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RACIAL DISCRIMINATION, HOME
APPRAISALS, AND THE FAIR HOUSING
ACT:
REGULATING PRIVATE APPRAISERS TO
REDUCE THE RACIAL WEALTH GAP

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ABSTRACT

This paper highlights the prevalence of racial discrimination in the home appraisal market through critical race theory (CRT) techniques and theory. When a home's value can be reduced by almost twenty-five percent simply because of the perceived race of its owners or of the neighborhood, Black families find themselves at a disadvantage as they try to amass capital. Using the CRT technique of storytelling, this paper highlights how the problem of discriminatory appraisals affects Black homeowners today. Secondary mortgages, business loans, and even flipping houses generate less wealth for Black families because of this pervasive and demonstrable discrimination. This paper proposes a federal legislative solution to this crisis—a regulatory framework for private appraisers grounded in CRT principles through community engagement and bias training. Because the Fair Housing Act requires individuals to pursue private action against appraisers, current federal law does not address the systemic nature of this problem. Indeed, the Fair Housing Act demonstrates the problem of liberalism and legal solutions that CRT scholars have highlighted for decades. Only federal regulation that empowers Black communities through stakeholder engagement and requires discrimination bias training for home appraisers will ensure that private appraisers stop using race as a criterion for home value. Moreover, federal legislation provides a nationwide solution to a systemic issue that touches almost every region of the United States.

Part I discusses the impact of home appraisals on wealth creation in the United States and highlights the ongoing crisis of racial discrimination in home appraisals. The article augments this analysis with storytelling—stories of Black homeowners forced to hide their race to receive a fair appraisal in 2021. Part II examines the Fair Housing Act, its troubled history with respect to appraisals, and the difficulties individual claimants face bringing suit. This Part also explores the CRT critique of liberalism and legal solutions and how the Fair Housing Act serves as an example of a larger problem with the structure of statutory interventions. Part III introduces proposed federal legislation that will create federal monitors to oversee the private appraisal market across all fifty states. Moreover, this legislation will require appraisers to use properties across a diverse set of neighborhoods as comparable properties and will establish metrics to which appraisers will need to adhere. Finally, the proposed legislation draws from CRT principles in that it requires states to

appoint local community members to complaint review boards and mandates bias training as a precondition for becoming a licensed appraiser. Such legislation will reduce the racial wealth gap, create new avenues for entrepreneurship within Black communities, and will boost the American economy as a whole.

I. INTRODUCTION

Like many families during the COVID-19 pandemic, the Hortons hoped to refinance their home with a lower interest rate.¹ Surrounded by midcentury homes valued at upwards of a half a million dollars in Jacksonville, Florida, the couple expected a modest appraisal of around \$450,000.² However, the appraiser came back with a value of \$330,000, shattering their dreams of a successful refinance.³ As the Black member of an interracial couple, Abena Horton suspected discrimination—and she conducted an experiment to prove racial bias.⁴

Abena asked the bank for a second appraisal, and this time she took steps to remove all traces of Blackness from her family home.⁵ A

¹ Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html>; see also Sumit Agarwal et al., *Refinancing Inequality During the COVID-19 Pandemic* 1, 17 (Fed. Deposit Ins. Corp.: Ctr. for Fin. Rsch., Working Paper No. 2021-08, 2021) (noting that “[b]etween February and June 2020, the difference in savings from refinancing between high and low-income borrowers was ten times higher than before the pandemic.”). Indeed, the refinancing boom spurred on by the COVID pandemic revealed structural inequities because the top quintile of borrowers enjoyed \$5 billion more in savings from refinancing than the bottom quintile during the pandemic. See *id.* at 3.

² Kamin, *supra* note 1.

³ *Id.* Unfortunately, the Hortons are not alone. In 2021, mortgage lenders denied fifteen percent (15%) of Black loan applicants while only denying six percent (6%) of White applicants. JAMES H. CARR & MICHELA ZONTA, NAT’L ASS’N REAL EST. BROKERS, 2022 STATE OF HOUSING IN BLACK AMERICA: THE ELUSIVE DREAM OF BLACK HOMEOWNERSHIP 15 (2022).

⁴ Kamin, *supra* note 1. This article capitalizes the first letter of racial or ethnic minority groups to recognize “the systemic inequity, injustice, and oppression minority communities endure.” DENVER L. REV., *Style Conventions*, <https://www.denverlawreview.org/style-conventions> (last visited Mar. 27, 2023). Because white communities do not face the same inequities, the word “white” will not be capitalized. *Id.*

⁵ See *id.*

lawyer by trade, Abena “knew immediately what needed to happen”—she took all the family’s photos from the mantle and gathered up works by Toni Morrison and Zora Neale Hurston.⁶ In their place, Abena hung paintings of her white husband’s family and put Shakespeare on the shelves.⁷ And on the day of the appraisal, Abena took her son to a nearby Target and left her white husband alone with the appraiser.⁸ Finding white-coded books and paintings of a white family, the second appraiser came back with a far higher value for Abena’s home—\$465,000, or a more than 40% increase in value.⁹

Abena’s experiment revealed what Black homeowners have known for decades—white appraisers undervalue Black-owned homes. With “less than 2 percent of appraisers identifying as Black,” Black homeowners must confront this issue almost every time they seek a mortgage loan or a refinance.¹⁰ Indeed, even Black appraisers face an uphill battle with lenders when they try to value properties in Black neighborhoods as they would for comparable properties in white

⁶ KSDK NEWS, *Florida Couple Erases ‘Blackness’ From Home, Appraisal Jumps 40%*, YOUTUBE (Aug. 25, 2020), <https://www.youtube.com/watch?v=lnJTTuwYnTo> (providing the thoughts Abena shared over Facebook in the video description).

⁷ *Id.*

⁸ Kamin, *supra* note 1.

⁹ *Id.*

¹⁰ Safia Samee Ali, *Black Appraisers Call Out Industry’s Racial Bias and Need for Systemic Change*, NBC NEWS (June 7, 2021, 11:57 PM), <https://www.nbcnews.com/news/us-news/black-appraisers-call-out-industry-s-racial-bias-need-systemic-n1269452>. Jim Park of the Consumer Finance Protection Bureau’s Appraisal Subcommittee bemoaned statistics showing the industry to be 96.5% white, stating: “Not only is the profession faced with a lack of diversity, it is also faced with an aging population, declining numbers, and few new entrants, even as demand for appraisal services has been increasing[.]” Brentin Mock, *Freddie Mac Finds ‘Pervasive’ Bias in Home Appraisal Industry*, BLOOMBERG (Sept. 30, 2021, 11:02 AM), <https://www.bloomberg.com/news/articles/2021-09-28/study-finds-widespread-racial-disparities-in-appraisals?srnd=citylab-housing>.

neighborhoods.¹¹ One Black valuation director with Cushman & Wakefield described how banks treat Black neighborhoods: “Oh, it's a Black neighborhood. It's crime-ridden and violence and all of that. There's no way this place is going to be able to make money.”¹² The numbers support this description, as the Brookings Institute found that houses in majority Black metropolitan neighborhoods “are valued at roughly half the price” as homes in comparable white neighborhoods.¹³ Abena’s problem extends beyond a single biased appraiser—the problem is systemic.

To that end, this paper proposes a systemic solution grounded in the critical race theory (CRT) principles of anti-bias education, community engagement, and racial recognition. In Part I, this article identifies the problem of racist appraisals and highlights how important appraisals can be to build generational wealth in the United States. In

¹¹ Ali, *supra* note 10.

¹² *Id.*

¹³ ANDRE PERRY ET AL., BROOKINGS INST., THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS 2 (2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf; see also *How Invidious Discrimination Works and Hurts: An Examination of Lending Discrimination and Its Long-term Economic Impacts on Borrowers of Color: Virtual Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 117th Cong. 56 (2021) (Prepared Statement of Andre M. Perry, Senior Fellow, Brookings Institute).

High-profile reporting of instances of appraisal bias should also draw attention to the systems that facilitate those behaviors. We must understand that these stories are not isolated incidents (racist appraisal practices have occurred and continue to occur without making headlines), and that the appraisal is not the only step of the process in which racism distorts housing markets and extracts wealth across numerous systems.

Id.

Part II, this article analyzes the current legislative solution, the Fair Housing Act (“FHA”), and employs the classic CRT criticisms of liberalism to show how ineffective the FHA has been. In Part III, this article offers a different legislative solution, a solution that draws from the work of CRT scholars. Instead of private rights of action, the proposed legislation creates state review boards with community stakeholders in key positions. Instead of a reactive solution, the proposed legislation offers proactive tools to combat discrimination, including mandatory antibias training as a precondition for appraisal licensure. Finally, the proposed legislation requires appraisers to include the racial composition of neighborhoods when they use comparable properties to avoid the hidden bias that lurks behind a race-blind appraisal regime.

II. RACIAL DISCRIMINATION IN THE PRIVATE APPRAISAL MARKET

Discrimination in home appraisals affects many aspects life for American Black families. From entrepreneurship to refinancing, a multitude of wealth-creation tools remain out of reach or less effective for Black families confronting the invidious problem of discriminatory home appraisals. Both anecdotal evidence and hard data support what Black homeowners have known for generations—the appraisal system actively suppresses the wealth of Black people in the United States.

A. Home Equity as a Function of Familial Wealth

For most American families, home equity serves as a crucial, if not essential, asset.¹⁴ Indeed, home equity helps build a family’s

¹⁴ Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 J.L. & POL’Y 53, 65 (2006); see also Kamille Wolfe Dean, *Foreclosures and Financial Aid: Mind Over Mortgages in Closing the PLUS Loan Gap*, 4 COLUM. J. RACE L. 129, 149 (2014). For lower-income families, home equity often becomes the household’s most significant investment. Manuel A. Hernandez & Danilo R. Trupkin, *Asset Maintenance as Hidden Investment Among the Poor and Rich: Application to Housing*, 40 REV. ECON. DYNAMICS 128, 128, 136 (2021) (“Maintaining and repairing fixed assets can be a substitute for investment to

wealth.¹⁵ A family can leverage their home equity to pay off other debts like student loans that carry a higher rate of interest.¹⁶ Home equity also provides a hedge against other market forces, as a downturn in the stock market might not affect home value.¹⁷ In an emergency, the availability of home equity can be the difference between affording a medical procedure and facing years of collections as the medical debt accrues interest.¹⁸

Home equity extends beyond the immediate needs of a family and often determines whether a person can establish a small business and become an entrepreneur.¹⁹ One study out of the United Kingdom found that the more leveraged a person's home, the less likely that person would be to form a business.²⁰ This comports with the general structure of a home equity loan (HELOC), which only permits a

some extent, particularly among credit-constrained firms and low-income families.”).

¹⁵ Amy Fontinelle & Mike Cetera, *Why Home Equity Matters*, FORBES ADVISOR (Feb. 9, 2021, 7:52 AM), <https://www.forbes.com/advisor/mortgages/why-home-equity-matters/>.

¹⁶ *Id.*; See also Michele Lerner, *Should You Refinance Your Home to Pay Down Your Student Loans*, WASH. POST (Sept. 9, 2021, 5:30 AM), <https://www.washingtonpost.com/business/2021/09/09/should-you-refinance-your-home-pay-down-your-student-loans/> (quoting Robert Humman, Chief Revenue Officer of Credible.com, that paying off student loans with a home refinance can save “\$500 to \$800 in monthly student loan payments,” therefore, the ability to refinance a home to pay student loans can make a significant difference in the financial life of an average American family).

¹⁷ Fontinelle & Cetera, *supra* note 15.

¹⁸ Kim Porter, *Loan Options to Help Pay Your Medical Bills*, U.S. NEWS & WORLD REP. (Feb. 14, 2019), <https://loans.usnews.com/articles/loan-options-to-help-pay-your-medical-bills>.

¹⁹ See Philippe Bracke et al., *Homeownership and Entrepreneurship: The Role of Commitment and Mortgage Debt* 3 (Forschungsinstitut zur Zukunft der Arbeit [IZA], Working Paper, No. 7417, 2013) (Ger.), <https://www.econstor.eu/bitstream/10419/80679/1/749697903.pdf>.

²⁰ *Id.*

borrower to draw monies out of existing equity in a house.²¹ The less equity a person has in their home, the less money they can use to start a business. Therefore, an appraisal that undervalues a home reduces the amount of capital a person can access to start a business, pay off student loans, or even cover emergent medical expenses.

Black and Hispanic families rely on home equity even more than white families do because their homes comprise a larger share of their family wealth.²² In 2019, home equity comprised 28% and 20% of Hispanic and Black families' wealth, respectively, while comprising only 16% of white families' wealth.²³ Because Black and Hispanic families "have less wealth overall than white and Asian families," a significantly higher percentage of that wealth remains "tied up in home equity."²⁴ Therefore, discriminatory appraisals affect Black homeowners on a deeper level—the undervaluation degrades the

²¹ Kara Johnson, *Using a Home Equity Loan to Start a Business*, MORTGAGELoAN, <https://www.mortgageloan.com/using-a-home-equity-loan-to-start-a-business#Understand-the-differences> (last visited Mar. 14, 2023).

²² Fontinelle & Cetera, *supra* note 15; WILLIAM P. O'HARE, WEALTH AND ECONOMIC STATUS: A PERSPECTIVE ON RACIAL INEQUALITY 9 (1983) ("[E]quity in a home accounted for almost half of the wealth of blacks (46 percent) but less than a third of the wealth of whites (32 percent)."); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 106 (10th ed. 2006) (finding that for black families, 62.5% of their wealth is derived from home equity, while home equity only comprised 43.3% of white families' wealth).

²³ Fontinelle & Cetera, *supra* note 15. In the first quarter of 2022, the Black homeownership rate in the United States fell to 44.7%, down from 45.3% in 2020. CARR & ZONTA, *supra* note 3, at 22. In fact, the racial homeownership gap between white and Black families expanded from 23.8% in 1970 to 31% in 2019. *Id.* ("Today, the Black homeownership rate is only modestly higher than it was at the time of the passage of the 1968 Fair Housing Act (the Act), but the gap in homeownership rates between Blacks and Whites is substantially larger than it was at the time of the passage of the Act.").

²⁴ Fontinelle & Cetera, *supra* note 15.

principal component of their overall wealth.²⁵ Indeed, the 2008 financial crisis affected minority homeowners even more drastically than it did white homeowners because white families did not have as much of their wealth tied up in home equity as home prices dropped nationwide.²⁶

B. Racial Discrimination in the Appraisal Process

Recent news stories highlight how discriminatory appraisals affect Black homeowners through the present day. The numbers also support these stories, but the stories themselves reveal the painful truth lurking behind the statistics. CRT scholars often use storytelling as a means to create space for a conversation about systemic bias,²⁷ and this technique demonstrates why stakeholder involvement in monitoring the

²⁵ See Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U.L. REV. 329, 340-41 (2009). Indeed, the gap in homeownership rate and the higher appraisal rates for white-owned homes “are a major driver of the enormous wealth gap between Blacks and Whites.” CARR & ZONTA, *supra* note 3, at 21 (“[I]n 2020, the median White family held 12 times the amount of wealth of the median Black family. That disparity translates into an estimated median net worth of \$18,430 for Black households compared to a median net worth of \$217,500 for White households.”); see also Symposium, *Tax Advice for the Second Obama Administration: The 535 Report: A Pathway to Fundamental Tax Reform*, 40 PEPP. L. REV. 1155, 1169 (2013) (outlining the tax advantages for homeowners that disproportionately favor White households).

²⁶ Dean, *supra* note 14, at 149, 149 n. 139 (citing PAUL TAYLOR ET AL., PEW RSCH. CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS (2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/> (“[A]nalysis finds that, in percentage terms, the bursting of the housing market bubble in 2006 and the recession that followed from late 2007 to mid-2009 took a far greater toll on the wealth of minorities than whites.”)).

²⁷ See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1243-45 (1993) (using storytelling as a tool throughout the piece to create narrative space).

appraisal process will be a crucial component for any legislative solution.

Carlette Duffy tells a story that would be quite familiar to Abena Horton.²⁸ Refinancing her Indianapolis home, Carlette sought three separate appraisals because she suspected discrimination.²⁹ She had paid \$100,000 for her home three years ago, but the price appreciation in the neighborhood led her to expect an appraisal of roughly \$185,000.³⁰ Her surprise mirrored Abena's when the first appraisal returned with a value of \$125,000.³¹ After three appraisals, Carlette went to work—she set up a “fair housing test.”³²

Just like Abena, Carlette removed all photos of her Black family.³³ She whitewashed³⁴ the home, taking down any art or books that celebrated her Blackness.³⁵ That third appraisal justified her efforts and vindicated her future FHA discrimination claim—the appraisal increased by almost \$150,000, valuing her home at \$259,000.³⁶ By eliminating her Blackness, Carlette demonstrated the racism undergirding the entire appraisal process. Noe Rojas of the Fair

²⁸ See Kamin, *supra* note 1; Anna Bahney, *When a Black Homeowner Concealed her Race, her Home's Appraisal Value Doubled*, CNN BUSINESS (May 19, 2021, 3:29 PM), <https://www.cnn.com/2021/05/19/homes/black-homeowner-home-appraisal-feseries/index.html>. Like Abena, Carlette's story circulated through major news outlets. See, e.g., Antonio Planas, *After She Concealed her Race, Black Indianapolis Owner's Home Value More Than Doubled*, U.S. NEWS (May 17, 2021, 8:28 PM), <https://www.nbcnews.com/news/us-news/after-concealing-her-race-black-indianapolis-owner-s-home-value-n1267710>.

²⁹ Bahney, *supra* note 28.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Here, “whitewashed” refers to the process of making a space appear as if it were owned by a white family.

³⁵ Bahney, *supra* note 28.

³⁶ *Id.*

Housing Center of Central Indiana remarked that stories like Carlette’s “show[] how systemic racism continues to haunt neighborhoods of color.”³⁷

The numbers support Carlette’s story. From 1980 to 2015, homes in white neighborhoods saw their value increase by an average of \$225,000, while homes in Black neighborhoods only saw an average increase of \$31,000.³⁸ Freddie Mac identified appraisals as a significant factor in this overall undervaluation of Black homes, and it found that 12.5% of homes in Black neighborhoods fall under a mortgage contract price while only 7.4% of homes in white neighborhoods suffer the same fate.³⁹ Moreover, as the minority population concentrates in a given area, the appraisal gap widens even further.⁴⁰ Freddie Mac notes that the problem is systemic because it acknowledges that these numbers

³⁷ *Id.* (quoting Noe Rojas, Director of Systemic Investigations, Fair Hous. Ctr. Cent. Ind.). This systemic racism is far more than anecdotal. See JAMES H. CARR ET AL. NAT’L ASS’N REAL ESTATE BROKERS, FIFTY YEARS OF STRUGGLE: SETBACKS AND SUCCESSES SINCE THE RELEASE OF THE REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS AND ENACTMENT OF THE 1968 FAIR HOUSING ACT (2018); accord CARR & ZONTA, *supra* note 3, at 21 (“... the gap in homeownership today is greater than it was nearly a century ago.”).

³⁸ Evan Weinberger, *Biden Kicks Off Effort to End Discrimination in Home Appraisals*, BLOOMBERG LAW (June 18, 2021, 6:01 AM), <https://news.bloomberglaw.com/banking-law/biden-kicks-off-effort-to-end-discrimination-in-home-appraisals>.

³⁹ RACIAL AND ETHNIC VALUATION GAPS IN HOME PURCHASE APPRAISALS 3 (Sept. 20, 2021), http://www.freddiemac.com/research/insight/20210920_home_appraisals.page? When the purchase price exceeds the appraisal value, a lender may require additional monies at the closing or may impose a higher rate reflecting the reduction in the lender’s collateral. See *id.* (“An appraisal is meant to opine on the market value of a home, so that lenders have adequate collateral for the loan.”).

⁴⁰ *Id.*

come from “a large portion of appraisers.”⁴¹ Michael Bradley, Senior Vice-President of Econometrics and Data Science for Freddie Mac, opined that “[t]his is a persistent problem that disproportionately impacts hundreds of thousands of Black and Latino applicants.”⁴²

Other metrics also demonstrate the negative impact of the appraisal gap on Black families. After all, families owning homes in Black neighborhoods are twice as likely to owe more money than the value of their house than families owning homes in white neighborhoods.⁴³ In Detroit, 35.1 percent of homes in Black neighborhoods were underwater with their mortgage loans compared to 9.5 percent of homes in white neighborhoods.⁴⁴ And the Brookings Institute identified that Black homes are devalued across the United States in a pivotal 2018 study.⁴⁵ Drilling down into the numbers compiled by Brookings, the study reveals that in Lynchburg, Virginia, homes in Black neighborhoods were undervalued by 81.2%—an estimated difference in absolute value of \$161,063.⁴⁶ If legislative solutions provided a better avenue for Black homeowners to challenge the appraisal system, perhaps the situation would not have grown so

⁴¹ *Id.* at 5.

⁴² Press Release, Freddie Mac, Freddie Mac Research Explores Causes for the Appraisal Valuation Gap for Homeowners in Minority Neighborhoods (Sept. 20, 2021), <https://freddiemac.gcs-web.com/news-releases/news-release-details/freddie-mac-research-explores-causes-appraisal-valuation-gap>.

⁴³ Svenja Gudell, *Homes in Black Neighborhoods Twice as Likely to be Underwater as Homes in White Neighborhoods*, ZILLOW (Jan. 11, 2017), <https://www.zillow.com/research/negative-equity-race-q3-2016-14063/>.

⁴⁴ *Id.*

⁴⁵ PERRY ET AL., *supra* note 13, at 9.

⁴⁶ Andre M. Perry et al., *The Devaluation of Assets in Black Neighborhoods*, BROOKINGS INST. (Nov. 27, 2018), <https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/> (follow link; then scroll down the webpage until the interactive map titled “Devaluation of Black homes” is reached; then hover the mouse cursor over Lynchburg, VA to reveal the figures).

dire. As it is, the system demands a complete overhaul because the Fair Housing Act has failed to address this systemic issue.

III. THE FAIR HOUSING ACT: AN INEFFECTIVE TOOL

Though certain states like New Jersey have taken steps to address the problem of discriminatory appraisals within their own borders,⁴⁷ the problem of discriminatory appraisals is systemic and pervades the entire United States.⁴⁸ Black and other minority residents of various states have faced difficulty participating in their states' legislative processes,⁴⁹ especially where those legislatures are called to address issues of systemic racism.⁵⁰ Referring to the inaction of state legislatures, Richard Briffault writes that “the great advances of minorities in recent decades [are not] attributable to state legislative

⁴⁷ The New Jersey Senate voted to advance a bill in December of 2021 that would allow the New Jersey Division of Consumer Affairs to suspend the licenses of any appraisers found to have discriminated in the making of residential real estate appraisals. Dana Difilippo, *Bill Advances That Would Punish Discriminatory Real Estate Appraisers*, N. J. MONITOR (Dec. 7, 2021, 6:55 AM), <https://newjerseymonitor.com/briefs/bill-advances-that-would-punish-discriminatory-real-estate-appraisers/>; see also S. 777, 220th Leg. Sess. (N.J. 2022).

⁴⁸ See discussion *supra* Part I.B., (describing the national, systemic problem of discrimination in residential home appraisals); Press Release, The White House, Fact Sheet: Biden-Harris Administration Releases Action Plan to Address Racial and Ethnic Bias in Home Valuations (Mar. 23, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/23/fact-sheet-biden-harris-administration-releases-action-plan-to-address-racial-and-ethnic-bias-in-home-valuations/>.

⁴⁹ Kristen Barnes, *Breaking the Cycle: Countering Voter Initiatives and the Underrepresentation of Racial Minorities in the Political Process*, 12 DUKE J. CONST. L. & PUB. POL'Y 123, 168 n.257 (2017).

⁵⁰ Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1364 (1985) (book review).

action.”⁵¹ Therefore, federal legislation offers the best solution for the national, systemic problem of discrimination in real estate appraisals. Yet, existing legislation like the Fair Housing Act does not provide minority communities, particularly Black families, with an adequate path to relief.

The Fair Housing Act suffers from the same problems that plague many civil rights-era legislative initiatives— it provides for remedial enforcement but does not proactively combat systemic discrimination.⁵² Moreover, enforcement of the FHA depends on

⁵¹ *Id.* Briffault challenges the notion that state legislatures can be relied upon to address civil rights issues:

Indeed, it is difficult to argue that historically minorities -- in particular, blacks and other racial minorities -- did all that well in state legislatures. Racial discrimination was largely a product of state legislative action, not initiative votes. Nor are the great advances of minorities in recent decades attributable to state legislative action. The initial successes of the civil rights movement were won in the courts or on the streets. The legislatures resisted and delayed and became more responsive only under extraordinary political and legal pressures. Even today, in times of fiscal stringency, states may be more prone to cut programs that help minorities and the poor than those that serve more politically powerful groups.

Id.

⁵² See 42 U.S.C. § 3614 (authorizing injunctive relief to prohibit those found to have violated the FHA from future violations); 42 U.S.C. § 3613 (authorizing damages awards for individual claimant). Indeed, the Department of Housing and Urban Development under the Obama Administration recognized the lack of proactive measures in the FHA when it adopted the 2015 Affirmatively Furthering Fair Housing regulation (AFFH). *Affirmatively Furthering Fair Housing Interim Final Rule Fact Sheet*, HUD (Oct. 6, 2021), https://www.hud.gov/sites/dfiles/FHEO/documents/10_6_21_AFFH_IFR_Fact_Sheet.pdf (“The 2015 AFFH rule established a process by which grantees had to conduct a more extensive analysis of local fair housing concerns, called an Assessment of Fair Housing (AFH), commit to specific steps to remedy them, and then submit their AFH to HUD for review. It also created a

political will within the Department of Justice and the ability of individual claimants to file suit, both of which pose procedural and financial problems for those facing rampant appraisal discrimination.⁵³

A. History of the FHA

From 1965 to 1968, the civil rights movement clashed with the white majority in the United States as they struggled to bring systemic racism to light.⁵⁴ In Detroit alone, forty-three people died and protestors destroyed over \$100 million in property throughout the city.⁵⁵ Against this backdrop, Illinois Governor Otto Kerner and the National Advisory Commission on Civil Disorders investigated systemic racism in the United States.⁵⁶ The Commission released what would be called the Kerner Report, which found that “[w]hite racism is essentially

regulatory definition of the AFFH requirement to clarify the substantive expectations HUD had for grantee.”). While this regulation was rescinded by HUD under the Trump administration, HUD restored it as an interim rule in 2021 and intends to adopt a final rule after notice and comment. *Id.*

⁵³ See *supra* note 52. Enforcement by the Department of Justice and rulemaking by the Department of Housing and Urban Development can vary wildly as administrations change. See Jennifer Bellamy, *To Address Systemic Racism, We Must Dismantle Housing Discrimination and Segregation*, ACLU (May 4, 2021), <https://www.aclu.org/news/racial-justice/to-address-systemic-racism-we-must-dismantle-housing-discrimination-and-segregation> (advocating for the renewal of an Obama-era rule abandoned by HUD during the Trump administration).

⁵⁴ CARR ET AL., *supra* note 37, at 3; see also Brian Patrick Larkin, Note, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1621-22 (2007); see also DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 58-59 (1993).

⁵⁵ Karen Grigsby Bates, *Report Updates Landmark 1968 Racism Study, Finds More Poverty and Segregation*, NPR (Feb. 27, 2018, 8:50 PM), <https://www.npr.org/2018/02/27/589351779/report-updates-landmark-1968-racism-study-finds-more-poverty-more-segregation>.

⁵⁶ CARR ET AL., *supra* note 37, at 3.

responsible for [this] explosive mixture.”⁵⁷ The Report stated bluntly that “. . . white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”⁵⁸ To combat the systemic racism it found, the Commission recommended a “national, comprehensive and enforceable open occupancy law.”⁵⁹

Dr. Martin Luther King’s assassination a month later broke the deadlock in Congress⁶⁰ and led to the enactment of Title VIII of the Civil Rights Act of 1968, the Fair Housing Act.⁶¹ The FHA prohibited discrimination in renting or selling homes and contained enforcement mechanisms for the Department of Housing and Urban Development and the Department of Justice.⁶² However, the landmark legislation contained major flaws—its rushed passage provided no legislative history upon which future courts could rely to interpret its provisions.⁶³ Absent legislative history, courts defer to agency interpretations of the

⁵⁷ *Id.*; NAT’L ADVISORY COMM’N ON CIV. DISORDERS, REPORT OF THE COMMISSION ON CIVIL DISORDERS 91 (1968) [hereinafter KERNER REPORT]; *see also* Larkin, *supra* note 54, at 1622.

⁵⁸ KERNER REPORT, *supra* note 57, at 1.

⁵⁹ *Id.* at 263.

⁶⁰ Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 160 (1969) (explaining that MLK’s assassination “dislodged the Civil Rights Bill of 1968 from the Rules Committee”); *see also* DeNeen L. Brown, *The Fair Housing Act Was Languishing in Congress. Then Martin Luther King Jr. Was Killed*, WASH. POST (Apr. 11, 2018, 12:28 PM), <https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-luther-king-jr-was-killed/> (“Only hours after the Rev. Martin Luther King Jr.’s assassination in Memphis on April 4, 1968, President Lyndon B. Johnson began calculating how to use the nation’s shock, grief and anger to push a major civil rights law through a racist Congress.”).

⁶¹ CARR ET AL., *supra* note 37, at 9; *see also* 42 U.S.C. § 3601.

⁶² 42 U.S.C. §§ 3604-05, 3608, 3614.

⁶³ CARR ET AL., *supra* note 37, at 10.

FHA because Congress did not create a record for issues that arguably fall within the scope of the Act, like its application to the insurance industry.⁶⁴ Additionally, the original Act only permitted HUD to investigate specific homeowner complaints and request voluntary compliance and only authorized the DOJ to “seek restraining orders or injunctions, but not fines” for discrimination violations.⁶⁵ Moreover, the original FHA did not even address discrimination in mortgage lending itself, which Congress ultimately addressed through the Community Reinvestment Act in 1977.⁶⁶

Finally, in 1988, Congress permitted HUD to investigate concerns outside of specific homeowner complaints.⁶⁷ Also, the Department of Justice can now seek fines or damages for FHA violations.⁶⁸ Yet, the FHA has done little to address the problem of racial discrimination in home appraisals, as demonstrated by the stories and statistics set forth in Part I of this article.⁶⁹ Because DOJ enforcement requires political will to pursue these complicated cases, these so-called “pattern and practice” cases remain few and far between.⁷⁰ Moreover, the high evidentiary bar to prove these cases also discourages true enforcement of FHA provisions.⁷¹

B. CRT Critiques of Liberalism

Thus, the FHA serves as a profound example of how civil rights laws fail to achieve their ultimate objective. This paper engages in contextual historical analysis, a classic CRT technique employed by Derrick Bell, to show that the high-minded goals of the FHA do not

⁶⁴ See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, No. C-3-92-52, 1993 U.S. Dist. LEXIS 20323, at *27-40 (S.D. Ohio Sept. 27, 1993) (finding no legislative history on application of the FHA to the insurance industry).

⁶⁵ CARR ET AL., *supra* note 37, at 10-11.

⁶⁶ Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 578 (2015).

⁶⁷ CARR ET AL., *supra* note 37, at 12.

⁶⁸ *Id.*

⁶⁹ See discussion *supra* Part I.

⁷⁰ See CARR ET AL., *supra* note 37, at 13.

⁷¹ *Id.*

reflect material reality.⁷² The “comforting majoritarian interpretation” of the FHA as an effective solution to combat racism in the housing market does not comport with the actual reality experienced by Black families today.⁷³

Indeed, the FHA demonstrates why CRT scholars do not treat “liberalism as a framework for addressing America’s racial problems.”⁷⁴ For example, the FHA prohibits any appraiser from discriminating during the appraisal process “because of race, color, religion, sex, handicap, familial status, or national origin.”⁷⁵ However, the FHA specifically permits appraisers to “take into consideration factors other than race” when conducting an appraisal.⁷⁶ Thus, the FHA permits appraisers to account for the neighborhood, surrounding home values, and general appearance of a home—factors that all allow an appraiser to take race into account without explicitly stating so.⁷⁷ This type of race-blind requirement inherently privileges white homeowners, whose homes have not been systematically undervalued for a century the way that Black homes have been. As prominent CRT scholars note: “[I]f racism is embedded in our thought processes and social structures . . . then the ‘ordinary business’ of society . . . will keep minorities in subordinate positions.”⁷⁸ Thus, the FHA’s race-blind appraisal solution simply reinforces a discriminatory status quo by avoiding active recognition of existing racial disparities.

CRT scholars would also criticize the FHA’s individual claim enforcement method. Although the FHA recognizes the rights of

⁷² E.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

⁷³ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 25 (3d. ed. 2017).

⁷⁴ *Id.* at 26.

⁷⁵ 42 U.S.C. § 3605(a).

⁷⁶ 42 U.S.C. § 3605(c).

⁷⁷ For examples of appraisers taking objects within the interior of a home into account and devaluing a home based on the presence of items indicating Blackness, see Kamin, *supra* note 1, and Bahney, *supra* note 28.

⁷⁸ DELGADO & STEFANCIC, *supra* note 73, at 27.

individual claimants to sue for discrimination, the creation of a private legal or procedural right to sue divides Black communities and ensures that allegations of racism can be defended piecemeal by appraisal companies.⁷⁹ As CRT scholars have noted, individuated systems of rights “separate people from each other . . . rather than encouraging them to form close, respectful communities.”⁸⁰ Leaving courts to determine individual cases instead of addressing the systemic problem giving rise to those claims leaves white liberals feeling satisfied while failing to actually resolve the issue for the minority communities suffering from discrimination.⁸¹

Finally, the FHA also fails because it exhibits structural problems identified by CRT scholars. As a purely legal structure devoid of community involvement, the FHA falls into the trap of leaving courts and lawyers to simply look at past cases to determine the validity of an individual claim.⁸² As our society evolves, legal professionals tackle the difficult challenge of making creative arguments for emerging or novel issues while still grappling with precedent.⁸³ Courts and lawyers must argue for individual damages and cannot recommend the systemic changes necessary to address the root problem.⁸⁴ Moreover, the predominantly white judiciary lacks the empathy necessary to address the problems plaguing Black homeowners because they have not been exposed to the Black experience of discrimination in the housing market.⁸⁵ After all, twenty-two states do not have a single person of color in their supreme court, even in states where people of color

⁷⁹ See 42 U.S.C. § 3613 (“Enforcement by private persons”).

⁸⁰ DELGADO & STEFANCIC, *supra* note 73, at 29.

⁸¹ See *id.* at 29-30.

⁸² See *id.* at 30-32; see also CARR ET AL., *supra* note 37, at 10 (describing how courts interpreted the FHA on a case-by-case basis).

⁸³ See DELGADO & STEFANCIC, *supra* note 73, at 32.

⁸⁴ See *id.*; 42 U.S.C. § 3613(a)(1) (authorizing individual claims); 42 U.S.C. § 3613(c)(1) (providing for damages awards for individual claimants but limiting injunctive relief to cases where the Attorney General intervenes).

⁸⁵ See *id.* at 33-34.

comprise at least twenty percent of the population.⁸⁶ Thus, the tribunals from which Black homeowners must seek relief lack the knowledge of the Black experience necessary to address the issue of discrimination in home appraisals.

C. Difficulties Individual Claimants Face

Federal court cases dismissing individual claimants' FHA discrimination claims reveal how arduous the path to relief can be for Black homeowners under the current FHA, and even those that survive the pleading stage face an uphill struggle to relief at trial.⁸⁷ In *Routen v. Citi*, the Illinois Northern District Court dismissed the plaintiffs' FHA claim because differences in appraisal values "does not create an inference of discrimination."⁸⁸ The plaintiffs had been denied a loan because the lending bank had appraised their home for \$170,000 and the plaintiffs did not have enough equity in their home to secure the loan.⁸⁹ Even though the plaintiffs demonstrated that "other homes on their block recently sold for \$325,000 and \$260,000," the court still dismissed the FHA claim.⁹⁰ The court found that "differences in appraisal values cannot create an inference of racial discrimination."⁹¹

⁸⁶ Janna Adelstein & Alicia Bannon, *State Supreme Court Diversity—April 2021 Update*, BRENNAN CTR. (Apr. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-april-2021-update>.

⁸⁷ See Robert G. Schwemm, *Housing Discrimination and the Appraisal Industry*, in MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 364, 365-92 (John Goering & Ron Wienk, eds., 1996) (discussing of the difficulties Black families faced bringing discriminatory appraisal cases in the latter half of the twentieth century); see also Part II.C (discussing FHA cases dismissed at the pleading stage).

⁸⁸ *Routen v. Citi*, 706 F. Supp. 2d 854, 860 (N.D. Ill. 2009) (quoting *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998)).

⁸⁹ *Id.* at 856.

⁹⁰ *Id.* at 856, 860.

⁹¹ *Id.* at 860.

Even though it had to accept the plaintiffs' allegations as true,⁹² the court in *Routen* did not permit plaintiffs to even obtain discovery.⁹³ Given the facts the plaintiffs had marshalled before the court, this result is surprising. Plaintiffs described how the bank had required both the husband and wife to be present for the loan application interview.⁹⁴ Plaintiffs characterized this as a "first-step ploy" to discourage the couple from even applying.⁹⁵ Plaintiffs stated how the bank continued to highlight its "stringent" loan application requirements in a further effort to discourage them from applying for the loan.⁹⁶ Plaintiffs also highlighted a conversation during their loan interview involving a bank employee's mixed-race wife and child as an attempt to throw them off the scent of the discrimination they were about to face: "Citibank was getting ready to inflict racial discrimination of Plaintiffs by systematically eliminating them from a loan strictly due to race."⁹⁷ Coupled with the extreme difference between the bank's appraisal and an independent appraiser's evaluation, this scenario should have been more than enough for a court to permit discovery.

Yet, the court found that plaintiffs also could not prove "that the defendants continued to approve loans for applicants" with similar qualifications, a prong of the four-part test imposed by the court at the motion to dismiss stage of the proceeding.⁹⁸ The court thus upheld a regime where FHA plaintiffs would need to point to something *other than the appraisal disparity* and prove that similarly qualified applicants were approved for similar loans, even at the motion to dismiss stage. This could prove to be an impossible task for Black homeowners, who will be hard-pressed to find another applicant who received a loan with so little equity in their home.

⁹² See *id.* at 858 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)).

⁹³ See *id.* at 859.

⁹⁴ *Routen*, 706 F. Supp. 2d at 859.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

Courts like that in *Routen* liken appraisals to an art form rather than a science as a means to avoid the discrepancy in appraisal value itself, which is the clearest and best evidence that Black and other minority families have that discrimination occurred.⁹⁹ As *Routen* demonstrates, a court will find that the remaining evidence amounts to mere conjecture because the appraisers or bank employees do not explicitly state their racist intent.¹⁰⁰ For example, in *Thomas v. First Federal Savings Bank of Indiana*, the court dismissed the plaintiff's case even though a bank employee told the plaintiff that his appraisal value of \$22,000 would have gone up to \$100,000 if his home were located in a white neighborhood.¹⁰¹ The court tossed plaintiff's own appraiser's testimony out because "his appraisal was merely another subjective evaluation of the Thomas home through the inexact appraisal process."¹⁰² Again, a court dismissed a case where the appraisal itself served as stark, even glaring proof of discrimination because it viewed appraisals as "inexact," or more art than science.¹⁰³

Indeed, the nature of the appraisal process itself and the FHA's own prohibition on the consideration of race act as a shield for appraisers.¹⁰⁴ Robert Schwemm sums up the problem in *Housing Discrimination and the Appraisal Industry*:

[i]ndeed, the basic market approach to appraising, with its reliance on three 'comparables,' is inherently race neutral [P]roving [racial] discrimination is difficult, because it requires demonstrating that the appraiser departed from what appears to be an

⁹⁹ *E.g., id.* at 860; *see also* *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 ("[r]eal estate appraisal is not an exact science" and one appraisal being "lower than someone else's does not create an inference of discrimination.").

¹⁰⁰ *Routen*, 706 F. Supp. 2d at 858-60.

¹⁰¹ *Thomas v. First Fed. Sav. Bank of Ind.*, 653 F. Supp. 1330, 1339-41 (N.D. Ind. 1987); *see also* Schwemm, *supra* note 87, at 381.

¹⁰² *Thomas*, 653 F. Supp. at 1339.

¹⁰³ *See id.*

¹⁰⁴ *See* Schwemm, *supra* note 87, at 368-70 (describing the FHA's anti-discrimination provisions and the consideration of race).

inherently nondiscriminatory process and engaged in what amounts to aberrant behavior.¹⁰⁵

Thus, courts can point to the appraisal process itself as a demonstration that no discrimination occurred because it is (1) more art than science or (2) inherently race-neutral through the use of comparables and the FHA's prohibition on consideration of race.¹⁰⁶ Yet, the prohibition against introducing the appraisal itself as discrimination is only one of the barriers that courts have erected between would-be plaintiffs and the relief they seek under the FHA.

Other courts also impose impossible barriers for would-be FHA plaintiffs at the pleading stage. In *Thompson v. United States HUD*, the Maryland District Court determined that the plaintiffs would need to establish discriminatory intent or impact at the pleading stage.¹⁰⁷ The court imposed a four-part test to show discriminatory impact, a test that requires courts to analyze (1) whether a plaintiff demonstrates discriminatory effect; (2) intent to discriminate; (3) the defendant's justification for the allegedly discriminatory conduct; and (4) the harm plaintiff's requested relief would inflict on the defendant.¹⁰⁸ Not surprisingly, the court found that the plaintiffs did not meet this onerous burden.¹⁰⁹

The court found that the plaintiffs could not show discriminatory impact even though there was "no doubt that public housing" was sited

¹⁰⁵ *Id.* at 378-79.

¹⁰⁶ *See id.* at 381; *Thomas*, 653 F. Supp. at 1339; 42 U.S.C. § 3605(a) ("It 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.").

¹⁰⁷ *Thompson v. United States Dep't of Hous. & Urb. Dev.*, 348 F. Supp. 2d 398, 452 (D. Md. 2005).

¹⁰⁸ *Id.* at 452-53 (citing *Smith v. Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977)).

¹⁰⁹ *Id.* at 456.

primarily in Black neighborhoods because the housing was not “uniformly placed in Black areas.”¹¹⁰ The court required *total* segregation before finding a segregatory impact.¹¹¹ For mens rea, the court found that although defendants “could be said to have known that the obvious consequence” of their actions was to “separate the site” from white communities, the plaintiffs did not show mens rea because the defendants had “nondiscriminatory reasons” to build a fence.¹¹² Finally, the court found that a decision against defendants would impose “a substantial burden” on them, another factor weighing against plaintiffs and in favor of dismissal.¹¹³ The court’s words would likely chill future claims: “even if Defendant’s actions were found to have a racially discriminatory impact, it would be inappropriate to impose Fair Housing Act liability for discrimination”¹¹⁴

Courts are also free to disregard expert testimony that a plaintiff seeks to introduce to support an inference of discrimination where they cannot introduce the appraisal itself.¹¹⁵ In *Hanson v. Veterans Administration*, the court dismissed an FHA appraisal claim brought by residents of the MacGregor subdivision in Houston.¹¹⁶ The plaintiffs claimed that the VA’s appraisal procedure resulted in much lower appraisals for homes in Black neighborhoods than it did for comparable homes in white neighborhoods.¹¹⁷ Again, just as in *Thompson*, the court required plaintiffs to show proof of *intentional* discrimination beyond the appraisal value itself.¹¹⁸ Indeed, the Fifth Circuit compounded the problem for plaintiffs on appeal when it found that the trial court’s decision to rely on the VA’s expert instead of the plaintiffs’ “can

¹¹⁰ *Id.* at 453-54 (emphasis in original).

¹¹¹ *See id.*

¹¹² *Id.* at 454.

¹¹³ *Thompson*, 348 F. Supp. 2d at 456.

¹¹⁴ *Id.*

¹¹⁵ *See Schwemm, supra* note 87, at 376-79.

¹¹⁶ *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1390 (5th Cir. 1986).

¹¹⁷ Schwemm, *supra* note 87, at 376.

¹¹⁸ *Hanson*, 800 F.2d at 1387-88.

virtually never be clear error” and thus could not be reversed on appeal.¹¹⁹ Even where the plaintiffs introduced an expert to support their argument for a finding of discrimination in their appraisal values, the trial court was free to simply ignore their expert and choose the defendant’s instead.¹²⁰ Robert Schwemm describes the devastating effect that the need to show intent beyond the appraisal value itself can have on these FHA appraisal cases:

Hanson is a classic example of the fact that, when the plaintiff’s proof of discrimination is circumstantial rather than direct and there is conflicting evidence in the record, the key to the case becomes how the trial court views the evidence, with that view being virtually impossible to have overturned on appeal.¹²¹

Thus, the FHA does not offer a real solution for Black homeowners confronting discriminatory appraisals. The appraisal gap itself cannot serve as evidence of discrimination, which precludes plaintiffs from using the best piece of evidence available to them.¹²² Moreover, courts require FHA plaintiffs to meet multifactor tests to even move past the pleading stage of the litigation, a bar that many individual claimants will be unable to meet as they lack proofs as to intent before the discovery period begins.

IV. A PATH FORWARD: THE GROW AMERICAN WEALTH ACT

Any legislative solution must learn from the failures of the FHA and adopt the principles developed by CRT scholars to ensure that the

¹¹⁹ *Id.* at 1388 (internal citations omitted).

¹²⁰ *See id.*; *see also* Schwemm, *supra* note 87, at 377-78.

¹²¹ Schwemm, *supra* note 87, at 379.

¹²² *See* *Routen v. Citi*, 706 F. Supp. 2d 854, 860 (N.D. Ill. 2009). Indeed, many of these plaintiffs claiming discrimination in housing appraisals *only* have the appraisal discrepancy as support for their claim. *See, e.g., Hanson*, 800 F.2d at 1384 (“As support, appellants offered statistical evidence comparing the percentage of VA underappraisals in MacGregor with that of South Hampton, a white neighborhood allegedly similar to MacGregor. The evidence purported to show that MacGregor had a significantly higher percentage of underappraisals than South Hampton[.]”).

new law effectively combats the invidious problem of discriminatory home appraisals. Moreover, legislation must be passed on the federal level, where it can address what has emerged as a systemic, nationwide problem.¹²³ As discussed in Part II, state legislatures have failed time and again to address problems of invidious discrimination within their own borders, and minorities in the United States have struggled to gain a foothold in local governments across the country.¹²⁴ Although certain states like New Jersey have moved bills forward that would address the problem of discriminatory appraisals within their own borders,¹²⁵ these state proposals will leave Black communities in less progressive states fighting an uphill battle against this systemic, national problem. Moreover, each state will be left to license and manage their own appraisal system,¹²⁶ which will result in a patchwork landscape of partial solutions that fails to remediate the ongoing siphoning of wealth from Black families in the United States.

Enter the Grow American Wealth Act (the “Act”), a remedial solution that addresses the systemic nature of the problem. The Act engages with CRT scholarship to provide a four-pronged solution. First, the Act consolidates the property appraisal licensing process under federal law and imposes additional anti-bias training requirements. Second, the Act creates a review board for each state that will independently monitor appraisals within its jurisdiction. Third, the Act clarifies private rights of action for discriminatory appraisals and sets

¹²³ For further discussion of the national and systematic nature of the problem of discriminatory appraisals, *see supra* Part I.

¹²⁴ *See* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 115-19 (1992) (highlighting this problem with respect to the selection of local legislative delegations).

¹²⁵ *See* Difilippo, *supra* note 47.

¹²⁶ *E.g.*, PA. DEP’T OF STATE, STATE BOARD OF CERTIFIED REAL ESTATE APPRAISERS, <https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/CertifiedRealEstateAppraisers/Pages/default.aspx> (last visited Dec. 17, 2021) (describing the appraisal licensing procedure for Pennsylvania).

clear evidentiary standards that supersede the court-created multifactor tests under the FHA. Fourth, the Act requires appraisers to take the racial composition of neighborhoods into account and balance their valuations by selecting comparable properties from both white and minority neighborhoods. These four prongs will reduce barriers for enforcement, provide for active monitoring of the appraisal market, and ensure that appraisers receive the tools necessary to dismantle the existing, biased system.

First, the Act will consolidate appraisal licensing under federal law. Instead of permitting states to license their own appraisers, Congress will exercise its power under the Commerce Clause to create a national appraisal licensing system.¹²⁷ Instead of varying state requirements, the Act will establish a uniform system of education that includes antibias training. Thus, the federal licensing system will expose appraisers to the Black experience of discrimination in housing appraisers before they even begin working in the field. This should ameliorate part of the empathy problem identified by CRT scholars, the lack of exposure that many white actors have to the Black experience.¹²⁸ Although anti-bias training will not resolve the problem, it may create space for individual actors to consider the impact of their valuation decisions.

Second, the Act will create a review board for each state that will conduct annual reviews of appraisal values in their jurisdiction. The Act will require that each review board reserve a certain number of seats for community members from undervalued neighborhoods in that state. The inclusion of stakeholders will ensure that the material reality experienced by these communities is reflected in the decisions and analysis of the review board.¹²⁹ Moreover, these review boards will

¹²⁷ U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); see *Quick Takeaways on Property Appraisals*, NAT'L ASS'N OF REALTORS, <https://www.nar.realtor/appraisal-valuation> (last visited Mar. 14, 2023).

¹²⁸ See DELGADO & STEFANCIC, *supra* note 73, at 33-34.

¹²⁹ See *id.*; see also Bell, *supra* note 72 (highlighting the divergence between legal opinion and material reality).

perform annual analyses instead of waiting for individual claimants to bring suits for discrimination. Unlike the FHA, which *reacts* to discrimination, the Act will proactively combat the systemic discrimination that exists in each state.¹³⁰ These review boards will be empowered to recommend fines and injunctive relief to the Department of Justice, which will be required to follow those recommendations. Thus, community stakeholders will control the relief their communities need through engagement with a forum that actively combats discrimination and recognizes that the project must continue even in the absence of individual claims. Moreover, the results of these review board analyses will be made available to the public at large through the maintenance of a federal database. The availability of public data on appraisals will allow the general public, experts, and legislators to view the progress of the Act in real-time.

Third, the Act will supersede the FHA's appraisal provision and establish a private right of action for claimants suffering discrimination in appraisals. Unlike the FHA, which does not specify the type or level of proofs required to bring a private claim, this Act will set forth explicit categories of evidence courts must consider.¹³¹ Thus, the Act will take threshold considerations out of individual judges' hands and provide private claimants a clearer path to relief. This addresses the empathetic fallacy problem identified by CRT scholars because it avoids a white judge weighing familiar experiences (those of the bank) against unfamiliar allegations (the experience of Black homeowners).¹³² Under the Act, claimants will not need to establish discriminatory intent through different treatment of some other loan applicant; instead, claimants can use an appraisal gap of more than 20% as *prima facie* evidence of discrimination.¹³³ So, to move past the pleading stage a claimant will need to show only that a significant appraisal gap exists. At that point, the appraiser will need to rebut the presumption of

¹³⁰ See discussion *supra* Part II.

¹³¹ See *supra* Part II (discussing current barriers to private FHA actions).

¹³² See DELGADO & STEFANCIC, *supra* note 73, at 33-35.

¹³³ See *Routen v. Citi*, 706 F. Supp. 2d 854, 860 (N.D. Ill. 2009).

discrimination with other evidence. This will empower individual claimants and give the Act the teeth it needs to address this systemic issue.

Importantly, the Act will also create a fund to pay for counsel for those seeking to bring discrimination claims because minority communities do not enjoy the same access to counsel that white communities do.¹³⁴ The fund will receive a certain portion of appraisal licensing application fees from across the fifty states, and claimants will submit a proof of claim to the fund to petition for the appointment of counsel. If they have a valid claim, which will most often involve the *per se* showing of discrimination through the discrepancy in appraisal values, the fund will appoint local counsel. This way, no person will be left behind due to an inability to pay counsel to represent them on the claim.

Finally, the Act will move away from the FHA's race-blind scheme to a deliberate consideration of race in the appraisal process. Unlike the FHA, which absolutely prohibits consideration of race during the appraisal process,¹³⁵ the Act will require appraisers to declare the racial composition of the neighborhoods from which they draw the comparable properties used to make the valuation decision. Declaration of racial makeup of neighborhoods will empower individual homeowners to challenge an appraisal and serve as a deterrent to discrimination in the appraisal process. But the Act will go further—the Act will also require appraisers to select homes from both majority-white *and* majority-minority neighborhoods when performing a valuation. By equalizing the valuation process in this manner, the Act will gradually erode the appraisal gap in the United States by arriving at a valuation “average” across all neighborhoods. Moreover, white

¹³⁴ See generally COLUM. L. SCH. HUM. RTS. INST., EQUAL ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS 2 (July 2014), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal_access_to_justice_-_cerd_shadow_report.pdf.

¹³⁵ See 42 U.S.C. § 3605(a).

homeowners will be incentivized to recognize the value of Black-owned properties because their own appraisal value will be affected by the value of nearby Black neighborhoods.

This will mark a significant, but necessary departure from the FHA's race-blind provisions. CRT scholars recognize that race-blindness often "stands in the way" of dismantling systemic racism because it enforces the status quo.¹³⁶ Thus, minorities are kept "in subordinate positions" by legislation like the FHA, which allows appraisers to use *other* factors, like the value of nearby homes, to reach a valuation decision.¹³⁷ Appraisers must consider race to combat the existing inequity in the appraisal system, and the Act takes that into account. By including race, the white majority will also be encouraged to support proper valuation of Black neighborhoods. After all, Derrick Bell himself recognized that the majority will only act when it is in its own best interest—his theory of "interest convergence."¹³⁸ As Professor Bell wrote: "Racial remedies may instead be the outward manifestations of . . . judicial conclusions that the remedies . . . will secure . . . societal interests deemed important by middle and upper class whites."¹³⁹ By tying the interests of white homeowners to their Black neighbors, the Act will draw upon interest convergence theory to effectuate its end goal of eliminating the appraisal gap and, ultimately, the racial wealth gap.

V. CONCLUSION

A home should not be worth more simply because the owner is white. The FHA failed in its mission to eliminate racial bias in housing services. Specifically, it has completely failed to eliminate the appraisal gap between Black and white neighborhoods. Time and again, Black homeowners tell their stories to the press or to courts, only to receive little to no relief. Courts take every opportunity to dismiss FHA appraisal claims, and they do not even permit Black homeowners to

¹³⁶ DELGADO & STEFANCIC, *supra* note 73, at 27.

¹³⁷ *Id.*; 42 U.S.C. § 3605(c).

¹³⁸ Bell, *supra* note 72, at 523.

¹³⁹ *Id.*

introduce the appraisal itself as evidence of discrimination. Moreover, courts require Black homeowners to make a near-impossible showing of intentional discrimination without the use of the undervalued appraisal, a threshold requirement that effectively bars the courthouse doors to would-be litigations.

The time has come to dismantle the state-based appraisal system and erect a national, community-oriented system in its place. Only through engagement with Black communities and through the conflation of white and Black interests can the appraisal gap be eliminated once and for all. And in the end, all citizens of the United States will benefit. Family wealth will increase, and more Black families will be able to access equity from their homes to start businesses, pay medical bills, pay off student loans, and other benefits. The proposed Act will be the first step toward eliminating the racial wealth gap in this country, a step long overdue.