

# Can New Americans Achieve the American Dream? Promoting Homeownership in Immigrant Communities

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## INTRODUCTION

Homeownership represents the attainment of the “American Dream” for many immigrants to the United States.<sup>1</sup> Immigrants in America typically pursue homeownership for its vast economic, cultural and psychological advantages.<sup>2</sup> The significant benefits of homeownership in America are well-established.

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<sup>1</sup> See, e.g., RACHEL BOGARDUS DREW, JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., *NEW AMERICANS, NEW HOMEOWNERS: THE ROLE AND RELEVANCE OF FOREIGN-BORN FIRST-TIME HOMEBUYERS IN THE U.S. HOUSING MARKET 4* (2002), available at [http://www.jchs.harvard.edu/publications/homeownership/drew\\_N02-2.pdf](http://www.jchs.harvard.edu/publications/homeownership/drew_N02-2.pdf); OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP’T. OF HOUS. & URBAN DEV., *Introduction to WHAT WE KNOW ABOUT MORTGAGE LENDING DISCRIMINATION IN AMERICA* (1999), available at <http://www.hud.gov/library/bookshelf18/pressrel/newsconf/menu.html> [hereinafter *WHAT WE KNOW*]; Nicolas P. Retsinas & Eric S. Belsky, *Examining the Unexamined Goal*, in *LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL* 1, 3 (Nicolas P. Retsinas & Eric S. Belsky eds., 2002) (noting that the concept of homeownership is “oft equated with the American dream” and that homeownership is “not far behind motherhood and apple pie as an American symbol”); WILLIAM M. ROHE ET AL., *THE SOCIAL BENEFITS AND COSTS OF HOMEOWNERSHIP: A CRITICAL ASSESSMENT OF THE RESEARCH* 1 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. LIHO-01.12, 2001), available at <http://www.jchs.harvard.edu/publications/homeownership/liho01-12.pdf> [hereinafter *ROHE ET AL., SOCIAL BENEFITS*].

Housing market literature also enshrines homeownership as the American Dream for immigrants. See, e.g., FANNIE MAE, 2001 ANNUAL REPORT 1–18 (2002), available at <http://www.fanniemae.com/global/pdf/ir/annualreport/2001/fullreport.pdf>; John Buckley, *From Dream to Reality*, *MORTGAGE BANKING*, Sept. 1, 1995, at 12 (“Immigrants to the United States are almost three times as likely as all adults to rank buying a home as their ‘number-one’ priority.”) (citing Fannie Mae survey).

<sup>2</sup> See, e.g., GEORGE J. BORJAS, *HOMEOWNERSHIP IN THE IMMIGRANT POPULATION* 6 (Research Inst. for Hous. Am., Working Paper No. 02-01, 2002), available at <http://www>.

Home equity often serves as the financial foundation for homeowners to build wealth.<sup>3</sup> Ownership of a home symbolizes the achievement of prosperity, stability and success.<sup>4</sup> Homeownership also demonstrably strengthens communities and society.<sup>5</sup>

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housingamerica.org/docs/WP02\_01.pdf (“It seems as if homeownership is an important part of the ‘offer’ of political, cultural, and economic benefits that draws immigrants to the United States.”); DREW, *supra* note 1, at 2 (“Owning a home not only gives immigrants a stake in America, but also provides the opportunity to own something of lasting value and a source of wealth.”); ANDREW I. SCHOENHOLTZ & KRISTIN STANTON, FANNIE MAE FOUND., REACHING THE IMMIGRANT MARKET: CREATING HOMEOWNERSHIP OPPORTUNITIES FOR NEW AMERICANS 2 (2001), available at [http://www.fanniemaefoundation.org/programs/pdf/rep\\_immigrant.pdf](http://www.fanniemaefoundation.org/programs/pdf/rep_immigrant.pdf) (“Immigrants to the United States have a strong desire to become citizens and to have their children belong in the new land. Homeownership is perceived as a major milestone in becoming settled, in feeling a part of a new community, in thinking of themselves as *Americans*.”). See also NAT’L ASS’N OF REALTORS, HOUSING OPPORTUNITIES IN THE FOREIGN BORN MARKET 4 (2002), available at [http://www.realtor.org/cipshome.NSF/files/ImmigrantMkt\\_2002.PDF/\\$FILE/ImmigrantMkt\\_2002.pdf](http://www.realtor.org/cipshome.NSF/files/ImmigrantMkt_2002.PDF/$FILE/ImmigrantMkt_2002.pdf) (“[M]any immigrants consider homeownership not only an investment but also a milestone toward establishing a sense of permanence, belonging, and commitment to a community. At the same time, many consider homeownership as an important indicator of socioeconomic achievement, providing security against job loss or financial hardship. Further, buying is preferred for the safety and autonomy a home provides, such as being able to engage in their own social and cultural activities.”).

<sup>3</sup> JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 7 (2002), available at <http://www.jchs.harvard.edu/publications/markets/Son2002.pdf> (noting that “in 1998 half of all homeowners held at least 50 percent of their net wealth in home equity”); see also STEPHEN ROSS & JOHN YINGER, THE COLOR OF CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND FAIR-LENDING ENFORCEMENT 1 (2002) (noting that “[h]omeownership is the most commonly used method for wealth accumulation”). Home equity can be a source of home equity loans, a significant financial tool that homeowners can use to finance education and businesses, and a reserve source of cash. Nat’l Home Equity Mortgage Assoc., *Benefits of Home Equity Loans*, at <http://www.nhema.org/About> (last visited Nov. 14, 2003) (listing the benefits of home equity loans, including home equity as a source of capital, business and educational loans, emergency funds, and credit improvement). Homeownership also provides tax relief, since the interest from a home equity loan is often tax-deductible, whereas rent payments are not. 26 U.S.C. § 163(h)(3) (2000). See generally DANIEL AARONSON, FED. RESERVE BANK OF CHI., A NOTE ON THE BENEFITS OF HOMEOWNERSHIP (1999), available at [http://www.chicagofed.org/publications/workingpapers/papers/wp98\\_20.pdf](http://www.chicagofed.org/publications/workingpapers/papers/wp98_20.pdf); DEP’T. OF HOUS. AND URBAN DEV., HOMEOWNERSHIP AND ITS BENEFITS (Urban Policy Brief No. 2, 1995), available at <http://www.huduser.org/publications/txt/hdbrf2.txt>; William M. Rohe and Leslie S. Stewart, Fannie Mae Found., *Homeownership and Neighborhood Stability*, 7 HOUS. POL’Y DEBATE 37 (1996), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_0701\\_rohe.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0701_rohe.pdf).

<sup>4</sup> See generally RAPHAEL W. BOSTIC & BRIAN J. SURETTE, HAVE THE DOORS OPENED WIDER? TRENDS IN HOMEOWNERSHIP RATES BY RACE AND INCOME 1 (Fed. Reserve Sys., Finance and Economics Discussion Series No. 2000-31, 2000), available at <http://www.federalreserve.gov/pubs/feds/2000/200031/200031pap.pdf> (“[H]omeownership has long been viewed as an important milestone for families, and an important contributor to economically vibrant communities.”); Retsinas & Belsky, *supra* note 1 (noting that homeownership symbolizes success and achievement in America).

<sup>5</sup> See, e.g., THOMAS P. BOEHM & ALAN M. SCHLOTTMAN, HOUSING AND WEALTH ACCUMULATION: INTERGENERATIONAL IMPACTS 16 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. LIHO-01.15, 2001), available at <http://www.jchs.harvard.edu/publications/homeownership/liho01-15.pdf> (“[P]arental [home] ownership indirectly impacts child labor earnings through increased educational attainment that is particularly significant for lower income households. . . . [C]hildren from owner-occupied households

Immigrants now own a large share of the home equity in the United States. In 2001, approximately six million foreign-born homeowners were living in the United States, holding \$876 billion in home equity.<sup>6</sup> This figure represents a substantial portion of the total \$6.7 trillion in home equity held nationwide in 2001.<sup>7</sup>

As immigration to the United States has skyrocketed,<sup>8</sup> homeownership in immigrant communities has become a priority for institutions involved in the American real estate market, such as government agencies, banks, mortgage brokers, realtors, and nonprofits.<sup>9</sup> These institutions have started developing programs designed to help immigrants buy homes. Mortgage financing giant Fannie Mae, for example, is creating new mortgage products “designed to meet the unique needs of New Americans,”<sup>10</sup>

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have fewer social problems, which also seems to augment labor earnings.”); Retsinas & Belsky, *supra* note 1, at 1–12 (emphasizing the economic, social, and psychological benefits of homeownership); ROSS & YINGER, *supra* note 3, at 1 (noting that “homeownership is associated with investments in social capital, such as membership in nonprofit organizations or helping to solve local problems”); ROHE ET AL., SOCIAL BENEFITS, *supra* note 1 (commenting that homeownership has positive economic and social benefits, both on the individual and societal level); WHAT WE KNOW, *supra* note 1 (“[B]eing a homeowner is also known to increase people’s feelings of control over their lives and their sense of overall well-being. High rates of homeownership are believed to strengthen neighborhoods as well, by increasing residents’ stake in the future of their communities.”).

<sup>6</sup> See DREW, *supra* note 1, at 2.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> The American foreign-born population increased 191% from 1970 to 2000. ECON. & STATISTICS ADMIN., U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000, at 3 (2001), available at <http://www.census.gov/prod/2002pubs/p23-206.pdf> [hereinafter PROFILE OF THE FOREIGN-BORN].

<sup>9</sup> See, e.g., NAT’L ASS’N OF REALTORS, *supra* note 2, at 2 (“[I]dentifying and understanding this market niche [immigrant real estate demand] is vital to REALTORS® in marketing real estate to those clients.”); SCHOENHOLTZ & STANTON, *supra* note 2, at 1 (“Financial institutions today have an excellent opportunity to capture an emerging market of very interested and eligible first-time home buyers—new American immigrants.”); Andrea Lee Negroni & Lorna M. Neill, *Marketing Mortgages en Español*, MORTGAGE BANKING, Aug. 1, 2002, at 39 (“U.S. population trends suggest mortgage lenders who want to expand or even maintain market share must reach out to the foreign-born, the newly immigrated and Americans of foreign heritage.”); David S. Jones, *Immigrants Buy Homes Too*, The Real Estate Ctr., Tex. A&M Univ. (Dec. 24, 2002), at <http://recenter.tamu.edu/news/24-1202.html> (“[I]mmigrants make up a growing market that contributes a great deal to the American economy, and they are expected to play an even bigger role in the housing market over the coming decades.”) (quoting Martin Edwards, President, National Association of Realtors).

<sup>10</sup> See Kenneth R. Harney, *Bush Minority Homeownership Plan Rests Heavily on Fannie and Freddie*, REALTY TIMES, June 24, 2002, at [http://realtimes.lycos.com/renews/20020624\\_bushplan.htm](http://realtimes.lycos.com/renews/20020624_bushplan.htm). For examples of other Fannie Mae initiatives targeting immigrants, see Fannie Mae, *American Dream Commitment*, at <http://www.fanniemae.com/initiatives/adc/index.jhtml> (last visited Nov. 14, 2003) (noting that immigrants are a target audience for Fannie Mae’s “American Dream” commitment); News Release, Fannie Mae, Fannie Mae Convenes Roundtable Discussion on New Immigrant and Minority Affordable Housing Opportunities in Utah (Aug. 17, 2000), at <http://www.fanniemae.com/newsreleases/2000/0896.jhtml>; News Release, Fannie Mae, HomeBanc and Fannie Mae Announce Multicultural Homeownership Initiative; Hialeah Mayor Raul L. Martinez Praises Effort to Provide Homeownership Opportunities to Low- and Moderate-Income Immigrant and

while its chief competitor Freddie Mac has designed a home financing program called "Mortgage Solutions for Immigrant Families."<sup>11</sup> The U.S. government has also begun to promote homeownership in immigrant communities.<sup>12</sup>

Although immigrants are buying homes in ever greater numbers, discrimination in the American real estate market remains significant. Much of this discrimination occurs in the area of mortgage lending. Simply defined, a mortgage is a loan to purchase a home.<sup>13</sup> As most homebuyers cannot afford to pay for homes entirely in cash, they take out home mortgage loans to finance their purchases.<sup>14</sup> Discrimination in the mortgage finance market, therefore, poses an obstacle to immigrant homeownership. Although legitimate mortgage lenders have provided millions of immigrants with the credit required to purchase homes, unscrupulous lenders frequently prey on immigrants, who often lack a sophisticated understanding of the market, by offering exploitative loan terms and conditions. Systemic discrimination prevents many immigrants from purchasing homes,

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Minority Families (Sept. 19, 2002), at <http://www.fanniemae.com/newsreleases/2002/2157.jhtml>; News Release, Fannie Mae, HomeBanc and Fannie Mae Announce New \$1 Billion Multicultural Homeownership Initiative to Serve Minority and Immigrant Families in Georgia and Florida (Oct. 4, 2001), at <http://www.fanniemae.com/newsreleases/2001/1554.jhtml>; News Release, Fannie Mae, U.S. Representative Nancy Pelosi, Mayor Willie Brown, and Fannie Mae Announce New Homeownership Effort for New Immigrants (Apr. 20, 2000), at <http://www.fanniemae.com/newsreleases/2000/0725.jhtml>; News Release, Fannie Mae, The Urban League of Greater Chattanooga, SunTrust, and Fannie Mae Celebrate Success of the Wealth Creation Program; Partners Welcome Families Into Their New Homes (June 11, 2002), at <http://www.fanniemae.com/newsreleases/2002/1966.jhtml>.

<sup>11</sup> See Al Heavens, *Freddie Mac Makes It Easier for Non-Traditional Borrowers*, REALTY TIMES, Feb. 28, 2002, at [http://realtimes.lycos.com/renews/20020228\\_freddie.htm](http://realtimes.lycos.com/renews/20020228_freddie.htm). For examples of Freddie Mac's other initiatives targeting immigrant communities, see Freddie Mac, *Opening Doors to Homeownership within the Immigrant Community*, at <http://www.freddiemac.com/singlefamily/divmkt.html> (last visited Nov. 16, 2003) (describing how Freddie Mac has changed its underwriting guidelines to accommodate immigrants); Freddie Mac, *Simplified Guidelines for Permanent and Nonpermanent Resident Aliens*, at [http://www.freddiemac.com/sell/factsheets/res\\_alien.htm](http://www.freddiemac.com/sell/factsheets/res_alien.htm) (last visited Nov. 16, 2003) (same); Press Release, Freddie Mac, Freddie Mac and Seven Leading Hispanic Organizations Launch Nationwide Bilingual Credit Education Initiative (Dec. 10, 2002), at [http://www.freddiemac.com/news/archives/afford\\_housing/2002/cse\\_121002.html](http://www.freddiemac.com/news/archives/afford_housing/2002/cse_121002.html); Press Release, Freddie Mac, *New Mortgage Products and New Borrower Requirements Help Lenders Help More Homebuyers* (May 2, 2000), at <http://www.freddiemac.com/news/archives2000/retainbus.htm> (describing how Freddie Mac has changed its underwriting guidelines to accommodate immigrants).

<sup>12</sup> See generally U.S. GOVERNMENT, *A HOME OF YOUR OWN: EXPANDING OPPORTUNITIES FOR ALL AMERICANS* (2002), at <http://www.whitehouse.gov/infocus/homeownership/homeownership-policy-book-whole.pdf> (discussing the removal of obstacles to minority and immigrant homeownership).

<sup>13</sup> A mortgage is "[a] conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms . . . . Loosely, [it is] the loan on which such a transaction is based." BLACK'S LAW DICTIONARY 1026-27 (7th ed. 1999).

<sup>14</sup> See ROSS & YINGER, *supra* note 3, at 1 (noting that "the vast majority of home purchases are made with the help of a mortgage loan").

thus undermining their ability to establish economic and social footholds in this country.<sup>15</sup>

This Note examines potential legal, legislative, and community advocacy strategies that immigrants can use to combat discrimination in the American mortgage finance market. Part I of this Note provides a factual overview of relevant immigration and housing trends in contemporary America. Part II examines the major obstacles faced by immigrants in the mortgage finance market. Part III considers legal remedies that immigrants can pursue in response to mortgage finance discrimination. Finally, Part IV discusses legislative and community advocacy strategies for improving access to mortgage finance in immigrant communities.

This Note is specifically concerned with discrimination on the basis of citizenship status. Given that immigrants constitute a diverse population, they may encounter several forms of discrimination, including discrimination based on race, national origin, sex and familial status. In contrast to discrimination on the basis of citizenship status, none of these forms of discrimination is uniquely experienced by immigrants. Unlike these other forms of discrimination, citizenship discrimination in the mortgage lending market is a relatively underexamined area of scholarship. This Note's discussion of legal remedies, therefore, focuses on the ability of immigrants who are not U.S. citizens to utilize traditional legal remedies in fighting mortgage lending discrimination on the basis of citizenship status. Unfortunately, as this Note explains, few effective legal remedies exist to combat citizenship discrimination in the homeownership market. This Note therefore suggests that legislative and community advocacy strategies are the best tools to advance immigrants' homeownership, given the difficulty that immigrants (particularly noncitizens) experience in harnessing the principal federal antidiscrimination statutes to oppose mortgage lending discrimination (particularly discrimination on the basis of citizenship).

A full discussion of pervasive institutional discrimination in the mortgage finance market, and of how it might be combated, would require a combined sociological, historical, and economic critique that is beyond the scope of this Note. Methods for redressing institutional inequality in the homeownership market (primarily through housing market and banking sector reform) have already been extensively explored in the

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<sup>15</sup> Cf. DEANNE LOONIN & CHI CHI WU, NAT'L CONSUMER LAW CTR., CREDIT DISCRIMINATION 1 (3d ed. 2002) ("One direct consequence of credit discrimination is lost opportunity—lost opportunity for home ownership, lost opportunity for a college education, and denial of access to medical care and other essential services."); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 135–58 (1995) (listing the adverse economic and sociological consequences of discrimination against minorities in the homeownership market). As discussed *infra* note 37, the sizeable population overlap between minority and immigrant communities means that the status of homeownership in minority communities is inextricably linked to the status of homeownership in immigrant communities.

legal, economic and sociological literature. Accordingly, this Note will focus on alleviating discrimination in the mortgage finance market endured by *individual* immigrants and promoting strategies that empower immigrant communities to overcome barriers to achieving homeownership.

This Note bases its analysis of homeownership in the immigrant population upon the U.S. government's definition of "foreign-born" individuals, which includes immigrants, legal nonimmigrants (such as refugees and persons on student or work visas), and persons illegally residing inside the United States.<sup>16</sup> For purposes of simplicity in this Note, I use "immigrants" and "foreign born" interchangeably.

## I. HOMEOWNERSHIP AMONG AMERICAN IMMIGRANT COMMUNITIES: FACTS AND FIGURES

### A. *Immigrant Populations in the United States*

Immigration to America has soared over the past thirty years. Between 1970 and 2000, the American foreign-born population increased 191%, from 9.7 million to 28.4 million.<sup>17</sup> Within this total figure, the naturalized citizen foreign-born population grew 71%, from 6.2 million to 10.6 million, while the noncitizen population skyrocketed 401%, from 3.5 million to 17.8 million.<sup>18</sup> Twenty percent of the American population,

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<sup>16</sup> The Census Bureau defines "foreign born" as follows:

Simply put, the foreign born are not U.S. citizens at birth. The foreign-born population is classified by citizenship status: those who have become U.S. citizens through naturalization and those who are not U.S. citizens. Natives, as defined by the Census Bureau, were born in the United States, in U.S. Island Areas such as Puerto Rico, or were born in a foreign country of at least one parent who was a U.S. citizen . . . . Immigrants, as defined in the Immigration and Nationality Act, are aliens admitted to the United States for lawful permanent residence. They may be issued immigrant visas overseas by the Department of State or adjusted to permanent resident status in the United States by the Immigration and Naturalization Service.

PROFILE OF THE FOREIGN-BORN, *supra* note 8, at 8.

The Immigration and Nationality Act defines immigrants as those aliens that do not fall within a specified class of nonimmigrant aliens. 8 U.S.C. § 1101(a)(15) (2000). The designation "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." *Id.* § 1101(a)(20). The designation "national of the United States" means "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* § 1101(a)(22). In 2003, the Immigration and Naturalization Service became part of the newly formed Department of Homeland Security. See Carl Bialik, *Homeland Agency Web Site Remains Only in English*, WALL ST. J., July 29, 2003, at B3.

<sup>17</sup> PROFILE OF THE FOREIGN-BORN, *supra* note 8, at 3.

<sup>18</sup> *Id.* The U.S. Census Bureau notes that as a consequence of these trends, "[t]he pro-

or 55.9 million people, now hails from “foreign stock.”<sup>19</sup> In addition to the 28.4 million foreign-born individuals, 14.8 million people claim foreign parentage (American-born but with both parents foreign born) while 12.7 million people claim mixed parentage (one foreign-born parent).<sup>20</sup> This represents an increase of almost 70% from 1970’s total foreign stock of 33.6 million individuals.<sup>21</sup> The tremendous growth in the foreign-born population has greatly outpaced overall population growth in America: from 1970 to 2000, the total U.S. population grew from 203.2 million to 274.1 million, an increase of only 35%.<sup>22</sup> These figures demonstrate that the segment of the U.S. population facing discriminatory challenges unique to immigrants is potentially very large.

### B. Homeownership Among Immigrant Populations in the United States

Immigrant homeownership in the United States lags behind national homeownership averages. In 2000, the foreign-born headed 11.6 million of the 104.7 million households in the United States.<sup>23</sup> Although the national homeownership rate among all households was 67.2% (70.4 million householders), homeownership among native-born households, at 69.5% (64.7 million householders), was significantly greater than homeownership among foreign-born households, which was at 48.8% (5.7 million householders).<sup>24</sup> Rates of homeownership within the foreign-born household population differed dramatically according to citizenship status. Among foreign-born households, homeownership rates were higher among households headed by naturalized citizens (66.5%) than among households headed by noncitizens (33.5%).<sup>25</sup> Length of residence in the United States interacts with citizenship status to predict homeownership

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portion of naturalized citizens in the foreign-born population has declined since 1970,” suggesting that citizenship distinctions will become increasingly important. *Id.* at 20. For the Census Bureau’s definition of “foreign-born,” see *supra* note 16.

<sup>19</sup> *Id.* at 3. The U.S. Census Bureau defines “foreign stock” to include the foreign-born population and the native population of mixed parentage (one parent native-born and one parent foreign-born) and the native population of foreign parentage (both parents foreign-born). The foreign stock population thus includes both the first and second generation of U.S. residents. *Id.* at 22.

<sup>20</sup> *Id.* at 22.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 28.

<sup>23</sup> *Id.* at 30.

<sup>24</sup> *Id.* at 52–53. The United States Census Bureau defines the “homeownership rate” as:

the percentage of householders in which the owner or a co-owner is a member of the household, whether or not the housing unit is mortgaged or not otherwise fully paid for. Households are classified as foreign born or native based on the nativity of the householder, regardless of the nativity of other household members.

*Id.* at 52.

<sup>25</sup> *Id.* at 53.

rates among the foreign born. While only 22.6% of those foreign-born noncitizens who have lived in the United States for less than ten years own houses, the figure is 68.1% for those naturalized citizens who have lived in the United States for over ten years.<sup>26</sup> The data suggest that length of residence as well as citizenship status positively influence homeownership among the foreign born.<sup>27</sup> Homeownership is likely to boom among foreign-born populations as more foreign-born householders obtain the economic and cultural stability that accompanies increased length of American residence and the attainment of citizenship.<sup>28</sup>

The relative youth of the foreign-born population suggests that the demand for homeownership among immigrant communities will also increase. The median age of the foreign-born population declined from 57.2 years in 1960 to 38.1 years in 2000.<sup>29</sup> Simultaneously, homeownership rates among foreign-born households increased steadily with age: foreign-born householders younger than 35 had a homeownership rate of 25.8%, while foreign-born householders aged 35 to 64 had a homeownership rate of 55.8% and foreign-born householders 65 years or older had a homeownership rate of 67.4%.<sup>30</sup> These “aging effect” data suggest that home purchases will likely grow in number as the foreign-born population ages. Given that homeownership among foreign-born populations increases with the attainment of citizenship, length of residence, and age, homeownership among the foreign born will likely boom as a relatively young foreign-born population matures and establishes roots in the United States. The considerable growth in the foreign-born population likely will work in tandem with these factors to fuel the overall foreign-born homeownership demand to unprecedented heights.

Within immigrant populations in the United States, homeownership rates differ considerably. First, foreign-born homeownership rates vary according to the householder’s country of origin. In 2000, the homeownership rate was 63.5% among householders from Europe, 52.0% for householders from Asia, and 41.2% for householders from Latin America.<sup>31</sup> Vast differences exist in educational background and economic status among national origin groups.<sup>32</sup> Those disparities likely explain the

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<sup>26</sup> *Id.*

<sup>27</sup> The data show that 22.6% of noncitizens who had lived in the United States for less than ten years owned homes; 43.1% of noncitizens who had lived in the United States for ten or more years owned homes; 42.3% of naturalized citizens who had lived in the United States for less than ten years owned homes; and 68.1% of naturalized citizens who had lived in the United States for ten or more years owned homes. *Id.* at 52.

<sup>28</sup> See NAT’L ASS’N OF REALTORS, *supra* note 2, at 5 (“During the early years of residency (less than five years), immigrants are more likely to live with other family members or friends. After adapting to their new environment, establishing a stable employment record, and building their savings, immigrants tend to move out and rent their own quarters.”).

<sup>29</sup> PROFILE OF THE FOREIGN-BORN, *supra* note 8, at 27.

<sup>30</sup> *Id.* at 52.

<sup>31</sup> *Id.*

<sup>32</sup> George Borjas reports:

varying homeownership rates among these groups<sup>33</sup> as better educated and wealthier immigrants are more likely to enter into homeownership.<sup>34</sup> Household composition also impacts homeownership rates: the homeownership rate for foreign-born married-couple families was 59.8%, while the homeownership rate among foreign-born female-headed families where no husband was present was 37.3%.<sup>35</sup>

## II. MORTGAGE LENDING DISCRIMINATION FACED BY IMMIGRANTS

Although immigrants to the United States aspire to homeownership,<sup>36</sup> immigrants face several obstacles to becoming homeowners. This Note explores mortgage lending discrimination, one of the principal forms of discrimination that immigrants encounter in the homebuyers' market. The needs of the foreign-born population in the United States often overlap with the needs of the foreign stock and minority populations.<sup>37</sup> The

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Mean years of schooling (obtained either in the US or in the country of origin) range from 8 years for immigrants originating in Mexico or Portugal, to about 15 years for immigrants originating in such diverse countries as India and the United Kingdom. Similarly, immigrants from El Salvador or Mexico have household income that is 30 percent lower than that of native households. In contrast, immigrants from the United Kingdom and India have household incomes that are six and 38 percent higher respectively than the native population. Moreover, these differences cannot be attributed to the fact that some national origin groups have lived in the United States for longer periods. . . . There is substantial dispersion in both educational attainment and household income even among immigrants who have been in the country more than 10 years.

BORJAS, *supra* note 2, at 6–7.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.* at 10. Borjas suggests that a change in the national origin mix of immigrants over the past twenty years may be responsible for the “widening homeownership gap” that has developed from 1980 to 2000 between native-born householders and immigrants. *Id.* at 3, 16. Borjas also notes that “[i]mmigrants who originate in countries that have abundant human capital and higher levels of per-capita income tend to do better in the United States, partly because these immigrants have higher levels of educational attainment and may also have skills that are more easily transferable to the U.S. labor market.” *Id.* at 2.

<sup>35</sup> PROFILE OF THE FOREIGN-BORN, *supra* note 8, at 53.

<sup>36</sup> See *supra* notes 1–2.

<sup>37</sup> Foreign-born individuals constitute one of the most easily identifiable categories of new residents in the United States, but individuals claiming mixed or foreign parentage may also face many of the same economic, cultural, and legal barriers encountered by foreign-born individuals. Thus, any analysis addressing the foreign born automatically implicates the challenges faced by the entire population of foreign stock, which includes both the foreign born and individuals possessing at least some foreign parentage.

Discussion of mortgage lending discrimination experienced by minorities in the United States automatically implicates individuals of foreign stock. Significant overlap exists between foreign stock and minority populations in the United States. In 2001, 9.6 million (87.9%) of the 10.9 million Asian/Pacific Islanders living in the United States were of foreign stock. PROFILE OF THE FOREIGN-BORN, *supra* note 8, at 24–25. Similarly, 22 million (67.6%) of the 32.8 million Hispanic population and 3.6 million (10.1%) of the 35.5 million Black population were of foreign stock. *Id.*

For a more complete definition of “foreign stock,” see *supra* note 19.

analysis of the challenges to homeownership faced by immigrants thus often rests upon extrapolation from data on homeownership in minority communities.

Discrimination in all stages of the mortgage finance process constitutes a major barrier to immigrants seeking to obtain home financing. This Part of the Note discusses impediments to homeownership faced by immigrants within the entire mortgage lending system.

### A. *The American Mortgage Finance Market*

The American mortgage market consists of a primary and a secondary market.<sup>38</sup> In the primary market, mortgages are originated and funds are loaned to borrowers.<sup>39</sup> After a mortgage is originated, a primary lender can either hold the mortgage in its own portfolio or sell the mortgage to a secondary market investor, which provides the primary market lender with a source of funds for additional mortgages.<sup>40</sup> The secondary market consists of investors that trade mortgages.<sup>41</sup>

The American primary mortgage market can be classified into two major lending segments: the “prime” mortgage lending market and the “subprime” market.<sup>42</sup> Prime mortgage loans are the mortgage loans with

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<sup>38</sup> For a description of the primary and secondary mortgage markets, see Fannie Mae, *The Industry*, at <http://www.fanniemae.com/aboutfm/industry/index.jhtml?p=About+Fannie+Mae> (last visited Nov. 14, 2003). The primary market consists of “mortgage companies, savings and loans, commercial banks, credit unions, and state and local housing finance agencies.” *Id.*

<sup>39</sup> Fannie Mae, *Frequently Asked Questions: Mortgage Industry Primer*, at <http://www.fanniemae.com/faq/industry.jhtml?p=FAQ> (last visited Dec. 1, 2003).

<sup>40</sup> *Id.*

<sup>41</sup> Secondary market investors include pension funds, insurance companies, securities dealers, “market makers” like Fannie Mae and Freddie Mac, and other financial institutions. Secondary market investors issue cash for mortgages in two ways. A secondary market investor either pays cash for mortgages and holds the mortgages in its own portfolio or issues mortgage-backed securities in exchange for groups of mortgages from lenders. Mortgage-backed securities are publicly traded financial instruments. A secondary market investor issues debt securities to fund the mortgages it purchases. Institutions like Fannie Mae earn a profit from their mortgage activity:

Essentially, Fannie Mae purchases home mortgages from banks and other loan makers so they can replenish their funds to lend. We obtain the money to buy the mortgages by selling debt securities to investors. Then we earn a profit from the difference—the “spread”—between the interest rate we receive from holding the mortgages, and the interest rate we pay to our debt investors.

FANNIE MAE, 2002 ANNUAL REPORT 9 (2003).

Institutions like Fannie Mae and Freddie Mac do not lend money themselves, but often dictate lending terms to the lenders with which they work. ROSS & YINGER, *supra* note 3, at 23. See also FANNIE MAE, 2002 ANNUAL REPORT 8 (“We [Fannie Mae] raise billions of dollars in capital from investors all over the world and supply it to mortgage lenders all over America so they have a constant source of low-cost funds to lend”).

<sup>42</sup> LOONIN & WU, *supra* note 15, at 129.

the lowest costs and fees;<sup>43</sup> they offer the best rates because borrowers are considered low-risk.<sup>44</sup> In contrast, subprime loans typically have higher interest rates and fees than do prime (also known as conventional) mortgage loans.<sup>45</sup> Subprime lenders target borrowers who are unable to obtain prime mortgage loans at the standard bank rate because they often have cash flow problems and poor credit records that increase the risk of lending to them.<sup>46</sup> To compensate for the increased risk that the borrowers pose, subprime loans have higher interest rates relative to prime mortgage loans.<sup>47</sup> Although commercial banks have traditionally focused on providing prime mortgage loans while mortgage bankers have specialized in subprime lending, commercial banks have started to expand into the subprime market.<sup>48</sup>

Mortgage providers make lending decisions in part by analyzing loan applicants' credit scores, which they obtain from credit bureau agencies.<sup>49</sup> These agencies calculate an individual's credit score using information from the individual's credit file.<sup>50</sup> The credit score aims to predict the

<sup>43</sup> ROSS & YINGER, *supra* note 3, at 72.

<sup>44</sup> Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1258 (2000).

<sup>45</sup> See ROSS & YINGER, *supra* note 3, at 19 (“[S]ubprime lending . . . involves the issuing of mortgages with lower credit standards but higher costs.”); Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 573 (2002).

<sup>46</sup> See Association of Community Organizations for Reform Now (ACORN), SEPARATE AND UNEQUAL: PREDATORY LENDING IN AMERICA 2 (2002), available at <http://www.acorn.org/acorn10/predatorylending/plreports/SU2002/main.pdf> [hereinafter SEPARATE AND UNEQUAL]; LOONIN & WU, *supra* note 15, at 129 (“The subprime market is also known as the ‘alternative financial services’ or ‘fringe banking sector.’ It has become a major source of traditional banking services for low-income and working poor consumers, residents of minority neighborhoods, and people with blemished credit histories.”); Suzanne F. Garwood & Melanie L. Hibbs, *The HUD and Treasury Joint Report on “Curbing Predatory Home Mortgage Lending,”* 54 CONSUMER FIN. L. Q. REP. 218, 220 (2000) (noting that “[a]mong the most common reasons for borrowers to turn to the subprime market to access necessary credit are: a poor credit history, high monthly debt payments relative to income, variable income sources, or a lack of familiarity with traditional prime lenders”); Anne-Marie Motto, *Skirting the Law: How Predatory Mortgage Lenders Are Destroying the American Dream*, 18 GA. ST. U. L. REV. 859, 859 (2002) (“Subprime lenders provide loans to people with cash flow problems and blemished credit, often charging high fees and interest in order to compensate for added risk.”).

<sup>47</sup> See SEPARATE AND UNEQUAL, *supra* note 46, at 2; Deborah Goldstein, *Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions*, 35 HARV. C.R.-C.L. L. REV. 225, 229 (2000) (“Loans with higher interest rates than those in the conventional market are not necessarily predatory. Such loans may simply be calculated to offset the higher risk and cost associated with lending to borrowers who have poor credit histories.”); Motto, *supra* note 46, at 859.

<sup>48</sup> ROSS & YINGER, *supra* note 3, at 18 (citing Steve Bergsman, *Reexamining Subprime Insurers*, MORTGAGE BANKING, May 1, 1999, at 24).

<sup>49</sup> LOONIN & WU, *supra* note 15, at 100–01; ROSS & YINGER, *supra* note 3, at 22.

<sup>50</sup> See LOONIN & WU, *supra* note 15, at 100. Credit scoring is a well-institutionalized process in the United States. See *id.* (“The leading creator of models is Fair, Isaac & Co. (Fair Isaac), also known as FICO; hence, a credit score is sometimes referred to as a ‘FICO score.’ Fair Isaac has developed credit scoring models for each of the three major credit bureaus (Trans Union, Experian, and Equifax).”).

individual's likelihood of default on future credit: the higher the credit score, the higher the creditworthiness.<sup>51</sup> Credit bureaus generate credit scores independently of an individual's application for a mortgage; the number is a generic reflection of an applicant's overall creditworthiness.<sup>52</sup>

Mortgage lenders generally incorporate credit scores into the mortgage approval process.<sup>53</sup> The process of granting a loan based on a credit score calculation is known as "underwriting."<sup>54</sup> Although underwriting used to be manual, it has become increasingly automated in order to promote speed and objectivity.<sup>55</sup> In the automated underwriting process, lenders enter data relevant to creditworthiness, including the credit score generated by a credit bureau, into a computer program that automatically calculates a borrower's credit risk.<sup>56</sup> The construction and use of cus-

<sup>51</sup> *See id.* ("This number purports to predict the risk that a consumer will default on credit in the future and is based on the historic performance of credit extended to consumers with similar characteristics. The number is calculated from an algorithm or mathematical model."); ROSS & YINGER, *supra* note 3, at 22 ("Credit scoring, for example, uses statistical techniques to estimate the likelihood that an applicant will repay a debt based on his or her characteristics, including performance on previous loans."); *see also* LOONIN & WU, *supra* note 15, at 100 ("Depending on the model used, a generic credit score will fall within a range, from a low of 300 to 400 to a high of 800 to 900. . . . [A] score of 660 or greater is generally considered to be less of a risk for the lender, while a score of 620 or lower is considered a poor risk.").

<sup>52</sup> LOONIN & WU, *supra* note 15, at 100–01.

<sup>53</sup> *Id.* at 100.

<sup>54</sup> Ellen P. Roche, *Statement, in* 1 MORTGAGE CREDIT PARTNERSHIP SCORING COMM., FED. RESERVE SYS., PERSPECTIVES ON CREDIT SCORING AND FAIR MORTGAGE LENDING 2–3 (Fed. Reserve Sys. 2002) [hereinafter PERSPECTIVES ON CREDIT SCORING AND FAIR MARKET LENDING].

<sup>55</sup> *See id.*; LOONIN & WU, *supra* note 15, at 100–01; ROSS & YINGER, *supra* note 3, at 22–23.

<sup>56</sup> *See* LOONIN & WU, *supra* note 15, at 101 ("Credit application scores are increasingly being used in the form of 'automated underwriting systems.' These systems contain computerized decision-making programs that determine whether or not an applicant should receive a loan."); ROSS & YINGER, *supra* note 3, at 22–23 ("A credit score also might be incorporated into (or generated by) an automated underwriting system, which provides a lender with a series of steps that lead to an underwriting decision."); Ann Hayes Peterson, *Credit Scoring*, CREDIT UNION MAG., Jan. 1, 1998, at 44 ("Credit-scoring systems use mathematical formulas, also called scorecards, to assign points to different components of a member's credit application form and credit bureau report.").

Fannie Mae and Freddie Mac, the largest and most important secondary mortgage market institutions, have their own automated underwriting models and establish underwriting guidelines for the loans that they purchase. ROSS & YINGER, *supra* note 3, at 23. Guy Stuart describes these models as follows:

Fannie Mae and Freddie Mac have gone one step beyond credit scoring and developed their own automated underwriting systems, Desktop Underwriter (DU) and Loan Prospector (LP), respectively . . . . The automated systems are still highly dependent on the data entered into them; they rely on data gathered from a wide variety of sources, principally the applicant's employer, bank statements and investment accounts, and the appraisal and sales contract.

GUY STUART, DISCRIMINATING RISK: THE U.S. MORTGAGE LENDING INDUSTRY IN THE TWENTIETH CENTURY 124–25 (2003).

Other factors considered by these automated underwriting models include "past delin-

tomized, highly specific automated underwriting models has become widespread.<sup>57</sup>

The automated underwriting model ultimately produces a sophisticated assessment that reflects the applicant's creditworthiness.<sup>58</sup> A lender then analyzes this information and makes a final determination on the mortgage application.<sup>59</sup> A mortgage applicant can receive immediate approval for a loan.<sup>60</sup> If the applicant poses a higher-than-average credit risk, then the applicant may be denied a loan or referred for additional screening, which signals that the loan will be more expensive for the applicant.<sup>61</sup>

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quencies; public records, foreclosures, and accounts in collection; credit card limit and use; age of accounts; and number of inquiries." Press Release, Fannie Mae, Fannie Mae Introduces Enhanced Desktop Underwriter; Newest Version is the Next Step in Company's Commitment to Open the Book on its Automated Underwriting System; Provides Mortgage Lenders and Consumers More Information, More Loan Products, and More Cost Savings (July 18, 2000), at <http://www.fanniemae.com/newsreleases/2000/0854.jhtml?p=Media&s=News+Releases>; see also Press Release, Freddie Mac, Freddie Mac Releases Automated Underwriting Factors Used by Loan Prospector (June 7, 2000), at <http://www.freddiemac.com/news/archives2000/aufactors.htm> (listing factors including credit bureau score; foreclosures and bankruptcies; liens or judgments; credit delinquencies, collections or charge-offs; and cash reserves).

<sup>57</sup> See ROSS & YINGER, *supra* note 3 at 22–23, 277–80 (observing the sophistication, complexity, and customization in automated underwriting models); Peterson, *supra* note 56, at 44 (describing advent of customized credit scoring models).

<sup>58</sup> See, e.g., STUART, *supra* note 56, at 125 (“[t]he automated underwriting system is not simply a ‘decision machine’ that spits out an ‘accept’ or ‘deny’ answer when the lender submits a loan application to it.”).

<sup>59</sup> LOONIN & WU, *supra* note 15, at 102 (describing the use of automated underwriting outputs to determine loan disbursement); Peterson, *supra* note 56 (“‘Loan officers or managers use scoring models to help them make loan decisions . . . . Based on that score, managers can decide whether to approve the loan, deny it, or further review the application, . . . .’”) (quoting Gail Wetzel, President of Experian).

<sup>60</sup> FINANCIAL SERVICES ROUNDTABLE, AUTOMATED UNDERWRITING STUDY (2001), at <http://www.fsround.org/autounderwriting32001.html>.

<sup>61</sup> See *id.* (“Although Fannie Mae and Freddie Mac may ultimately purchase a substantial number of loans with a ‘refer’ or ‘caution’ decision, the consumer often is required to provide more documentation or may incur a higher interest rate. Certain applicants who receive a ‘caution’ rating are simply denied a mortgage loan.”). This process is quite complex:

Both DU [Fannie Mae's Desktop Underwriter] and LP [Freddie Mac's Loan Prospector] differentiate among loans that they have approved according to the level of documentation they require. For example, LP categorizes approved applications as either Accept Plus, Streamlined Accept, or Standard Accept. In addition, Fannie Mae's DU evaluates the loan not only in terms of whether it is an acceptable risk, but also whether it is eligible under Fannie Mae's guidelines. It lets the lender know of cases where the loan still constitutes an acceptable risk even though it is ineligible for sale to Fannie Mae . . . . In addition, any loan application the system does not approve comes with recommendations on how to make it pass muster. Freddie Mac's LP Feedback Certificate uses 104 different codes to provide the underwriter with information about the major risk factors that the application presents. Fannie Mae's DU version 4 provided three broad “referral reasons” . . . . DU version 5 provides a more sophisticated set of feedback messages, including suggestions on alterations in the terms of the loan that might improve DU's recommendation.

### B. Overview of Mortgage Lending Discrimination

Immigrants face two chief forms of discrimination in the mortgage lending process. First, immigrants endure discrimination in the underwriting process that assesses “creditworthiness.” Underwriting models built on discriminatory assumptions or that use discriminatory variables can generate credit scores that overestimate true credit risk in immigrant populations, in turn resulting in the discriminatory disbursement of mortgage loans. This constitutes discrimination in access to credit. Immigrants also face a range of “predatory lending” practices, which consist of exploitative and fraudulent lending practices that impact the design of a loan, such as abusive loan terms and structure.<sup>62</sup>

### C. Discrimination Against Immigrants in the Automated Underwriting Process

#### 1. Overview

The automated underwriting system has been criticized as a source of mortgage lending discrimination.<sup>63</sup> Critics allege that the structure of automated underwriting models is a primary source of mortgage lending discrimination because discriminatory bias pervades both the structure and inputs of underwriting models.<sup>64</sup> Models are constructed in terms of dominant paradigms of consumer behavior that may not reflect the financial realities or behavioral patterns of groups that are often outside of the mainstream of the financial system, such as minorities and immigrants.<sup>65</sup> Furthermore, these models are designed to be guidelines for

STUART, *supra* note 56, at 125.

When a loan officer makes a decision contrary to the outcome suggested by the model, this is called “overriding.” *Id.* at 126.

<sup>62</sup> See *infra* notes 119–120 and accompanying text.

<sup>63</sup> See generally ROSS & YINGER, *supra* note 3 (discussing the limits of automated underwriting models and the discriminatory outcomes often generated by them); STUART, *supra* note 56.

<sup>64</sup> See, e.g., 1 PERSPECTIVES ON CREDIT SCORING AND FAIR MORTGAGE LENDING, *supra* note 54, at 5–9 (2002) (quoting Calvin Bradford, President, Calvin Bradford & Assocs.) (noting that current credit systems measure default in discriminatory ways, several predictive factors used in credit systems may have no causal connection with default, scoring models based on non-mortgage credit are unlikely to predict mortgagor behavior well, and credit scoring ignores changes in borrower behavior).

<sup>65</sup> See, e.g., 5 *id.*, at 3–4 (2002) (“[S]ome systems disproportionately penalize some minority applicants for having more credit activity with finance companies . . . . Because brokers are disproportionately active in minority communities, this is an important point.”) (quoting Dan Immergluck, Grand Valley State Univ.); *id.* at 8 (“Credit-scoring models are based, by and large, on how the majority of mainstream consumers use credit. Such models are designed to match credit applicants with the manifest behavior of middle-class consumers.”) (quoting Kevin Stein, Cal. Reinvestment Comm.); *Credit Scoring: Friend or Foe?*, CASCADE (Phila. Fed. Reserve Bank, Phila., Pa.), Spring 1999, at 3–4, available at <http://www.phil.frb.org/ccapubs/cascade39.pdf> (“For example, scoring models may

lenders, who in theory have the opportunity to correct discriminatory outcomes when processing applications based on them.<sup>66</sup> In practice, however, lenders simply adopt the recommendations of the models, and as a result reinforce their discriminatory effect.<sup>67</sup> Finally, because these models sometimes use citizenship status or length of residence as indicators of creditworthiness, immigrants can be uniquely disadvantaged by the underwriting process.

## 2. Automated Underwriting System Structure and Inputs Produce Discriminatory Lending Outcomes

The variables that automated underwriting systems evaluate and the formulas they use to evaluate them often lead to discrimination in access to mortgage finance. Credit scores generated by credit bureaus can create discriminatory results when used as inputs into automated underwriting models. Error and bias often pervade credit scores calculated by credit bureaus.<sup>68</sup>

The structure of automated underwriting models may contribute to discriminatory outcomes. Automated underwriting models are complicated computer programs that analyze a range of variables to determine creditworthiness.<sup>69</sup> Different variables can be assigned different point values to produce a final credit score for an applicant.<sup>70</sup> A person's employment history, for example, might be assigned a different point value depending on whether the person had prolonged periods of unemployment (unemployment would detract from the total point score). Similarly, certain geographic areas might be assigned more points than others.

The use of other seemingly neutral variables in automated underwriting models, such as employment history or geographic location, may

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leave out rent, utility, and other nonstandard payment histories, which are often considered an important part of the payment record of low- and moderate-income populations. Thus, scores for these populations may not reliably assess individual risk.”)

<sup>66</sup> 1 PERSPECTIVES ON CREDIT SCORING AND FAIR MORTGAGE LENDING, *supra* note 54, at 4 (2002) (quoting Paul Smith, Senior Counsel, Am. Bankers Ass'n, who stated that credit scores are typically used as one of many factors in the automated underwriting process).

<sup>67</sup> 5 *id.* at 8 (“Unfortunately, existing secondary review [of loan applications] can appear more theoretical than real, merely affirming the initial decision to deny low-cost credit to low-income borrowers and borrowers of color.”) (quoting Kevin Stein, Cal. Reinvestment Comm.).

<sup>68</sup> LOONIN & WU, *supra* note 15, at 105–08 (noting that credit scores are often generated on the basis of inaccurate information or discriminatory assumptions); 1 PERSPECTIVES ON CREDIT SCORING AND FAIR MORTGAGE LENDING, *supra* note 54, at 5 (“Credit scoring has not been intentionally discriminatory in its typical uses. Nonetheless, regulators, researchers and the developers of credit scoring systems have all recognized that, on average, minorities have lower credit scores than majority populations.”) (quoting Calvin Bradford, President, Calvin Bradford & Assocs.).

<sup>69</sup> See *supra* note 56.

<sup>70</sup> See BRIAN R. WITT, EVALUATING CREDIT SCORING SYSTEMS 1 (1999), available at <http://www.fwwlaw.com/client/articles/witt/080.pdf>.

also produce significantly divergent mortgage terms or approval rates across different racial or ethnic groups, with non-white mortgage applicants either being denied mortgages at higher rates than whites or being subjected to more expensive mortgage terms than white mortgage applicants.<sup>71</sup> For example, an underwriting model may give greater points to applicants from geographic areas that are predominantly white than to applicants from geographic areas that are predominantly minority. If most white applicants come from predominantly white geographical areas and most minority applicants come from predominantly non-white geographical areas, an automated underwriting program that gives more points to geographical areas that are predominantly white will effectively reward white applicants and disadvantage minority applicants in the distribution of mortgages.<sup>72</sup> Critics of automated underwriting therefore focus on removing those variables that have little predictive power with respect to creditworthiness and disproportionately disadvantage some qualified applicants.<sup>73</sup>

### *3. Discrimination Results from the Use and Application of Credit Data Generated by Automated Underwriting Systems*

Over-reliance on the outputs of an automated underwriting model can have a disparate impact on minority and immigrant groups. Discrimina-

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<sup>71</sup> Brian Witt notes:

Some factors may be statistically correlated with repayment but may nevertheless operate to disqualify a high percentage of minority applicants. For example, zip code and home ownership may be statistically correlated with repayment, but these factors can be correlated with race in some areas, and therefore may have a disparate impact on minorities. Under Regulation B, a credit factor that has a disparate impact may still be utilized where the factor is demonstrated to meet a legitimate business need that otherwise cannot reasonably be achieved by less disparate means.

*Id.* at 2. “Regulation B,” codified at 12 C.F.R. § 202 (2003), implements the Equal Credit Opportunity Act, 15 U.S.C. 1601 (2000). *See also Credit Scoring: Friend or Foe?*, *supra* note 65, at 3 (“For example, requiring that applicants have incomes in excess of a certain amount to qualify for an overdraft line of credit could mean that women and minority applicants will be rejected at a higher rate than men and nonminority applicants.”).

<sup>72</sup> *Cf. LOONIN & WU*, *supra* note 15, at 61 (“[C]ourts will likely find a disparate impact if a plaintiff can show that a creditor’s insistence on a credit history from a bank, and not just a finance company, is more likely to impact creditworthy African-Americans than creditworthy whites.”).

<sup>73</sup> *LOONIN & WU*, *supra* note 15, at 58–64; *ROSS & YINGER*, *supra* note 3, at 273–312 (providing a statistical analysis of how the inclusion of certain variables in an automated underwriting model can create disparate impact even in the absence of disparate treatment). There are some limitations to the use of this disparate impact analysis, however. Courts will probably not find disparate impact merely because a higher percentage of minorities are rejected for credit than whites; rather, courts will likely assess whether a higher percentage of qualified minorities are turned down for credit than qualified whites. *LOONIN & WU*, *supra* note 15, at 61. Moreover, a legitimate business need may in some circumstances permit the use of a “neutral” variable that has a disparate impact. *Id.* at 63.

tion in the use and application of creditworthiness data produced by underwriting models has been well-documented.<sup>74</sup> Many mortgage finance companies utilize automated underwriting models, such as those provided by mortgage finance giants Fannie Mae and Freddie Mac.<sup>75</sup> These automated underwriting models provide customized credit risk scores that should function merely as guidelines for determining creditworthiness, not as the sole decision-making criteria.<sup>76</sup> As previously discussed, however, automated underwriting models often contain structural biases or use discriminatory inputs.<sup>77</sup> The exclusive reliance on scores generated by automated underwriting models can therefore result in the denial of prime loans to deserving candidates who either never receive loans or instead pay thousands of dollars more to receive subprime mortgages. If large numbers of individuals from a particular population (such as minorities or immigrants) are denied loans or receive less favorable loans relative to their numbers in the applicant pool, the use of the credit score as a sole measure of creditworthiness probably has a disparate impact on these populations.

Discrimination can also occur when a loan officer manually reviews the findings of an automated underwriting model. Lenders typically undertake this process, known as “secondary review,” when the automated underwriting model has recommended denying an applicant a loan.<sup>78</sup> Because the results produced by automated underwriting models are not fool-proof, equitable secondary review should play an important and regularized role in the underwriting process.<sup>79</sup> Unfortunately, even when mortgage lenders undertake secondary review of an applicant’s file after receiving the automated credit score, discriminatory biases may prevent the mortgage lender from reviewing the file in an equitable manner.<sup>80</sup> Mort-

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<sup>74</sup> See, e.g., SEPARATE AND UNEQUAL, *supra* note 46, at 36 (2002) (arguing that minorities with credit scores that would qualify them for prime loans are still steered toward subprime loans).

<sup>75</sup> ROSS & YINGER, *supra* note 3, at 22–23 (discussing growth in use of automated underwriting); STUART, *supra* note 56, at 124–30 (same).

<sup>76</sup> 1 PERSPECTIVES ON CREDIT SCORING AND FAIR MORTGAGE LENDING, *supra* note 54, at 4.

<sup>77</sup> See *supra* notes 68–73 and accompanying text.

<sup>78</sup> STUART, *supra* note 56, at 126. When a loan officer acts contrary to the recommendation of the automated underwriting model, this is called “overriding” (such as when the loan officer grants a loan in spite of the automated underwriting model’s recommendation against it). *Id.* Such overrides must be justified by additional data supporting the loan officer’s conclusion. *Id.* at 125–26.

<sup>79</sup> See, e.g., 2 PERSPECTIVES ON CREDIT SCORING AND FAIR MORTGAGE LENDING, *supra* note 54, at 4 (“[A] second review of all adverse actions should be standard operating procedure for lending institutions, both to ensure fair and equal access to credit and to ensure that acceptable business opportunities are not missed.”) (quoting James Wheaton, Neighborhood Hous. Servs. of Chi.); 5 *id.* at 6 (“[B]anks should offer portfolio products that do not rely completely on the automated underwriting process.”) (quoting Chris Aldridge, Fifth Third Bank).

<sup>80</sup> See 5 *id.* at 8. Stanley Longhofer writes:

gage lenders, for example, have given different racial groups different credit ratings even when an automated underwriting model has produced the same credit score for both groups.<sup>81</sup>

#### *4. Immigrants Face Unique Discrimination in the Underwriting Process*

Racial and ethnic minority groups have encountered considerable discrimination in the underwriting process.<sup>82</sup> Because immigrants comprise a large fraction of several of these groups,<sup>83</sup> discrimination in underwriting against these groups necessarily translates into discrimination in underwriting against immigrants.

Immigrants suffer from disparate impact due to the inclusion of several types of variables in automated underwriting models. First, given the overlap between immigrant and minority populations, the inclusion of any variable in an automated underwriting program that creates a disparate impact along lines of race, ethnicity, or national origin will likely disadvantage immigrants seeking mortgages. Second, some automated underwriting models classify mortgage applicants who have accounts with finance companies or other subprime lenders as high-risk.<sup>84</sup> Certain populations, however, may live in neighborhoods in which no main-

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[A] subjective analysis may allow lenders to inject intentional or inadvertent prejudicial bias in the underwriting process. Additionally, lenders may be too unwilling to reverse the conclusions of the scoring model, either because the subjective analysis itself is too much effort or because secondary-market purchasers may be unwilling to purchase loans that were originally "rejected" by the scoring model.

Stanley D. Longhofer, Mortgage Scoring and the Myth of Overrides, COMMUNITIES AND BANKING (Boston Fed. Reserve Bank, Boston, Mass.), Fall 2002, at 18–21, *available at* <http://www.bos.frb.org/commdev/c&b/2002/fall/CS5.pdf>.

<sup>81</sup> See, e.g., The Mortgage Institute, *Predatory Lending*, at <http://www.themortgageinstitute.net/Predatory.html> (last visited Nov. 14, 2003) ("Under law, credit scoring should be race-blind, and should insure [sic] that similarly situated white and minority borrowers receive similar mortgage rates. However, individual lenders charge wildly different rates for the same score.")

<sup>82</sup> OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T. OF HOUS. & URBAN DEV., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS (2002), *available at* <http://www.huduser.org/Publications/PDF/aotbe.pdf> (showing that African Americans and Latinos receive less favorable treatment than do whites in the mortgage lending process); URBAN INST., MORTGAGE LENDING DISCRIMINATION: A REVIEW OF EXISTING EVIDENCE 3–4 (Margery Austin Turner & Felicity Skidmore eds., 1999), *available at* [http://www.urban.org/UploadedPDF/mortgage\\_lending.pdf](http://www.urban.org/UploadedPDF/mortgage_lending.pdf). See generally ROSS & YINGER, *supra* note 3; SEPARATE AND UNEQUAL, *supra* note 46; STUART, *supra* note 56; YINGER, *supra* note 15.

<sup>83</sup> See *supra* note 37.

<sup>84</sup> See 5 PERSPECTIVES ON CREDIT SCORING AND FAIR MORTGAGE LENDING, *supra* note 54, at 8 ("[D]isturbingly, credit scoring models may downgrade borrowers who have accounts with finance companies or subprime and payday lenders.") (quoting Kevin Stein, Cal. Reinvestment Comm.).

stream banks exist, forcing them to turn to subprime sources of financing even when they could have qualified for prime loans.<sup>85</sup> Because immigrants are new to the United States, their financial behavior may be particularly unlikely to meet the standards outlined by conventional automated underwriting mortgage programs.<sup>86</sup> Immigrants who borrow from subprime lenders may be inaccurately classified as “high-risk” borrowers.

Finally, certain automated underwriting programs include variables that measure United States citizenship status or length of residence in the United States, allocating more “points” to citizens and long-time residents than to noncitizen recent arrivals.<sup>87</sup> Immigrants who do not possess United States citizenship or who have not lived in the United States for extended time periods may be disadvantaged by such variables. As factors such as citizenship status or length of U.S. residence may not correlate with creditworthiness, inclusion of such variables in underwriting models may have a vast and unjustified disparate impact on immigrant populations. Noncitizens, particularly non-permanent residents, often pay higher interest rates and down payments than do U.S. citizens.<sup>88</sup> If such differential treatment in the mortgage lending process lacks a business justification—that is, noncitizens do not pose higher credit risks than citizens pose—this differentiation between citizens and noncitizens constitutes discrimination.<sup>89</sup> The role of underwriting discrimination on the basis of citizenship is an important area that merits additional social science research.<sup>90</sup>

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<sup>85</sup> *Cf. id.* (“[T]hese borrowers are in the subprime market because they and their neighborhoods have been abandoned by mainstream banks and thrifts.”); SEPARATE AND UNEQUAL, *supra* note 46, at 34–35 (“[B]anks have for the most part abandoned low-income and minority neighborhoods . . . . This is significant because studies have documented that the proximity of a bank’s branches to low and moderate income neighborhoods is directly related to the level of lending made by the bank in those neighborhoods.”).

<sup>86</sup> *See supra* note 65.

<sup>87</sup> *See* Jennifer S. Cowley, *More Paperwork, Higher Interest*, TIERRA GRANDE (The Real Estate Ctr., Tex. A&M Univ.), Oct. 2000, available at <http://recenter.tamu.edu/pdf/1430.pdf>; Holden Lewis, *Noncitizens Can Live the American Dream, Too*, (May 9, 2002), at <http://www.bankrate.com/brm/news/mtg/20020509a.asp?prodtype=mtg>.

<sup>88</sup> Holden Lewis writes:

[M]ost lenders push non-permanent residents into adjustable mortgages . . . a new arrival to the country has to put at least 20 percent down and gets an adjustable-rate mortgage [“ARM”]. Five-year and seven-year hybrid ARMs are popular, and foreign nationals often pay a higher interest rate than citizens with equivalent credit histories—maybe an eighth-point or quarter-point higher or even more.

Lewis, *supra* note 87; *see also* Cowley, *supra* note 87 (discussing higher interest rates and down payments charged to noncitizens, particularly non-permanent residents).

<sup>89</sup> *See* URBAN INST., *supra* note 82, at 10, 99.

<sup>90</sup> *Cf.* E-mail from Jennifer Cowley-Evans, Assistant Professor, Ohio State Univ., to Charu A. Chandrasekhar (Mar. 31, 2003) (on file with author) (“I am not aware of any studies that specifically look at mortgage lending discrimination among immigrants . . . . As far as predatory lending rates, this is virtually impossible to find . . . .”).

*D. Discrimination Against Immigrants Through Predatory Lending in the Homebuyers' Market*

Immigrant homebuyers also face discrimination through predatory lending, a corrupted form of subprime lending. Although subprime lenders play an important role in providing credit to borrowers who would not otherwise receive credit from prime lending institutions,<sup>91</sup> subprime lending has been subject to rampant abuse. Subprime lenders who engage in financially exploitative lending practices are known as “predatory lenders.”<sup>92</sup> Though not all subprime lenders are predatory, the vast majority of predatory loans are subprime.<sup>93</sup> The subprime lending industry has been called “a fertile breeding ground for predatory practices.”<sup>94</sup>

Predatory lenders are mortgage and finance companies that “make loans with high interest rates, exorbitant fees, and harmful terms” using “fraudulent and deceptive methods.”<sup>95</sup> Such lenders sometimes target borrowers who should qualify for credit on better terms, trying to sell them higher-cost loans.<sup>96</sup> Predatory financing tactics include charging higher interest rates than a borrower’s credit warrants;<sup>97</sup> “loan packing,” which involves adding excessive fees to loans;<sup>98</sup> making loans without regard to

<sup>91</sup> See, e.g., OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP’T. OF HOUS. & URBAN DEV., CURBING PREDATORY HOME MORTGAGE LENDING, at 2–3 (2000), available at <http://www.huduser.org/Publications/pdf/treasrpt.pdf> [hereinafter CURBING PREDATORY HOME MORTGAGE LENDING] (“By providing loans to borrowers who do not meet the credit standards for borrowers in the prime market, subprime lending provides an important service, enabling such borrowers to buy new homes, improve their homes, or access the equity in their homes for other purposes.”); SEPARATE AND UNEQUAL, *supra* note 46, at 3 (“There is a legitimate place for flexible loan products for people whose credit or other circumstances will not permit them to get loans on ‘A’ terms.”); Goldstein, *supra* note 47, at 229–30 (“Subprime borrowers need lenders who will assume the higher risk that they present.”).

<sup>92</sup> See Motto, *supra* note 46, at 860.

<sup>93</sup> SEPARATE AND UNEQUAL, *supra* note 46, at 2; Motto, *supra* note 46, at 867 (noting that “the incidence of predatory lending practices is considerably higher among subprime lenders than among prime lenders”).

<sup>94</sup> SEPARATE AND UNEQUAL, *supra* note 46, at 2; see also Garwood & Hibbs, *supra* note 46, at 220 (explaining that the existence of factors such as credit history problems or cash flow problems could “cause a borrower to believe that no other credit sources are available, making it easier for an unscrupulous lender to manipulate or mislead the borrower”).

<sup>95</sup> SEPARATE AND UNEQUAL, *supra* note 46, at 2.

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., *id.* at 38 (“Borrowers with perfect credit are regularly charged interest rates 3 to 6 points higher than the market rates; with some subprime lenders, there is simply no lower rate, no matter how good the credit.”).

<sup>98</sup> See, e.g., Garwood & Hibbs, *supra* note 46, at 220 (“Loan packing has the effect of concealing the true cost of credit to the borrower. By adding or ‘packing’ such costs as broker fees or single premium credit insurance into the amount of the loan financed, the consumer may be misled as to the price of such services.”). The disadvantages to consumers from loan packing are not limited to the added fees:

Predatory lenders often finance huge fees into loans, stripping thousands of dollars in hard-earned equity and racking up additional interest in the future. Bor-

the borrower's ability to pay;<sup>99</sup> charging prepayment penalties;<sup>100</sup> granting loans for over one hundred percent of the loan-to-value (LTV) ratio;<sup>101</sup> creating yield spread premiums;<sup>102</sup> selling single premium credit insurance;<sup>103</sup> arranging mortgages with balloon payments;<sup>104</sup> using negative amortization;<sup>105</sup> and engaging in loan flipping<sup>106</sup> and property flipping.<sup>107</sup> Other deceptive maneuvers related to the loan agreement include engineering home improvement scams<sup>108</sup> and creating loan agreements with mandatory arbitration clauses, which can disadvantage the borrower seeking to resolve a dispute.<sup>109</sup> None of these practices is *per se* predatory, and they may even be necessary in order to provide legitimate subprime loans

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rowers in predatory loans are routinely charged fees of just under 8% of the loan amount . . . compared to the average 1%–2% assessed by banks to originate loans. Once the paperwork is signed and the rescission period expires, there is no way to get that equity back, and borrowers frequently lose up to \$10,000 or \$15,000 from their home while receiving little, if any, benefit from the refinancing.

SEPARATE AND UNEQUAL, *supra* note 46, at 38.

<sup>99</sup> See, e.g., Garwood & Hibbs, *supra* note 46, at 220 (describing “Asset-Based Lending”). Predatory lenders make money even when borrowers default:

Some predatory lenders make loans based solely on a homeowner's equity, even when it is obvious that the homeowner will not be able to afford their payments. Especially when there is significant equity in a home, the lender can turn a profit by reselling the house after foreclosure. Until that happens, the borrower is stuck with exorbitant monthly payments.

SEPARATE AND UNEQUAL, *supra* note 46, at 39.

<sup>100</sup> “[Prepayment] penalties come due when a borrower pays off their [sic] loan early, typically through refinancing or a sale of the house.” SEPARATE AND UNEQUAL, *supra* note 46, at 39.

<sup>101</sup> “Some lenders regularly make loans for considerably more than a borrower's home is worth with the specific intents of maximizing their debts and thus their payments, and trapping them as customers for an extended period.” *Id.* at 40.

<sup>102</sup> “A yield spread premium is compensation paid by a lender to a mortgage broker for the broker's success in getting the borrower to accept a higher interest rate than the lender would have given the borrower at the standard, or ‘par,’ rate.” *Id.* at 41.

<sup>103</sup> “Credit insurance is insurance linked to a specific debt or loan which will pay off that particular debt if the borrower loses the ability to pay either because of sickness (credit health insurance), death (credit life insurance), or losing their [sic] job (credit unemployment insurance).” *Id.* at 42.

<sup>104</sup> “Mortgages with balloon payments are arranged so that after making a certain number of regular payments . . . the borrower must pay off the remaining loan balance in its entirety, in one ‘balloon payment.’” *Id.* at 43.

<sup>105</sup> “In a negatively amortized loan, the borrower's payment does not cover all of the interest due, much less any principal. The result is that despite regularly making the required monthly payment, the borrower's loan balance increases every month and they lose [sic], rather than build, equity.” *Id.* at 44.

<sup>106</sup> Loan flipping occurs when a lender, “often through high-pressure or deceptive sales tactics, encourages repeated refinancing by existing customers and tacks on thousands of dollars in additional fees or other charges each time.” *Id.*

<sup>107</sup> Property flipping occurs when “unsuspecting first-time homebuyers are sold houses in serious states of disrepair for prices far above what the houses are actually worth.” *Id.*

<sup>108</sup> See *id.* at 52.

<sup>109</sup> See Motto, *supra* note 46, at 866.

to borrowers who lack alternative sources of credit.<sup>110</sup> The loan terms and the context in which a loan is made determine whether the loan is predatory.<sup>111</sup> Loans are considered predatory when the borrower loses home equity, must make larger payments than originally promised or needed, endures other emotional or social adverse impacts because of the loan, or must default.<sup>112</sup>

Subprime lending is pervasive within racial and ethnic minority communities, particularly among lower income groups, as is predatory lending.<sup>113</sup> The vast growth in the subprime market over the past decade has fueled growth in subprime loans to racial and ethnic minority communities,<sup>114</sup> thus increasing the possibility of predatory lending. From 1995 to 2001, for example, subprime home purchase loans to Latino homebuyers increased by 882%, while prime loans to this population increased only by 65%.<sup>115</sup> Over this same time period, subprime mortgage loans to African Americans increased by 686%, while prime loans to this population decreased by 6%.<sup>116</sup> The explosive growth of subprime lending often lacks solid financial justification: many subprime borrowers could have qualified either for lower-cost subprime loans or for prime loans.<sup>117</sup> The rapid growth of the subprime lending market, coupled with the fact that many subprime borrowers deserved loans on better terms, strongly suggests rampant predatory lending.

There are no statistical studies that analyze the impact of predatory lending solely in terms of the “foreign-born” and “foreign stock” categories defined by the United States Census. Because immigrants comprise a sizeable portion of certain racial and ethnic minority groups,<sup>118</sup> however, the spread of subprime and predatory lending in racial and ethnic minority communities suggests that immigrants are particularly susceptible to

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<sup>110</sup> See Goldstein, *supra* note 47, at 229–30; Motto, *supra* note 46, at 866.

<sup>111</sup> See Goldstein, *supra* note 47, at 232; Motto, *supra* note 46, at 866.

<sup>112</sup> See Motto, *supra* note 46, at 866–67.

<sup>113</sup> See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP’T. OF HOUS. & URBAN DEV., SUBPRIME MARKETS, THE ROLE OF GSEs, AND RISK-BASED PRICING 5 (2002), available at <http://www.huduser.org/Publications/pdf/subprime.pdf> (“Subprime lenders serve a much higher proportion of minority and lower income borrowers than prime lenders.”); CURBING PREDATORY HOME MORTGAGE LENDING, *supra* note 91, at 3 (“[S]ubprime lending tends to be concentrated in low-income and minority communities.”). See generally ACORN, THE GREAT DIVIDE: HOME PURCHASE MORTGAGE LENDING NATIONALLY AND IN 68 METROPOLITAN AREAS (2002), available at <http://www.acorn.org/acorn10/communityreinvestment/reports/HMDA2002/main.pdf>; SEPARATE AND UNEQUAL, *supra* note 46. For a discussion of subprime lending, see notes 45–46.

<sup>114</sup> See SEPARATE AND UNEQUAL, *supra* note 46, at 2 (“The rise in subprime and predatory lending has been most dramatic in minority communities. Subprime lenders account for half, 51 percent, of all refinance loans made in predominantly black neighborhoods, compared to just 9 percent of the refinance loans made in predominantly white neighborhoods.”).

<sup>115</sup> *Id.* at 8.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 36.

<sup>118</sup> PROFILE OF THE FOREIGN-BORN, *supra* note 8, at 24–25.

predatory lending. Indeed, extensive anecdotal evidence demonstrates that predatory lending is widespread in immigrant communities.<sup>119</sup> Predatory lenders prey upon immigrants' powerlessness, targeting immigrants who lack fluency in English, familiarity with the American real estate market and wealth.<sup>120</sup>

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<sup>119</sup> See, e.g., Louis Aguilar, *Bilingual Agents Ease Home Buying; Spanish-Speaking Market Booming*, DENVER POST, Feb. 23, 2003, at K5 ("Often Latino immigrants are too afraid to come forward to complain. . . . That tells me there are a lot of unreported crimes. . . .") (quoting Dee Lewis, loan counselor for ACORN); Daniel González, *Devious Brokers Fleece Easy Prey: Immigrant Home Buyers Being Exploited*, ARIZ. REPUBLIC, Nov. 17, 2001, available at <http://www.acorn.org/acorn10/predatorylending/plclips/devious.htm> ("There is a growth in the number of immigrants buying houses and also in the number of people willing to take advantage of them . . .") (quoting Elisa de la Vara, Fannie Mae Ariz. Partnership Office); Christian Murray & Carrie Mason-Draffen, *Preying on Immigrants' Dreams; Realtor Accused in Housing Scam*, NEWSDAY, Aug. 16, 2002, at A2 (corrected Aug. 17, 2002) (describing how a real-estate speculator targeted hundreds of low-income, largely blue-collar immigrant Hispanics for predatory homeownership loans); *Reaching Out: Banking for Immigrants*, ECONOMIST, Feb. 22, 2003 (explaining that predatory lenders often victimize groups like immigrants that do not have access to traditional lending markets); Paul Demko, *Junk Mail: Advocates Fight Against Predatory Lenders and for Regulatory Relief*, (Aug. 29, 2001), at <http://www.acorn.org/campaigns/pc.php?p=356> (describing how a predatory lender targeted a low-income Vietnamese family).

<sup>120</sup> Bert Caldwell, *Borrowing Trouble; Predatory Lenders Rely on Consumer Desperation, Ignorance by Deliberately Boosting Credit, and Offering Unrealistic Loan Terms*, SPOKESMAN-REV. (Spokane, Wash.), Jan. 20, 2002, at D1 ("I think that (predatory lending) is a very significant problem within a certain segment of the community . . . notably seniors and immigrants or others with poor language skills.") (quoting Dave Huey, Assistant Washington State Attorney General); Richard Craver, *Lowdown Loans: Subprime Lenders Take a Huge Cut From Mortgages, Often Foreclose*, WINSTON-SALEM J., Feb. 23, 2003, at D1 (noting that "the typical target[s] of a predatory mortgage lender or broker . . . [were] low- to moderate-income resident[s], the elderly, the disabled, or people with poor credit ratings"); González, *supra* note 119 (describing one immigrant's experience with predatory lending—the immigrant had limited education, knowledge of English, and financial resources); Jonathan Lemire, *Informing Asians About Tenant Rights*, N.Y. DAILY NEWS, Apr. 5, 2002, at 4 (in discussing Asian immigrants to the United States, observing that "[m]ost Asians are unfamiliar with the laws and language of this country and may be reluctant to come forward if they are being discriminated against . . .") (quoting Sue Rheem, Asian Americans for Equality); Jennifer Oldham, *Easing the Way for Latinos to Buy Homes*, L.A. TIMES, Jan. 7, 2001, at K1 ("[A Latino immigrant family] fired their other Realtor and canceled escrow after that Realtor bullied them into it . . .") (quoting a Pasadena, Cal., real estate agent); James Reilley, *A Just Pursuit*, MORTGAGE BANKING, Jan. 1, 2001 ("[Immigrants and minorities] do not have the level of education and experience, on the whole, that other demographic groups have. As well, the lack of proficiency in the language can be a real setup for victimization.") (quoting attorney who purchases litigation rights to mortgage fraud claims); Mary Sanchez, *Kansas City Lending Program to Tap and Protect Hispanics*, CHI. TRIB., June 2, 2002, at 7J (recounting the story of a Guatemalan immigrant victimized by predatory lending).

### III. LEGAL REMEDIES TO DISCRIMINATION FACED BY IMMIGRANTS IN THE HOME PURCHASE MARKET

#### A. Overview

Immigrants who encounter discrimination in the mortgage finance process can seek redress under several federal statutes. The ability of an immigrant to use a particular statute to claim relief varies with both the statute in question and the immigrant's legal status. This Part examines the ability of immigrants to bring mortgage finance discrimination claims under the Fair Housing Act ("FHA"),<sup>121</sup> the Equal Credit Opportunity Act ("ECOA"),<sup>122</sup> and 42 U.S.C. § 1981. This Part only focuses on those federal antidiscrimination statutes that provide private causes of action and omits discussion of federal laws that place affirmative documentation and tracking obligations on financial institutions.<sup>123</sup>

While these statutes offer immigrants several well-established forms of protection against discrimination on the basis of race, color, religion, familial status, or national origin, this Note does not examine these established categories of protection in detail since they have been exhaustively litigated and studied. This Part focuses instead on understanding the relevance of citizenship status to mortgage finance discrimination, a topic that applies solely to immigrants. Despite the breadth of both litigation and scholarship concerning the earlier-mentioned federal antidiscrimination statutes, scant scholarship exists on the protections that these statutes afford to noncitizens. This Part focuses on two issues: first, non-citizen immigrants' standing to sue under these statutes, and second, the protection afforded by these statutes to fight discrimination on the grounds of citizenship.

Immigrants may experience citizenship discrimination in the mortgage lending process either through disparate treatment by lenders or through the disparate impact of lenders' policies. Analysis of disparate

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<sup>121</sup> 42 U.S.C. §§ 3601–3619 (2000).

<sup>122</sup> 15 U.S.C. § 1691 (2000).

<sup>123</sup> For discussion of such federal statutes relevant to remedying lending discrimination that do not provide private causes of action, see G. Carol Brani, *Civil Rights and Mortgage Lending Discrimination*, 5 RACE & ETHNIC ANC. L.J. 42 (1999) (discussing Home Mortgage Disclosure Act); Robert G. Schwemm, *Introduction to Mortgage Lending Discrimination Law*, 28 J. MARSHALL L. REV. 317 (1995) (discussing, *inter alia*, Home Mortgage Disclosure Act and Community Reinvestment Act). For discussion of federal statutes that provide some private rights of action in requiring lenders to make full disclosure about loan terms, see Anne P. Fortney, *Fair Lending Law Developments*, 55 BUS. LAW. 1309 (2000); Garwood & Hibbs, *supra* note 46 (discussing, *inter alia*, the Truth in Lending Act, Real Estate Settlement Procedures Act, Home Ownership and Equity Protection Act); Goldstein, *supra* note 47 (same); Motto, *supra* note 46 (discussing, *inter alia*, Home Ownership and Equity Protection Act). I do not examine private rights of action under such disclosure statutes but limit my examination to private rights of action under the three major federal antidiscrimination statutes that aim to combat lending discrimination.

treatment in the housing markets (here, the mortgage lending markets) occurs under the “burden-shifting” analysis outlined in the Title VII context by the Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>124</sup> Under the *McDonnell Douglas* test, a plaintiff must first present a prima facie case of discrimination.<sup>125</sup> A plaintiff can establish a prima facie case of disparate treatment in the housing market by showing that (1) she is a member of a protected class; (2) she sought and qualified for the dwelling at issue; (3) she was denied the right to procure the dwelling; and (4) the dwelling remained available after being denied to her.<sup>126</sup> Once the plaintiff establishes a prima facie case of disparate treatment, the burden shifts to the defendant to produce a legitimate, nondiscriminatory explanation for her adverse action.<sup>127</sup> If the defendant produces legitimate, nondiscriminatory evidence for her action, the plaintiff must prove by a preponderance of the evidence that the defendant’s ostensibly nondiscriminatory reason was in fact a pretext for discrimination.<sup>128</sup> The *McDonnell Douglas* Title VII burden-shifting analysis of disparate treatment applies to the FHA,<sup>129</sup> ECOA,<sup>130</sup> and Section 1981<sup>131</sup> contexts.

The FHA and ECOA employ a similar burden-shifting analysis for measuring disparate impact discrimination in mortgage lending.<sup>132</sup> In disparate impact cases brought under these statutes, the plaintiff must first establish that a defendant’s housing or lending practice has a disproportionate adverse impact on individuals belonging to protected classes under the applicable statute.<sup>133</sup> Statistical evidence is central to establishing a disparate impact claim: if a facially neutral, nondiscriminatory practice creates adverse consequences that disproportionately burden people belonging to protected classes, then a prima facie case of disparate impact

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<sup>124</sup> 411 U.S. 792 (1973).

<sup>125</sup> See, e.g., *Mitchell v. Century 21 Rustic Realty*, 233 F. Supp. 2d 418, 433 (E.D.N.Y. 2002).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 432–33 (describing applicability of *McDonnell Douglas* to FHA context).

<sup>130</sup> *Faulkner v. Glickman*, 172 F. Supp. 2d 732, 737 (D. Md. 2001) (citing *Gross v. Small Bus. Admin.*, 669 F. Supp. 50, 52 (N.D.N.Y. 1987), *aff’d* 867 F.2d 1423 (2d Cir. 1988)) (describing applicability of *McDonnell Douglas* to ECOA context).

<sup>131</sup> See *infra* notes 194–197.

<sup>132</sup> For a description of the burden-shifting disparate impact analysis under the FHA, see *Fair Hous. in Huntington Comm. v. Town of Huntington*, 316 F.3d 357, 366 (2d Cir. 2003). For a description of the burden-shifting analysis under ECOA, see *A.B. & S. Auto Serv. v. S. Shore Bank of Chi.*, 962 F. Supp. 1056, 1060–61 (N.D. Ill. 1997). Note that § 1981 prohibits disparate treatment discrimination but does not cover disparate impact discrimination. See *infra* note 200.

<sup>133</sup> *S. Shore Bank of Chi.*, 962 F. Supp. at 1060 (“In order to prove discrimination under the disparate impact analysis or ‘effects’ test, an applicant must show how ‘a policy, procedure, or practice specifically identified by the [applicant] has a significantly greater discriminatory impact on members of a protected class.’”) (citations omitted); see also Schwemm, *supra* note 123, at 331.

has been made.<sup>134</sup> The burden then shifts to the defendant to demonstrate there is a legitimate business justification for the policy and that there is no less discriminatory method for achieving the same goal.<sup>135</sup>

Litigation is a commonly discussed avenue for redressing individual claims of discrimination in the housing context.<sup>136</sup> Unfortunately, as this Part demonstrates, litigation under the federal antidiscrimination laws offers immigrants only weak remedies for fighting citizenship discrimination. Furthermore, litigation is a reactive measure; it provides redress only in those individual cases in which mortgage lending discrimination has restricted immigrants' access to homeownership and does not promote homeownership in immigrant communities on a broad scale. Given that litigation is often a lengthy and complex process, it is also not a swift and immediate method for effecting change. Thus, legislative reform, community activism, and education in immigrant communities must also be undertaken to redress the structural inequities that limit immigrants' opportunities for homeownership and to enable individual immigrants to purchase homes on equitable, nondiscriminatory terms.

### *B. Potential Relief Under the Fair Housing Act*

The Fair Housing Act ("FHA")<sup>137</sup> forbids discrimination against "any person" in the sale or rental of housing on the basis of race, color, religion, sex, familial status, or national origin.<sup>138</sup> Several categories of immigrants likely have standing under the FHA to combat a variety of forms of discrimination in the homeownership market. The U.S. Supreme Court has construed the standing requirements under the FHA broadly, ruling that the sole requirement for standing is that the claim satisfies the Article III criteria of the U.S. Constitution.<sup>139</sup> Although the FHA does not expressly protect noncitizens, gaps in the language of the FHA suggest that they can access the protections of the statute. Because the standing to bring FHA claims is as broad as the standing allowed under Article III, "any person who claims to have been injured by a discriminatory housing

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<sup>134</sup> See *S. Shore Bank of Chi.*, 962 F. Supp. at 1061 ("If the statistical disparity is significant, then plaintiff is deemed to have made out a prima facie case.") (citation omitted). Note, however, that "courts have found that 'proof of disparate impact need not be shown by statistics in every case nor need it be shown by proof of actual disproportionate exclusion from the applicant pool.'" *Id.*; see also Schwemm, *supra* note 123, at 331.

<sup>135</sup> Schwemm, *supra* note 123, at 331.

<sup>136</sup> LOONIN & WU, *supra* note 15. See generally sources cited *supra* notes 46, 82.

<sup>137</sup> 42 U.S.C. §§ 3601–3619 (2000).

<sup>138</sup> *Id.* § 3604. The FHA defines "person" as "one or more individuals." *Id.* § 3602.

<sup>139</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376 (1982) (holding that "[a]s long as respondents have alleged distinct and palpable injuries that are 'fairly traceable' to petitioners' actions, the Art[icle] III requirement of injury in fact is satisfied"); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (holding that courts should give standing under the FHA a "generous construction").

practice”<sup>140</sup> can bring a claim, which implies that a noncitizen immigrant can access FHA protections.<sup>141</sup>

As mentioned above, FHA violations can be brought under two different theories:<sup>142</sup> disparate treatment<sup>143</sup> or disparate impact.<sup>144</sup> Furthermore, the FHA specifically prohibits discrimination in the mortgage finance process. The FHA states that “[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>145</sup> Residential real estate-related transactions include the “making or purchasing of loans or providing other financial assistance” for “purchasing, constructing, improving, repairing, or maintaining a dwelling” or “secured by residential real estate” and “[t]he selling, brokering, or appraising of residential real property.”<sup>146</sup> A plaintiff can establish a prima facie case of a § 3605(a) violation under the *McDonnell Douglas* test.<sup>147</sup> Although denial of a mortgage finance loan is the most

<sup>140</sup> *Trafficante*, 409 U.S. at 207 n.1.

<sup>141</sup> The filing of an administrative complaint through the Department of Housing and Urban Development is another enforcement option. See 42 U.S.C. § 3602(i) (2000); 24 C.F.R. § 103.9 (2003). Enforcement through the Department of Justice is a further possibility. See 42 U.S.C. § 3612(o)(3) (2000); 24 C.F.R. § 103.410(d) (2003). This Note only discusses private lawsuits.

<sup>142</sup> *Fair Housing in Huntington Comm. v. Town of Huntington*, 316 F.3d 357, 366 (2d Cir. 2003) (quoting *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995)) (noting viability of disparate treatment and disparate impact claims in FHA context).

<sup>143</sup> Housing policies and practices motivated by discrimination on the basis of race, color, religion, sex, familial status, or national origin can give rise to an FHA disparate treatment claim. *United States v. City of Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *aff'd* 661 F.2d 562 (6th Cir. 1981) (citing *United States v. W. Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971); *United States v. Northside Realty Assoc.*, 474 F.2d 1164 (5th Cir. 1973)). Note that the discriminatory purpose does not have to be the “sole or dominant motive.” *City of Parma*, 494 F. Supp. at 1054.

<sup>144</sup> Housing policies and practices may violate the FHA if there is a showing of a discriminatory impact on the basis of race, color, religion, sex, familial status, or national origin, even absent evidence of a discriminatory motive (“disparate impact” theory). *City of Parma*, 494 F. Supp. at 1053 (citing, *inter alia*, *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Bishop v. Pecsok*, 431 F. Supp. 34 (N.D. Ohio 1976)). See also *Town of Huntington*, 316 F.3d at 366 (“In order to make out a prima facie case under the FHA on a theory of disparate impact, a plaintiff must demonstrate that an outwardly neutral practice actually or predictably has a discriminatory effect; that is, has a significantly adverse or disproportionate impact on minorities, or perpetuates segregation.”).

<sup>145</sup> 42 U.S.C. § 3605(a) (2000).

<sup>146</sup> *Id.* § 3605(b); see also 24 C.F.R. § 100.120(a) (2003).

<sup>147</sup> The plaintiff must prove that: (1) the plaintiff is a member of a class protected by the FHA; (2) the plaintiff applied and was qualified for a loan from the defendant; (3) the loan was rejected despite the plaintiff’s qualifications; and (4) the defendant continued to approve loans for applicants with qualifications similar to the plaintiff’s merits. *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993). The Seventh Circuit has disagreed with the otherwise widely accepted prima facie formulation. *Latimore v. Citi-*

obvious violation of 42 U.S.C. § 3605, even discriminatory practices in other aspects of the mortgage lending process (such as predatory lending or discriminatory marketing practices) short of an outright rejection of a loan may give rise to 42 U.S.C. § 3605 violations.<sup>148</sup> The use of the FHA to combat mortgage lending discrimination has been extensively litigated.<sup>149</sup> This Section focuses on the relatively unexplored question of whether the FHA protects immigrants who experience disparate treatment or disparate impact discrimination in the mortgage lending process on grounds of citizenship.

Immigrants who encounter mortgage finance discrimination may experience difficulty in bringing an FHA claim on the basis of citizenship discrimination. Although the FHA explicitly forbids discrimination based on national origin, it does not expressly proscribe discrimination on grounds of citizenship status.<sup>150</sup> Courts have only been willing to bar discrimination on grounds of citizenship in the housing context when such discrimination is tantamount to discrimination on grounds of national origin. In *Espinoza v. Hillwood Square Mutual Association*,<sup>151</sup> the court held, *inter alia*, that although citizenship discrimination was not a *per se* violation of the FHA, the FHA prohibited discrimination on the basis of citizenship whenever it had the purpose or effect of discriminating on the basis of national origin.<sup>152</sup> The *Hillwood* court stated that the definition of national origin developed by the Supreme Court in the context of Title VII, in *Es-*

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bank, 151 F.3d 712 (7th Cir. 1998) (holding that the prima facie case approach was inapplicable to situations of credit discrimination).

<sup>148</sup> For examples of other types of prohibited practices under 42 U.S.C. § 3605, see 24 C.F.R. § 100.120(b) (2003):

Prohibited practices under this section include, but are not limited to, failing or refusing to provide to any person, in connection with a residential real estate-related transaction, information regarding the availability of loans or other financial assistance, application requirements, procedures or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin.

<sup>149</sup> See, e.g., *Paschal v. Flagstar Bank*, 295 F.3d 565 (6th Cir. 2002) (holding that defendant engaged in racially discriminatory mortgage lending in violation of FHA); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555–57 (5th Cir. 1996) (holding that white landlord did not provide enough evidence of racial discrimination to state FHA claim of lending discrimination); *Ring*, 984 F.2d at 924 (holding that lender's refusal to make loan was motivated by racial discrimination).

<sup>150</sup> See 42 U.S.C. § 3604 (2000).

<sup>151</sup> 522 F. Supp. 559 (E.D. Va. 1981).

<sup>152</sup> Cf. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88–94 (1973) (holding that “national origin,” as used in the Title VII context, refers to the country where a person was born or from where his ancestors came; although Title VII did not cover discrimination on the basis of citizenship, Title VII prohibited discrimination on the basis of citizenship whenever it had the purpose or effect of discriminating on the basis of national origin).

*pinoza v. Farah Manufacturing Co.*,<sup>153</sup> should be used as the definition of national origin in the FHA context.<sup>154</sup>

Unfortunately, the *Hillwood* court did not explain how a court should determine *when* discrimination on the grounds of citizenship constitutes a pretext for national origin discrimination in the housing context.<sup>155</sup> Analogizing to the Title VII context still provides some insight into how a court might make that determination. The *Hillwood* court noted that “the analogy between the discrimination provisions of Title VII and Title VIII [Fair Housing Act] is extremely close.”<sup>156</sup> Given the willingness of courts to use Title VII liberally in the interpretation of the FHA, courts might permit applying the Title VII test of when citizenship discrimination constitutes a pretext for national origin discrimination to the FHA context.<sup>157</sup>

Courts have extensively discussed the circumstances under which citizenship discrimination constitutes a pretext for national origin discrimination in the Title VII context. In *Farah*, the primary plaintiff alleged that the employer’s policy of hiring only U.S. citizens constituted a pretext for discrimination against individuals of Mexican national origin.<sup>158</sup> The Court held that the fact that over 96% of the employees were of Mexican descent and the fact that the employee hired instead of the plaintiff had a Spanish surname demonstrated that no evidence of discriminatory purpose or effect existed.<sup>159</sup> The Court found that the plaintiff was denied employment not because of the country of her origin, but because she had not yet obtained U.S. citizenship.<sup>160</sup> In *Barnett v. Technology International*,<sup>161</sup> an employee brought disparate treatment and dispa-

<sup>153</sup> *Id.*

<sup>154</sup> *Hillwood*, 522 F. Supp. at 567–68.

<sup>155</sup> In *Hillwood*, applicants for membership in a cooperative housing association brought an action claiming that the association’s refusal of their application on the basis of citizenship violated § 1981 and the FHA. *Id.* at 561. The court issued a memorandum opinion denying both the plaintiffs’ joint motion for partial summary judgment with respect to their § 1981 claim and the defendant’s motion for summary judgment on the FHA claims on the ground that material factual issues remained unresolved. *Id.* at 560. After the court issued its opinion, the plaintiffs dropped their FHA claim. *Espinoza v. Hillwood Square Mutual Ass’n*, 532 F. Supp. 440 (E.D. Va. 1982).

<sup>156</sup> 522 F. Supp. at 568. Similarly, several other courts have also used Title VII to interpret the scope of the FHA. *See, e.g.*, *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997); *Pfaff v. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 745 n.1 (9th Cir. 1996); *Mountain Side Mobile Estates v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1254 (10th Cir. 1995); *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990).

<sup>157</sup> The discussion of national origin discrimination in the FHA context has been explored by several courts. However, such a discussion is not fully on-point in a situation where citizenship discrimination might be used *as a pretext for* national origin discrimination.

<sup>158</sup> 414 U.S. at 87, 93. The *Farah* plaintiffs did not specify whether they were bringing a disparate treatment or a disparate impact claim.

<sup>159</sup> *Id.* at 93.

<sup>160</sup> *Id.*

<sup>161</sup> 1 F. Supp. 2d 572 (E.D. Va. 1998).

rate impact claims, alleging that the company's policy of providing particular benefits to company employees who came from other countries to work for the company's U.S. offices, but not to company employees who *already* resided in the United States at the time they joined the company constituted national origin discrimination.<sup>162</sup> In holding that no disparate treatment existed, the court stated any such differential treatment was based on residence or domicile and not on national origin or membership in any other protected category under Title VII.<sup>163</sup> The court observed that this differential treatment occurred because the company wanted to provide an incentive to nonresidents to work in the United States and alleviate the hardships of relocating from another country to the United States.<sup>164</sup> The court supported its opinion by highlighting that, among company employees who already resided in the United States at the time they joined the company, the company did not differentiate between foreign-born employees and employees born in the United States.<sup>165</sup>

Similarly, in *EEOC v. Switching System Division of Rockwell International Corp.*,<sup>166</sup> a company maintained a policy of immediately terminating any employee who falsified information on an employment application and terminated four employees, three of Mexican and one of Nigerian national origin, for falsifying either their citizenship status or their social security numbers on their job applications.<sup>167</sup> Although the EEOC alleged that the policy was illegal under Title VII because it had a disparate impact on employees born outside of the United States and thus constituted national origin discrimination, the court disagreed.<sup>168</sup> The court noted that no evidence suggested that, in dismissing the employees, the company was concerned with their national origin or that the company maintained different policies for those employees born in the United States and those employees born outside of the United States.<sup>169</sup> Rather, the company required that all employees provide truthful information on their employment applications.<sup>170</sup>

Unfortunately, noncitizens likely cannot bring disparate treatment or disparate impact claims under the FHA against mortgage lenders who discriminate on the basis of citizenship. Although national origin is a protected category under the FHA, per *Hillwood* noncitizens likely could

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<sup>162</sup> *Id.* at 576–80.

<sup>163</sup> *Id.* at 577–79. The court held that the evidence offered by the plaintiff in support of his disparate impact claim was statistically insignificant and had to be disregarded and granted the company's motion for summary judgment on the disparate impact claim. *Id.* at 579–80.

<sup>164</sup> *Id.* at 578.

<sup>165</sup> *Id.*

<sup>166</sup> 783 F. Supp. 369 (N.D. Ill. 1992).

<sup>167</sup> *Id.* at 373–74.

<sup>168</sup> *Id.* at 374–75.

<sup>169</sup> *Id.* at 374.

<sup>170</sup> *Id.* The *Rockwell* court's discussion did not include a statistical analysis of any potential disparate impact.

not have an FHA disparate treatment claim against a mortgage lender whose screening policy made distinctions only on the basis of citizenship, not on the basis of national origin.<sup>171</sup> Noncitizens of a particular national origin group, however, might have an FHA claim against a mortgage lender that discriminates on the basis of citizenship if the mortgage lender's particular underwriting policy has the disparate impact of denying loans to relatively large numbers of noncitizens belonging to one particular national origin group.<sup>172</sup>

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<sup>171</sup> If per *Farah* national origin derives from ancestry or country of birth, a mortgage lender can credibly assert that an underwriting policy that makes distinctions between U.S. citizens and other loan applicants does not constitute disparate treatment on the basis of national origin because the policy favors *all* U.S. citizens, regardless of national origin. Such an argument might be tenable if *Farah's* definition of national origin is strictly applied such that citizenship and national origin are not synonymous. Such a mortgage lender can assert that the fact that its loan policy does not distinguish between U.S. citizens by birth (who ostensibly are of American national origin) and naturalized U.S. citizens (who, because of their birth elsewhere, are not of American national origin) shows that disparate treatment is not occurring on the grounds of national origin.

For example, an ethnically Chinese person who is born in China, immediately moves to the United States, becomes a naturalized U.S. citizen, and lives in the United States until death would be classified as "Chinese" under the *Farah* definition by virtue of birth and ancestry. Under a mortgage lending policy that makes distinctions only according to citizenship status, this person should be assessed as a U.S. citizen regardless of national origin. Similarly, by the *Farah* definition a person born in America whose ethnically Chinese parents moved from China to America immediately *prior* to giving birth could either be classified as having either a "Chinese" national origin (by virtue of ancestry) or an "American" national origin (by virtue of birth on American soil). Regardless of national origin, a mortgage lending test based solely on citizenship status would evaluate this person as a U.S. citizen, as birth in the United States automatically confers American citizenship. 8 U.S.C. § 1401(a) (2000). As a second example, a child born to U.S. citizens living in China often automatically receives U.S. citizenship. 8 U.S.C. § 1401(c) (2000). By the *Farah* test this child possesses Chinese national origin (by virtue of being born in China) *and either* American national origin (by virtue of ancestry, assuming per *Farah* that both parents received U.S. citizenship by virtue of being born in the United States) *or* the national origin of the country where the parents were born (assuming that both parents are naturalized U.S. citizens). Under a strict citizenship-based mortgage lending test, this person should be classified as a citizen. As a third example, a strict citizenship-based mortgage lending test would evaluate a person who was born on American soil (thus by the *Farah* test possessing American national origin), who later renounced American citizenship for Chinese citizenship, as a noncitizen. This person has American national origin without having U.S. citizenship.

If in practice the citizenship screening test produces such outcomes in these and other similar hypothetical scenarios, then a mortgage lender can defeat a claim of citizenship discrimination as a pretext for national origin discrimination by asserting that it follows the strict citizen/noncitizen divide upheld in *Rockwell* and that under *Barnett* it makes no distinctions based on national origin.

<sup>172</sup> A mortgage lender's underwriting policy that distinguishes between citizens and noncitizens also probably cannot give rise to a disparate impact claim if noncitizens of one particular national origin are not disproportionately impacted by the lender's underwriting screening process relative to applicants of other national origins. In order to prove that it does not discriminate on the basis of national origin, the mortgage lender can compare the cases of a Chinese citizen with permanent U.S. residency (a "green card" holder), a naturalized U.S. citizen born in China, and a U.S. citizen born in the United States to Chinese parents. Although under *Farah* all three people could be viewed as being of Chinese national origin, favorable underwriting treatment would be granted only to the U.S. citizens.

*C. Potential Relief Under ECOA*

The Equal Credit Opportunity Act (“ECOA”),<sup>173</sup> as implemented by Federal Reserve Board Regulation B,<sup>174</sup> prohibits financial institutions and other lenders from discriminating with respect to any aspect of a credit decision on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the ability to contract), receipt of income from public assistance programs, and good-faith exercise of any rights under the Consumer Credit Protection Act.

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Using this example, a mortgage lender that grants U.S. citizens preferential lending treatment can assert under *Rockwell* and *Barnett* that the only distinctions its lending process makes are along the lines of citizenship status, not of national origin. Moreover, much like the *Hillwood* defendant, such a mortgage lender may assert that its underwriting criteria do not create a disparate impact on the grounds of national origin because the mortgage lender applies the policy even-handedly among different national origin groups without distinguishing among these groups. This, however, will not be sufficient to defeat a disparate impact claim if the statistical evidence demonstrates that the mortgage lender’s policy disproportionately impacts members of a particular national origin group. The mortgage lender may agree that its behavior constitutes discrimination on grounds of citizenship but will likely assert that this practice does not violate the FHA’s prohibition of national origin discrimination.

A mortgage lender might be liable for a disparate impact claim if all of the noncitizens subjected to its policy belonged to the same national origin group, while the U.S. citizens subjected to that policy belonged to entirely different national origin groups. In such a case, an argument could be made that the mortgage lender’s policy of giving only U.S. citizens favorable loan terms has a disparate impact on this particular national origin group. If the mortgage lender lends to a community of noncitizens consisting of many different national origins, this claim is far less likely to succeed.

A colorable claim might still exist, however, if the mortgage lender lends to certain national origin groups that are comprised primarily of non-U.S. citizens as well as to certain other national origin groups that are comprised primarily of U.S. citizens. Although the mortgage lender may be applying its preferential treatment of U.S. citizens even-handedly across all national origin groups, the impact of this policy may disproportionately affect particular national origin groups if the members of those national origin groups are chiefly non-U.S. citizens. In this context, the national origin groups that are comprised primarily of noncitizens may have a disparate impact claim for discrimination on the grounds of national origin.

Similarly, noncitizens can allege that the application of a mortgage lender’s definition of “creditworthiness” has a disparate impact on certain non-U.S. citizens only if all of the noncitizens affected share the same national origin (and have virtually no common national origin with U.S. citizens who undergo the mortgage lender’s underwriting screening). Such a disparate impact analysis would contest a definition of “creditworthiness.” For example, if a mortgage lender’s automated underwriting system had a credit scoring system in which applicants with credit scores lower than 90 were always charged higher interest rates, it could be argued that the cutoff definition disparately impacted noncitizens (from a particular national origin group) if the score of 90 would always be impossible for a noncitizen to obtain, based upon the points that were allocated to U.S. citizens (as opposed to noncitizens) in the automated underwriting model. This would differ from a disparate treatment claim, which would challenge a mortgage lender’s differential treatment of citizens and non-citizens from the outset of the underwriting screening process.

<sup>173</sup> 15 U.S.C. § 1691 (2000).

<sup>174</sup> 12 C.F.R. § 202 (2003).

Like the FHA, ECOA violations can be brought under both the disparate treatment and the disparate impact theories.<sup>175</sup> The *McDonnell Douglas* burden-shifting analysis of disparate treatment in the ECOA context “requires that the plaintiff make out a *prima facie* case of discrimination by offering evidence indicating: (1) that the plaintiff belongs to a class protected by the statute; (2) that he applied for credit for which he was qualified; . . . (3) that he was rejected despite his qualifications”; and “(4) that the defendant continued to approve loans for applicants with qualifications similar to those of the plaintiff.”<sup>176</sup> Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant to demonstrate a legitimate, nondiscriminatory explanation for the adverse credit action.<sup>177</sup> If the defendant can offer such an explanation, the burden shifts back to the plaintiff to demonstrate that the proffered reason constituted a pretext for discrimination.<sup>178</sup>

The burden-shifting analysis used in FHA disparate impact cases also applies in the ECOA disparate impact context.<sup>179</sup> Once a plaintiff has demonstrated that a lender’s policy has a disparate impact on the basis of a protected class under ECOA, the burden shifts to the defendant lender to demonstrate that the “policy, procedure, or practice has a manifest relationship to the creditworthiness of the applicant.”<sup>180</sup> The burden is on the defendant to demonstrate that “the particular practice makes defendant’s credit evaluation system more predictive than it would be otherwise.”<sup>181</sup>

ECOA can be enforced against “any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.”<sup>182</sup> ECOA therefore applies “to commercial banks, financial intermediaries, such as mortgage companies and credit unions, and to the federal government.”<sup>183</sup>

Some groups of immigrants can likely use ECOA to bring claims. ECOA defines an “applicant” as “any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceed-

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<sup>175</sup> See Schwemm, *supra* note 123, at 328–32 (describing disparate treatment and disparate impact theories under ECOA).

<sup>176</sup> *Faulkner v. Glickman*, 172 F. Supp. 2d 732, 737 (D. Md. 2001); *A.B. & S. Auto Serv. v. S. Shore Bank of Chi.*, 962 F. Supp. 1056, 1060 n.6 (N.D. Ill. 1997).

<sup>177</sup> *Faulkner*, 172 F. Supp. 2d at 737.

<sup>178</sup> *Id.*

<sup>179</sup> *S. Shore Bank of Chi.*, 962 F. Supp. at 1060–61.

<sup>180</sup> *Id.* at 1061 (citations omitted).

<sup>181</sup> *Id.*

<sup>182</sup> 15 U.S.C. § 1691a(e) (2000).

<sup>183</sup> See 12 C.F.R. 202.2(l) (2003); Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL’Y REV. 333, 356 n.117 (2001).

ing a previously established credit limit.”<sup>184</sup> ECOA covers “applicants” belonging to the aforementioned protected classes.<sup>185</sup> Although standing under ECOA is narrower than standing under the FHA, immigrants who are not U.S. citizens can still likely receive ECOA protections. Although 15 U.S.C. § 1691(a)(b)’s definition of “applicant” differs slightly from 12 C.F.R. § 202.2’s definition of “applicant,” neither definition explicitly denies standing to noncitizens, which suggests that noncitizens who apply for credit from commercial banks, financial intermediaries, and the federal government have standing under ECOA.<sup>186</sup>

Given ECOA’s broad standing requirements, the statute probably provides immigrants a basis for bringing discrimination claims under ECOA’s various protected categories. Unfortunately, immigrants pursuing discrimination claims in the homeownership market probably cannot bring a disparate treatment claim against a mortgage lender for *citizenship* discrimination under ECOA. Regulations interpreting ECOA state that a

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<sup>184</sup> Relative to 15 U.S.C. § 1691a(b)’s definition of “applicant,” 12 C.F.R. § 202 broadly construes the definition of “applicant” as “any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers and similar parties.” 12 C.F.R. § 202.2(e) (2003). The use of the term “requests” in this version of the definition of “applicant” suggests that a potential borrower can become an applicant without actually making a formal application. 12 C.F.R. § 202.2(f) (2003) defines “application” as an “oral or written request for an extension of credit that is made in accordance with procedures established by a creditor for the type of credit requested.” Under this definition, any act by a potential borrower that is not considered an application under the creditor’s procedures means that no application will have been made. However, the creditor’s actual practices, not its written procedures, control. 12 C.F.R. § 202.2(f), Supp. I, at 56 cmt.2 (2003) (“For example, if a creditor’s stated policy is to require all applications to be in writing on the creditor’s application form, but the creditor also makes credit decisions based on oral requests, the creditor’s establish [sic] procedures are to accept both oral and written applications.”). A potential consumer who makes inquiries about a creditor’s general lending procedures likely is not an “applicant” according to either definition. *Id.* § 202.2(f), Supp. I, at 57 cmt.4. But

if in giving information to the consumer the creditor also evaluates information about the applicant [sic], decides to decline the request, and communicates this to the applicant, the creditor has treated the inquiry as an application and must then comply with the notification requirements under § 202.9. Whether the inquiry becomes an application depends on how the creditor responds to the applicant, not on what the applicant [sic] says or asks.

*Id.* § 202.2(f), Supp. I, at 56–57 cmt.3. ECOA protections thus likely apply to all acts that a creditor treats as an application. PAUL BARRON & MICHAEL A. BERENSON, *FEDERAL REGULATION OF REAL ESTATE AND MORTGAGE LENDING* § 8:7 (4th ed. 2001). A customer who requests a loan preapproval that a creditor either grants or denies is also an applicant. 12 C.F.R. § 202.2(f), Supp. I, at 57 cmt.5.

<sup>185</sup> 15 U.S.C. § 1691(a)(b) (2000).

<sup>186</sup> Courts have read ECOA and Regulation B’s definition of “applicants” narrowly. In *Evans v. First Federal Savings Bank*, 669 F. Supp. 915 (N.D. Ind. 1987), the court held that although the FHA protects any person who claims to have been injured by a discriminatory housing practice, ECOA does not employ such broad terms, referring specifically and only to “applicants.” *Id.* at 922 & n.3. Nonetheless, standing for aliens under ECOA still likely exists.

creditor can inquire about the permanent residence and immigration status of a credit applicant (or any person related to the credit transaction) in order to determine creditworthiness.<sup>187</sup> Courts have distinguished between an applicant's nationality and his or her citizenship and have held that ECOA does not protect against discrimination based on citizenship.<sup>188</sup> In *Nguyen v. Montgomery Ward & Co.*,<sup>189</sup> a Vietnamese alien who allegedly was denied a department store credit card because she lacked U.S. citizenship could not recover under ECOA.<sup>190</sup> The *Nguyen* court held that although ECOA prohibited discrimination on the basis of national origin, neither the law nor its legislative history suggested a congressional intent to proscribe the denial of credit on the basis of lack of citizenship, particularly in light of Regulation B, which permits creditors to consider immigration status when evaluating a credit application.<sup>191</sup> As a result, the court held that ECOA did not protect against citizenship discrimination.<sup>192</sup> Although no case law has discussed whether the use of citizenship in measuring creditworthiness could constitute a pretext for national origin discrimination, ECOA explicitly suggests that a finding of citizenship discrimination does not automatically translate into a finding of national origin discrimination.<sup>193</sup> Given that citizenship is not a protected class under ECOA, a disparate impact claim of citizenship discrimination cannot be brought.

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<sup>187</sup> 12 C.F.R. § 202.5(d)(5) (2003) (noting that “[a] creditor may inquire about an applicant’s permanent residence and immigration”); 12 C.F.R. § 202.6(b)(7) (2003) (stating that “[a] creditor may consider whether an applicant is a permanent resident of the United States, the applicant’s immigration status, and any additional information that may be necessary to ascertain the creditor’s rights and remedies regarding repayment”); see also 12 C.F.R. § 202.2(z)(2), Supp. I, at 58 cmt.2 (“A creditor may not refuse to grant credit because an applicant comes from a particular country but may take the applicant’s immigration status into account. A creditor may also take into account any applicable law, regulation, or executive order restricting dealings with citizens (or the government) of a particular country or imposing limitations regarding credit extended for their use.”).

<sup>188</sup> Wayne Raymond Barr, *Cause of Action for Discrimination Under the Federal Equal Credit Opportunity Act* [15 U.S.C. §§ 1691 et seq.], in 1 SHEPARD’S CAUSES OF ACTION § 10, at 543 (1983 & Supp. 2001).

<sup>189</sup> 513 F. Supp. 1039 (N.D. Tex. 1981).

<sup>190</sup> *Id.* at 1040.

<sup>191</sup> *Id.* (citing *Farah*, 414 U.S. 86 (holding that Title VII does not prohibit discrimination against aliens on the grounds of citizenship)).

<sup>192</sup> *Id.*

<sup>193</sup> Comments to 12 C.F.R. § 202.6(b)(7) state:

1. National origin—immigration status. The applicant’s immigration status and ties to the community (such as employment and continued residence in the area) could have a bearing on a creditor’s ability to obtain repayment. Accordingly, the creditor may consider immigration status and differentiate, for example, between a noncitizen who is a long-time resident with permanent resident status and a noncitizen who is temporarily in this country on a student visa.

2. National origin—citizenship. A denial of credit on the ground that an applicant is not a U.S. citizen is not per se discrimination based on national origin.  
12 C.F.R. § 202.6(b)(7), Supp. I, at 63 cmts. 1–2 (2003).

*D. Potential Relief Under § 1981*

The Civil Rights Act of 1870 (codified at 42 U.S.C. § 1981) provides:

All persons within the jurisdiction of the United States have the same rights in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 claims must be founded on purposeful racial discrimination<sup>194</sup> proven through the use of direct or circumstantial evidence.<sup>195</sup> In a case in which there is direct evidence of racial discrimination, a plaintiff who wishes to bring a claim of race-based disparate treatment must first establish a prima facie case of intentional discrimination.<sup>196</sup> Once the plaintiff has established a prima facie case, the burden of persuasion then shifts to the defendant, who must rebut the direct evidence of racial discrimination by proving that the same decision would have been made even if race had not been considered.<sup>197</sup>

The test for establishing discrimination using direct evidence differs from the test for establishing discrimination using circumstantial evidence. When a plaintiff intends to prove discrimination through circumstantial evidence, she is required to meet the *McDonnell Douglas* burden-shifting standard.<sup>198</sup> Under this standard, the plaintiff has the burden of first presenting a prima facie case of discrimination. The burden then shifts to the defendant to present legitimate nondiscriminatory reasons for its actions. If the defendant is able to do this, the burden shifts back to the plaintiff to show that the reasons presented merely constitute a pretext for discrimination.<sup>199</sup> Plaintiffs cannot bring disparate impact claims under § 1981.<sup>200</sup>

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<sup>194</sup> *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999) (holding that a showing of disparate impact through neutral practice is insufficient to prove a Section 1981 violation because proof of discriminatory intent is essential).

<sup>195</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (describing the legal standard for claims alleging non-facially discriminatory actions).

<sup>196</sup> See *Ferrill*, 168 F.3d at 472. In establishing a prima facie case of racial discrimination, the plaintiff must demonstrate that: (1) the plaintiff belongs to a racial minority; (2) the defendant discriminated against the plaintiff; (3) the defendant possessed an intent to discriminate on the basis of race; and (4) the discrimination concerned one or more of the activities enumerated in the statute. See *White v. Williams*, 179 F. Supp. 2d 405, 420 (D.N.J. 2002) (citations omitted); *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>197</sup> See *Ferrill*, 168 F.3d at 472; *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>198</sup> 411 U.S. at 801–03.

<sup>199</sup> *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994).

<sup>200</sup> Section 1981 claims must be founded on purposeful discrimination; “[a] showing of

Immigrants probably have access to substantial relief under § 1981.<sup>201</sup> Standing under § 1981 is very broad, and several courts have held that noncitizens have standing to bring claims under 42 U.S.C. § 1981.<sup>202</sup> Section 1981's protections against racial discrimination have been extensively and successfully litigated, and immigrants can take advantage of these protections when they are discriminated against on the basis of race.<sup>203</sup> Furthermore, immigrants can probably bring § 1981 claims on the basis of citizenship discrimination. Courts have recently held that § 1981 prohibits private discrimination on the basis of citizenship.<sup>204</sup> *Anderson v.*

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disparate impact through neutral practice is insufficient to prove a § 1981 violation because proof of discriminatory intent is essential." *Ferrill*, 168 F.3d at 472 (citation omitted).

<sup>201</sup> Note that 42 U.S.C. § 1982 (2000) only protects the rights of citizens: "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

<sup>202</sup> See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (upholding equal protection challenge to a state statute forbidding aliens ineligible for citizenship from obtaining fishing licenses by holding that "[t]he protection of [42 U.S.C. § 1981] has been held to extend to aliens as well as to citizens"); see also *Anderson v. Conboy*, 156 F.3d 167 (2d Cir. 1998) (holding, *inter alia*, that the "all persons" language of § 1981 and history of § 1981 indicated that noncitizens were able to bring claims under § 1981); *Duane v. GEICO*, 37 F.3d 1036 (4th Cir. 1994) (holding that § 1981 prohibits private discrimination against permanent resident aliens in making contracts); *Roberto v. Hartford Fire Ins. Co.*, 177 F.2d 811, 813–14 (7th Cir. 1949) (holding that § 16 of the 1870 Act protects aliens as well as U.S. citizens); *Baca v. Butz*, 394 F. Supp. 888, 890 n.2 (D.N.M. 1975) (use of term "persons" was amended to "bring within the protected class aliens who are discriminated against due to their race"); *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636, 638–39 (N.D. Cal. 1972) ("Section 1981 was enacted to protect the rights of two groups of people—non-whites and non-citizens who were not afforded equal treatment to white citizens.").

<sup>203</sup> Note that although § 1981 provides protections against racial discrimination, immigrants cannot seek relief under § 1981 against national origin discrimination. See, e.g., *Sajous v. First Nat'l Bank of Chi.*, No. 87-C-3564, 1987 WL 28403, at \*3 (N.D. Ill. Dec. 21, 1987) (holding that "[t]he rule that claims of discrimination based solely on national origin are not recoverable under Section 1981 is firmly established"). Some courts, however, have permitted national origin discrimination claims to be brought under § 1981 when national origin discrimination has been commingled with racial discrimination. See, e.g., *Chandoke v. Anheuser-Busch, Inc.*, 843 F. Supp. 16 (D.N.J. 1994) (observing that knowledge of a person's national origin could lead to racial discrimination). Other courts have recognized that race and national origin are inextricably intertwined and have acknowledged the difficulty of distinguishing between national origin discrimination and racial discrimination. See, e.g., *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (deeming strict categorizations of race irrelevant to determining the scope of § 1981 protections); *Jatoi v. Hurst-Euleess-Bedford Hosp. Auth.*, 807 F.2d 1214, 1218 (5th Cir. 1987) ("When a plaintiff asserts he has suffered discrimination based on his membership in a group that is commonly perceived as 'racial' because it is ethnically and physiognomically distinct, we will treat the case as asserting a claim under § 1981 whether he labels that discrimination as based on 'national origin' or on 'race.'").

<sup>204</sup> See, e.g., *Anderson v. Conboy*, 156 F.3d 167 (2d Cir. 1998); see also *Duane*, 37 F.3d 1036 (holding, *inter alia*, that § 1981 applied in its pre-enactment form to prohibit private discrimination against noncitizens in making of contracts); *Espinoza v. Hillwood Square Mutual Ass'n*, 522 F. Supp. 559 (E.D. Va. 1981) (holding, *inter alia*, that § 1981 reaches private discrimination based on citizenship); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135 (N.D. Ill. 1977) (holding that § 1981 may be used to vindicate rights infringed by discrimination based on citizenship).

*Conboy* held that § 1981 forbids citizenship discrimination on the part of private parties with respect to the right to make and enforce contracts.<sup>205</sup> In *Anderson*, a union's regulations required that certain union leadership posts be held by only U.S. or Canadian citizens.<sup>206</sup> This union removed Anderson, a Jamaican citizen, from the post of "Business Representative."<sup>207</sup> The Second Circuit reversed the district court's holding that § 1981 did not prohibit private citizenship discrimination, noting that the history and structure of § 1981 justified a reading that prohibited citizenship discrimination by state as well as by private actors.<sup>208</sup>

Section 1981 disparate treatment claims of citizenship discrimination can be brought using either direct or circumstantial evidence of discrimination.<sup>209</sup> Noncitizens should be able to make a § 1981 claim that a mortgage lender's policy of discriminating against noncitizens constitutes direct evidence of discrimination on the grounds of citizenship. The success of a mortgage lender's rebuttal hinges primarily on the sufficiency of data showing that all of the noncitizens who were subject to stricter loan conditions on the basis of citizenship would have been subject to these same conditions because they posed credit risks independent of their citizenship status.

Section 1981 has been applied with varying degrees of success to fighting claims of lending discrimination, both within and beyond the mortgage context.<sup>210</sup> No case law exists under § 1981 that addresses claims of citizenship discrimination in the mortgage lending process.

### *E. Integrating the FHA, ECOA, and § 1981*

Noncitizens who experience discrimination in the mortgage lending process can seek only limited degrees of redress under the FHA, ECOA, and § 1981, depending on the nature of the discrimination experienced. Those who wish to seek relief for discrimination on the basis of these statutes' protected categories possess clear standing to seek relief. Section 1981, however, offers the only measure of hope for immigrant noncitizens wishing to seek relief for citizenship discrimination. Suits under the

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<sup>205</sup> 156 F.3d 167.

<sup>206</sup> *Id.* at 168.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 177–78.

<sup>209</sup> *See supra* note 195.

<sup>210</sup> *See, e.g.*, *Kelly v. Bank Midwest*, 177 F. Supp. 2d 1190 (D. Kan. 2001) (awarding \$40,000 in compensatory damages to a plaintiff claiming racial discrimination in lending as a violation of § 1981); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000) (holding that genuine issue of material fact existed as to whether mortgage company employed racially discriminatory lending practices, precluding summary judgment on § 1981, § 1982, FHA, and ECOA claims); *Davidson v. Citicorp/Citibank*, 1990 WL 176426 (S.D.N.Y. Nov. 8, 1990) (denying defendant's motion to dismiss § 1981 and ECOA claims).

FHA or ECOA for citizenship discrimination would encounter considerable challenges.

Depending on the nature and circumstances of the discrimination they have faced, plaintiffs can simultaneously plead several claims under these different statutes.<sup>211</sup> Some statutes might permit claims that the other statutes forbid. For example, the FHA exempts certain dwellings from liability.<sup>212</sup> In such a case, ECOA and § 1981 claims may provide alternative grounds for relief. Section 1981 does not provide protection from disparate impact discrimination, but such claims can be pled under the FHA and ECOA. ECOA only prohibits discrimination as it relates to the provision of credit but may not prevent other predatory lending practices, suggesting that relief for certain forms of predatory lending practices not related precisely to mortgage lending would have to be sought under the FHA or § 1981.<sup>213</sup> All three federal statutes provide comparable damages, typically including temporary and permanent injunctive relief, compensatory damages, and punitive damages.<sup>214</sup>

The discussion above shows that mortgage lending discrimination against noncitizen immigrants is not a well-established area of jurisprudence, and litigation fighting it has met with only mixed success. Furthermore, the process of fighting mortgage lending discrimination through these antidiscrimination statutes is complicated.<sup>215</sup> The federal antidis-

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<sup>211</sup> ECOA's provision allowing lenders to consider citizenship status in the determination of an applicant's creditworthiness may create a conflict with any attempt to establish a prima facie case of discrimination on grounds of citizenship under § 1981. In some instances, however, the two seemingly contradictory provisions might be reconcilable. Although a lender is permitted to consider citizenship status when determining creditworthiness, if it can be demonstrated that no clear correlation exists between citizenship and creditworthiness, a lender's differential treatment of noncitizens in the underwriting screening process may constitute a pretext for discrimination on grounds of citizenship. Courts have yet to commence discussion on this potential conflict, so the issue remains unresolved for the moment.

<sup>212</sup> Specifically, 42 U.S.C. § 3603(b) (2000) exempts certain classes of housing from FHA requirements, including "any single-family house sold or rented by an owner" that meets certain conditions.

<sup>213</sup> See, e.g., Tania Davenport, *An American Nightmare: Predatory Lending in the Subprime Home Mortgage Industry*, 36 SUFFOLK U. L. REV. 531, 551 (2003) ("The scope of the ECOA is limited to its prohibitions on discrimination in the granting of credit, and the act does not directly address any other predatory lending abuses.").

<sup>214</sup> See 42 U.S.C. § 3613(c) (2000); 15 U.S.C. § 1691e (2000); see also Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws*, 89 KY. L.J. 581, 597-98 (2001) (describing availability of compensatory and punitive damages under § 1981); JOHN RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 3:14 (1992) (discussing injunctive relief available under § 1981).

<sup>215</sup> Engel & McCoy, *supra* note 44, at 1315-16 (describing difficulties in pursuing and proving lending discrimination claims). For other discussions of the difficulty of litigating mortgage lending discrimination, see Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REFORM 527, 549 (1993); Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for an Old Injury Arising from Housing Discrimination*, 77 WASH. U. L.Q. 1153, 1188-91 (1999); Michele L. Johnson, *Your Loan is Denied, But What About Your Lending*

crimination statutes offer noncitizens fighting alienage discrimination only limited relief.

#### IV. EDUCATION AND COMMUNITY ADVOCACY STRATEGIES TO PROMOTE IMMIGRANT HOMEOWNERSHIP

Federal antidiscrimination statutes provide relatively limited options for immigrants seeking to remedy discrimination (particularly citizenship discrimination) in the mortgage finance process. Sociological and cultural barriers further frustrate the ability of immigrants both to marshal these statutes to protect their rights and to participate in the mortgage finance market. This Part describes these barriers and discusses potential remedies, focusing on education and community advocacy strategies to increase immigrant awareness of homebuyer rights.

##### A. Sociological and Cultural Barriers to Homeownership

Immigrants face a range of sociological and cultural barriers to homeownership that both limit homeownership possibilities and prevent immigrants from pursuing relief for homeownership discrimination. First, many immigrants are unfamiliar and uncomfortable with the U.S. financial system and homebuying process,<sup>216</sup> and therefore often make mistakes in the mortgage lending process that can result in foreclosure.<sup>217</sup> Many immigrants choose not to participate in the mainstream American financial system at all.<sup>218</sup> For example, approximately 25% of the nation's Latinos,

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*Discrimination Suit?*: *Latimore v. Citibank, Fed. Savings Bank*, 68 U. CIN. L. REV. 185, 214–15 (1999).

<sup>216</sup> See Tommy Fernandez, *Minority Home Loans Coming Out of Silos*, AM. BANKER, Jan. 31, 2003, at 11 (“Minority and immigrant borrowers, especially those with low or moderate income, have needs and characteristics that are different from those in the mainstream market. Some cannot speak English, and others are unbanked.”); *Immigrants Face Mortgage Woes*, NEWSDAY, May 24, 2002, at C3 (“[P]eople who move to the United States sometimes have misconceptions. They believe that the entire monthly mortgage payment is deductible from federal income taxes (the interest and property taxes are deductible). They often underestimate the costs of taxes, insurance, utilities and maintenance, since many of these costs had been included in rent.”) (summarizing the opinion of a mortgage banker who specializes in mortgages to immigrants); Jay Loomis, *Banks Learn to Translate the Language of Investment*, J. NEWS (N.Y.), Apr. 28, 2002, at 2D (summarizing the opinion of one community development manager at First Union that “[s]ome recent Latin-American immigrants, coming from poorer, less advanced economies, can be unfamiliar with basics like checking accounts, home mortgages, or the stock market”); Sanchez, *supra* note 120 (discussing the observations of immigrants’ rights and housing rights advocates, who believe that “[i]mmigrant families are often cash-ready but naïve to American banking”).

<sup>217</sup> See, e.g., Amilda Dymi, *Successful Niche Marketing*, BROKER MAG., Feb. 8, 2002, at 23 (noting that certain subprime Hispanic borrowers “end up in foreclosure simply because they do not understand the credit system and the concept of adjustable rate mortgages”).

<sup>218</sup> Non-participation may occur for a variety of reasons:

Many immigrants bring with them old-country knowledge and customs regarding

a population which includes a significant number of immigrants, do not have bank accounts.<sup>219</sup> Immigrants who operate outside of the American financial mainstream often have no credit history,<sup>220</sup> which severely limits their ability to receive a mortgage.<sup>221</sup> Language barriers also often complicate immigrants' ability to understand the homebuying process and increase their vulnerability to unscrupulous lending practices.<sup>222</sup> Individuals or families that lack lawful immigration status might also hesitate to apply for mortgages, fearing that disclosure of this status through the mortgage lending process might lead to deportation.<sup>223</sup>

### B. Education, Community Activism, and Legislation

Given the challenges posed by litigating lending discrimination claims and immigrants' sociological and cultural barriers to homeownership, an alternative route to promoting homeownership among immigrants is to

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home-buying and financial institutions. Often, they arrive with a distrust of such institutions and do not open checking or savings accounts. They generally do not have an understanding of the credit approval process and requirements. Many who come from societies where a very large down payment is the rule assume the same applies in the United States.

SCHOENHOLTZ & STANTON, *supra* note 2, at 3.

<sup>219</sup> Mick Mrkvicka, *Banks Seek Growing Hispanic Population*, EL PASO TIMES, May 26, 2002, at E1.

<sup>220</sup> SCHOENHOLTZ & STANTON, *supra* note 2, at 4 ("At the point where they might like to purchase a home, many immigrants cannot demonstrate conventional histories or document earnings. By custom, they often prefer not to use credit cards. While they pay rent, their names may not be on the leases."); MAUDE TOUSSAINT-COMEAU & SHERRIE W.L. RHINE, FED. RESERVE BANK OF CHI., *ETHNIC IMMIGRANT ENCLAVES AND HOMEOWNERSHIP: A CASE STUDY OF AN URBAN HISPANIC COMMUNITY* 6 (2000), available at <http://www.chicagofed.org/publications/publicpolicystudies/ccapolicystudy/pdf/cca-2000-6.pdf> ("Unfamiliarity with the U.S. credit system may result in households being less informed of opportunities that could increase their chances of attaining homeownership.").

<sup>221</sup> Also, immigrants who have not established financial histories in a manner recognized by conventional underwriting processes can be viewed as credit risks. *See, e.g.*, SCHOENHOLTZ & STANTON, *supra* note 2, at 4 ("Many financial institutions use conventional tools to measure creditworthiness. Immigrants are often deemed ineligible for financing when their conventionally measured assets and income are screened by computer. In many cases, immigrants' cash payments for their work off the books don't register under conventional approaches.").

<sup>222</sup> *See* SCHOENHOLTZ & STANTON, *supra* note 2, at 4 ("Limited ability to understand and speak English keeps immigrants outside the mainstream home-buying industry. To overcome this limitation, immigrants sometimes turn to 'cultural brokers'—some legitimate, but others not."); TOUSSAINT-COMEAU & RHINE, *supra* note 220, at 6 ("The immigrant experience of some groups may have an even more potent impact on ownership outcomes. The intricacies of the home purchase process require a certain level of financial acumen and mastery of the English language, which might be more difficult for Hispanic and other non-native English speaking immigrants.") (internal citations omitted). *See also supra* note 120.

<sup>223</sup> Jason Stein, *More Latinos Own Houses, But the Percentage is Smaller*, WISC. ST. J. (Aug. 17, 2002), at <http://www.madison.com/wisconsinstatejournal/local/30726.html> (Aug. 17, 2002) (noting that some Latinos who lack immigration documents fear the homeownership application process due to uncertainties in legal status).

take a preventative approach, working to remove the sociological and cultural barriers to homeownership they face. The reduction of such barriers might make immigrants less susceptible to discriminatory practices. Programs that educate immigrants about the American financial system and mortgage lending industry, for example, will reduce their vulnerability to predatory lending practices.

A preventative approach to homeownership discrimination experienced by immigrants can take several forms. First, immigrant communities can mobilize to increase awareness of housing and homeownership rights. The emergence of the community development corporation (“CDC”) exemplifies such immigrant activism. A CDC is a nonprofit corporation that serves a particular community and operates under that community’s guidance,<sup>224</sup> focusing on economic, residential, and social betterment of that community.<sup>225</sup>

CDCs have been important vehicles for advancing immigrants’ housing rights. Founded in 1947, Asian Americans for Equality (“AAFE”) is a CDC that runs several initiatives to advance economic and social justice for Asian Americans in the New York metropolitan region.<sup>226</sup> AAFE runs two homeownership centers in New York that provide “full cycle (pre- and post-purchase) homeownership services” and “education through various workshops and seminars.”<sup>227</sup> AAFE also runs a Community Development Fund (“AAFE CDF”) that “serves to educate and counsel low- and moderate-income families on their rights, responsibilities, and options when buying or owning a home.”<sup>228</sup> AAFE CDF offers several loan products to facilitate affordable homeownership in the Asian American community, with a focus on lower-income clients,<sup>229</sup> and also provides education, counseling, and technical assistance to homebuyers.<sup>230</sup>

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<sup>224</sup> For an overview of the community development corporation, see Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753 (1996–1997). For examples of CDCs, see *id.* at 769–72, 776–77, and see generally WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* (2002).

<sup>225</sup> See generally Schill, *supra* note 224.

<sup>226</sup> See Asian Americans for Equality, Home Page, at <http://www.aafe.org> (last visited Nov. 14, 2003). AAFE has several services, including: affordable housing development; small business assistance; homeownership promotion; property management; services to emerging communities; housing, social, and legal services; access to technology; and public policy and advocacy. See AAFE, Services, at <http://www.aafe.org/services.php> (last visited Nov. 14, 2003).

<sup>227</sup> See AAFE Services, *supra* note 226.

<sup>228</sup> *Id.*; see also AAFE CDF, Home Page, *supra* note 226.

<sup>229</sup> See AAFE CDF, Products, at [http://www.aafecdf.org/CDF\\_pages/products.html](http://www.aafecdf.org/CDF_pages/products.html) (last visited Nov. 6, 2003) (describing loan products including down payment assistance loans (to help first-time homebuyers with their down payments); home rehabilitation loans; emergency repair loans; and conversion loans (to pay for the costs of making single family homes into two- or three-family homes)).

<sup>230</sup> See AAFE CDF, About Us, at [http://www.aafecdf.org/CDF\\_pages/aboutUs.html](http://www.aafecdf.org/CDF_pages/aboutUs.html) (last visited Nov. 6, 2003).

The Latino Community Development Agency of Oklahoma aims to promote first-time homeownership as part of its wider strategy of improving the quality of housing for Latinos in the region.<sup>231</sup> It offers homeownership services as part of a diversified range of economic and social programs.<sup>232</sup> Similarly, Nueva Esperanza is a CDC that works with Latino communities to promote homeownership as part of a broader strategy of economic and social advancement for Latinos.<sup>233</sup> Based in Philadelphia, Nueva Esperanza aims to promote “the establishment of Hispanic owned and operated institutions that lead to the familial, economic and spiritual development of our communities.”<sup>234</sup> Their Housing and Economic Development Program has helped hundreds of Hispanic families obtain their first mortgage and has counseled thousands on mortgage-related financial issues.<sup>235</sup> The Program offers intensive counseling and training for all stages of the homeownership process, from securing a loan to managing post-occupancy issues.<sup>236</sup> It also supports housing rehabilitation for sale or rental to low-income families, as well as new construction for homeownership.<sup>237</sup>

Other CDCs focus solely on housing rights for immigrants. Chhaya is a CDC that focuses on promoting housing rights for South Asian immigrants residing in New York City.<sup>238</sup> Chhaya’s mission is “to address the housing, community and economic development needs of South Asian Americans and other immigrant communities in New York City.”<sup>239</sup> Chhaya works in neighborhoods that have large South Asian populations, such as Jackson Heights.<sup>240</sup> Its current focus is advancing tenant rights in the city, where thousands of South Asians face an extremely high risk of homelessness and often live in poor, overcrowded housing conditions.<sup>241</sup> Recognizing that South Asian first-time homebuyers face considerable insti-

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<sup>231</sup> See Latino Community Development Agency, Futuro Familiar Housing Program, at [http://www.latinoagencyokc.org/ws\\_MainPages/MainHousingPage.html](http://www.latinoagencyokc.org/ws_MainPages/MainHousingPage.html) (last visited Nov. 14, 2003) (describing the “home buyer education” program, which aims to promote homeownership in the Latino community through education and training).

<sup>232</sup> See Latino Community Development Agency, Home Page, at <http://www.latinoagencyokc.org/index.html> (last visited Nov. 14, 2003).

<sup>233</sup> Nueva Esperanza, About Us, at <http://www.nueva.org/about.html> (last visited Nov. 14, 2003).

<sup>234</sup> *Id.*

<sup>235</sup> See Nueva Esperanza, Nueva Esperanza’s Housing and Economic Development Program, at <http://www.nueva.org/housing.html> (last visited Nov. 14, 2003).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> CHHAYA CMTY. DEV. CORP., FINDING A PATH TO SOUTH ASIAN AMERICAN COMMUNITY DEVELOPMENT: A REPORT ON THE HOUSING AND COMMUNITY DEVELOPMENT NEEDS ASSESSMENT OF SOUTH ASIAN AMERICANS IN NEW YORK CITY 1 (2001), available at <http://www.chhayacdc.org/pdf/study.pdf>.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 2.

tutional discrimination in the homeownership market,<sup>242</sup> Chhaya strives to promote homeownership in this community.<sup>243</sup>

Immigrants have also successfully worked with financial institutions to encourage them to take a leadership role in promoting homeownership in immigrant communities. Financial institutions have started targeting immigrant communities for mortgage lending by offering mortgages to immigrants who might not otherwise have access for financial or immigration reasons.<sup>244</sup> Moreover, both banks and real estate agencies are actively targeting immigrant communities for mortgage lending with special marketing and outreach programs designed to overcome barriers to immigrant homeownership.<sup>245</sup> The tools for promoting immigrant homeownership have included training employees in language and cultural skills; translating real estate materials into multiple languages; providing Internet sites and toll-free numbers that offer mortgage information to immigrants in multiple languages; operating pilot homebuyer-education programs to inform buyers of abusive lending practices and the basics of

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<sup>242</sup> *Id.* (“In the process of purchasing homes, South Asian Americans commonly experience limited options in financing, incur higher loan fees and pay more for their homes than New York City homeowners in general . . . [I]n the process of obtaining financing for the purchase of a home, South Asian Americans are susceptible to predatory brokers and lenders who impose excessive commission fees and debt payments.”).

<sup>243</sup> Chhaya Cmty. Dev. Corp., Programs and Services, at [http://www.chhayacdc.org/pdf/infosheet\\_en.pdf](http://www.chhayacdc.org/pdf/infosheet_en.pdf) (last visited Nov. 14, 2003).

<sup>244</sup> Andrew LePage, *California Real Estate Firms Find Success Marketing to Latinos*, SACRAMENTO BEE, Sept. 14, 2002 (discussing use of alternative credit sources, such as rent payments, utility payments, and cell phone payments); Mrkvicka, *supra* note 219 (noting that some banks permit immigrants to open accounts without requiring proof of lawful United States immigrant status); Rick Wartzman, *Minority Player: How Tiny MetroBank Wins Big by Catering to an Ethnic Market*, WALL ST. J., Jan. 15, 1996, at A1 (noting that Asian-owned MetroBank “offers first-time mortgages to people who can make a large down payment but wouldn’t normally qualify for a loan because they lack a traditional credit history”); Diane Wedner, *CitiMortgage, Fannie Mae to Target Underserved*, L.A. TIMES, Apr. 6, 2002, at C3 (discussing how financial institutions are waiving credit history requirements or accepting nontraditional substitutes to establish credit).

A *Los Angeles Times* article described how the Bank of America established a program that offers immigrants mortgage packages with zero down payment and use of utility/rent payments in place of a traditional credit history. Oldham, *supra* note 120. This led to a doubling of the number of loans made to Latinos in Southern California over a two-year period. Fannie Mae eliminated the requirement that buyers have a two-year work history to qualify for a mortgage because immigrants “piece together a panoply of jobs.” As a consequence, loans to Latinos purchased by the mortgage-financing giant jumped from 25% to 33% of the total number of loans made to minority households. *Id.*

<sup>245</sup> Loomis, *supra* note 216 (discussing how financial institutions hire Spanish-speaking employees and use Spanish-language marketing); Mrkvicka, *supra* note 219 (highlighting bank marketing outreach to immigrants, including millions of dollars in marketing spending); Oldham, *supra* note 120 (describing how groups including the National Association of Hispanic Real Estate Professionals (NAHREP), the California Association of Realtors, Freddie Mac, the National Hispanic Housing Council, Countrywide Home Loans, the Mortgage Bankers Association of America, the National Council on Economic Education, and Bank of America have instituted programs to promote immigrant homeownership); Wedner, *supra* note 244 (discussing neighborhood outreach program, including hiring of Spanish-speaking employees).

buying a home; and encouraging financial literacy among immigrants.<sup>246</sup> Developers are also converting “downmarket” apartments into affordable housing for immigrant communities.<sup>247</sup> Although immigrants have traditionally lived in segregated “ethnic enclaves,”<sup>248</sup> they are starting to spread out across the nation,<sup>249</sup> suggesting that financial and real estate institutions across the country will have to address the unique homeownership needs of immigrants.

Legislative activity is another route for combating mortgage lending discrimination in immigrant communities. Dozens of states and localities have successfully enacted legislation to fight mortgage lending discrimination.<sup>250</sup> Immigrant communities can and should mobilize to ensure that such legislation includes specific protections for immigrants, including prohibitions on citizenship discrimination in lending. Noncitizens cannot enforce citizenship protections at the ballot box, so immigrants’ rights organizations must build coalitions with other groups that are striving to fight lending discrimination in order to ensure that the voices of immigrants are represented in anti-predatory lending legislation.

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<sup>246</sup> The importance of targeting immigrant communities with specific strategies has been widely discussed and dozens of financial and real estate institutions have started to cater to the unique needs of prospective homeowners in immigrant communities. *See, e.g.*, Dymi, *supra* note 217 (discussing seminars held by financial institutions in immigrant communities that discuss financial planning, home ownership, and balancing a checkbook); Julia Fairclough, *Firms are Sold on Diversity*, BOSTON HERALD, Sept. 20, 2002, at 45 (noting advantage of multilingual real estate agents in making immigrants feel comfortable in homeownership process); Adrian Feuchtwanger, *In Other Words: Lenders Are Finding Ways to Tear Down the Language Barrier that Deters Hispanics from Becoming Homeowners*, MORTGAGE BANKING, June 1, 1996, at 90 (discussing use of multilingual employees, social events in immigrant communities); LePage, *supra* note 244; Loomis, *supra* note 216; Michael Murray, *An Education for the Mortgage Industry*, MORTGAGE BANKING, Nov. 1, 2002, at 70; Oldham, *supra* note 120; Sanchez, *supra* note 120.

<sup>247</sup> *See* Evan Perez, *Condo Conversions Bolster Miami’s Immigrant Areas*, WALL ST. J., Feb. 10, 1999, at F1.

<sup>248</sup> *See* Borjas, *supra* note 2 (describing segregation of immigrant communities into “ethnic enclaves”).

<sup>249</sup> *See* Negroni & Neill, *supra* note 9.

<sup>250</sup> *See, e.g.*, Arkansas Home Loan Protection Act, Act 1340, 2003 Ark. Adv. Legis. Serv. 279 (Michie); ARIZ. REV. STAT. §§ 6-635(A)(4), 6-635(D) (Supp. 2003); Connecticut Abusive Home Loan Lending Practices Act, Pub. Act 2001-34, 2001 Conn. Legis. Serv. 47 (West); New Jersey Home Ownership and Security Act, of 2002, ch. 64, 2003 N.J. Sess. Law. Serv. 193 (West) (to be codified at N.J. STAT. ANN. §§ 64:10B-22 to -35); Home Loan Protection Act, ch. 436, 2003 N.M. Adv. Legis. Serv. 4394; N.C. GEN. STAT. §§ 24-1.1A–1.1E (2001). Several cities, including Los Angeles, New York, and Oakland, have enacted local anti-predatory lending ordinances. For Web sites that track federal, state, and local anti-predatory lending legislation, *see, e.g.*, ACORN, *Predatory Lending: What’s Happening Now*, at <http://www.acorn.org/campaigns/events.php?c=6> (last visited Nov. 14, 2003); Ctr. for Responsible Lending, Federal and State Update, at [http://www.responsiblelending.org/fed\\_state\\_update/index.cfm](http://www.responsiblelending.org/fed_state_update/index.cfm) (last visited Nov. 14, 2003); Mortgage Bankers Assoc. of Am., Predatory Lending Resource Center, at <http://www.mbaa.org/resources/pledend> (last visited Nov. 14, 2003).

*C. Future Areas of Research on Immigrants*

As this Note has discussed, rich anecdotal evidence demonstrates that immigrants endure considerable discrimination in mortgage finance markets. Unfortunately, concrete quantitative and statistical information tracking loan denial rates or differential treatment of immigrants does not exist. Therefore, one area for improvement in the study of immigrant homeownership would be to require federally regulated financial institutions to track lending according to citizenship status.

The Home Mortgage Disclosure Act (“HMDA”)<sup>251</sup> is the best statutory framework in which to track mortgage lending data. The HMDA aims to:

provide the citizens and public officials of the United States with sufficient information to enable them to determine whether depository institutions are fulfilling their obligations to serve the housing needs of the communities and neighborhoods in which they are located and to assist public officials in their determination of the distribution of public sector investments in a manner designed to improve the private investment environment.<sup>252</sup>

It is intended to assist local communities in tracking flows of bank financing to their communities and to encourage neighborhoods to organize against redlining, and to promote community economic development.<sup>253</sup> The HMDA requires financial institutions to track and disseminate information about the mortgage loans that they grant.<sup>254</sup> HMDA data have demonstrated glaring disparities in lending rates between white and minority communities<sup>255</sup> and have proven “extremely useful to both plaintiffs and community housing groups seeking evidence of redlining in minority neighborhoods.”<sup>256</sup>

HMDA data currently must include breakdowns according to race and gender but do not have to be classified according to citizenship status or time of residence in the United States.<sup>257</sup> Therefore, one immediate area for reform would be to amend the HMDA to require tracking of mortgage

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<sup>251</sup> 12 U.S.C. §§ 2801–2810 (2000).

<sup>252</sup> *Id.* § 2801(b).

<sup>253</sup> Richard D. Marsico, *Fighting Poverty Through Community Empowerment and Economic Development: The Role of the Community Reinvestment and Home Mortgage Disclosure Acts*, 12 N.Y.L. SCH. J. HUM. RTS. 281, 293 (1995).

<sup>254</sup> See Schwemm, *supra* note 123, at 319.

<sup>255</sup> *Id.*

<sup>256</sup> Brani, *supra* note 123, at 54.

<sup>257</sup> 12 U.S.C. § 2803(b)(4) (2000) (requiring data tracking of “the number and dollar amount of mortgage loans and completed applications involving mortgagors or mortgage applicants grouped according to census tract, income level, racial characteristics, and gender”).

finance trends in immigrant, particularly noncitizen, communities. While the existence of mortgage finance discrimination based on citizenship status can be inferred from anecdotal evidence, institution- and industry-wide statistics are needed to draw attention to discrimination endured by noncitizens in the homeownership market.

#### CONCLUSION

Homeownership represents the attainment of the American Dream for many immigrants to this country. It also strengthens immigrant communities economically and enables them to deepen cultural ties to America. Unfortunately, immigrants seeking to purchase homes face considerable hurdles in obtaining mortgages. Discrimination across all stages of the mortgage lending process prevents immigrants from enjoying full access to the mortgage finance market. Automated underwriting has undoubtedly revolutionized the mortgage finance industry; when improperly designed or used, however, it can also perpetuate discrimination in the allocation of mortgage finance. Predatory lending also acts as an obstacle to the equitable disbursement of mortgage loans. Furthermore, linguistic, sociological and cultural barriers can prevent immigrants from developing the necessary financial savvy to enforce their rights against discriminatory lenders or to recognize abusive lending practices.

The law provides few options for immigrants seeking to combat the one form of mortgage lending discrimination that is unique to the immigrant experience: citizenship-based discrimination. This form of discrimination is not accounted for in, and may even be permitted by, some of the principal federal antidiscrimination statutes, such as the Fair Housing Act and the Equal Credit Opportunity Act. Given the difficulty immigrants face accessing federal antidiscrimination remedies, the solution to fighting mortgage lending discrimination lies, at least in part, in the empowerment and mobilization of immigrant communities. Indeed, immigrants have successfully formed community organizations that strive to promote homeownership through education and training of immigrant communities. These organizations often teach immigrants the fundamentals of mortgage finance and train them to avoid unscrupulous lenders. As immigrant communities grow and become stronger, these organizations will likely grow in importance as vehicles for advancing immigrant homeownership. Moreover, as financial institutions are eager to profit from immigrant homeownership, immigrant communities should work actively with these entities to ensure that the mortgage lending process treats immigrants equitably. Immigrant communities should also push financial institutions to address the unique economic and cultural needs of immigrants with specifically tailored products and services.

Additionally, there is a need for increased data collection on mortgage lending discrimination against noncitizens. Such data can be mar-

shaded to lobby for broader remedies to fight mortgage lending discrimination, and immigrants' rights organizations could use such data to urge financial institutions to refrain from making unilateral lending decisions based on criteria, such as citizenship status, that may not accurately measure creditworthiness. The government could play a broader role in monitoring citizenship-based discrimination and in facilitating the collection of this information.

Ultimately, a sophisticated coalition of public and private sector actors must collaborate closely with immigrant communities to enable American immigrants to realize the American Dream of homeownership.