the desired rate of return and whether or not there are factors in the applicant's file that will present a risk to obtaining that return.182

The risk of default, which may lead to a significant reduction in the desired rate of return, is assessed by evaluating different factors that appear facially neutral or objective, including credit-worthiness and the value of the property offered as collateral. To determine the credit-worthiness of an applicant, the loan officer reviews credit history, employment record, future income potential, savings and other resources or wealth.

179. Supra note 154.
180. Some community housing advocates have been successful in using the CRA to protest a lending institution's attempt to establish a new branch or merge with another regulated institution. See Allen Fishbein, The Community Reinvestment Law After Fifteen Years, 20 Fordham Urban L.J. 293, 298–300.
181. Researchers indicated that the rate of return depends in large part on the terms of the loan. Important factors include the interest rate, loan-to-value ratio, the probability that the loan will default, and the impact of a default on the return. See John Yinger, Discrimination in Mortgage Lending, in MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 30 (John Goering & Ron Wienk eds., 1996).
182. Id. at 30.
The credit-worthiness is often ranked as the primary factor in determining risk of default. The evaluation process assesses the probability of default and/or foreclosure. Research on default and its causes does not include credit-worthiness as the primary cause of loan default. Instead, the most often stated reasons for default are marital problems or divorce, financial difficulty due to a reduction in income, unemployment, mortgagee illness or death and change of ownership usually through assumption of mortgage by a third party. Indeed, other resources and accumulated net wealth become important in most of the highly cited possible reasons for default. In addition, loan officers appraise other factors not necessarily drawn from the submitted documentation in order to improve their evaluation of the risk.

Other undocumented data about the applicant contributes to the subjectivity of the process. Utilizing factors such as credit history, net worth, debt ratios, income, employment history and educational level fails to identify all the relevant criteria which may bear upon a lender’s assessment of an individual applicant. Generally, it is accepted that the loan officer is assessing more than what is presented on the face of the submitted documents. “The loan officer is assessing such hard-to-measure qualities as the applicant’s strength of attachment to property, motivation, character, reputation, and stability of family life.” All of these factors relating to the borrower’s characteristics and the quality of the collateral weigh into the eventual decision made by the loan officer.

It is at this stage that discrimination is most likely to occur. Biases and assessments based on predetermined characteristics of a group to which the applicant is a member factor into the process. “All standards incorporate a degree of subjective assessment of individual risk based on the uniqueness of each applicant’s file. Discrimination based on beliefs regarding members of a group as distinguished from factors specific to this individual may appear economically rational but is still discrimination.” While subjectivity in its entirety is not to be dismissed as an untenable approach, each applicant deserves an independent review of credit-worthiness based on his or her own qualities and characteristics, not on predetermined attributes transferred to the applicant. This is because access to credit in order to acquire property is so important in our society. Although objective criteria are utilized, the subjective nature of the process creates an opportunity for discriminatory treatment, even in the assessment of the objective criteria. “Banks may for example define income differently for different applicants, fail to follow-up on adverse credit reports that may be incorrect, or vary the maximum acceptable ratio of monthly payments to monthly income or other criteria depending on

183. Id.
184. Id. at 32.
185. The evaluation process assesses the probability of default which may lead to foreclosure. See Schaffer and Ladd, Discrimination in Mortgage Lending 17 (1981).
186. For a discussion of positive aspects of subjectivity in mortgage lending, see Anthony Taibi, Banking, Finance and Community Economic Empowerment, 107 Harv. L. Rev. 1463, 1482 (1994).
188. See Yinger, supra note 181, at 32.
certain characteristics of the borrower." \(^{189}\) Lenders also have flexibility in determining the final disposition of the loan. Not all loans are either approved or denied. Lenders may approve the application as requested, approve it with modifications to the terms, such as requiring a higher down payment, a higher interest rate or a shorter term for repayment or deny it as submitted. \(^{190}\)

Only if assuming a formalistic approach to the analysis can one deduce that the decisions related to a loan application are made identically, regardless of one's experience, values, points of view, gender, race, class, religion, or culture. \(^{191}\) A more realistic approach would suggest that life experience and the perspective from which one operates shapes their view of the world and the decisions made. \(^{192}\) Consequently, although the decision-making process may appear to be objective, its implementation is actually impacted by many outside factors. This leads to decisions that are not deductive and based on clear objective rules, but are socially constructed according to the makeup and experience of the decision-maker. \(^{193}\) Failure to recognize our own perspectives and to proceed as if there are only objective factors allows the bias to continue unchecked. Those whose lives as citizens qualitatively depend on the decisions are viewed not from their experience, but rather from the experience of the decision maker. \(^{194}\)

Empirical studies indicate that more than a century after emancipation, discrimination based on race is alive and well. A review of the quality and breadth of the surveys presents a persuasive case for the claim that significant discrimination in lending still exists. \(^{195}\) An intense debate

189. See Taibi, supra note 186, at 1482.
190. See Schaefer & Ladd, supra note 185, at 62 (presenting situation when discrimination difficult to detect because lender discourages completion of application during pre-screening).
191. Utilizing the formalist approach to reasoning, rules are derived from nature and then by analogy are applied to different facts arriving at a logical result based on deductive reasoning. “Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs . . . .” See William Twining, Karl Llewellyn and the Realist Movement 11 (1985).
192. Legal Realists contend that there are different ways of looking at law other than as a logical consistently applied body of rules. In fact, law was perceived as dynamic, not static. Karl Llewellyn once stated that law was nothing more than “[w]hat . . . officials do about disputes.” The rules were viewed as tools which primarily assisted in the process of predicting what judges may do. See Karl Llewellyn, The Bramble Bush 12 (1930).
195. See Munnell et al., Mortgage Lending in Boston (Federal Reserve Bank of Boston Study 1992) and Yinger, supra note 181, at 35.
continues on other possible explanations for the variations in treatment and denial rates for minority and non-minority groups.

One leading voice in the debate is Gary Becker, who questions whether the disparities are based on a determination of profitability of loans to different groups. The profitability premise is usually supported by an economic analysis that lending institutions will not voluntarily sacrifice profit, even if prejudice is a factor. Other scholars have not found the position of profitability as viable an explanation for the high denial rate for minority groups. Anthony Taibi emphasizes the role of uncertainty in all investment decisions. "Some investment decisions do not live up to expectations and others outperform expectations." He concludes that this uncertainty makes investment decisions indeterminate and thus undermines the economists' theory that profitable loans will be funded.

The decision to approve a loan is heavily subjective and uncertain. In addition, the profitability analysis does not address whether, in our society where property is valued as providing independence and stability and has become the primary source of wealth accumulation, it is acceptable to focus solely on profit maximization. The loss of some profit without undermining the profit function of the lending process may be preferred in order to facilitate the attainment of the neo-republican vision of property, especially in the face of a legacy of discrimination against African Americans. This would replace the view that lenders should only consider the interest of profit with the view that the importance of property in our historic democratic tradition necessitates that they avoid actions which disproportionately impact access to property by certain groups. The profit-only view provides no mechanism for judging the relative importance of a lending decision on the affected interest. The harm to active participation in citizenship may be too great to sacrifice in the name of profit alone. Thus, the courts must determine when a stated business interest, particularly profit in the mortgage lending area, is causing a harm to such a disproportionate extent on minority groups that a remedy should be ordered. The standards adopted by the court in this essential balancing function should reflect the importance of the interest involved. The law should seek to widen the playing field for those previously excluded from realizing this valued and central vehicle to obtain the neo-republican vision of liberty—property.


197. See Becker and Zycher & Wolfe, supra note 196.

198. Supra note 186.

199. Id. at 1468.

200. Id. at 1468 n.7, 1467-69. Taibi argues that traditional assumptions about efficient allocation by the market are incorrect.

V. THE PINNACLE AND THE RETREAT

A. The Standards of Proof in Disparate Impact Cases Under the Fair Housing Act and the Equal Credit Opportunity Act

The promise of the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA) to widen the playing field to allow African Americans greater access to property hinges on court implementation and interpretation. Implementation, exclusively, has been left largely in the hands of courts just as interpretation of the standards required for a plaintiff to successfully assert a claim of discrimination prohibited by the acts has been the venue of the courts.

Two aspects of implementation of both the FHA and the ECOA have generated controversy. One is whether evidence of a disparate impact, without evidence of an intent to discriminate, is sufficient to establish a violation. The second involves the standard of proof a defendant must satisfy to rebut a plaintiff’s prima facie case of illegal lending discrimination based on disparate impact.

Common law involving lending discrimination claims brought under the FHA and the ECOA has utilized analogies to employment discrimination law under Title VII of the Civil Rights Act of 1964. Title VII prohibits employers from discriminating on the basis of certain factors, such as sex or race. The legal doctrines used by courts to determine whether a facially neutral practice has a disparate impact on a protected class in violation of Title VII were developed by the United States Supreme Court in a series of cases beginning with Griggs v. Duke Power Co.

In Griggs, black employees challenged the requirement of high school education or the passing of a standardized general intelligence test as a condition of employment or transfer under Title VII. The Supreme Court reversed the Court of Appeals, holding that neither good intent nor the absence of discriminatory intent on the part of an employer will “redeem” employment procedures or testing mechanisms that operate as “built-in headwinds” for minority groups. The court’s opinion supported the view that Title VII was aimed not only at motivation, but at the consequences of employment practices. Hence, it ruled that the requirements violated Title VII because they did not bear “demonstrable relationship to successful performance of the jobs for which [they were] used.” The practice, though appearing neutral, had a discriminatory impact on a protected class under Title VII. Griggs, along with its progeny, clearly sets forth standards of proof applicable to a plaintiff seeking to establish a prima facie case by showing disparate impact and a defendant seeking to rebut a violation of Title VII.

202. A substantial portion of the reported FHA decisions are non-lending cases; thus, many of the cases cited in this Article involve claims of housing discrimination rather than lending discrimination.
204. See id. at 426.
205. See id. at 432.
206. See id.
207. See id. at 431.
Eighteen years after the ruling in Griggs, the Supreme Court decided Wards Cove Packaging Co. v. Antonio. In Wards Cove, nonwhite employees sued their employer cannery under Title VII, alleging that the employer's hiring and promotion practices caused a racially unbalanced work force. Assignment of work at the cannery placed the vast majority of whites in the higher paying non-cannery jobs, causing non-white workers to be over-represented in lower-paying cannery positions. In holding that the lower-paid non-white employees had the burden of proving that the employer’s hiring and promotion practices had a statistically disparate impact on them, the Supreme Court modified the Griggs standard. The plaintiff was required to designate which policy or practice caused the disparity. Justice Stevens, in the dissent, addressed this additional proof standard wherein the plaintiff was required to define the specific policy and how it caused the alleged disparate impact:

It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, a plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable. Although the causal link must have substance, the act need not constitute the sole or primary cause of harm. Thus, in a disparate impact case, proof of numerous questionable practices ought to fortify an employee’s assertion that the practices caused racial disparities. Ordinary principles of fairness require that Title VII actions be tried like “any lawsuit.” The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles.

With the possible application of this higher standard to plaintiffs attempting to establish a prima facie case of disparate impact in housing and lending discrimination cases, the burden placed on the complainant rises substantially, placing access to housing and lending farther out of reach. The increased difficulty or “tipping of scales” in proving discrimination in lending would leave many previously disenfranchised Americans with considerably less than what full citizenship imparts.

To date, the federal courts have not uniformly employed the standards of Griggs or Wards Cove in deciding disparate impact claims of discrimination in lending and housing. A plethora of proof standards have emerged from the circuit courts because the Supreme Court and Congress have

208. 490 U.S. 642, 656.
209. See id. at 647.
210. See id.
211. See id.
212. See id. at 656 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)). In Watson, a plurality of the Court laid the foundation for the Wards Cove holding. The Supreme Court ruled that the plaintiff’s burden exceeded just a mere showing of statistical disparities in the workforce. The plaintiff must identify the specific employment practice being challenged and then show the causal connection between the policy and the disparity. Establishing disparate impact based on a cumulative effect would not suffice to establish a prima facie case.
213. 490 U.S. 642, 672.
214. Id.
215. In Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988), the Supreme Court expressly declined to comment on the appropriateness of using the
declined to explicitly set forth such standards in the context of lending and housing. Some circuits have adopted a burden-shifting approach similar to that used in Title VII cases. Others have established a four-factor approach to determining whether a plaintiff has established a violation of the FHA on a disparate impact theory. In addition, the standards within a particular circuit often vary depending on whether a case involves a public or private plaintiff or defendant.

Further, bank regulatory agencies, the Department of Justice and the Department of Housing and Urban Development acknowledge the existence of these variant legal standards. The Policy Statement on Discrimination in Lending issued by ten federal agencies in April 1994 (the “Policy Statement”) states that “the precise contours of the law on disparate impact as it applies to lending discrimination are under development.”

B. The Establishment of a Prima Facie Case Based on Disparate Impact: Confusion in the Circuit Courts

Several circuits have analyzed disparate impact discrimination using a burden-shifting approach in Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA) cases. The burden-shifting approach allows plaintiffs to establish a prima facie case of disparate impact discrimination using statistics to demonstrate that a facially neutral policy has a disproportionately adverse effect on a protected class. Courts addressing the issue of disparate impact analyze this statistical proof of discrimination in a variety of ways. For example, in Betsey v. Turtle Creek Associates, the Fourth Circuit held that disparate impact is established when “the policy in question had a disproportionate impact on the members of a protected class in the total group to which the policy was applied.” In Betsey, the defendant partnership purchased the apartment buildings where the plaintiffs resided and instituted an all-adult policy in an effort to upgrade the property. Specifically, the defendant partnership attempted to prohibit

disparate impact test to establish violations of the FHA. The question has not been considered by the Supreme Court since that time.

216. In the burden-shifting approach, exemplified by Huntington, the plaintiff must establish a prima facie case of discrimination by showing that a practice or policy had a disparate impact on a group protected under the statute. Then the burden shifts to the defendant to show the necessity of the challenged practice.

217. This approach was developed by Metropolitan House Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) [hereinafter "Arlington Heights II"], which involved a zoning decision by a town. The four factors were: (i) the strength of the plaintiff’s showing of discriminatory effect, (ii) the presence of some evidence of discriminatory intent, (iii) the interest of the defendant in taking the action which produces a discriminatory impact, and (iv) the nature of the relief which the plaintiff seeks.

218. A number of courts have expressed reservations as to the extent to which a private party can be found to have violated the FHA based on a disparate impact claim. See Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990) and Brown v. Artery Organization, Inc., 654 F. Supp. 1106 (D.D.C. 1987).


220. 736 F.2d 983 (4th Cir. 1984).

221. See id. at 987.

222. See id. at 985.
children from living on the property.\textsuperscript{223} The plaintiffs argued that the policies were a deliberate and systematic effort to alter the racial composition of the complex and had a disproportionate impact on the minority tenants.\textsuperscript{224} In reviewing the record, the court stated that there is little question that the all-adult policy in question had a substantially greater adverse impact on the minorities in the total group of tenants to which the policies were applied.\textsuperscript{225} The percentage of non-whites harmed was greater than the percentage of whites harmed by adoption of the policy.

On the other hand, in \textit{Edwards v. Johnston County Health Department},\textsuperscript{226} another Fourth Circuit panel took an alternate approach. It found that in order for a facially neutral housing-related practice to have disparate impact on a protected class, the practice must have a greater negative effect on one group than another.\textsuperscript{227} The percentage of non-whites and whites harmed by the practice as compared to the percentage of non-whites and whites in the population is irrelevant. Instead, the critical question is whether the practice affects the non-whites more harshly than the whites. Assessment requires looking beyond the absolute numbers to analyze the disproportionate burden on minorities.

At issue in \textit{Edwards} was whether the practice of issuing permits for the establishment of substandard migrant housing for non-white workers, despite the facilities' failure to meet state health and safety standards, violated the FHA.\textsuperscript{228} The Fourth Circuit court explained that in order to establish that a facially neutral, housing-related policy violates the FHA, the non-white plaintiffs must demonstrate that the policy either has a "greater adverse impact on one race than another or [that] it may perpetuate [ ] segregation and thereby prevent [ ] interracial association . . . ."\textsuperscript{229} Applying the \textit{Betsey} test, the court reasoned that because white and non-white migrant workers suffered the same degree of harm by sharing the same housing, the plaintiff failed to make a showing of the first form of impact.\textsuperscript{230} The court further decided that "demonstrating a mere statistical imbalance" was insufficient to prove a policy has disparate impact where the majority of migrant workers are non-white, thereby necessarily affecting more non-whites than whites.\textsuperscript{231}

Furthermore, some of the courts that do accept a statistical showing of discrimination also require evidence that the defendant acted with discriminatory intent or purpose, which in effect nullifies disparate impact claims. Plaintiffs with evidence of discriminatory intent could establish a claim under the amendment without asserting disparate impact.\textsuperscript{232} The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{223} See id.
\item \textsuperscript{224} See id.
\item \textsuperscript{225} See id. at 987.
\item \textsuperscript{226} 885 F.2d 1215 (4th Cir. 1989).
\item \textsuperscript{227} See id. at 1223.
\item \textsuperscript{228} See id. at 1217.
\item \textsuperscript{229} See id. at 1223.
\item \textsuperscript{230} See id.
\item \textsuperscript{231} See id.
\item \textsuperscript{232} See Brown, 654 F. Supp. 1106, 1115 (finding that plaintiff must present proof that a private party defendant acted with discriminatory intent) and Bellwood, 895 F.2d 1521, 1534. See also Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989) (citing Denny v. Hutchinson Sales Corp., 649 F.2d 816, 822 (10th Cir. 1981)) for the statement
\end{itemize}
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that a plaintiff must prove a discriminatory intent in order to prevail on a claim made under FHA.


234. FRB Regulation B, which implements the ECOA, states that the legislative history of the Act indicates that Congress intended an "effects test" concept, as outlined in the employment discrimination cases by the Supreme Court, to be applicable to a creditor's determination of creditworthiness: Griggs, 401 U.S. 424 (1971) and Albermarle Paper Co., 422 U.S. 405 (1975).

235. See S. Rep. No. 94-589, at 5 (1976) and HR Rep. No. 94-210, at 5 (1975). The report of the Senate Banking Committee states that a finding of intentional discrimination is not necessary to a finding that the ECOA has been violated. "In determining the existence of discrimination on these grounds [discrimination on the basis of race, color, religion or national origin] as well as on the grounds discussed below, [age and the receipt of income from public assistance programs], courts or agencies are free to look at the effects of a creditors practices as well as the creditor's motives or conduct in individual transactions. Thus judicial constructions of anti-discrimination legislation in the employment field in cases such as Griggs, 401 U.S. 424 (1971) and Albermarle, 422 U.S. 405 (1975), are intended to serve as guides in the application of the Act, especially with respect to the allocation of burdens of proof."


237. Id.


Disparate Impact Case—No provision of this title shall be construed as allowing statistical data which tend to show that the credit decisions of a creditor have had a disparate impact on various classes of credit applicants to be used as
Although the McCollum Amendment was approved by the House Banking Subcommittee on Financial Institutions on June 14, 1995, it was rejected by the House Banking Committee. Therefore, the Amendment was not included in the Financial Institutions Regulatory Relief Act of 1995 adopted by the Committee. Pursuant to the proposed McCullom Amendment, a plaintiff asserting violations of the FHA or the ECOA based on disparate impact must also present evidence that the defendant acted with discriminatory intent.

Although the language of the proposed amendment raised the evidentiary burden for plaintiff’s in housing and lending discrimination cases, it did not indicate the amount or type of evidence of discriminatory intent a plaintiff must present in order to prevail in a lending discrimination claim brought under the FHA or the ECOA. The requirement that a plaintiff present even a minimal amount of evidence of discriminatory intent might have a “chilling effect” on discrimination claims, since many plaintiffs would find it difficult to produce the “smoking gun” required to prove the defendant’s intent. In these cases, it is the disproportionate negative impact that compels a finding of discrimination. In fact, it is this difficulty in proving discriminatory intent that allowing for a showing of disparate impact is designed to remedy.

Prior to Wards Cove, courts allowed plaintiffs to establish FHA violations without presenting any evidence of discriminatory intent expressly because of the practical difficulties in proving a defendant’s motive. For instance, in Huntington Branch, NAACP v. Town of Huntington, the Second Circuit held that practical concerns militate against inclusion of intent in any disparate impact analysis. In Robinson v. 12 Lofts Realty, Inc., the Second Circuit pointed out that “clever men may easily conceal their motivations.” Concealed motivation is especially relevant in disparate impact cases where facially neutral rules are being challenged. “Often,

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1. The pattern or practice actually discriminated against any person or class on a prohibited basis; and

2. The creditor engaged in such pattern or practice with the purpose or intent to engage in an activity in violation of this title.

240. H.R. 1858.
242. See id.
243. See id.
244. See Arlington Heights II, 558 E2d at 1290 (finding that the “requirement that the plaintiff prove discriminatory intent...is often a burden that is impossible to satisfy...A strict focus on intent permits racial discrimination to go unpunished in the absence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find.”)
245. 844 E2d 926 (2nd Cir. 1988).
246. Id. at 935.
247. 610 E2d 1032 (2d Cir. 1979).
such rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied.249

In light of the historical importance of property ownership, any mechanism that disproportionately impedes the access of a protected group of citizens to property necessitates a stabilizing remedy. The relevant issue is disparate impact, even without proof of discriminatory intent. Most courts before Wards Cove interpreted the FHA and the ECOA as potentially holding a creditor liable for unequal outcomes with respect to different groups, even if such outcomes were not the result of any discriminatory intent. However, a few courts have taken the position espoused by the McCollum Amendment.250 They contend that a defendant should not be liable for illegal lending discrimination unless there is some evidence that the defendant acted with discriminatory intent.251 For example, the district court in Brown v. Artery Organization, Inc.,252 reasoned that the FHA requires proof that a private defendant acted with discriminatory intent. The court questioned the soundness of a rule that made private defendants liable for the discriminatory effects of their housing-related actions, irrespective of their purpose or intent. It would, in effect, “render them responsible for consequences over which they have no control.”253 This approach disregards the private defendant’s role in the development of the policy or practice in question, and his power to modify for a less discriminatory result.

Commentators and courts disagree on the extent to which to hold an actor responsible for the unintended, disparate impact of a practice or policy.254 However, when considering the equities involved, the argument that a creditor is liable for a facially neutral policy that has a disparate impact becomes stronger when one considers what is at stake—the dilution of citizenship. When disproportionate numbers of a protected class are locked out of essential mechanisms to access property, purposeful discrimination is not the central determination. The gravity of the harm to the protected group becomes the critical factor. If there is a neo-republican goal, requiring a plaintiff to prove that the defendant acted with discriminatory intent in order to establish a violation of the FHA or the ECOA contradicts a fundamental premise of fair lending policy. This area is one of such significance that defendants should be potentially liable for the discriminatory effects of facially neutral practices and policies that have a disparate impact on protected classes, regardless of intent or pur-

249. 844 F.2d at 935.
251. Supra note 249.
252. 654 F. Supp. at 1116 n.23. The district court explained that although a plaintiff could not meet his burden of proof against a private defendant establishing only that a practice or policy had a disparate impact, the disparate impact was a factor to be taken into account by the court when ruling on a private defendant’s liability under the FHA. In addition, the district court ruled the plaintiff could establish that a public defendant violated the FHA based solely on evidence that the FHA regulation, ordinances and zoning decisions had a disparate impact. Compare The McCollum Amendment, which would require plaintiffs to prove that both private and public defendants had acted with discriminatory intent.
253. See id. at 1116.
pose. The McCollum Amendment drew a strong reaction from some members of Congress, including Rep. Maxine Waters (D-Cal.), who characterized the amendment as "[an] attack on our civil rights . . . [which] would have created a loophole for a single industry from [sic] the standards Congress and the Federal Courts have determined are necessary to prohibit discrimination."255

The fact that the House Banking Committee did not adopt the McCollum Amendment supports the position that plaintiffs do not have to offer evidence of a defendant’s discriminatory intent to prove a violation of the FHA or the ECOA. However, in the absence of a ruling on this issue from the Supreme Court or a definitive statement from Congress as a whole, the debate over discriminatory intent remains unresolved.

C. Rebutting a Prima Facie Case Based on a Disparate Impact

Current regulatory and case law interpretations of the Federal Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA) provide that not every practice or policy that has a disparate impact on a protected class constitutes illegal discrimination. Once a plaintiff has established a prima facie case of lending or housing discrimination based on disparate impact, the defendant has the opportunity to justify its use of the practice that produced the disparate impact. The burden of proof that the defendant must satisfy to rebut the plaintiff’s prima facie case has been the subject of intense debate. Depending on the court or agency involved, defendants in FHA cases are required to meet standards of proof ranging from articulating a legitimate business reason for the challenged practice or policy to proving the policy serves a compelling interest. To date, the majority of ECOA case law indicates that defendants are required to prove that a challenged practice is a legitimate business need.256 The Policy Statement issued by the federal agencies provides that, in disparate impact claims under either the FHA or the ECOA, a lender must demonstrate that a challenged practice is a business necessity.

Initially, in the field of employment discrimination, Griggs established that a defendant could rebut a prima facie case of employment discrimination based on disparate impact by demonstrating that the challenged practice was a "business necessity."257 However, in 1989, the Supreme Court significantly modified the disparate impact standard as applied in Title VII cases in a controversial five-to-four decision in Wards Cove Packaging Company, Inc. v. Antonio258 Wards Cove held that a defendant in a Title VII case could rebut a prima facie case of disparate impact by producing evidence that the challenged practice significantly served legitimate employment goals.259 Wards Cove expressly rejected a strict appli-

256. See, e.g., Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980) (court examined lender’s credit selection criterion to determine if it was necessary to meet legitimate business objectives) and Thomas v. First Federal Saving Bank of Indiana, 633 F. Supp. 1300, 1341 (N.D. Ind. 1987) (lender’s credit selection did not violate the ECOA because it represented the lender’s legitimate business interests).
259. Id. at 659. While noting that a “mere substantial justification” would not be sufficient
cation of the business necessity standard, stating instead that a defendant need not prove that the challenged practice was "essential" or "indispensable" to its business.260

In 1991, Congress enacted the Civil Rights Act and provided statutory guidelines for the adjudication of disparate impact suits under Title VII in order to reverse the more lenient standards set out in Wards Cove. The Civil Rights Act of 1991, although a compromise, was an attempt to raise the standard from merely any "legitimate employment goals" to a "business necessity."261 Congress believed that this and other rulings in Wards Cove had to be modified because they cut back drastically on the scope and effectiveness of civil rights protections, making existing protections and remedies inadequate to deter unlawful discrimination.262 Concerned that the "legitimate employment goals" standard announced in Wards Cove "seriously undermined the effectiveness of Title VII," Congress restored "business necessity" as the applicable legal standard in Title VII disparate impact cases.263

The Civil Rights Act of 1991 mandated that an employment practice that has a disparate impact will not be deemed unlawful under Title VII if the defendant can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."264 Significantly, the Act is silent as to its applicability to cases of housing discrimination under the FHA. Because the courts have largely developed the current body of housing discrimination law under the FHA by analogy to the law of employment discrimination under Title VII, the Wards Cove holdings are potentially applicable to FHA cases.

The legal effect of the Civil Rights Act of 1991 on Wards Cove's applicability to FHA cases remains undetermined because Congress did not amend the Act to reflect the 1991 enactments in the employment area. It can be argued that Wards Cove is not binding authority since it was implicitly overturned by the Civil Rights Act of 1991. The current body of case law under the ECOA was also developed by analogy to Title VII case law. Therefore, the arguments regarding the applicability of Wards Cove and the Civil Rights Act of 1991 to the FHA can also be made regarding their applicability to the ECOA.

D. Recent Developments

Three recent developments—a regulatory revision to the Federal Reserve Board's (FRB) interpretations of Regulation B, a proposed amendment to the Equal Credit Opportunity Act (ECOA), and a decision by the Court of Appeals for the Tenth Circuit—have begun addressing the im-

260. Id.
263. Id. at 27.
Applications of *Wards Cove* and the Civil Rights Act of 1991 for the Fair Housing Act (FHA) and the ECOA. On December 29, 1994, the FRB published for comment proposed revisions (the "Proposal") to its official staff commentary (the "Commentary") to Regulation B, which implements the ECOA. The FRB proposed to add the following sentence to the Commentary:

[C]redit scoring systems that employ neutral factors could violate the act or regulation if there is a disparate impact on prohibited basis, unless the practice is justified by business necessity with no less discriminatory alternative available.

The Proposal was consistent with the language and interpretations of the Civil Rights Act of 1991, yet was inconsistent with a large portion of ECOA case law addressing this issue. The ECOA itself states that a creditor must show that a challenged practice meets "a legitimate business need," presumably a lower standard than "business necessity." Although "business necessity" has been defined in numerous ways, in this context it is given the *Griggs* interpretation. The Proposal would have clarified business necessity as the standard by which facially neutral practices with a disparate impact would be evaluated under the ECOA, without any direct action from Congress.

Commentators generally commended the FRB for attempting to clarify the doctrine of disparate impact, but expressed concern that the Proposal was an oversimplification of a complex evolving doctrine that could mislead examiners, private litigants and possibly the courts. On June 5, 1995, the FRB adopted final revisions to the Commentary, but the amendment did not include the proposed business necessity standard. Instead, the FRB added language to the Commentary, which referenced the burdens of proof contained in the Civil Rights Act of 1991. This reference to the Act indirectly appears to impose the same business necessity standard mentioned in the Proposal. The section into which this reference was placed, however, continues to refer to legitimate business need as the relevant standard for defending an ECOA claim. Despite this apparent conflict, the amendment to the Commentary does not discuss the FRB's view of the interplay between a "business necessity" standard and a "legitimate business need" standard.

Since the FRB, ultimately, did not adopt the Proposal to the Commentary, the debate on the Commentary revisions and the sequence of events around it is of uncertain significance. The debate around clarification continues. Legislation to amend the ECOA by adopting a business necessity standard (the Hinchey Amendment) was proposed during the 104th con-

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266. Id. at 67237.
268. See Thomas P. Vartanian et al., *Revising Regulation B: Codifying the Obvious or Making New Law?*, BANKING POL’Y REP., Feb. 6, 1995 at 16.
gressional session. The Hinchey Amendment was approved by the House Banking Committee and was included in H.R. 1858, the Financial Institutions Regulatory Relief Act. The Hinchey Amendment would amend the ECOA.\(^{270}\)

As proposed, the Hinchey Amendment would require a creditor who used a credit-scoring system that included a factor that had a disparate impact on a prohibited basis to prove that the use of the challenged factor was a business necessity and that no less discriminatory alternative to the challenged factor was available. If enacted, the amendment would change the ECOA in a way that is arguably inconsistent with the current FRB and judicial interpretations of the ECOA by imposing a business necessity, rather than a legitimate business need, standard on creditors.\(^{271}\) The Hinchey Amendment is also significant in that, if enacted, it would provide express support for the proposition that the ECOA could be violated on a disparate impact theory of discrimination, which in the context of the FHA and the ECOA has existed only as a court-made rule. The Amendment would also resolve the question of which party in a disparate impact suit under the ECOA bears the burden of proving that no less discriminatory alternatives to a challenged practice exist by placing this burden on the plaintiff. The House Banking Committee report that accompanies H.R. 1858 states that, with respect to the Hinchey Amendment:

The term business necessity as well as the duty of showing a less discriminatory alternative shall be construed consistent with U.S. Supreme Court precedent such as *Griggs v. Duke Power Company*, 270. H.R. Rep. No. 104-193, at 107 (1995).

Credit Scoring System—(1) In General. A creditor shall be deemed to be in compliance with subsection (a) [creditors may not discriminate on a prohibited basis] with respect to any credit decision made by the creditor which is based solely on the use of an empirically derived, demonstrably and statistically sound, credit-scoring system (as defined by the [Federal Reserve] Board in regulations prescribed under this title) if such system and statistically sound, credit-scoring system (as defined by the [Federal Reserve] Board in regulations prescribed under this title)—

A. Does not utilize any category protected under subsection (a);

B. Does not use as a factor in such system any criterion which is so directly associated with such a category as to be the functional equivalent of such a category; and

C. Does not use as a factor in such system any criterion that has a disparate impact on a category prohibited under subsection(a) unless use of the criterion is justified by business necessity and there is no less discriminatory alternative available.

(2) Age as a Factor. No provision of this subsection shall be construed as precluding a creditor from using age as a factor in a credit-scoring system under paragraph (1) to the extent otherwise permitted under this title.

270. Although Mr. Hinchey has stated that his proposed legislation is “consistent with the Federal Reserve Board’s current interpretation concerning the use of credit scoring systems for credit decisions,” that may not be the case. H.R. Rep. No. 193, at 225 (Additional view of Rep. Hinchey).
401 U.S. 424 (1971) and Albemarle Paper Company v. Moody 422 U.S. 405 (1975).\textsuperscript{272}

In \textit{Albemarle Paper Company},\textsuperscript{273} a Title VII case, the Supreme Court ruled that once an employer has demonstrated that the challenged employment criteria are job related, the plaintiff may then "show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest . . . ."\textsuperscript{274} In this case, a class of African American paper mill employees brought suit, contending that the defendant plant owner used a pre-employment testing program in a discriminatory manner.\textsuperscript{275} At issue was whether the defendant had shown its tests to be job related, that is, whether the tests had a manifest relationship to the employment in question.\textsuperscript{276} The court held that while the complainant has the initial burden of showing that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants, the employer has the burden of proving that its pre-employment tests are job related.\textsuperscript{277} If the employer can do this, the burden shifts back to the complainant who must then show that other tests or selection devices would serve the employer's legitimate interest without a racially discriminatory effect.\textsuperscript{278}

Although the majority of decisions in both the employment and housing discrimination fields have held that the plaintiff must prove that a less discriminatory alternative exists,\textsuperscript{279} a few courts have placed this burden on the defendant.\textsuperscript{280} In addition, even the Hinchey Amendment did not specify which party in an FHA or ECOA case has the burden of proving that no less discriminatory alternative exists.\textsuperscript{281} Placing this burden on the defendant is both fair and logical. The plaintiff has the manageable burden of proving a positive—that the act has a disparate impact. The defendant shoulders the burden of proving the action taken was a necessity.\textsuperscript{282}

On May 30, 1995, the Court of Appeals for the Tenth Circuit issued a decision in \textit{Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development},\textsuperscript{283} which addressed, among other things, the ap-

\textsuperscript{273}. 422 U.S. 405 (1975).
\textsuperscript{274}. \textit{See} id. at 425.
\textsuperscript{275}. \textit{See} id. at 408.
\textsuperscript{276}. \textit{See} id. at 423.
\textsuperscript{277}. \textit{See} id.
\textsuperscript{278}. \textit{See} id.
\textsuperscript{279}. \textit{See} Department of Housing and Urban Development v. Mountain Side Mobile Estates Partnership, 2 Fair Housing-Fair Lending (P-H) ¶ 25,057 (HUDALJ Sept. 20, 1993).
\textsuperscript{280}. \textit{See} Department of Housing and Urban Development v. Carter, 2 Fair Housing-Fair Lending (P-H) ¶ 25,029 (HUDALJ May 1, 1992) (requiring the respondent trailer park owner to show that no alternative course of action could have been adopted that would have served its interest with less discriminatory impact). \textit{See also} Resident Advisory Board v. Rizzo, 564 F.2d 126, 146-49 (3rd Cir. 1977), \textit{cert. denied}, 435 U.S. 908 (1978).
\textsuperscript{282}. Huntington, 488 U.S. at 18.
\textsuperscript{283}. \textit{Mountain Side Mobile Estates Partnership v. Department of Housing and Urban Development}, 56 F.3d 1243 (10th Cir. 1995). The debate over the appropriate standard of proof in disparate impact cases was played out in \textit{Mountain Side Mobile Estates Partnership v. Department of Housing and Urban Development}, 2 Fair Housing-Fair
appropriate standard of proof in a housing discrimination claim under the FHA based on disparate impact. In a two-to-one ruling, the Tenth Circuit panel found that HUD Secretary Cisneros had correctly concluded that the defendant in a disparate impact case needed to demonstrate that a challenged practice was a "business necessity" but had improperly exceeded the "business necessity" standard enunciated in Title VII cases when it required the defendant trailer park in *Mountain Side* to demonstrate that the challenged practice, an occupancy limit, was a "compelling need or necessity." Instead, the Tenth Circuit held that *Griggs* and the Civil Rights Act of 1991 require that "the defendant must demonstrate that the discriminatory practice has a 'manifest relationship' to the housing in question. A mere insubstantial justification in this regard will not suffice, because such a low standard would permit discrimination to be practiced through the use of spurious, seemingly neutral practices." At the same time, there is no requirement that the defendant establish a "compelling need or necessity" for the challenged practice to pass muster since this degree of scrutiny would be almost impossible to satisfy.

Thus, if a plaintiff in a lending discrimination case under the FHA first established a prima facie case based on a disparate impact, then the Tenth Circuit would require the lender to show that the challenged lending practice had a "manifest relationship" to the credit product(s) in question. For example, if it were found that a lender’s policy of refusing to offer home mortgages with a loan-to-value ratio greater than 80% had a disparate impact on a protected class of mortgage applicants, a lender could justify its use of this policy by demonstrating that applicants who made a 20% down payment on a home were less likely to default than those who did not. Therefore, the 80% loan-to-value ratio requirement has a "manifest relationship" to home mortgages. However, a lender might encounter difficulty in proving that an 80% loan-to-value ratio policy was a business necessity in areas where other lenders extended home mortgages with a ninety or 95% loan-to-value ratio and whose operations remained viable. Thus, any remote risk of default, although having a "manifest relationship" to lending, would not reach the level of "business necessity." Even though the Tenth Circuit stated that the "manifest relationship" standard was required by the Supreme Court and by the Civil Rights Act of 1991, the Act clearly could be interpreted as imposing a more demanding standard on a defendant.

The McCollum and Hinchey Amendments have posed questions for Congress concerning what standards a plaintiff and a defendant must

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284. Mountain Side, 56 F.3d at 1255.
285. See id.
286. See id.
meet to establish or rebut a violation of the FHA or the ECOA. These questions have focused attention on issues that are the subject of conflicting circuit court opinions. In addition, developments such as the FRB’s revisions to the Commentary and the Mountain Side decision may lead to further consideration by the courts of the implications of the Civil Rights Act of 1991 for the FHA and the ECOA. Hopefully, this consideration will yield some meaningful guidance for the future.

The passage of a series of anti-discrimination laws provided a framework of negative sanctions and penalties for proven discriminatory behavior in the public and private sectors. However, the approach seems to embody significant practical limitations and philosophical weaknesses.

Negative sanctions are an extremely weak method for deterring institutionalized discriminatory actions, which are deeply ingrained and practiced by an overwhelming majority of institutions and individuals. Applying the sanctions becomes increasingly problematic when the behavior is so long standing that it becomes “normal.” Given the multiple opportunities for discriminatory actions throughout the lending and real estate process, discrimination is often difficult and costly to prove. The costs and difficulties increase when the acts are not overt or intentionally discriminatory, but instead are omissions or failures to take the next steps or provide options or new information.\(^7\)

One important method for proving unintentional institutional discrimination is disparate impact. The use of disparate impact methodology seems to have a limited theoretical underpinning to center its empirical analysis. This limitation undermines the confidence of some courts to use it as a proxy for finding discrimination.

To situate the anti-discrimination law framework in an individually initiated complaint context fails to address the accumulated economic and social capital accumulation of white Americans that was achieved as a result of the multi-generational system of discrimination in property accumulation.\(^8\) This may represent the most telling limitation of the legal complaint strategy: how to level the playing field after nearly 200 years of inequality and discrimination.

VI. CONCLUSION

A. Summary

In the various theories of citizenship debated during the formation of the country’s institutions and Constitution (including the various strands of republicanism), the ownership of productive property was an essential element to a citizen’s independence and liberty. Over the course of the country’s history, governmental bodies at the local, state and national level actively and intentionally legislated and initiated policies to universalize the ability of white male citizens to acquire productive property. Our legal system increasingly, in its progressive re-defining of property, sanctioned and facilitated this process.\(^9\)

\(^7\) See Lake, supra note 145, at 242–46 (1987).
\(^8\) See Part IV of text.
\(^9\) See Oliver & Shapiro, supra note 3, at 37–39.
I suggest that the universal opportunity to acquire productive property can be considered a quasi-entitlement to white male citizens that was systematically denied to African Americans whose citizenship status was problematic at best. The restrictions on this entitlement remained in place in law and custom into the twentieth century, when it was gradually extended to others. This quasi-entitlement to the acquisition of productive property (and later its new version tied to home ownership and employment) and the underlying social capital had, and still has, a significant multiplying effect. The wealth/equity created could be transferred through generations without meeting any criteria (e.g., intelligence, ability, investment, etc.) other than familial ties. This made the continued accumulation of wealth and opportunities to secure liberty and the pursuit of public happiness possible for succeeding generations. The denial to African Americans of this quasi-entitlement to own productive property (or its neo-republican reformulation) in any geographical location where one’s resources allowed, intentionally and substantially disadvantaged generations of African Americans in their ability to secure liberty, independence and the pursuit of public happiness. The denial of this “first-class” citizenship entitlement was promulgated on a theory of “races” and color that established a hierarchy of “races” within which white Europeans were at the top and African Americans at the bottom. This racial theory of African American inferiority sunk deep into the common culture of the United States. Even with the eventual extension of first-class citizens’ rights to African Americans in the late twentieth century, this conception of African American inferiority colored everyday transactions in lending, real estate, and employment.

Because the ownership of productive property is so essential to republican and neo-republican citizenship, the adoption of anti-discrimination laws in the areas of lending and real estate are necessary to the protection of citizen liberty and independence. Given the depth and penetration into the common culture of “race” theory and the continuing discrimination in lending, real estate and employment, the enforcement provisions and the interpretation of these laws needs a stronger and more extensive penalty framework to insure that the decisions to discriminate are subject to severe sanctions. The reformulation of an anti-discrimination approach does not undo the years of accumulated intergenerational advantage that property ownership by white households has created. I believe some strategy encompassing a redistribution of productive assets must be devised to provide, for a time, for present and future generations of African American households (and other historically disenfranchised collectives) a clear and universal opportunity to acquire productive property.

B. Preliminary Thoughts on a Neo-Republican Theory of Anti-Discrimination Law and Social Policy

The basis for a neo-republican theory of anti-discrimination law and social policy can be rooted in four central concepts. The first is that universal ownership of productive property and the bundle of rights attached to it are essential to citizens in a capitalist democratic system to exercise liberty, independence, and pursue public happiness. It is also a protection against the “control of employers or landlords.”
Second, the denial of this quasi-entitlement (e.g., racial discrimination) must be vigorously discouraged in law and custom through the creation of a legal framework of sanctions and penalties that are undergirded by understanding the historical existence of a hierarchy of citizenship that denied, in the entire cultural infrastructure, opportunities to African Americans. While this hierarchy was "leveled" in the 1950s and 1960s with the passage of civil rights legislation and the 1954 Supreme Court decision in Brown, the continued role of racial inferiority theory in the real estate and lending industries is still an important factor in the continual disparity of property ownership between African Americans and whites, and continuing spatial segregation. Also, one must recognize that the manifestations of this racial inferiority theory tend not to be overt or blatant, but are translated into the everyday "normal" business practices and social habits of institutions by acts of commission and omission.

Additionally, because of the status of normalcy associated with racial discrimination, indirect measurements of racial discrimination must be created and used as a proxy for blatant observable acts of racial discrimination (e.g., disparate impact methodology).

Finally, one must understand that the disparate impact methodology must assume an equality context between ethnic and "racial" populations. It must assume that intelligence and ability are equally distributed through these populations, and, therefore, the distribution of African Americans in relation to comparable groupings of whites in particular markets such as mortgage lending and home ownership should reflect their ratios in the general population. This should always be the case unless the existence of extraordinary conditions explaining the disparities can be proven by the businesses or institutions that have been found to have significant disparities. For example, for the average person, property acquisition in the form of a home is an important step in generating wealth and accumulating the capital needed to fund other desirable ends, such as a college education or stability during a family crisis. For most Americans, this end is not attainable without a mortgage. Thus, in the mortgage lending process, the guiding principle should be fairness. In a democracy, where "all people are created equal," and all under the law have equal opportunity, lenders should consider the ramifications of their actions upon other people. This is especially the case where one has the ability to so drastically affect the future of others. Lenders should not engage in unconstrained decisionmaking, but they should have to account for decisions that disproportionately impact an asset as essential as property.

Excluding a group from attaining an asset that is central to participating in our democratic society may be an unintended, but considerable, consequence of outdated practices and procedures based on misguided notions. Only with the revelation of the bases for the decision can one adequately address what may be a faulty or erroneous premise. Legal rules, like all other rules, derive their significance from context. Lenders should be given the opportunity to illustrate why their chosen rule or practice, though apparently discriminatory, is actually based on some necessity. Sometimes the values behind the choices involved in a decision must be clarified. This struggle over equal access to credit and housing is related to the larger struggle to obtain liberty and economic independence.
through property acquisition. The larger struggle is to control and determine one’s own destiny and to rearrange existing power relations.

If continuing to limit access to credit and property acquisition means perpetuating something deemed inconsistent with a neo-republican vision of citizenship, it is no longer acceptable to allow this type of decision making without a justifiable cause. Instead, the courts must act on behalf of the individual, shifting the current power balance out of the hands of a few in control of lending and housing decisions.

Defining the role of property as essential to independence and liberty changes the baseline by shifting the burden of proof to the one who has the right to deny access, thus forcing the lender to justify the decision. This may be viewed as limiting the lender’s property interest, but limits on property interests are seen throughout the law. In adverse possession, sleeping on your rights for the statutory period for ejection may lead to a total extinguishment of the property interest. In mortgages, the law also grants an equity of redemption that allows a defaulted borrower to regain the property and also allows for the complete forfeiture of property acquired with the proceeds from the distribution of illegal drugs. When social conditions have fundamentally changed, application of the rule may require something different from what was required in the past.

More than ever, equal opportunity must have legal backing. Without the resources to obtain economic independence, an entire group of people is caught in an unbreakable cycle of dependence. We cannot allow lending decisions to be made in a vacuum without regard for what is really at stake for the group impacted and for the country. Human dignity, the pursuit of happiness and a just distribution of power are too much to risk.

There is also a need for the establishment of new universal redistribution strategies comparable to the 1800s Homestead Acts and the G.I. bills of the 1940s and 1950s. These new neo-republican strategies would guarantee the attainment of productive property (e.g., home ownership) for all households over a limited multi-generation time frame to redress the advantage gained during the earlier periods for white male households. There is also a need for the creation of “alternative institutional mechanisms” to address the deeply imbedded incentives to discriminate in the real estate and lending industries.

Robert W. Lake has suggested a series of proposals aimed at creating an affirmative approach that encourages the development of conditions conducive to equal access to housing market information. Other possible strategies would create and/or expand alternative lending and would entail the drafting of a new social compact between financial institutions and the communities they serve to insure the availability of fair credit to

290. Obviously, the definition of productive property in the 20th century must include other productive assets. For example, stocks, bonds, and homes. The practical reality is that very few African Americans own stocks and bonds and other productive assets. Access to these productive assets often is the result of intergenerational transfers, disposable income and employment status.

While the opportunity to own these forms of productive property are increasingly “color blind,” I would suggest an analysis of this area still needs to be explored in some detail. For a path-breaking look into these questions of wealth accumulation and African Americans, see OLIVER & SHAPIRO, supra note 3.

291. See LAKE, supra note 145, at 242–49.
all citizens, regardless of their place in income, gender or racial groupings. This is especially needed in light of the federal guarantee of insurance on accounts and the underwriting protection of loans through the Federal Housing Administration and Veterans Administration.

These ideas represent some thoughts in a continuing conversation and debate about the nature of citizenship and property in democracy and the impact of racial discrimination on these two concepts. Hopefully, the conversation will continue, and these thoughts will contribute to that debate.