

BLACK LIVELIHOODS MATTER: ACCESS TO CREDIT AS A CIVIL RIGHT AND STRIVING FOR A MORE PERFECT CAPITALISM THROUGH INCLUSIVE ECONOMICS*

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ABSTRACT

Following the murder of an unarmed African-American male by a white police officer, in 2020 the nation erupted in protest, rallying to the call of Black Lives Matter, shining a light on the systemic racism engendered in American society. While the dialogue on racial inequality often focuses on police brutality and the political rights of African-Americans, one of the best illustrations of racial disparity can be found in the stark difference in access to credit. In the past century, capitalism has been blamed for countless ills in the United States. From the Great Depression to the Great Recession to the ever-growing disparity of income, the scapegoat has been capitalism—a reasonable reaction to today's economy that is so unfettered it resembles a multi-national financial oligarchy. But a more careful analysis of today's growing inequality reveals a different conclusion—that the disparity of income between the Anglo-Saxon majority and the historically disenfranchised is a result of discrimination by race rather than any inherent feature of capitalism. Rather, a more perfect capitalism would mean greater access to capital for all, based on merit and not race. Thus, a nation with as diverse a population as the U.S. would thrive with a more diverse set of financial products than what is readily available today. Currently, most lending mechanisms are sized to maximize the greatest opportunity per single transaction, using a criterion that is ineffective at gauging risk, and instead, primarily serves the wealthy and historically privileged, regardless of their likelihood to repay. More effective and more

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inclusive financial products would help the historically disenfranchised to acclimate to the code and culture buried in the mysteries of credit underwriting. If effectively and efficiently deployed, such tools would remove barriers to access and result in a smaller disparity in income and thus, serve to equalize political power. The concept of access to capital as a civil right has roots in several activist thinkers throughout history, including civil rights leaders Mahatma Gandhi and Martin Luther King, Jr. Concrete solutions have manifested themselves in market-based pilot projects experimented with through a variety of mechanisms during the New Deal, and even more recently via the Americans Recovery and Reinvestment Act of 2009, and afterward. Some of these solutions include financial literacy programming, fintech tools, and more inclusive underwriting implementation, to name a few, and are discussed as part of an overarching strategy towards achieving an inclusive economic capitalist system.

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I. INTRODUCTION

In the summer of 2020, an African-American man named George Floyd was detained by the Minneapolis police for allegedly using a counterfeit \$20 bill at a convenience store.¹ He was pinned at the neck by a white police officer while in the presence of other officers, which ultimately resulted in his death.² The event was captured on video and sparked protests nationwide with slogans “Defund Police” and “Black Lives Matter” (BLM),³ the latter of which was first coined in 2013, following the acquittal of the man who slayed Trayvon Martin, an unarmed African-American teenager.⁴ Often referred to as the BLM movement, activists for this decentralized cause most often focus their messaging on police reform to prevent physical violence against African-Americans.⁵ Others apply the concept more broadly, for example, in terms of economic justice and redistribution, calling for reparations and a reform of the tax code.⁶

At the heart of the event that took Floyd’s life was his tragic history of disenfranchisement, a fate shared by many other African-Americans, rooted in racial injustice in a number of different facets of everyday life. This history includes unequal access to safe, affordable housing or adequate education, combined with an early introduction to the criminal justice system and the prison industrial complex.⁷ Indeed, the inequality fought by activists in the BLM movement is no less present in other avenues of American life as they are in the culture of American policing. In this article, I focus on systemic racism in the American

1. See Jemima McEvoy, *New Transcripts Reveal How Suspicion Over Counterfeit Money Escalated Into The Death Of George Floyd*, FORBES (July 8, 2020, 7:33 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/07/08/new-transcripts-reveal-how-suspicion-over-counterfeit-money-escalated-into-the-death-of-george-floyd/>.

2. *Id.*

3. Jennifer Calfas & Elizabeth Findell, *Protests Sparked by George Floyd Fuel Moves to Defund Police; Largest Demonstrations Remained Mostly Peaceful over Weekend; Trump Tells National Guard to Begin D.C. Pullout and New York Ends Curfew*, WALL ST. J., June 7, 2020, at 1-2, PROQUEST, 2410816287.

4. MONICA ANDERSON, SOCIAL MEDIA CONVERSATIONS ABOUT RACE 16 (Aug. 15, 2016), <https://www.pewresearch.org/internet/2016/08/15/social-media-conversations-about-race/>.

5. See Conor Friedersdorf, *How to Distinguish Between Antifa, White Supremacists, and Black Lives Matter*, THE ATLANTIC (Aug. 31, 2017), <https://www.theatlantic.com/politics/archive/2017/08/drawing-distinctions-antifa-the-alt-right-and-black-lives-matter/538320/>.

6. In 2016, fifty Civil Rights organizations drafted a proposal demanding reforms in a multitude of economic areas. Tanzina Vega, *The Next Battle for Black Lives Matter: Economic Justice*, CNN, (Aug. 2, 2016, 6:34 PM), <https://money.cnn.com/2016/08/02/news/economy/black-lives-matter-the-economy/index.html>.

7. Toluse Olorunnipa & Griff White, *Born With Two Strikes, How Systemic Racism Shaped Floyd’s Life and Hobbled His Ambition*, WASH. POST (Oct. 8, 2020, 7:47 AM), <https://www.washingtonpost.com/graphics/2020/national/george-floyd-america/systemic-racism/>.

banking system, which has kept many African-Americans under the tyranny of intergenerational poverty in a manner just as ubiquitous as police brutality—if not moreso. In short, I argue that black livelihoods matter, and through inclusive economics and the principles set out by civil rights leaders, we could be one step closer to reaching true equality.

American households of color have long suffered from discrimination in lending. Too often, this phenomenon is explained away with the indisputable fact that, on average, people of color have lower incomes and credit scores than whites. However, this retort does little to address the following facts: 1) overtly racist lending practices have historical roots in the U.S. slave era, 2) overt racism in lending continued to flourish through redlining and other discriminatory lending practices, long after the abolition of slavery, and 3) people of color continue to be targeted by predatory lenders with exploitative credit products, disproportionately and significantly more so than white households with similar incomes and credit scores.⁸

Racial discrimination in lending has been overt in the past but continues today in more subtle forms. Though guised as economic efficiency, these practices have the opposite effect: such barriers to access leave a large segment of the U.S. population unserved or underserved; and thus, reliable, credit-worthy households of color are precluded from meeting their full economic potential because they have little to no access to the type of credit that could help their households and communities prosper and stabilize.⁹

Profit maximization in modern capitalism has come to stand for the principle that it is economically efficient for each commercial transaction to yield as high of a profit margin as possible.¹⁰ While the labor and infrastructural costs to service a loan do not differ from one loan to the next, regardless of the size of the loan, banks often perceive there to be an opportunity cost in servicing smaller loans. Accordingly, a bank prefers the lion's share of its portfolio to be comprised of fewer, larger-sized loans. As a disincentive to borrowers of smaller-sized loans, a larger fee is imposed, and often, a larger interest rate. A parallel situation exists in other banking products, such as depository accounts. Most banks prefer to service customers with larger deposits rather than smaller deposits, even though servicing one customer requires no more resources than servicing another. This preference exists because banks are able to lend based on a percentage of their account holdings.

Accordingly, all things being equal, banks prefer to service wealthier customers over poorer ones, even before considering the customer's reliability, or before considering the customer's ability or

8. See *infra* Part III.

9. *Infra* Part III.

10. *Infra* Part IV.

willingness to repay a loan. Indeed, use of the credit score in lending is shrouded in mystery. While credit scores are a factor in the banks' decisions, the algorithms behind the FICO process (and most other credit score calculations) are trade secrets that are unregulated by any government entity.¹¹ The 2008 recession indicates that one's ability to repay a loan was—and still is—a minor factor. While banks may have increased the required credit score, there is no indication that it weighs more heavily in the underwriting process.

Furthermore, credit scores do not measure the financial reliability of unbanked individuals, those who work in the informal economy, or those who do not otherwise fit within the narrow demographic of the Anglo-Saxon family unit.¹² Instead, banks shorthand the process of eliminating those smaller loans simply by targeting customers of color with more costly loans and banking products, thereby setting up such households for failure. This shareholder capitalist thinking has been criticized by policymakers and academics alike as short-termist, but those critiques fall short of recognizing the broad spectrum of concrete solutions that have already been piloted and could be deployed strategically to eradicate inequality in access to credit.

A more macro-economically efficient economy would have financial products that are more inclusive. Such products would take into consideration the reliability of the borrower through criteria that recognize the diversity of the U.S. population and the different lifestyles that have been built within communities of color to provide solid infrastructural and financial support within a family. A more inclusive economic policy would recognize a broader set of stakeholders, a diverse population of consumers, and litigation strategies and financial products that would protect and serve such interests.

This article examines these issues and provides a survey of tools that have somewhat haphazardly been experimented with in the past one hundred years, and which could be used to increase access to credit for the disenfranchised.

Part II of this article evaluates the history and importance of credit, Part III discusses credit in the context of civil rights, Part IV summarizes the racist roots of credit in the U.S., Part V discusses the overarching role of short-termism and shareholder capitalism in racial discrimination in economic rights, Part VI summarizes the existing tools created to address this injustice, Part VII describes successful policy measures, and Part VIII proposes new solutions needed as viewed through a lens of inclusive economics. Finally, the article concludes by arguing that

11. Amy Biegelsen, *Unregulated FICO has Key Role in Each American's Access to Credit*, CTR. FOR PUB. INTEGRITY (last updated May 17, 2011, 12:19 PM), <https://publicintegrity.org/inequality-poverty-opportunity/unregulated-fico-has-key-role-in-each-americans-access-to-credit/>.

12. See Kim Vu-Dinh, *Inclusive Economics and Home Loan Policies for Informal Workers*, 3 BUS. & FIN. L. REV. 170, 187–188, 209 (2020).

inclusive economic approaches to lending are not only the constitutionally correct outcome, but also superior from a macro-economic perspective.

II. HISTORY OF CREDIT

Access to credit has been linked to the rise of a civilization. Credit was used in the ancient worlds of Assyria, Babylon, and Egypt and became imperative in creating a supply chain for food and agriculture.¹³ By the late 1700s, it was accepted as a necessary building block for innovation and national development in the United Kingdom, Holland, Germany, France, and Switzerland.¹⁴

By the 1800s, credit reports were developed in England,¹⁵ and made their way to America's shores as war and trade became more common.¹⁶ Eventually, debt instruments were created via banking services through the U.S. Post Office in order to fund massive infrastructural projects, such as the telegraph, in the late 1800s.¹⁷ By 1956, the FICO score was created in the U.S. By the mid-1990s, it was endorsed by Fannie Mae and Freddie Mac and was ubiquitous.¹⁸

Today, credit is imperative to the most basic, modern living requirements. Access to credit is equated with socio-economic stability on a broad level. This is most evident in homeownership. Though once regarded as a luxury, homeownership is now generally accepted as the equivalent of middle-class security. Buying a home creates intergenerational wealth and stability.¹⁹

The importance of consumer credit is no less significant. Some might argue that consumer credit is only necessary for those who wish to live beyond their means. This perception, however, does not

13. SCOTT B. MACDONALD & ALBERT GASTMANN, *A HISTORY OF CREDIT & POWER IN THE WESTERN WORLD*, 19–20 (Routledge, 2017). Some of the world's earliest regulations on lending can be found in the Code of Hammurabi in which 150 paragraphs were dedicated to matters involving loans, guarantees, interest, and other credit-related matters. Credit as a form of wealth accumulation was found in other European societies as well—the Italian di Medici dynasty became one of the richest families in Europe through its ability to collect interest on loans issued to a wide variety of businesses. Around the early 1500's, massive loans financed colonial expeditions on the high seas and enabled centuries of European domination in Asia and the Americas. *Id.* at 9, 80–87.

14. *See id.* at 179.

15. MARTIN DAUNTON & MATTHEW HILTON, *THE POLITICS OF CONSUMPTION*, 101–02 (Bloomsbury Publishing, 2001). Credit reports were first created first by a cohort of tailors who shared their firsthand information on the debtor status of various U.S. members of the gentlemen class, resulting in the Manchester Guardian Society, a monthly newsletter of various U.S. debtors' repayment status. *Id.* at 101.

16. ROWENA OLEGARIO, *THE HISTORY OF CREDIT IN AMERICA* (May 23, 2019), <https://doi.org/10.1093/acrefore/9780199329175.013.625>.

17. MEHRSA BARADARAN, *HOW THE OTHER HALF BANKS* 188 (2015).

18. Janna Herron, *How FICO Became 'The' Credit Score*, YAHOO!FINANCE (Dec. 12, 2013), <https://finance.yahoo.com/news/fico-became-credit-score-100000037.html>.

19. JUNG HYUN CHOI ET AL., *URB. INST., INTERGENERATIONAL HOMEOWNERSHIP* 16–17 (Oct. 2018), www.urban.org/sites/default/files/publication/99251/intergenerational_homeownership.pdf.

recognize the insidious effects of credit on one's reputation as a responsible adult in a number of ordinary facets of life. Not only does consumer credit control whether one is able to rent an apartment, but credit scores have also become gatekeeping factors to formal employment with a salary and benefits,²⁰ despite little to no evidence correlating credit and one's ability to maintain employment.²¹ Consumer credit is also frequently used in purchasing a car, even for a non-luxury make and model.²²

Business credit is also an essential feature of modern American living. From 1993–2016, more than 60% of all jobs were created by small businesses,²³ for which business credit is imperative.²⁴ Small businesses and micro-entrepreneurship offer crucial income opportunities to targets of discrimination.²⁵ This is yet another area where households of color, and businesses in neighborhoods of color, experience barriers to access. Similar to consumer credit, when businesses of color are approved for loans, they are only offered at higher rates and fees compared to their white counterparts with comparable incomes and credit scores.²⁶

In these ways, home loans, business loans, and consumer debt are no longer considered mere frivolities; rather, credit has become a staple of subsistence across class and race.

III. ACCESS TO CREDIT AND CIVIL RIGHTS: DR. KING AND GANDHI

The American Civil Rights Movement is most often affiliated with Dr. Martin Luther King Jr. and his work fighting the political disenfranchisement of African-Americans. Considered one of the “most

20. Kyle Herkenhoff et al., *The Impact of Consumer Credit Access on Employment, Earnings, and Entrepreneurship* 25–27 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22846, 2016), https://www.nber.org/system/files/working_papers/w22846/w22846.pdf.

21. Terrence Cain, *The Bankruptcy of Refusing to Hire Persons Who Have Filed Bankruptcy*, 91 AM. BANKR. L.J. 657, 659–60 (2017).

22. Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1498–1502 (2004).

23. FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESS, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., <https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf> (last visited Oct. 14, 2020).

24. Marco Carbajo, *10 Stats That Explain Why Business Credit is Important for Small Business*, U.S. SMALL BUS. ADMIN.: SBA BLOG, (Mar. 9, 2017), <https://www.sba.gov/blog/10-stats-explain-why-business-credit-important-small-business>.

25. Sonari Ginton, *Some Black Americans Turn to Informal Economy in the Face of Discrimination*, NPR: ALL THINGS CONSIDERED (Oct. 27, 2017, 4:45 PM), www.npr.org/2017/10/27/560239264/someAfrican-American-americans-turn-to-informal-economy-in-the-face-of-discrimination.

26. Jared Weitz, *Why Minorities Have So Much Trouble Accessing Small Business Loans*, FORBES: FIN. COUNCIL (Jan. 22, 2018, 9:00 AM), <https://www.forbes.com/sites/forbesfinancecouncil/2018/01/22/why-minorities-have-so-much-trouble-accessing-small-business-loans>; VICTOR HWANG ET AL., ACCESS TO CAPITAL FOR ENTREPRENEURS: REMOVING BARRIERS, EWING MARION KAUFFMAN FOUND. 1, 11 (2019), https://www.kauffman.org/wp-content/uploads/2019/12/CapitalReport_042519.pdf.

far-reaching pieces of Civil Rights legislation,” the Voting Rights Act of 1965 was the result of grassroots work organized by Dr. King and his march across the Pettus Bridge in Selma, Alabama.²⁷ Through the Voting Rights Act and a number of key court cases, many obstacles to voting were eradicated.²⁸

Though not nearly as well-publicized, economic equality was also one of Dr. King’s priorities in his campaign for civil rights. His message of equality was not exclusive to the plight of African-Americans but also included members of any race who were economically disenfranchised, particularly the white communities of rural America.²⁹ Shortly before his death, Dr. King began the Poor People’s Campaign, which sought to unify the poor rural white population of the U.S. with the African-American activism in the civil rights movement.³⁰ His famous speech, “I Have A Dream,” was given at a well-known march with a lesser-known name invoking economic equality—the March on Washington for Jobs and Freedom.³¹ Though the march was organized by a coalition of civil rights, labor, and religious groups, in popular media, its moniker has been shortened to the “March on Washington” and has been credited with the passage of numerous legislative acts related to political rights, but not any economic reforms.³²

Indeed, the principal organizers of The March on Washington, Bayard Rustin and Asa Phillip Randolph, were known for their activist work demanding economic justice. Randolph had already established a name for himself, having organized the largest union of African-

27. See NAT’L PARK SERV., *Voting Rights Act of 1965*, <https://www.nps.gov/articles/votingrightsact.htm> (last visited Aug. 8, 2021); The Voting Rights Act essentially prohibits racial discrimination in voting under the 14th and 15th Amendments of the U.S. Constitution, 52 U.S.C. § 10101. Before its passage, numerous states and localities imposed a variety of regulations that created practical obstacles to African Americans from voting. Such laws took shape in a variety of forms including poll taxes, grandfather clauses, and property ownership requirements); Elizabeth Anderson & Jeffrey Jones, *Techniques of Direct Disenfranchisement, 1880-1965*, UNIV. OF MICH.: THE GEOGRAPHY OF RACE IN THE U.S. <http://umich.edu/~lawrace/vote.htm> (last visited Aug. 9, 2021) (on file with author).

28. Neil Foley et al., *Civil Rights In America—Racial Voting Rights*, NAT’L PARK SERV., 69–72 (last updated 2009), https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights_VotingRights.pdf (citing *Harper v. Va. State Bd. of Elections* 383 U.S. 663 (1966)).

29. MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE* 17 (Beacon Press, 2010), <https://www.uni-five.com/upload/doc/82818file.pdf> (“At this level Negro programs go beyond race and deal with economic inequality, wherever it exists. In the pursuit of these goals, the white poor become involved, and the potentiality emerges for a powerful new alliance.”).

30. James Freeman & Peter Kolozi, *Martin Luther King, Jr. and America’s Fourth Revolution: The Poor People’s Campaign at Fifty*, 64 AM. STUD. J. 01 (2018), <http://www.asjournal.org/64-2018/martin-luther-king-jr-americas-fourth-revolution-poor-peoples-campaign-fifty/#>.

31. N’dea Yancey-Bragg, *5 things you didn’t know about the March on Washington and MLK’s ‘I Have a Dream’ speech*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/08/27/march-washington-5-things-you-didnt-know-1963-march/5617478002> (last updated Aug. 28, 2020, 12:32 PM).

32. *Id.*

Americans through the Brotherhood of Sleeping Car Porters in 1925.³³ Bayard Rustin, an activist who fought for economic justice, gay rights, and racial equality, was another critical organizer for the March on Washington and other civil rights activities for decades. He most often worked in the shadows at the request of his colleagues because of his status as a gay man.³⁴ Along with a cohort of economists, in the fall of 1965 following the March on Washington, Randolph and Rustin co-drafted *A Freedom Budget for All Americans*,³⁵ which explicitly explained and explored economic discrimination faced by African-Americans, who they believed could only achieve true equality through collective action with the working poor of all races.³⁶ They wrote:

The tragedy is that the workings of our economy so often pit the white poor and the black poor against each other at the bottom of society. The tragedy is that groups only one generation removed from poverty themselves, haunted by the memory of scarcity and fearful of slipping back, step on the fingers of those struggling up the ladder.³⁷

The authors expounded on the idea of systemic reforms rather than wholesale overthrowing of American capitalism:

What we must also recognize is that we now have the means of achieving complete employment—at no increased cost, with no radical change in our economic system, and at no cost to our present national goals—if we are willing to commit ourselves totally to this achievement. No doles. No skimping on national defense. No tampering with private supply and demand. Just an enlightened self-interest, using what we have in the best possible way.³⁸

In line with this vision of civil rights, their article proposed the development of high-quality jobs dedicated to creating an improved infrastructure in the areas of housing, utilities, schools, hospitals, and other features of urban development generally.³⁹ Under the plan, jobs would pay a living wage, a feature integral to their concept of true freedom and equality.⁴⁰

Dr. King was one of dozens of signatories of the Freedom Budget⁴¹ and was clearly motivated by its principles. In his last written work, *Where Do We Go from Here?* King laid out extensive arguments and

33. A. Philip Randolph, ENCYC. BRITANNICA, (May 12, 2021), <https://www.britannica.com/biography/A-Philip-Randolph>.

34. Bayard Rustin, NAT'L PARK SERV., <https://www.nps.gov/people/bayard-rustin.htm> (last visited Oct. 3, 2020).

35. A. PHILIP RANDOLPH INST., A "FREEDOM BUDGET" FOR ALL AMERICANS: A SUMMARY (1967).

36. *Id.* at 8.

37. *Id.* at 3.

38. *Id.* at 10, 12.

39. *Id.* at 12–14.

40. *Id.* at 14, 20.

41. *Id.* at 22.

strategies arguing that his movement needed to start embracing a broader spectrum of allies based on the premise that economic rights were part and parcel of civil rights. He wrote:

Negroes have irrevocably undermined the foundations of Southern segregation; they have assembled the power through self-organization and coalition to place their demands on all significant national agendas. And beyond this, they have now accumulated the strength to change the quality and substance of their demands. From issues of personal dignity, they are now advancing to programs that impinge upon the basic system of social and economic control. At this level Negro programs go beyond race and deal with economic inequality, wherever it exists. In the pursuit of these goals, the white poor become involved, and the potentiality emerges for a powerful new alliance.⁴²

Access to economic rights was also a burning issue of one of Martin Luther King's major influences: Mahatma Gandhi.⁴³ An English-educated lawyer, born and raised in India, Gandhi was best known for his work in civil rights and defeating British colonialism through non-violent direct action.⁴⁴ Himself an ascetic, with few possessions to call his own upon his death, Mahatma Gandhi also believed in the power of property to fortify one's independence from the state. He disavowed Marxism and communism but rather called upon the wealthy to use their property for the benefit and "welfare of all".⁴⁵ Though generally critical of organized religion, he was a scholar of Hindu philosophies, which deeply influenced his style of activism and teachings.⁴⁶ Gandhi believed in not only the importance of human detachment of material possessions but also mental and emotional detachment from dogma.⁴⁷ He wrote about the concept of *non-possession* and *nonstealing*, which did not require complete asceticism, but rather possession of necessities on an as-needed basis only; these necessities included personal and real property.⁴⁸ Thus, under his thinking, to own a home sufficient to support the needs of oneself and one's family could fall under the idea of

42. MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE* 17 (Beacon Press 2010).

43. *Gandhi, Mohandas K.*, The Martin Luther King, Jr. Rsch. & Educ. Inst., STAN. UNIV., <https://kinginstitute.stanford.edu/encyclopedia/gandhi-mohandas-k> (last visited Sept. 4, 2021).

44. B.R. Nanda, *Mahatma Gandhi*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Mahatma-Gandhi> (last visited Aug. 10, 2021).

45. Nehal A. Patel, *Mindful Use: Gandhi's Non-Possessive Property Theory*, 13 SEATTLE J. SOC. JUST. 289, 314, (2015) (citing SURINENI INDIRA, *GANDHIAN DOCTRINE OF TRUSTEESHIP* (1991); Jai Narain Sharma, *Theory of Trusteeship*, in *GANDHISM AFTER GANDHI*, 93, 93-100 (1999); Shyamkrishna Balganes, *Gandhi and Copyright Pragmatism*, 101 CALIF. L. REV. 1705, 1708 (2013); N. N. Chatterjee, *Mahatma Gandhi and the Industrial Worker*, 101 INT'L LAB. REV. 215, 224-28 (1970)); See M.V. NADKARNI, *ETHICS FOR OUR TIMES: ESSAYS IN GANDHIAN PERSPECTIVE* 21 (2011).

46. HUSTON SMITH, *THE WORLD'S RELIGIONS* 13 (HarperCollins 1991).

47. NARENDAR PANI, *INCLUSIVE ECONOMICS: GANDHIAN METHOD AND CONTEMPORARY POLICY* 70 (Sage Publications 2001).

48. M.K. GANDHI, *SARVODAYA (THE WELFARE OF ALL)* 12-15 (1954).

nonstealing, so long as such property was not in excess of such needs.⁴⁹ The ability to earn a living and provide for oneself, in his thinking, was a right. He wrote:

A workman should receive a just wage according to his ability. Even then there will be competition of a sort, but the people will be happy and skillful, because they will not have to under-bid one another, but to acquire new skills in order to secure employment . . . True economics is the economics of justice. People will be happy insofar as they learn to do justice and be righteous.⁵⁰

Gandhi used the Hindu word *sarvodaya*, loosely translated as *welfare for all*, to define a guiding principle for his theory of property law.⁵¹ He characterized the wealthy who owned more property than needed for their own survival as holding such excess property *in trust* for others.⁵² And, in order to avoid committing the crime of theft by possessing such property, Gandhi argued, these industrialists were required to act and use such property for the welfare of all.⁵³ In essence, he strongly believed that economic self-sufficiency was a necessary feature of political independence and lobbied many of the captains of industry in his newly-independent India to adopt his concept of trusteeship. He wrote:

Supposing I have come by a fair amount of wealth—either by way of legacy, or by means of trade and industry—I must know that all that wealth does not belong to me; what belongs to me is the right to an honourable livelihood by millions of others. The rest of my wealth belongs to the community and must be used for the welfare of the community.⁵⁴

A small number of legal scholars have also argued that economic rights are a form of civil rights. One legal activist has characterized the government's refusal to regulate Payday Loans and its disproportionately negative effects on African-American communities as an international human rights violation.⁵⁵ Another scholar, Professor Lan Cao, also highlights human rights issues, but in the context of U.S. civil rights. In her article titled *Looking at Communities and Markets*, she argues that though the term civil rights typically is reserved to describe access to the political process, economic rights are so intrinsic to life and

49. *Id.* at 12.

50. *Id.* at 28–29.

51. *See id. passim.*

52. *See* MAHATMA GANDHI, TRUSTEESHIP 4 (Navajivan Publishing House 1960).

53. *Id.* at 2–3.

54. *Id.* at 4.

55. Paulina Davis, *Racism, Capitalism, and Predatory Lending: How the U.S. Government's Failure to Regulate the Disproportionate Negative Effects of Payday Lending in Black Communities Violates the International Convention on the Elimination of All Forms of Racial Discrimination*, 4 HUM. RTS. & GLOB. L. REV. 61, 62–63 (2010).

liberty that such rights also comprise civil rights.⁵⁶ Moreover, she argues that civil rights activism should do more than result in regulation of public actors but rather enter the sphere of reforming private law-making in the areas of contract and access to credit.⁵⁷ Her work then provides an extensive survey of a number of immigrant communities in the U.S. and the informal credit mechanisms they have developed.⁵⁸ She concludes that such communities should be allowed to enforce informal contractual disputes in courts as a matter of civil liberty.⁵⁹

While Professor Cao explores the informal, private sector responses to address credit discrimination, this article looks at policy-making on a national level—both in the public sector and in the private credit market.⁶⁰ Access to credit is, in fact, a civil right and one that current legislation does not adequately protect. By using an inclusive economics framework, this article concludes that policies and litigation tools should be adopted to protect the civil right of access to credit.

IV. RACISM AND CREDIT

Racially discriminatory practices in lending are ubiquitous and contemporary in the United States, with a long history. From slavery to redlining and other discriminatory banking practices, racial discrimination in access to credit has taken many forms.

A. *Slavery and the American Credit System*

In antebellum America, credit was one of the many tools used to entrench the power of not only Southern plantation owners but also lenders in the industrial North.⁶¹ Slavery was unambiguously a key feature of the Southern plantation economy. After the invention of the cotton gin, one of the world's rarest resources—cotton—was manufactured more easily, and the practice of slavery, and accordingly, the wealth of slave owners, grew more quickly.⁶² Indeed, the drive to expand the agricultural capacity of the fertile American South was the reason slavery continued long after it had been abandoned by European

56. Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 841–44 (1999).

57. *Id.* at 845–56.

58. *See generally id.* at 848 (explaining immigrant communities and the credit mechanisms developed by those communities).

59. *Id.* at 923.

60. *Id.*

61. Dina Gerdeman, *The Clear Connection Between Slavery and American Capitalism*, FORBES (May 3, 2017, 12:47 PM), <https://www.forbes.com/sites/hbsworkingknowledge/2017/05/03/the-clear-connection-between-slavery-and-american-capitalism>.

62. Jeremy William Kleman Ziemer, *Interjurisdictional Property Rights Discrimination and Civil War* 27 (2011) (M.P.S. thesis, Iowa State University).

countries.⁶³ When plantations expanded, slaves were used to collateralize credit from Northern bankers to Southern plantation owners.⁶⁴ Northern credit financed the purchase of labor, land, and the marketing and transportation of cotton undertaken by Northern businessmen.⁶⁵ In these ways, slavery formed the basis of the Northern credit market and Southern agricultural economy. The economic strength of the U.S. depended heavily on these race-based lending practices. From these racist roots, the American credit system grew.

B. Discrimination in Home Mortgages

1. Redlining

Although slavery was outlawed in 1865 with the passage of the Thirteenth Amendment, in the 1930s, credit discrimination against African-Americans continued in the form of redlining. Redlining is a practice in which banks identify geographic regions with high concentrations of minorities,⁶⁶ then prohibit lending to anyone living in those areas.⁶⁷ In 1935, the Federal Housing Administration (FHA), historically the largest provider of home loans in the nation since its inception, adopted redlining policies that steered mortgage providers away from minority neighborhoods.⁶⁸ Between 1934 and 1962, 98% of home loans issued by the FHA went to white households.⁶⁹ Accompanying redlining was reverse redlining, a practice in which lenders targeted neighborhoods with high concentrations of African-Americans with high-cost lending products.⁷⁰

The FHA also buttressed this homeownership policy by creating low-income housing projects that overtly segregated its inhabitants by race.⁷¹ In 1948, Assistant Authority Commissioner W.J. Lockwood stated

63. *Id.* at 29–36.

64. *Id.*

65. *Id.*

66. Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining*, 12 SEATTLE J. SOC. JUST. 1, 9 (2013).

67. *Id.* at 1, 9, 13.

68. Amanda Tillotson, *Race, Risk and Real Estate: The Federal Housing Administration and Black Homeownership in the Post World War II Home Ownership State*, 8 DEPAUL J. SOC. JUST. 25, 33, 35–36 (2014).

69. Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1091 (2017) (citing GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 6 (rev. ed. 1998)).

70. Szto, *supra* note 66, at 28–32.

71. Joan Kane, *The Constitutionality of Redlining: The Potential for Holding Banks Liable as State Actors*, 2 WM. & MARY BILL RTS. J. 527, 533 (1993) (“Far more troubling than the prejudice of individuals is the prior discrimination by the Federal Housing Administration (FHA). During the early part of the twentieth century, the FHA engaged in overtly discriminatory practices and embraced prejudicial policies.”) (citing CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* 229 (1971), and *Letter from W. J. Lockwood to James Cassels, Executive Secretary, National Cooperative Mutual Housing Association* (Nov. 19, 1948), quoted in ABRAMS, at 533).

that the FHA “has never had a housing project of mixed occupancy,” and the FHA policy of single-race projects remained in force until 1949 when references to “inharmonious racial groups” were finally removed.⁷² In practice, segregation in public housing projects continued throughout the country even after the passage of the Fair Housing Act.⁷³

Thus, despite the prohibition against slavery, through segregationist policies in homeownership and rental real estate, race-based barriers to access to credit remained in full effect.

C. Sub-Prime Loans, Discretionary Pricing, and Standard Target Pricing

Even after redlining was eventually made illegal in 1968 through the passage of the Fair Housing Act,⁷⁴ discriminatory targeting of households of color remained rampant in the subprime mortgage markets up to and throughout the 2000s.⁷⁵ Though the lion’s share of subprime loans in the Great Recession were issued to white, upper-middle-class, and upper-class households in upper-middle-class neighborhoods, evidence suggests that minorities were heavily targeted. Even when minorities were eligible for loans at better rates, those loans were given to their white counterparts with similar incomes and credit scores.⁷⁶ In 2006, for instance, African-American and Latino households making more than \$200,000 were given subprime loans at a rate that exceeded subprime loans made to white households making less than \$30,000 with similar credit profiles.⁷⁷ In essence, in order to serve minority households, banks demanded more money, regardless of any risk assessed through credit scores or household income. The race-based discrimination was so overtly clear that in *United States v. Wells Fargo*,⁷⁸ the U.S. Department of Justice (DOJ) entered into a landmark settlement with Wells Fargo for \$175 million—with \$125 million to be

72. *Id.* at 533.

73. Richard Rothstein, *Race and Public Housing: Revisiting the Federal Role*, 21 POVERTY & RACE 1 (2012).

74. Fair Housing Act, 42 U.S.C. §§ 3601–3631 (1988 & Supp. IV 1992), (making it illegal to deny a loan for purchasing, constructing improving or repairing a dwelling on the basis of race, color, religion, sex, handicap, or familial status), 42 U.S.C. § 3605 (1988).

75. Rick Rothacker & David Ingram, *Wells Fargo to Pay \$175 Million in Race Discrimination Probe*, REUTERS (July 12, 2012, 9:49 AM), <https://www.reuters.com/article/us-wells-lending-settlement/wells-fargo-to-pay-175-million-in-race-discrimination-probe-idUSBRE86B0V220120712>.

76. Szto, *supra* note 66, at 31; Emily Badger, *The Dramatic Racial Bias of Subprime Lending During the Housing Boom*, BLOOMBERG CITYLAB (Aug. 16, 2013, 5:54 AM), <https://www.citylab.com/equity/2013/08/African-Americans-really-were-targeted-bogus-loans-during-housing-boom/6559/>; Justin P. Steil et al., *The Social Structure of Mortgage Discrimination*, 33 HOUS. STUD. 759, 761 (2018).

77. Badger, *supra* note 76.

78. *U.S. v. Wells Fargo Bank*, 891 F. Supp. 2d 143, 146–47 (D.D.C. 2012).

paid directly to minority victims of discrimination,⁷⁹ “who were steered into subprime mortgages or who paid higher fees and rates than white borrowers because of their race or national origin.”⁸⁰ While Wells Fargo asserts the settlement was entered “solely for the purpose of avoiding contested litigation,”⁸¹ the DOJ asserted otherwise, stating:

This a case about real people, African-American and Latino, who suffered real harm as a result of Wells Fargo’s discriminatory lending practices. . . . People with similar qualifications should be treated similarly. They should be judged by the content of their credit worthiness and not the color of their skin. . . .⁸²

Wells Fargo’s discriminatory lending practices were not an isolated instance; Bank of America’s lending units, Countrywide Financial, also paid out a settlement of \$335 million for similar circumstances.⁸³ While Wells Fargo issues one in three mortgages in the U.S.,⁸⁴ and was ranked the third most prolific lender in 2019, Bank of America ranked eighth on that list.⁸⁵ Between these two monolith institutions, the continuation of their discriminatory practices had a devastating effect on millions of minority borrowers.

Despite the successful DOJ litigation against lenders, African-American and Latino households continue to be rejected for mortgages at a higher rate than are whites with equivalent income and other demographic statistics.⁸⁶ In lieu of traditional redlining, banks began to use more sophisticated mechanisms. For example, discretionary pricing refers to the practice in which a bank allows loan officers and brokers to tack on fees to a home loan that do not match an objectively determined “par rate” of an individual loan, which factors in income (through fees and interest) the bank wishes to make per loan.⁸⁷ Surveys and census

79. Luke Broadwater, *Wells Fargo agrees to pay \$175M settlement in pricing discrimination suit*, THE BALTIMORE SUN (July 12, 2012), <https://www.baltimoresun.com/news/bs-xpm-2012-07-12-bs-md-ci-wells-fargo-20120712-story.html>.

80. Press Release, Dep’t of Justice, *Justice Department Reaches Settlement with Wells Fargo Resulting in More Than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims* (July 12, 2012), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>.

81. Rothacker & Ingram, *supra* note 75.

82. *Id.* (quoting U.S. assistant attorney general for civil rights, Thomas Perez, who quoted Martin Luther King Jr.’s “I have a Dream” speech at a Washington News conference).

83. *Id.*

84. *Id.*

85. Alex Roha, *Here Are the Top 10 Mortgage Lenders of 2019*, HOUSING WIRE (June 25, 2020, 6:29 PM), <https://www.housingwire.com/articles/here-are-the-top-10-mortgage-lenders-of-2019/>.

86. Aly Yale, *Black Home Buyers Denied Mortgages More Than Twice As Often As Whites, Report Finds*, FORBES (May 7, 2018), <https://www.forbes.com/sites/alyyale/2018/05/07/mortgage-loan-denials-more-common-with-minorities-new-report-shows/>.

87. Robert G. Schwemm & Jeffrey L. Tarem, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 375–76, 395–96 (2010).

data show that Latinos and African-Americans were charged more in fees for their loans than their white counterparts of comparable loan values and lending risks (including credit scores), resulting in billions of dollars of extra payments for their mortgages and a number of class-action lawsuits.⁸⁸

After many failed attempts, discretionary pricing was eventually eliminated through a series of class-action lawsuits and settlements.⁸⁹ However, it since has manifested itself into an equally discriminatory permutation of itself: target pricing by neighborhoods. In this practice, lenders set a goal amount of money to be made per neighborhood (instead of per individual loan as was done in discretionary pricing); and, as in discretionary pricing, this allows lenders to charge a higher interest rate or fees, or both, in order to reach that target pricing.⁹⁰ Thus, if homes in a neighborhood cost less, generating smaller loans, such as in minority neighborhoods, lenders charge minorities higher transaction fees and interest rates on home loans in lower-cost minority neighborhoods. In short, it is virtually a revival of redlining and discretionary pricing, captured in a more convoluted mechanism.

Other aspects of the underwriting process are equally discriminatory but entirely legal. For example, conventional underwriting prohibits the inclusion of roommate income, a feature present in a large number of households of color living in traditional, multi-generational structures, a practice that better poises the household to absorb economic shocks at large.⁹¹ Currently, Fannie Mae only allows a static 75% of boarder income to be included, and roommate income can comprise only up to 30% of the applicant's income.⁹² Likely, these percentages were applied in order to reflect the

88. *Id.* at 376.

89. *See* Rodriguez v. Nat'l City Bank, 277 F.R.D. 148, 153–55 (E.D. Penn. 2011) (order denying final approval of settlement and certification of settlement class); Order Den. Pls.' Mot. for Class Certification; Den. Def.'s Motion to Exclude; Vacating Sept. 9, 2011 Hr'g at 1, *In re* Wells Fargo Residential Mortg. Lending Discrimination Litig., 08-md-01930 MMC (2011); *In re* Countrywide Financial Mortg. Lending Practices Litig., No. 08-MD-1974, MDL No. 1974 *4 (W.D. Ky. Oct. 13, 2011) (memorandum opinion containing the order denying plaintiff's motion for class certification).

90. Robert G. Schwemm & Jeffrey L. Tarem, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. REV. 375, 416, 432 (2010) (analyzing issues related to discretionary pricing); *Id.* at 429 analyzing issues of standard target pricing of neighborhoods; *See* also, Matt Egan, *Wells Fargo accused of preying on black and Latino homebuyers in California*, CNN Business (Feb. 27, 2018) <https://money.cnn.com/2018/02/27/investing/wells-fargo-sacramento-lawsuit-discriminatory-lending/index.html>. In lawsuit brought against Wells Fargo by the City of Sacramento, it was revealed that Wells Fargo created "lender credits" for borrowers in minority neighborhoods, which essentially increased the fees associated with such loans.

91. D'Vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households*, PEW RSCH. CTR. (Apr. 5, 2018), <https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/>.

92. Chad Baker, *How to Use Boarder and Renter Income for Loan Approval*, SAN DIEGO PURCHASE LOANS (Feb. 7, 2018), <https://sandiegopurchase loans.com/boarder-income-loan-approval/>. *See* HomeReady FAQs, FANNIE MAE (Oct. 5, 2020), <https://www.fanniemae.com/content/faq/homeready-faqs.pdf>.

risk of roommate income, regardless of the actual vacancy rate of the city in which the home is located or the viability of roommate income.

Conventional underwriting also makes it extremely difficult to obtain a mortgage for households in the informal economy, a segment comprised of a significant proportion of households of color. Latino and African-American workers make up approximately 28% of the informal economy.⁹³ This segment often serves needs unmet by formal industries. For example, some consider African-American street vendors to be a key component of African-American culture that the formal retail market fails to serve.⁹⁴ Workers in the informal economy are prejudiced against in a way that is neither economically efficient nor relevant to ascertaining their reliability.⁹⁵ In short, the procedures that workers in the informal economy are forced to adopt include requiring two years of tax returns and third-party verification from sources of income.⁹⁶ In the informal economy, these are often unrealistic or impossible to obtain for lawful, legitimate reasons.

Through this cornucopia of tools, racial discrimination in lending has been alive and well throughout the history of the U.S., and this phenomenon is not limited to the American South, despite its roots in slavery. In fact, some research has shown that this phenomenon occurs even more so in the Midwest and Eastern regions of the country.⁹⁷ While banks continue to argue that this phenomenon is the result of lower household incomes rather than racial animus, such an explanation fails to acknowledge or address the prevalence of racially discriminatory practices still in effect today.

D. Discrimination in Consumer Credit

Racial bias is also evident in access to consumer credit. In his article entitled *Credit Card Redlining*, written while employed at the Federal Home Loan Bank of Boston, economist Dr. Ethan Cohen-Cole provided extensive research on the racial disparities in terms and quality of credit between credit cards issued to African-American and white borrowers. He studied the credit applications of over 285,000

93. Paulina Restrepo-Echavarria & Maria Arias, *What is the Informal Labor Market?*, ST. LOUIS FED RSRV. BANK: ON THE ECON. BLOG (Apr. 18, 2017), <https://www.stlouisfed.org/on-the-economy/2017/april/informal-labor-market>.

94. Regina Austin, *An Honest Living: Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2122, 2124 (1994).

95. Vu-Dinh, *supra* note 12, at 190.

96. *Id.* at 193.

97. Aly J. Yale, *Black Home Buyers Denied Mortgages More than Twice as Often as Whites, Report Finds*, FORBES (May 7, 2018, 7:00 AM), <https://www.forbes.com/sites/alyyale/2018/05/07/mortgage-loan-denials-more-common-with-minorities-new-report-shows/>.

individuals over two points in time, June 2003 and June 2004.⁹⁸ He concludes that the disparity results from long-standing practices that mimic redlining in home loans—the quantity of the credit card offers vary based on racial demographics of zip codes, holding household income and credit scores equal.⁹⁹ In essence, households living in predominantly African-American neighborhoods were offered fewer credit lines and lower credit limits, as compared to households with the same or similar credit scores and debt-to-income ratios living in predominantly white neighborhoods.¹⁰⁰

Other scholars provide equally telling conclusions: African-Americans are 27% less likely and Latinos 17% less likely to receive credit card offers than whites, controlling for all other factors.¹⁰¹ Another Federal Home Loan Bank economist, Dr. Simon Firestone, conducted a study of direct mail received by over 78,000 individuals between August 2009 and October 2012. The data clearly indicated that African-Americans and Latinos were more heavily targeted for higher cost, higher interest rates loan products.¹⁰² A 2008 survey reflected that despite having lower balances on average, African-American borrowers paid more in interest, with higher interest rates that made monthly payments at least \$100 more expensive on average.¹⁰³ In lieu of optimal credit offers made to comparable borrowers in white neighborhoods, African-American and minority neighborhoods have easier access to usurious and exploitative payday loans.¹⁰⁴ Through payday loans, households are issued loans with future paychecks held as collateral at interest rates ranging from an average of 390% to up to 910%.¹⁰⁵

Though reserved for lower-cost personal property, consumer credit can have a significant impact on one's ability to qualify for a mortgage. This, in turn, makes it more difficult for the borrower to increase their credit score, and to accrue savings for a down payment, and can effectively create barriers to qualifying for a mortgage.¹⁰⁶

98. Ethan Cohen-Cole, *Credit Card Redlining* 7–8 (FRB of Bos. Quantitative Analysis Unit Working Paper, QAU08-1, 2009), <https://ssrn.com/abstract=1098403>.

99. *Id.* at 3–4.

100. *Id.*

101. Simon Firestone, *Race, Ethnicity, and Credit Card Marketing*, 46 J. MONEY, CREDIT, & BANKING 1205, 1222–1224 (2014) (citing Song Han et al., *Credit Supply to Bankrupt Consumers*, 43 J. MONEY, CREDIT, & BANKING 491–517 (2011)).

102. Firestone, *supra* note 101, at 1206.

103. Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1078 (2017).

104. See Paulina Davis, *Racism, Capitalism, and Predatory Lending: How the U.S. Government's Failure to Regulate the Disproportionate Negative Effects of Payday Lending in Black Communities Violates the International Convention on the Elimination of All Forms of Racial Discrimination*, 4 HUM. RTS. & GLOB. L. REV. 61, 76, 82, 83 (2010–2011).

105. *Id.* at 76–77.

106. Cohen-Cole, *supra* note 98, at 2, 4–5.

E. Discrimination in Business Credit

Race-based discrimination is also evident in the issuance of business credit. Businesses with twenty or fewer employees comprise 88% of America's 28.7 million firms, and nearly 40% have annual revenue of \$100,000 or less.¹⁰⁷ Small businesses are at the heart of the American economy and access to credit has long been imperative to their operations.¹⁰⁸

Importantly, entrepreneurship serves those who are vulnerable to discrimination.¹⁰⁹ Not only are small businesses able to provide income opportunities to people of color who are unable to find comparable opportunities elsewhere,¹¹⁰ but small businesses also fill niches for products and services that are not met by the larger market.¹¹¹ As with other sectors of the credit market, evidence of racial discrimination in the business lending sector is rampant and closely tracks the discrimination evident in consumer lending.¹¹² In a study conducted by the National Community Reinvestment Coalition, secret shoppers of various races gathered data on customer service experiences in order to track the differences between experiences.¹¹³ The results reflected that African-American and Latino shoppers were asked for additional financial information approximately 30% more often than their white counterparts.¹¹⁴ White counterparts were given more information about rates and better loan products 35%–44% more often than their Latino and African-American counterparts, and, overall, white secret shoppers were given better customer service.¹¹⁵

Discrimination in business lending in relation to housing credit has a disparate impact on households of color. In addition to shelter, homes also provide a source of equity that is used for the start-up or growth of new businesses. Home Equity Lines of Credit (HELOC) are loans issued

107. *Small Businesses Are an Anchor of the U.S. Economy*, JP MORGAN CHASE & CO. INST.: SMALL BUS. DATA DASHBOARD, <https://institute.jpmorganchase.com/institute/research/small-business/small-business-dashboard/economic-activity>. (last visited Feb. 7, 2021).

108. BD. OF GOVERNORS OF THE FED. RESRV. SYS., REPORT TO THE CONGRESS ON THE AVAILABILITY OF CREDIT TO SMALL BUSINESSES 15–24 (2017), <https://www.federalreserve.gov/publications/files/sbfreport2017.pdf>.

109. Vu-Dinh, *supra* note 12, at 190.

110. See Sonari Ginton, *Some Black Americans Turn to Informal Economy in the Face of Discrimination*, NPR, at 2:43 (Oct. 27, 2017, 4:45 AM), <https://www.npr.org/2017/10/27/560239264/some-black-americans-turn-to-informal-economy-in-the-face-of-discrimination>.

111. *Id.*

112. Oscar P. Abello, *'Secret Shopper' Tests Find Possible Evidence of Bias in Small-Business Lending (Again)*, NEXT CITY (Sept. 5, 2019), <https://nextcity.org/daily/entry/tests-find-possible-evidence-of-bias-in-small-business-lending-again>.

113. AMBER LEE ET AL., DISINVESTMENT, DISCOURAGEMENT AND INEQUITY IN SMALL BUSINESS LENDING, NAT'L CMTY. REINV. COAL. 4 (2019), <https://ncrc.org/disinvestment/>.

114. *Id.* at 5.

115. *Id.*

by banks collateralized by the amount of equity a homeowner has invested in the house.¹¹⁶ The amount is typically calculated as the difference between the value of the house and the amount owed, minus fees, so long as 85% of the home's value remains untouched.¹¹⁷ Between 7%–25% of new businesses are started with capital from home equity loans, and HELOCs are seen as critical to jumpstarting new businesses because they are typically offered at lower rates compared to most small business loans or lines of credit.¹¹⁸ In an era where racial discrimination still exists as a central feature of the home loan market, another barrier exists in small business financing for households of color.

F. Discrimination in Banking Services

Yet another obstacle to credit for households of color is the fact that banking services are only offered to low-income households at premium rates with high fees. Accounts with lower deposit amounts are charged higher fees in the form of monthly fees and overdraft fees.¹¹⁹ Banks adopt “short-termist” policies of maximizing profit margin potential per transaction rather than overall.¹²⁰ Therefore, they are loath to expend their services on smaller-sized accounts and thus create disincentives to those with such accounts by requiring high opening account balances, charging larger annual and monthly fees based on account balances, and charging penalty fees for not maintaining a certain-sized balance or for overdrafts.¹²¹ Additionally, conventional banks often limit their physical branches to higher-income areas.¹²²

Conventional banks are rarely found in low-income neighborhoods with high minority populations. In their place are predatory lending institutions charging exorbitant interest rates, such as payday lenders, pawnbrokers, or Rent-to-Own stores.¹²³ These institutions provide

116. Jane Hodges, *Should You Use a Home Equity Loan to Fund Your Startup?*, MAGNIFY MONEY (Jan. 30, 2019), <https://www.magnifymoney.com/blog/mortgage/use-home-equity-loan-fund-startup/>.

117. *Id.*

118. *Id.*

119. Vu-Dinh, *supra* note 12, at 192.

120. Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265–268, 280, (2012). (“[S]hort-termism or myopia, which is defined as the excessive focus . . . on short-term results, whether quarterly or short-term portfolio returns, and a repudiation of concern for long-term value. . . . A 2005 survey of 401 financial executives demonstrates the pervasiveness of short-termism. Financial executives confirmed that they would take an action that is value-decreasing for their firms to meet [short term] earnings expectations.”).

121. *See generally, id.* (explaining the pervasiveness, problem, and symptoms of short-termism within corporate and personal lenders). Vu-Dinh, *supra* note 12, at 192.

122. Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217, 1226 & n.44 (2004) (citing CHRISTOPHER L. PETERSON, *TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET* 199, 218 (1st ed. 2004)).

123. *See id.*

quasi-banking and quasi-lending services, collateralized by paychecks at an interest rate that can soar to 400% or more.¹²⁴

The inability to obtain affordable banking services affects one's access to credit in a number of ways. In the process of obtaining a mortgage, lenders investigate a borrower's financial history (including documented expenses and payments) as captured by bank statements preceding the loan application.¹²⁵ In general, bank accounts document one's ability to handle financial matters reliably, making it easier to qualify for consumer credit and business credit as well, and without a bank account, minority borrowers are handicapped at proving their creditworthiness.¹²⁶

G. Barriers to Access Financial Literacy Education

At the heart of racial discrimination in credit are the barriers to access financial literacy education in communities of color. Financial literacy can be defined as the ability to "make informed judgments and to take effective actions regarding the current and future use and management of money."¹²⁷ Financial literacy is one of the most effective tools supporting household economic growth by equipping individuals with the ability to handle both daily and long-term financial decisions.¹²⁸ Without it, it is difficult to negotiate better loan terms or credit card offers. According to a 2015 National Financial Capabilities Study of over 27,000 individuals nationwide (at least 500 in each state), sponsored by the FINRA Investor Education Foundation, minorities scored 6–15 points lower on financial literacy tests than whites.¹²⁹

Financial literacy has been a major component of numerous successful economic development programs and has become an imperative step in best practices for microfinance in low-income

124. Kelly Anne Smith, *The True Cost Of Payday Loans*, FORBES (Oct. 27, 2019, 8:00 AM), <https://web.archive.org/web/20191027125124/https://www.forbes.com/sites/advisor/2019/10/27/the-true-cost-of-payday-loans/#48f78b5d6947>.

125. HUD 4155.1, 5-B-1-6, U.S. DEP'T. OF HOUS. & URB. DEV. (2011), www.hud.gov/sites/documents/4155-1_5_SECB.PDF.

126. Lance Cothorn, *Can I Get A Credit Card Without A Bank Account?*, U.S. NEWS & WORLD REP. (June 25, 2019), <https://creditcards.usnews.com/articles/can-i-get-a-credit-card-without-a-bank-account>.

127. Afton Cavanaugh, *Rich Dad vs. Poor Dad: Why Leaving Financial Education to Parents Breeds Financial Inequality & Economic Instability*, 34 CHILD.'S LEGAL RTS. J. 59, 63 (2013) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-93SP, HIGHLIGHTS OF GAO FORUM: THE FEDERAL GOVERNMENT'S ROLE IN IMPROVING FINANCIAL LITERACY 1 (Nov. 2004), <http://www.gao.gov/new.items/d0593sp.pdf>).

128. Vu-Dinh, *supra* note 12, at 219 & n.230 (citing Syden Mishi et al., *Impact of Financial Literacy in Optimising Financial Inclusion in Rural South Africa: Case study of the Eastern Cape Province*, ECON. RES. S. AFR. 21–22 (2012)).

129. Abdullah Al-Bahrani & Jamie Weathers, *Persistence of the Racial Financial Literacy Gap. Can Parental and Formal Financial Education Bridge the Gap?* 8–10 (2019) (unpublished manuscript) (on file with author).

households. Microfinance is a banking service in which low-income households, or those who otherwise cannot qualify for a conventional loan, are lent small sums of money, with the goal of providing impoverished households the opportunity to build capacity and become self-sufficient.¹³⁰ One of the micro-finance movement's most significant results has been the increase in financial literacy for historically disenfranchised communities.¹³¹ Even where microfinance has not resulted in an increase in household income, the financial literacy programming packaged with microfinance loans has increased financial independence and personal liberty.¹³²

But only a fraction of this nation's disenfranchised are privy to the in-depth financial literacy education of microfinance—financial literacy programs are offered in public schools in less than half of U.S. states, leaving this education up to parents in most of the country¹³³ and in low- and middle-income households, such education, often, does not exist at all.¹³⁴

Nearly one-third of all personal bankruptcies are filed by those living below the poverty level, suggesting that poor people have insufficient access to financial literacy education.¹³⁵ Other evidence suggests that the financial literacy programs that do in fact exist for the working poor are often administered only after a negative event such as bankruptcy or in the context of a deeply needed credit repair process—and accordingly can be demeaning and ineffective.¹³⁶

Without financial literacy, economic benefits such as business credit, long-term consumer credit, and homeownership are often

130. Julia Kagan, *Microfinance*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/microfinance.asp> (updated Jul. 21, 2021)). The microfinance movement was first widely developed in the 1970s in Bangladesh, through the work of Professor Muhammad Yunus. Celia W. Dugger, *Peace Prize to Pioneer of Loans to Poor No Bank Would Touch*, N.Y. TIMES (Oct. 14, 2006), <https://www.nytimes.com/2006/10/14/world/asia/14nobel.html>. He then founded Grameen Bank, which today has about 2,500 branches and lends billions of dollars to nine million borrowers worldwide, 97% of them being women, with a repayment rate of approximately 99%. *About Us*, GRAMEEN BANK, <https://www.grameen-info.org/about-us/> (last visited Aug. 29, 2021).

131. Faraha Nawaz, *Microfinance, Financial Literacy, and Household Power Configuration in Rural Bangladesh: An Empirical Study on Some Credit Borrowers*, 26 VOLUNTAS 1100, 1118 (2015). The impact has been observed particularly amongst women in South Asian countries with deep traditions of a caste society. Usha Gopinath, *More than microfinance: Financial literacy in India*, ACCION (May 24, 2016), <https://www.accion.org/microfinance-financial-literacy-india>.

132. See Stephanie Wykstra, *Microcredit Was a Hugely Hyped Solution to Global Poverty. What Happened?*, VOX (Jan. 15, 2019), <https://www.vox.com/future-perfect/2019/1/15/18182167/microcredit-microfinance-poverty-grameen-bank-yunus>.

133. COUNS. FOR ECON. EDUC., SURVEY OF THE STATES: ECONOMIC AND PERSONAL FINANCIAL EDUCATION IN OUR NATION'S SCHOOLS 1 (Mar. 2012), <https://www.councilforeconed.org/wp-content/uploads/2011/11/2011-Survey-of-the-States.pdf> (finding that only twenty-two states require students to take a high school course in economics and only fourteen states require schools to offer a personal finance course).

134. Cavanaugh, *supra* note 127, at 80.

135. See Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 410 (2009).

136. See *id.* at 425.

unattainable in households lacking intergenerational wealth, especially as these households are likely paying more in rent than they would for a mortgage.¹³⁷ The skills needed to budget in the long-term, earn interest on savings, plan for a major purchase, navigate underwriting, calculate interest payments and insurance costs, and negotiate with lenders, sellers, and insurance brokers are not intuitive; yet these skills, measured by a FICO score, are imperative to business credit, long-term consumer credit, and homeownership.

V. SHAREHOLDER CAPITALISM AND SHORT-TERMISM

The common thread in these various permutations of racial discrimination in lending is an economic justification that is best explained by the concepts of “short-termism” and “shareholder capitalism.” As explained in the Introduction, the knee-jerk retort to the allegation of discrimination in lending is the assertion that credit is distributed in proportion to household incomes and credit scores, and those just happen to be lower amongst households of color.¹³⁸ These arguments try to justify the unwillingness to buck financial trends, albeit racist ones, for fear of legal repercussions of shareholder litigation seeking to maximize immediate profit above all else. Not only does this justification fail to recognize the abundance of evidence of racial discrimination discussed above, but it also fails to recognize the economically unsound nature of such practices.

In 1919, the Michigan Supreme Court ruled that auto-maker Henry Ford was bound by decisions that maximized immediate profit for his company’s shareholders, rather than reinvest into workers’ wages (a move Ford made most likely in an effort to break one of its key investors and competitors, the Dodge Motor Company, rather than for philanthropic reasons).¹³⁹ This principle has not been upheld by the U.S. Supreme Court, yet the decision has been cited positively in at least seventy-one other cases in courts across the nation.¹⁴⁰ For whatever reason, it has become the landmark case supporting what has come to be known as “shareholder capitalism”, despite the fact that the scope of its binding legal authority is actually quite minimal.¹⁴¹ The “shareholder

137. See CHOI ET AL., *supra* note 19, at 17–18.

138. Theodore Day & Stan Liebowitz, *Mortgage Lending to Minorities: Where’s The Bias?* 36 ECON. INQUIRY, 1–2 (1998), <https://epps.utdallas.edu/~liebowit/mortgage/mortgages.pdf>.

139. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919); Ryan Felton, *The Dodge v. Ford Court Case Helps Explain How Corporations Work Today*, JALOPNIK (Jan. 1, 2018), <https://jalopnik.com/the-dodge-v-ford-court-case-helps-explain-how-corporat-1821512982>.

140. Westlaw.com, (search “Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)”; choose the “Citing References” tab; then choose “Cases” from the dropdown menu).

141. See Steven Pearlstein, *When Shareholder Capitalism Came to Town*, AMERICAN PROSPECT (Apr. 19, 2014), <https://prospect.org/economy/shareholder-capitalism-came-town/>; see also Loizos Heracleous & Luh Luh Lan, *The Myth of Shareholder Capitalism*, HARV. BUS. REV. (Apr. 2010), <https://hbr.org/2010/04/the-myth-of-shareholder-capitalism>.

primacy theory” of shareholder capitalism asserts that maximizing immediate shareholder value is the singular goal of a corporation, at the expense of workers and other stakeholders, innovation, and even long-term growth.¹⁴² This often creates tensions between the short-term profit of shareholders and the long-term health of the company and calls into question the propriety of allowing state law on corporate fiduciary duty to elevate wealth maximization above the best long-term interests of the corporation or even the wishes of investors.¹⁴³ As scholars have pointed out, this is at odds with the changing definition of what actual shareholder interests are. Today, identified shareholder values include human rights and environmentalism, and some have preferred longer-term growth to be reaped in their retirement years.¹⁴⁴ Congress espouses shareholder primacy theory, as demonstrated in SEC reporting requirements.¹⁴⁵

In the last century, cataclysmic market failures—the 1930s Great Depression, the 1997 Asian Financial Crisis, the 2001 Enron Crisis, and the 2008 Great Recession—resulted when the market primarily prioritized the highest possible rate of return per transaction, rather than over a period of time for the company and economy at-large. Most recently, in the Great Recession, the economy collapsed because of the myopic behavior of corporate managers, asset managers, and investors, who failed to account for the risk associated with transactions with high-profit margins in the immediate term—coined “short-termism” after the 2008–2009 Great Recession.¹⁴⁶ In her multiple writings on the topic, Professor Emeriti Lynne Dallas explored data suggesting that short-termism bears responsibility not only for the 2008 housing bubble but also the Enron financial scandal in the early 2000s.¹⁴⁷ She argued the potential for the greatest possible gain in the least amount of time by issuing loans as large as possible regardless of borrower reliability resulted in a peak of profit in the financial systems that were predicated on borrowers who eventually became insolvent on loans for overpriced homes.¹⁴⁸ This willful ignorance of risk, adopted by borrowers, lenders, asset managers, investors, board members, and CEOs, not only resulted in an exacerbation of disparity of income and

142. See Lenore Palladino & Kristina Karlsson, *Towards Accountable Capitalism: Remaking Corp. Law through Shareholder Governance*, ROOSEVELT INST. 1 (Oct. 3, 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Towards-%E2%80%98Accountable-Capitalism%E2%80%99-brief-201810.pdf>.

143. Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RES. L. REV. 865 (2019).

144. See *id.* at 868–69. See Judd Sneirson, *Shareholder Primacy and Corp. Compliance*, 26 FORDHAM ENV'T L. REV. 450, 454 (2015).

145. Lipton, *supra* note 143, at 875–76.

146. See Dallas, *supra* note 120, at 267.

147. *Id.*

148. *Id.* at 280–82.

housing quality by race, but it was also incredibly detrimental to the economy. Targeting people of color—a demographic with significantly less access to financial literacy¹⁴⁹—made it easy to sell subprime loans, which the industry did at a significantly higher rate than white borrowers with significantly lower household incomes.¹⁵⁰ Yet, not only would the borrowers pay in the end, so too did the rest of the nation and world.

The idea that short-termism results in market collapse has also gained traction outside of academia in the business community. In 2009, the Aspen Institute issued a report entitled, “Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management,” which was signed by a multitude of founders and leaders of high-powered companies such as Berkshire Hathaway, Vanguard Group, and IBM, to name a few.¹⁵¹

Holding aside any discriminatory effect or civil rights violations related to access to credit, thoughtful analysis of the Great Recession and other cataclysmic economic events of this century demonstrates the same conclusion: short-termism is detrimental. In order to foster meaningful economic growth, more inclusive, long-term economic planning must be its replacement.

VI. SOLUTIONS TO DATE

A. *Litigation*

Racial discrimination has attracted enough attention from members of Congress to result in the passage of four key statutes offering some relief to discriminatory lending. These acts pinpoint specific areas, including housing, consumer credit, and banking. While each offers some form of relief, they are not without shortcomings. The practical reality is that enforcement under these statutes requires access to sophisticated legal services, the time, and the capacity to bring federal litigation often unavailable to potential litigants of color.¹⁵² Additionally, for most of these laws, the most effective means of enforcement is through the DOJ or another federal agency, which so often are subject to the whims of the political process. In essence—for these and a variety of other reasons—enforcement has been “lackluster”

149. Al-Bahrani & Weathers, *supra* note 129, at 2.

150. Badger, *supra* note 76; Press Release, Dep’t of Just., *supra* note 80.

151. See Dallas, *supra* note 120, at 267 n.12.

152. See Sara Sternberg Green, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1267-1268 (2016).

at best.¹⁵³ The following acts, however, have put in place some litigation opportunities to remove discrimination in lending.

1. The Fair Housing Act

In the area of housing, the Fair Housing Act was created within the Civil Rights Act of 1968, making it illegal to deny a loan related to construction, rehab, or purchase of housing based on race, color, religion, sex, handicap, or familial status.¹⁵⁴ Under the Civil Rights Act, individuals denied mortgages could pursue remedy regardless of whether the U.S. Department of Housing and Urban Development (HUD) or DOJ does.¹⁵⁵ Later, under President Obama, provisions were added requiring that all developments using federal funds be required to provide access to a variety of high-quality services, including transportation, jobs, and education, and under a defined timeline.¹⁵⁶ Ideally, successful claims and new funding and programming under the Fair Housing Act would result in no disparity of mortgages across races, which should, in turn, also positively increase African-American households' access to credit for business purposes.

And yet, the Fair Housing Act's potential to remedy past wrongs and obstruct continued discrimination remains unmet as discrimination continues. Under the Act, the enforcement powers of the HUD are limited, and victims carry most of the burden to bring complaints via HUD or in federal court.¹⁵⁷ Under President Trump, HUD Secretary Ben Carson even postponed the timelines for enforcement of Fair Housing Act-related grant requirements.¹⁵⁸ The uncertainty as to whether President Biden or subsequent presidents will recognize these standards only highlights the ineffectiveness of the Fair Housing Act as one of the few avenues of recourse.

153. *Discrimination in Home Mortgage Lending: Hearing Before the Subcomm. on Consumer and Regul. Aff. of the Senate Comm. on Banking, Hous., and Urb. Aff.*, 101st Cong. 2 (1989) (statement of Sen. Dixon) (“[I]t’s 21 years since passage of the Fair Housing Act. Fifteen years since the Equal Credit Opportunity Act was passed in the Congress, and 11 years since the Community Reinvestment Act became the law of this land, and still we have discrimination in lending. The problem today is not lack of laws, in my view, it is lack-luster enforcement.”). *Banks Continue to Deny Home Loans to People of Color*, EQUAL JUST. INITIATIVE (Feb. 29, 2018), <https://eji.org/news/banks-deny-home-loans-to-people-color/>.

154. Fair Housing Act, 42 U.S.C. §§ 3601–3631 (1968) (amended 1988, 1995).

155. §§ 3610(a), 3614.

156. See Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (Apr. 11, 2018), <https://www.newyorker.com/news/news-desk/the-unfulfilled-promise-of-the-fair-housing-act>.

157. *Id.*

158. In January 2020, Carson indicated the release of a forthcoming HUD rule that would waive enforcement of various FHA features. Thomas Silverstein, an attorney with the Lawyers’ Committee for Civil Rights Under Law stated, “Based on what’s been reported, HUD is signaling a massive retreat from meaningful oversight and accountability with respect to its grantees’ activities.” Aaron Wiener, *Ben Carson Shows He’s Not Actually Interested in Making Cities Affordable*, MOTHER JONES (Jan. 3, 2020), <https://www.motherjones.com/politics/2020/01/ben-carson-shows-hes-not-actually-interested-in-making-cities-affordable/>.

2. The Community Reinvestment Act

The Community Reinvestment Act (CRA) was created in 1977 in order to remediate the longstanding practice of redlining but is characterized as “toothless.”¹⁵⁹ It was intended to hold banks accountable for the effects of their historic disinvestment in the neighborhoods in which communities of color lived and owned businesses.¹⁶⁰ However, the standards to which banks are held under the CRA are vague at best. Under the CRA, the Federal Reserve:

- examines state member banks to evaluate and rate their performance under the CRA;
- considers banks’ CRA performance in context with other supervisory information when analyzing applications for mergers, acquisitions, and branch openings; and
- shares information about community development techniques with bankers and the public.¹⁶¹

The evaluation is conducted using: i) a “lending test”; ii) a “service test”; iii) an “investment test”; or iv) a combination of these three in some permutation, depending on the size of the financial institution.¹⁶² These tests determine whether the bank meets the following grades: i) “outstanding”; ii) “satisfactory”; iii) “needs to improve”; or iv) “substantial noncompliance.”¹⁶³ Ironically, for a bank, there are no numeric metrics to measure whether lending institutions are in compliance with the CRA.

This impotence is exacerbated by the fact that regulators look at this somewhat meaningless score only when a bank has requested to expand, merge, or undertake a major activity.¹⁶⁴ Only eight of 50,000

159. BARADARAN, *supra* note 17, at 155; 166 CONG. REC. 118 (2020) (statement of Rep. Ocasio-Cortez.); See Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 233 (2004); see also Keith N. Hylton, *Banks and Inner Cities: Market and Regulatory Obstacles to Development Lending*, 17 YALE J. ON REG. 197, 204 (2000).

160. See Michael Berry & Jessie Romero, *Community Reinvestment Act of 1977*, FED. RSRV. HIST., https://www.federalreservehistory.org/essays/community_reinvestment_act (last visited Aug. 14, 2021).

161. *Community Reinvestment Act (CRA)*, BD. OF GOVERNORS OF THE FED. RES. SYS., (last updated Sep. 28, 2020), https://www.federalreserve.gov/consumerscommunities/cra_about.htm.

162. See *Community Reinvestment Act (CRA): Evaluation Methods*, BD. OF GOVERNORS OF THE FED. RES. SYS., (last updated Mar. 23, 2021), https://www.federalreserve.gov/consumerscommunities/cra_exam.htm.

163. See *Community Reinvestment Act (CRA): Evaluating a Bank’s CRA Performance*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., (last updated Dec. 7, 2018), https://www.federalreserve.gov/consumerscommunities/cra_peratings.htm; see also COMMUNITY DEVELOPMENTS FACT SHEET: COMMUNITY REINVESTMENT ACT, OFF. OF THE COMP. OF THE CURRENCY, (2014), <https://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-fact-sheets/pub-fact-sheet-cra-reinvestment-act-mar-2014.pdf>.

164. See COMMUNITY DEVELOPMENTS FACT SHEET, *supra* note 163.

mergers were rejected in the first twelve years of the CRA.¹⁶⁵ Enforcement may be carried out by only three regulators—the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation (FDIC), and the Board of Governors of the Federal Reserve System—and the only repercussion of a finding of violation has been to reject the merger application.¹⁶⁶ There are no private causes of action provided by the CRA which might compensate for lackluster compliance by these aforementioned enforcement entities.¹⁶⁷

3. Equal Credit Opportunity Act

Like the CRA, the Equal Credit Opportunity Act (ECOA) was intended to remediate past discrimination in lending, but in the consumer credit market. Enacted in 1974, the ECOA explicitly makes it illegal for a creditor to discriminate by race.¹⁶⁸ But, as in housing and other civil rights laws, the burden of the plaintiff is more stringent, in which many courts require discriminatory intent in addition to disparate impact.¹⁶⁹ Even where discriminatory evidence is present, methods of enforcement are hamstrung in a fashion similar to that of the CRA. Overseen by the Federal Trade Commission (FTC), the ECOA relies on the FTC and the U.S. Attorney General to pursue civil actions.¹⁷⁰ Private civil suits are authorized by the statute, but under limited circumstances: when the plaintiff can prove that the creditor is engaged in a pattern or practice of discrimination.¹⁷¹ As a result of this, combined with the increased burden in finding discriminatory intent and a higher standard for proving damages, private suits have been few and far between.¹⁷² Three major cases have been brought with significant import on the racist tactics of credit card companies, all involving Latino plaintiffs, and all resulting in settlements, which clearly have not eradicated the ongoing practices that continue today.¹⁷³

165. See Kane, *supra* note 71, at 552 (citing Jonathon P. Tomes, *The “Community” in the Community Reinvestment Act: A Term in Search of a Definition*, 10 ANN. REV. BANKING L. 225–227, 232 n.9 (1991)).

166. *Id.*

167. *Id.* at 543.

168. 15 U.S.C. § 1691 (2014).

169. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L. J. 1566, 1593–1599 (2019); see Kane, *supra* note 71, at 561–62.

170. See 15 U.S.C. §§ 1691(c), (e) (2014).

171. *Id.*

172. Scott Ilgenfritz, *The Failure of Private Actions as an ECOA Enforcement Tool: A Call for Active Governmental Enforcement and Statutory Reform*, 36 U. FLA. L. REV. 447, 457 (1984).

173. See Badger, *supra* note 76.

4. The Credit Card Accountability Responsibility and Disclosure Act

In 2009, Congress passed the Credit Card Accountability Responsibility and Disclosure Act ("CARD").¹⁷⁴ Intended to protect consumers from predatory credit card billing practices, it includes key features that specify how long a credit card company must allow a consumer to make a payment, forces companies to apply payments to higher-rate debt first, prohibits the retroactive application of credit rate increases, and limits the number of fees that could be charged to low-balance cards issued to borrowers with poor credit.¹⁷⁵ However, CARD does not address the rampant racist practices in the industry, such as marketing and customer service targeting African-American and Latino households. Nor does the Act address the interest rates on the products offered to households living in census tracts with high proportions of African-American and Latino households. The Act also has been criticized for failing to give its beneficiaries a private right of action.¹⁷⁶

VII. POLICIES—EXPANDED HOUSING OPPORTUNITIES THROUGH THE ARRA AND THE NEED FOR CONTINUATION.

A variety of housing finance tools have been developed or more thoroughly experimented with under the American Recovery and Reinvestment Act of 2009 (ARRA).¹⁷⁷ Amongst these tools were innovative home mortgage products and subsidized financing for the construction and/or sale of homes to low-income households. Section 8 to Homeownership,¹⁷⁸ a program originally created in 1974 and expanded in 2000 to include support for homeownership,¹⁷⁹ and one of the programs funded by the ARRA,¹⁸⁰ enabled employed, low-income households with suitable credit scores to use Section 8 vouchers to pay for part of a mortgage payment.¹⁸¹

174. Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 & 16 U.S.C.).

175. *See Id.*

176. Jim Hawkins, *The CARD Act on Campus*, 69 WASH. & LEE L. REV. 1471, 1529–1530 (2012).

177. *See* American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. § 115 (codified as amended in scattered sections of 16 & 42 U.S.C.). The stated purposes of ARRA are "[m]aking supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization . . . and for other purposes."

178. 24 C.F.R. § 982.1 (2015).

179. CONG. RSCH. SERV., AN OVERVIEW OF THE SECTION 8 HOUSING PROGRAMS: HOUSING CHOICE VOUCHERS AND PROJECT-BASED RENTAL ASSISTANCE (Feb 7, 2014); *See* Section 8 Homeownership Program, 65 Fed. Reg. 55133 (Sept 19, 2000) (to be codified at C.F.R. §§ 5, 903, 982).

180. *See* The Housing and Economic Recovery Act's Changes to the Voucher Programs, 79 Fed. Reg. 36145 (June 25, 2014) (to be codified at C.F.R. § 983.2) (funded under the tenant-based voucher of the Section 8 Program).

181. *Id.*

Unfortunately, though the homeownership on-boarding process provided effective financial literacy training with long-term impact to those undergoing loan qualification,¹⁸² it did not go far enough. Many of those counseling programs that had injections of funding from HUD's housing counseling program immediately after the housing crisis were Congressionally de-funded by 2011,¹⁸³ as the housing stock built with ARRA funds sold (ARRA was not re-funded after its second version in 2009). As argued earlier, this gap has not been filled by public programming; in a national study conducted by Champlain College to determine each state's efforts to provide financial literacy education, the majority of states received a C or lower on a scale of A to F.¹⁸⁴ Other nationwide studies revealed similar conclusions, reflecting that there is insufficient coverage of the topic in public schools.¹⁸⁵

VIII. NEW SOLUTIONS NEEDED—INCLUSIVE ECONOMICS AND USING EFFICIENCY AND EGALITARIANISM TO PROTECT THE CIVIL RIGHT TO ACCESS CREDIT

The solutions developed to date are not enough. Today, lending policies continue to be not only racist but also dangerous to the economic system as a whole. Instead, the more economically efficient models of underwriting can actually be more inclusive, given that communities of color are largely underserved in the credit market, and in a sense, comprise a largely untapped market. Creating more appropriate lending products to serve communities of color would not only benefit such households but would also be more beneficial on a macro-economic level by creating more commercial activity. This section will discuss: a) additional litigation strategies that could be used to dismantle laws that run counter to inclusive economic policies, and b) effective policies that would reduce barriers to credit. Using both litigation and policy, the resulting overarching strategy of inclusive economics could be an effective antidote to the civil rights violations impeding access to credit for the historically disenfranchised.

182. See, e.g., MARVIN SMITH ET AL., THE EFFECTIVENESS OF PRE-PURCHASE HOMEOWNERSHIP COUNSELING AND FINANCIAL MANAGEMENT SKILLS, A SPECIAL REPORT BY THE COMMUNITY DEVELOPMENT STUDIES AND EDUCATION DEPARTMENT, FED. RESERVE BANK OF PHILA. (Apr. 2014), <https://www.philadelphiafed.org/-/media/frbp/assets/community-development/reports/0414-homeownership-counseling-study.pdf>.

183. See CONG. RSCH. SERV., R41351, HOUSING COUNSELING: BACKGROUND AND FEDERAL ROLE (2012).

184. *Is Your State Making the Grade?: 2017 National Report Card on State Efforts to Improve Financial Literacy in High Schools*, CHAMPLAIN COLL., <https://www.champlain.edu/centers-of-experience/center-for-financial-literacy/report-national-high-school-financial-literacy> (last visited Feb. 6, 2021).

185. Stuart Draper, *Why Financial Literacy In Schools Matters Today For the Workforce of Tomorrow*, FORBES (Dec. 16, 2019 10:00 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2019/12/16/why-financial-literacy-in-schools-matters-today-for-the-workforce-of-tomorrow/>.

The following principles underscore the foundation of inclusive economic law and policy:

- Inclusive economic policies must recognize that corporations owe a fiduciary duty to a variety of stakeholders, not just financial investors, but also workers, customers, those displaced by corporate activity, and possibly members of the surrounding community;
- Inclusive economic policies must recognize and value the diversity of economies, particularly the smaller, more localized economies. Smaller economies are not necessarily superior to large-scale industry, but diversification of an economy into small and large businesses is inherently more stable than an economy entirely dependent on a few, monolithic industries;
- Inclusive economic policies must recognize the value of informal economies as pre-cursors to industry and create features in our economic system that enable the creation of wealth in households operating within the informal economy;
- Inclusive economic policies must recognize the diversity of household types in the U.S. that do not fall within the narrow demographic of Anglo-Saxon, nuclear households of privilege, and should recognize the ability of non-nuclear and multi-generational households of color, including immigrant households, to add value to an economy.¹⁸⁶

These principles guide how litigation and policy should be crafted under a theory of inclusive economics.

A. Inclusive Economics and Litigation—Constitutional Strategies in Place of Insufficient Statutes

Though yet to gain much traction, some scholars have developed litigation strategies to expand access to credit as a constitutional right. These strategies can be found in constitutional jurisprudence and antitrust litigation. While the same impediments to litigation would remain for victims seeking relief, these strategies at least provide litigation avenues that are not contingent on the political nature of federal agency officials like with the Fair Housing Act, the CRA, and the ECOA.

186. Vu-Dinh, *supra* note 12, at 209.

1. Equal Protection and Due Process Clause

In credit discrimination cases in which the CRA, Fair Housing Act, ECOA, or other civil rights statutes might not be available, there are constitutional strategies worth pursuing under the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. In *The Constitutionality of Redlining: The Potential for Holding Banks Liable as State Actors*, Joan Kane proposes holding banks liable for redlining by characterizing them as state actors.¹⁸⁷ Arguing that banks are “so intertwined” with the essential nature of American life, she refers to banks as “extensions” of the government, to the extent they are symbiotic, under both the “state actor” test and the “nexus” test from constitutional jurisprudence.¹⁸⁸ Kane invokes the “government encouragement test” (arguing that when the government regulates and encourages banks to fulfill a need critical to society, it becomes a state actor); the “public function test” (arguing that the banks fulfill a role generally reserved for the sovereign); and the “symbiotic test” (arguing that banks are so heavily regulated that they serve as state actors). She argues that for the purposes of establishing constitutional duties, banks can and should be considered state actors.¹⁸⁹ She then applies Fifth and Fourteenth Amendment analysis to discriminatory banking practices in lending, specifically redlining in the real property context.¹⁹⁰

As indicated by more contemporary discrimination litigation, even if the courts were to recognize banks as state actors and analyze discrimination cases under these constitutional protections, a discriminatory intent would need to be clearly established.¹⁹¹ But some precedent exists where discriminatory intent has not been required in cases involving discrimination in the lending context. In *Latimore v. Citibank Federal Savings Bank*,¹⁹² arguing that “wholesale transposition

187. Kane, *supra* note 71, at 529.

188. *Id.* at 546–47. (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721 (1961), and *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The “state actor test” under *Burton* examines whether an act by a private entity qualifies as a state action, whereas the “nexus test” under *Blum* examines whether there is a sufficient connection between a private actor and a state actor to qualify the actions of the state actor as private functions.

189. *Id.* at 546–53 Kane argues that the government benefits from bank deposits and bank loans, and that the activities of the bank are so physically and financially intertwined with the government that the acts of the private entity could be imputed to the government, under the standard set out under *Burton*.

190. *Id.* at 558–65.

191. See *Washington v. Davis*, 426 U.S. 229, 245 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987); *United States v. Windsor*, 570 U.S. 744, 769–70 (2013). In *Washington*, the Court used a “discriminatory racial purpose” test and used the discriminatory intent requirement to reject discrimination claims in the context of the death penalty in *McCleskey*, despite overwhelming statistics. In subsequent cases the Court refers to this discriminatory intent requirement as “animus.” *Windsor*, 570 U.S. at 769–70 (in the context of discrimination of same-sex couples).

192. *Latimore v. Citibank Fed. Sav. Bank*, 151 F. 3d 712, 712 (7th Cir. 1998).

of the *McDonnell Douglas* standard¹⁹³ to the credit discrimination context would display insensitivity to the thinking behind the standard,” Judge Posner refused to apply the discriminatory intent analysis to a case involving an African-American litigant suing a mortgage lender for discrimination.¹⁹⁴ He then allowed the litigant to meet the burden of showing discrimination in the “conventional way, without relying on any special doctrines of burden-shifting.”¹⁹⁵ While it appears that the issue raised by *Latimore* never made it to the U.S. Supreme Court, it has been cited positively by sixty-three cases and only cited negatively by six.¹⁹⁶ Indeed, the FDIC was likely influenced by *Latimore* when it adopted policies clarifying that lack of discriminatory intent is not a defense to discrimination.¹⁹⁷ In *Proving Racial Discrimination and Monitoring Fair Lending Compliance: the Missing Data Problem in Nonmortgage Credit*, Professor Winnie Taylor suggests that a prima facie case of discrimination does not require a showing of discriminatory intent or “overt” discrimination.¹⁹⁸ Professor Taylor proceeds to argue that even if overt evidence of racism is constitutionally required, federal data collected on race in the mortgage industry serves as sufficient evidence. For Congress to reach its goal of eradicating racism in lending, the government should collect such data in all lending industries.¹⁹⁹

Additionally, extensive evidence of discriminatory intent has been collected by various think tanks, such as secret shopper data reflecting discrimination in customer service based on race and the study indicated that African-American and Latino households are more heavily targeted with more expensive, inferior lending products than their white counterparts of similar incomes and credit scores.²⁰⁰ Today, with advancements in data-gathering technology, evidence is more readily available to support discriminatory intent than when the civil rights acts and the civil rights constitutional jurisprudence were first developed.

193. The *McDonnell Douglas* standard requires an employer to produce non-discriminatory basis for the litigated employment issue in response to the establishment of a prima facie case, which then shifts the burden to the plaintiff to pretext. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

194. *Latimore*, 151 F.3d at 714.

195. *Id.* at 715.

196. Westlaw.com (search “*Latimore v. Citibank Fed. Sav. Bank*, 151 F. 3d 712”; choose the “Citing References” tab, and then choose “Cases” from the dropdown menu).

197. See, FED. RSRV., CONSUMER COMPLIANCE HANDBOOK: FEDERAL FAIR LENDING REGULATIONS AND STATUTES (2017), https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_over.pdf.

198. Winnie Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 REV. BANKING & FIN. L., 199, 208 (2011).

199. *Id.* at 264.

200. Lee et al., *supra* note, 113 at 4–6.

2. Property—that you don’t own—as a Constitutional Right

Other scholars have argued that a constitutional right to property exists even if said property is not that which is already owned. The bulk of Takings Clause cases involve a litigant requesting just compensation for private property for which the litigant had legal title or “direct rights” to that property.²⁰¹ By contrast, Harvard Professor Frank Michelman argues the existence of a constitutional right to property even when the litigant does not hold legal title to it;²⁰² and, in order to define the boundaries of such a property right, Professor Michelman asks whether the property in question is heavily relied upon for daily existence.²⁰³ If the answer is in the affirmative, reliance is sufficient to warrant constitutional protection.²⁰⁴ He writes:

Property remains a significant constitutional right although what counts as property at any given time is apparently left entirely up to nonconstitutional law-makers. How can this be?

Let us consider that the institution of property is responsive to the values of security and regularity in daily social encounters—themselves conditions, it may well be said, upon which liberty in turn depends. In Justice Stewart’s words in the *Roth* case, ‘it is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.’ If so, then because daily reliance is obviously affected by contemporaneous legal rules, the content of those rules has a plain bearing on what should count as an illicit impairment of property. Indeed, an impairment might seem essentially to consist of a violation of, or departure from, the rules as they stood when the reliance arose.²⁰⁵

He further elaborates on how the Constitution even protects “property that is not treated as an entitlement”²⁰⁶ and that constitutionally-protected property can be defined as what people are entitled to expect.²⁰⁷ Quoting Harvard Professor Lawrence Tribe, he writes, “[A]t stake must be not only what people in fact expect upon examining the body of positive law, but also what they are entitled to expect, positive law to contrary notwithstanding.”²⁰⁸ Rather, Michelman argues, the Constitution should protect property that affects one’s

201. Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1099 (1981).

202. *Id.* at 1102.

203. *Id.*

204. *Id.*

205. *Id.* at 1102 (citing *Regents v. Roth*, 408 U.S. 564, 577 (1972)).

206. *Id.* at 1103.

207. *Id.*

208. *Id.* at 1109 (citing LAWRENCE TRIBE, AM. CONST. L. 469 (1978)).

ability to participate in the political process.²⁰⁹ He cites John Hart Ely to reconcile “what are sometimes characterized as two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other.”²¹⁰ They must focus “not on whether this or that substantive value is usually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.”²¹¹ Michelman argues that Article IV, Section 4 of the Constitution establishes a “systemic right of property,” but admits that such a right would be difficult to enforce.²¹² By way of example, Michelman discusses the demolition of the *Poletown* neighborhood in Detroit.²¹³ Here, residents protested planned real estate development projects in a neighborhood with a longtime presence of Polish immigrants.²¹⁴ He writes:

In these circumstances, we can easily see that property may represent more than money because it may represent things that money itself can't buy—place, position, relationship, roots, community, solidarity status,—yes and security too, but security in a sense different . . . My suggestion is to seek a rapprochement of property and popular sovereignty in the idea that rights under a political constitution, including property rights, are first of all to be regarded as political rights. They are precisely such, I suggest, because and insofar as they are rights affecting the individual's participation in popular sovereignty itself. . . . Rather one regards property as ‘an essential component of individual competence in social and political life’ as a ‘material foundation’ for ‘self-determination and self-expression,’ in sum as ‘an indispensable ingredient in the constitution of the individual as a participant in the life of the society, including not least the society's processes for collectively regulating the conditions of an ineluctably social existence.’²¹⁵

Michelman's arguments might be effectively applied to causes of action, arguing that rejection of a credit application (particularly where evidence exists that white counterparts are not being rejected or getting rejected at a lower rate) is a violation of a constitutional right to property. Today, access to credit affects a variety of aspects of daily life,

209. *Id.*

210. *Id.*

211. *Id.* at 1109 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST*, 1, 86–87 (1980)).

212. Frank I. Michelman, Comment, *Process and Property in Constitutional Theory*, 30 CLEV. ST. L. REV. 577, 585 (1981).

213. Michelman, *supra* note 201, at 1097–1098.

214. *Id.*

215. *Id.* at 1112.

including the ability to rent an apartment, get a job, and buy a home, car, or other consumer goods necessary for one's personal life or business. In that way, access to credit has become the property that qualifies for protection under the Constitution. The ability to secure credit affects one's "place, position, relationship, roots, community, and solidarity status" and most definitely affects one's material foundation for self-determination and self-expression.²¹⁶ Quite literally, without the ability to secure an apartment to rent or a house to buy, one is unable to participate in the political process because a home address is required when registering to vote.

3. Antitrust Litigation and Multiple Stakeholders

A broader question is who should be able to sue under a theory of inclusive economics. The question of standing is a fascinating one with a long history that exceeds the scope of this Article. This Article generally proposes that a system espousing inclusive economic principles must recognize a broader set of stakeholders than just two parties in a contractual transaction. Such a society should recognize that multiple stakeholders are affected by financial transactions that have important and lasting effects on a macro-economic scale. For instance, in a transaction where a corporation seeks to merge with another, the relevant stakeholders include not only the owners of the two corporations themselves but also the corporations' workers, customers, future customers, and those in other industries that have contracts with those corporations. Members of a corporation's local community may also be considered stakeholders as mergers can either bring jobs to or constrict commerce in that community. The interests of this broad spectrum of stakeholders should be measured and considered by the courts when examining causes of action that impact lending.

Recognizing multiple stakeholders is not without precedent in U.S. legal jurisprudence. In its mission to protect competition, case law has frequently expanded the definition of a stakeholder and continues to do so today. In antitrust litigation, the courts use a three-step burden-shifting framework in which the plaintiff must prove the existence of an anticompetitive effect that harms consumers.²¹⁷ If met, the defendant must then show a pro-competitive rationale.²¹⁸ Then, the burden shifts back to the plaintiff to show that more anticompetitive means exist that are less burdensome on the consumer.²¹⁹ The U.S. Supreme Court has stated:

216. *Id.*

217. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

218. *Id.*

219. *Id.*

Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'²²⁰

In essence, the market power of each stakeholder is analyzed, and a finding must be made whether there are "genuine adverse effects on competition."²²¹ This analysis provides a framework for recognizing multiple stakeholders.

a. Workers as Stakeholders, both Inside and Outside the Company

In a landmark line of antitrust cases, courts have recognized employees as stakeholders of contracts between companies.²²² Quite recently, employees of big tech companies who conspired to control prices have been recognized as stakeholders deserving of protection under antitrust laws.²²³ In this case, it was alleged that multiple large, well-known tech companies agreed not to hire one another's employees—referred to as "poaching"—with the intent, according to defendant employees, "to reduce employee compensation and mobility through eliminating competition for skilled labor."²²⁴ Defendants included Adobe, Apple, Google, and Intel, and the contracts under litigation included a wide variety of employees with a variety of job types.²²⁵ The employees brought individual civil claims, and the DOJ brought separate actions under antitrust laws.²²⁶

In these cases, the courts repeatedly found that the affected employees were valid stakeholders and that such activity "disrupted normal price-setting mechanisms that apply in the labor setting."²²⁷ Plaintiffs also successfully argued that the relevant stakeholders included not only the employees named in the suits but also employees from other companies who were affected by the same salary

220. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986) (citing 7 P. AREEDA, ANTITRUST LAW 429 (1986)).

221. *Id.* at 460.

222. *See, e.g., In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1192 (N.D. Cal. 2013); *United States v. Ebay Inc.*, No. 12-CV-05869-EJD-PSG, 2014 WL 5364751, at *1 (N.D. Cal. Sept. 2, 2014).

223. *See High-Tech Emp.*, 985 F. Supp. 2d at 1192.

224. *Id.* at 1173.

225. *Id.* at 1191.

226. *Id.*

227. *Id. See Ebay Inc.*, 2014 WL 5364751, at *1–3, The United States and Ebay entered a settlement agreement which prohibited Ebay from entering non-poaching agreements between high level tech companies. The court and litigants acknowledged the validity of qualified, noncompete agreements with employees, and also acknowledged that a company could choose not to hire someone from another tech company but made it clear that the latter decision could not be a result of an agreement signed with those other tech companies.

structure.²²⁸ The recognition of such a far-reaching scope of stakeholders has the potential to result in outcomes that are more broadly inclusive, strengthening the economic soundness of the decision in question.

b. Potential Consumers as Stakeholders

The courts in antitrust decisions have also recognized potential consumers as stakeholders of contracts between companies. In *United States v. Visa & Mastercard*, the Antitrust Division of the Department of Justice brought suit against two credit card companies that shared board and governance committee members.²²⁹ The DOJ argued that such governance duality resulted in customer rates and policies that threatened competition in violation of the Sherman Antitrust Act. The court agreed, stating that “exclusionary rules have significantly reduced product output and consumer choice in the issuing market and reduced competition in the network services market.”²³⁰

These lines of antitrust cases establish critical principles: that relevant stakeholders in economic litigation include not only workers and customers directly affected by financial institutions but also *potential* customers and employees who are not named parties in a suit between corporations. Expanding the definition of stakeholders in antitrust law might be analogized to recognizing the importance of borrowers and the protection of their rights in a credit transaction, even if they are not yet part of a lending transaction. In that borrowers could be and are affected by the discriminatory policies, one might similarly ask the courts to intervene.

Thus, where litigation strategies through the ECOA and the Fair Housing Act are not available in credit discrimination cases, these constitutional strategies and antitrust arguments could play a role in supporting litigation arising from inclusive economic principles and increasing access to credit.

B. Inclusive Economic Policymaking

Inclusive economic strategies aimed at increasing access to credit should also be expressed in policymaking. A large segment of the market of people who have funds to deposit and who have the financial and disciplinary means to take out and repay smaller loans, at the same lower rates for wealthier, mostly white customers, has been underserved due to skin color. While this is an injustice and a race-based civil rights violation, it is also an economic inefficiency to leave this large segment of the market untapped. The economic opportunity in

228. *In re High-Tech Emp.*, 985 F. Supp. 2d at 1192–93.

229. 163 F. Supp. 2d 322, 331–332 (S.D.N.Y. 2001).

230. *Id.* at 330.

providing affordable services to the poor has not been ignored in other service sectors, such as retail. Indeed, the world's largest company by revenue is Wal-Mart,²³¹ a discount store known for its low prices, with the largest share of its customer base having the lowest average income, in comparison with five of the nation's largest retailers.²³² In cell phone services, Cricket Wireless started out focusing on smaller, rural markets,²³³ and now is one of the premier low-cost cell phone service carriers, with a monthly plan beginning with a fixed \$30 in fees, no annual contract, or penalty fees for cancellation.²³⁴ Today, Cricket Wireless has 5,000 retail stores nationwide and a customer base of more than 10 million subscribers.²³⁵

Serving lower-income households is not merely morally sound; it is good business, and to neglect this demographic is economically inefficient. Furthermore, enabling this sector of the population with key tools that enable them to accumulate wealth, transfer intergenerational wealth, and build their businesses' capacity has a positive macroeconomic effect that distributes risk across a larger number of households. This is much less risky than investing the nation's economic security in the 1% of the population that holds most of the nation's wealth.

1. Policy Tenets - Recognizing Multiple Stakeholders, Abandoning Short-Termism and Shareholder Capitalism, and more Thoughts from Dr. King and Gandhi

In solving the conundrum of income disparity, policymakers must first and foremost begin to acknowledge the relevance and importance of recognizing a broader set of stakeholders, in the same vein as courts have in recent antitrust cases. For too long, the American economic culture and legal system have placed the shareholder at paramount importance, far beyond what is proportionally appropriate or economically efficient. As stated earlier, short-termist shareholder capitalism is believed by many to be responsible for the collapse of entire economic systems²³⁶ and should be avoided to the greatest extent possible moving forward. This fact alone should dispel any fears

231. *Global 500*, FORTUNE, <https://fortune.com/global500/> (last visited Aug. 11, 2021).

232. Mary Hanbury, *This is What the Average Walmart Shopper Looks Like*, BUS. INSIDER (Jan. 19, 2020, 8:39 AM), <https://www.businessinsider.com/walmart-shopper-demographics-average-is-white-woman-2020-1>.

233. Jonathan Sidener, *Something to Talk About*, SAN DIEGO UNION TRIB. (Apr. 12, 2009, 2:00 AM), <https://www.sandiegouniontribune.com/sdut-lz1b12leap224820-something-talk-about-2009apr12-story.html>.

234. *Id.*

235. *Cricket Wireless Is Turning 20*, CRICKET WIRELESS (Mar. 11, 2019), <https://www.cricketwireless.com/newsroom/news-release/cricket-wireless-is-turning-20-let-the-celebrations-begin.html>.

236. See Dallas, *supra* note 120, at 267, 273.

concerning derivative suits by individual shareholders forcing a company to maximize profits above all else.

To the assertion that bucking short-termist financial trends runs the risk of incurring liability to shareholders, such claims have been robustly addressed in academic circles. In a series of works, including a chapter included in a contemporary tone on corporate law issued by Cambridge University, Professor Judd Sneirson not only dispels the idea of stakeholder primacy but proposes an alternative principle he refers to as “enlightened stakeholderism.”²³⁷ Other scholars have proposed balancing the interests of the majority shareholder vote against the majority of shareholder individuals through a variety of altered voting structures.²³⁸ Yet other theorists propose reducing shareholder power altogether in corporate governance, arguing that most shareholders “are too uninformed or too unsophisticated to meaningfully contribute to corporate governance” in a long-term way.²³⁹ More explicitly, Professors Palladino and Karlsson propose reshaping corporate governance models through four specific legislative reforms:

1. Boards of directors should be accountable to all stakeholders, not just shareholders. Specifically, board “fiduciary duty” should run to all stakeholders;
2. corporate purpose statements should include a requirement that corporations positively benefit society;
3. multiple stakeholders should be represented on corporate boards; and
4. large corporations should be required to charter federally, in order to enable the reforms above.²⁴⁰

Palladino and Karlsson also offer four specific policy and process changes:

1. A revision of companies’ purpose statements—the foundational statement contained in all corporate charters against which a corporation’s decisions are measured—to require that corporations create a materially positive benefit for society;
2. a redefinition of board fiduciary duty, so that boards are required to consider the interests of all stakeholders who are meaningfully affected by the board’s decisions;

237. Judd Sneirson, *The History of Shareholder Primacy, From Adam Smith Through the Rise of Financialism*,

CAMBRIDGE HANDBOOK OF CORP. LAW, CORP. GOVERNANCE, & SUSTAINABILITY, 73–85 (Beate Sjøfjell & Christopher M. Bruner, eds., 2020).

238. Lipton, *supra* note 143, at 885–886.

239. *Id.* at 885.

240. Palladino & Karlsson, *supra* note 142, at 2.

3. stakeholder representation on the corporation's main governing body, the board; and
4. the creation of a federal charter for large corporations.²⁴¹

While this is a more recent conversation in legal academia and one gaining traction amongst policymakers, political activists throughout history have pointed to permutations of capitalism as potential tools to solve both political and economic inequality. Indeed, Gandhi and Martin Luther King Jr. both rejected Marxism and promoted a more economically inclusive capitalism to create a more equal, superior society. Though a strong critic of contemporary capitalism, King explicitly dismissed communism as a solution. He wrote:

The profit motive, when it is the sole basis of an economic system, encourages a cutthroat competition and selfish ambition that inspire men to be more I-centered than thou-centered. Equally, Communism reduces men to a cog in the wheel of the state. The Communist may object, saying that in Marxian theory the state is an 'interim reality' that will 'wither away' when the classless society emerges. True—in theory; but it is also true that, while the state lasts, it is an end in itself. Man is a means to that end. He has no inalienable rights. His only rights are derived from, and conferred by, the state. Under such a system the fountain of freedom runs dry. Restricted are a man's liberties of press and assembly, his freedom to vote, and his freedom to listen and to read.²⁴²

Instead, he extolled upon the importance of recognizing a variety of stakeholders, such as workers and the communities in which companies do business. He believed these stakeholders had the most direct ability to compel action as consumers and comprised the most powerful tool of the U.S. boycotts resulting in the desegregation of buses. Along with the other clergymen of the Southern Christian Leadership Conference, Dr. King organized Operation Breadbasket, a campaign that organized his grassroots membership to consolidate their consumer dollars for or against businesses as part of a negotiation tactic to create better jobs and remove discriminatory practices against its customers as well.²⁴³ He described components of Operation Breadbasket accordingly:

In Chicago we have recently added a new dimension to Operation Breadbasket. Along with requesting new job opportunities, we are now requesting that businesses with stores in the ghetto deposit the income for those establishments in Negro-owned banks, and that Negro-owned products be placed on the counters of all their stores. In this way we seek to stop the drain of resources out of

241. *Id.* at 6.

242. King Jr., *supra* note 29, at 197.

243. *Id.* at 152.

the ghetto with nothing remaining there for its rehabilitation. The two chain grocery stores with which we have so far negotiated, H-Low and National Tea, have readily agreed. They have now opened accounts in the two Negro banks of Chicago, and their shelves display every Negro-owned product of the city. This has given new vibrancy and growth to Negro businesses in Chicago, and will contribute to the continued economic growth of the city.²⁴⁴

Dr. King's strategy shone light upon the variety of stakeholders that all affect economic outcomes, not only on any given company but also on society's well-being, particularly African-American society in America.

Similarly, Gandhi believed in the existence of individual exceptionalism and felt it incumbent on the captains of industry to act as trustees of resources and that any wealth held in excess of one's own personal need should be used in the best interests of the poor and disenfranchised.²⁴⁵ Gandhi argued that the trusteeship relationship between the laborer and the industrialist was bi-lateral while recognizing that pragmatically, true trusteeship was unattainable but worthy of striving for in order to achieve a more equal state.²⁴⁶ He wrote:

... [W]orkers instead of regarding themselves as enemies of the rich, or regarding the rich as their natural enemies, should hold their labor in trust for those who are in need of it. ... Absolute trusteeship is an abstraction like Euclid's definition of a point, and is equally unattainable. But if we strive for it, we shall be able to go further in realizing a state of equality on earth than by any other method.²⁴⁷

Gandhi went on to argue that corporations should recognize a fiduciary duty owed not only to wealthy owners and investors but all stakeholders, including but not limited to the lowest-paid worker, the corporation's customers, and even those who are displaced by the corporation.²⁴⁸ The objectives of the corporation, Gandhi argued, could not be simplified in any single group of stakeholder interests, but rather,

244. *Id.* at 154.

245. GANDHI, *supra* note 48, at 8 ("Is it not conducive to the well-being of society that every member uses all his talents, only not for personal aggrandizement but for the good of all? We do not want to produce a dead equality where every person becomes or is rendered incapable of using his ability to the utmost possible extent. Such a society must ultimately perish. I therefore suggest that my advice that moneyed men may earn their crores (honestly only, of course) but so as to dedicate them to the service of all is perfectly sound.").

246. NARENDAR PANI, *INCLUSIVE ECONOMICS: GHANDHIAN METHOD AND CONTEMPORARY POLICY* 71 (Sage Publications 2001) (citing MAHATMA GANDHI, *TRUSTEESHIP* 4 (Navajivan Publishing House 1960)).

247. *Id.* at 71. (citing GANDHI, Vol. 59 138–40 (1958–93)).

248. N.N. Chatterjee, *Mahatma Gandhi and the Industrial Worker*, 101 INT'L LAB. REV. 215, 224–5 (1970).

a Pareto optimal goal should be set whereby no group of stakeholders should benefit at the expense of another.²⁴⁹ He believed that for this to work, all stakeholders had to be empowered both financially and with knowledge on an equal basis and that all stakeholders must share beliefs of what is fair.²⁵⁰ When tension between the various stakeholders occurred, Gandhi believed that a third-party manager could serve as a tiebreaker and decide which course of action was the fairest to most stakeholders.²⁵¹

These civil rights leaders expressed the root of inclusive economics; that sound economic policies should recognize multiple stakeholders in a capitalist society. Equally important to their beliefs was the potential of corporations to be part of the march towards equality.

2. Policy Solutions

a. More Accessible Financial Literacy

Inclusive economic policies should reflect the proliferation of better, more equal access to financial literacy. As argued earlier in this Article, financial literacy education and lack thereof is at the heart of the disparity of income between the rich and the poor, whites and communities of color; even if wealth has been earned in one's lifetime;²⁵² without financial literacy, the millionaire is vulnerable to becoming a pauper in an instant. Financial literacy is most often passed from one generation to another, and households without inter-generational wealth are less likely to be able to pass such knowledge where there is none.

As of December 2019, forty-two states, the District of Columbia, and Puerto Rico had pending legislation concerning financial literacy.²⁵³ This is a step in the right direction, but it should be noted that the most effective inclusive economic policy is to incorporate widely available financial literacy education across all K-12 public schools, particularly in areas with high populations of low-income households. Evidence reflects that the cultural relevance of such programming is also

249. M.K. GANDHI, TRUSTEESHIP 4–5 (Navajivan Publishing House 1960).

250. PANI, *supra* note 246, at 67–69, 74.

251. *Id.* at 74.

252. See generally *Financial Literacy for Professional Athletes*, GLOB. FIN. LITERACY EXCELLENCE CTR., <https://gflec.org/initiatives/bankruptcy-rates-among-nfl-players-short-lived-income-spikes/> (last visited Aug. 27, 2021) (discussing how the median income of an NFL player is \$3.2 million, yet 16% will file for bankruptcy within 12 years of retirement, with an average annual pension of \$30,000.).

253. Heather Morton, *Financial Literacy 2019 Legislation*, NAT'L CONF. STATE LEGISLATURES (Dec. 21, 2019), <https://www.ncsl.org/research/financial-services-and-commerce/financial-literacy-2019-legislation.aspx>.

imperative.²⁵⁴ Some scholars even suggest that financial literacy be implemented in a manner relevant to a family's culture through "whole-family" learning.²⁵⁵ The most effective programs will be specialized to address the income challenges of low-income households, with strategies that are culturally relevant.²⁵⁶

b. Better Underwriting

Inclusive economic policies should promote and facilitate the banking sector to adopt underwriting policies that more accurately gauge the reliability of historically disenfranchised people, rather than the current underwriting policies that reflect the lifestyle of the white, Anglo-Saxon Protestant households who are best served by the current financial system. In homeownership underwriting, rather than rely upon FICO scores, which often precludes thousands of households who are unbanked or who work in the informal economy, lenders should look at other indicators that are more closely related to a household's ability to make housing costs. A borrower's history of paying rent and utilities on time is a closer indicator of whether that borrower will default on a loan, yet neither of those factors is incorporated into the FICO score in a positive way.²⁵⁷ Homeownership underwriting should also take into consideration the more dynamic household living situations of communities of color,²⁵⁸ such as multiple income-earning adults living in the same house and contributing to household expenses. Households that have a demonstrated financial reliability to meet housing costs should be allowed to include the income of the various U.S. income-earning relatives living under one roof. Borrowers with an established history of roommate living should also be allowed to include roommate income as part of the borrower's income, which is currently only allowed by conventional loans on a very limited basis and under extremely narrow conditions.²⁵⁹ The local rate of housing available for rent would more accurately determine how much weight should be given to roommate income. In cities like New York City, where the

254. Elizabeth J. Tisdell, Edward W. Taylor & Karin Sprow, *Culturally Responsive Community Based Financial Literacy Education: Practical Implications from a Mixed Methods Study of Financial Educators*, 702 ADULT EDUC. RES. CONF. (2011), <https://newprairiepress.org/aerc/2011/papers/103>.

255. See Barbara J. Robles, *Economic Inclusion and Financial Education in Culturally Diverse Communities: Leveraging Cultural Capital and Whole-Family Learning*, 141 FIN. LIT. & ADULT EDUC. 57-66 (Mar. 7, 2014).

256. *Id.* at 59.

257. Vu-Dinh, *supra* note 12, at 187-88.

258. D'Vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households*, PEW RES. CTR. (Apr. 5, 2018), <https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/>.

259. Chad Baker, *How To Use Boarder And Renter Income For Loan Approval*, SAN DIEGO PURCHASE LOANS (Feb. 7, 2018), <https://sandiegopurchase loans.com/boarder-income-loan-approval/>.

vacancy rate is close to 0%, a vacating roommate is likely easily replaced. Accordingly, in those cities with low vacancy rates, roommate and boarder income is extremely reliable and should be accorded the appropriate weight for that locality.²⁶⁰

c. Micro-finance & Fintech

In business credit, inclusive economic policies should consider adopting tools and tactics that arise from opposite ends of the spectrum: microfinance and fintech. Grameen Bank uses a microfinance group lending model in which a potential borrower finds five other borrowers, all of whom attend a week of intensive financial literacy training.²⁶¹ Each loan is underwritten by the four other borrowers, and the loans are then accompanied by weekly consultations with a servicer in the field, which helps assess the borrowers' business needs.²⁶² Loan terms can vary from three to twelve months.²⁶³

Kiva is another well-known micro-finance institution that has lent \$1.62 billion in seventy-seven different countries.²⁶⁴ It boasts a repayment rate of 96.3%.²⁶⁵ Loans administered by Kiva undergo what they refer to as social underwriting, a process in which the borrower is vouched for by their friends and family (who are lending a portion of the loan), or in the alternative, by a Kiva-approved "Trustee."²⁶⁶ The borrower is then assigned a "Field Partner," who operates in the geographic proximity of the borrower and follows up with the borrower on a regular basis in order to make sure the borrower is compliant and progressing.²⁶⁷

Social underwriting is not new and can be found in informal lending everywhere from Asia to Africa. In Thailand, social underwriting comprises approximately 97% of financing in family businesses; social underwriting accounts for a comparable amount in Cote d'Ivoire where 94% of loans come from other villagers and only 6% from banks.²⁶⁸ However, structuring and formalizing social underwriting through microfinance programs like Kiva and the Grameen Bank enables

260. Chad Baker, *How To Use a Roommate's Rent for Loan Qualification*, SAN DIEGO PURCHASE LOANS (Oct. 28, 2018), <https://sandiegopurchaseloans.com/roommate-rent-loan-qualification/>.

261. Dugger, *supra* note 130.

262. *Credit Delivery System*, GRAMEEN BANK, <https://grameenbank.org/credit-delivery-system/> (last visited Sep. 10, 2021).

263. M. Nurul Alam & Mike Getubig, *Guidelines For Establishing and Operating Grameen-Style Microcredit Programs*, GRAMEEN FOUNDATION (2010), <https://grameenfoundation.org/documents/GrameenGuidelines.pdf>.

264. *About Us*, KIVA, <https://www.kiva.org/about> (last visited Aug. 18, 2021).

265. *Id.*

266. *How Kiva Works: The Journey of a Kiva Loan*, KIVA, <https://www.kiva.org/about/how> (last visited Aug. 14, 2021).

267. *Id.*

268. Alexander Karaivanov & Anke Kessler, *(Dis)Advantages of Informal Loans – Theory and Evidence*, 102 EUR. ECON. REV. 100 & n.1 (2018).

opportunities for those without wealthy personal contacts and thus includes a broader demographic.

On the other end of the underwriting spectrum is *fintech*, a term generally used to refer to the technological advances that “improve and automate the delivery and use of financial services.”²⁶⁹ With fintech, loans can also be administered without a bank via peer-to-peer lending, removing the costly services of a financial institution.²⁷⁰ While some fintech lenders use traditional lending criteria such as debt-to-income ratio and FICO scores,²⁷¹ others have used less conventional factors, such as the borrower’s participation in organizations,²⁷² the borrower’s physical health,²⁷³ the borrower’s smartphone habits,²⁷⁴ and the borrower’s social media habits.²⁷⁵ For example, Lenddo uses Facebook profiles, and Kabbage uses e-commerce histories from sites such as Amazon.²⁷⁶ Some argue that these factors are, in fact, better determinants of repayment than traditional methods.²⁷⁷

FinTech has been considered one of the most effective lending tools, resulting in shorter loan processing times, more efficient infrastructure for handling large volumes of applications, and a higher likelihood of receiving optimal market interest rates.²⁷⁸ Since much of the infrastructure is handled electronically, and because the business model is premised on handling the largest volume of loans rather than the highest value of loan per transaction, there is great potential to use

269. Julia Kagan, *Financial Technology – Fintech*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/fintech.asp> (last updated Aug. 28, 2020).

270. *See id.*

271. Christopher K. Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 781, 787 (2018).

272. *Id.* at 785.

273. *Id.*

274. Susan Adams, *How Tala Mobile is Using Phone Data to Revolutionize Microfinance*, FORBES (Aug. 29 2016, 6:20 PM), <https://www.forbes.com/sites/forbestreptalks/2016/08/29/how-tala-mobile-is-using-phone-data-to-revolutionize-microfinance/>; Emily Bary, *How Artificial Intelligence Could Replace Credit Scores and Reshape How We Get Loans*, MARKETWATCH (Oct. 29, 2018 8:29 AM), <https://www.marketwatch.com/story/ai-based-credit-scores-will-soon-give-one-billion-people-access-to-banking-services-2018-10-09>.

275. *See* Odinet, *supra* note 271, at 785.

276. Adi Ghosh & Harsh Sharma, *Alternative Credit Scores: Opportunities and Challenges*, TABB FORUM (Jan. 3, 2017), <https://webcache.googleusercontent.com/search?q=cache:iUqcqCoyCJoJ:https://tabbforum.com/opinions/alternative-credit-scores-opportunities-and-challenges/>.

277. BACKING AUSTRALIAN FINTECH, AUST. DEP’T OF TREASURY 13–14 (2016), <https://treasury.gov.au/sites/default/files/2019-03/Fintech-March-2016-v3.pdf> (“The Government recognizes Australia’s FinTech sector can play a vital role in aiding the positive transition that is occurring in our national economy. . . . FinTech can also help drive improvements in traditional financial services and promote disruption through innovative new products and services, which can offer benefits to consumers and other sectors of the economy. That’s why we’re working with the FinTech industry to prepare our financial system and economy for the future, and why it is such an important part of our plan to manage our transitioning economy.”).

278. *See* ANDREAS FUSTER ET AL., FED. RSRV. BANK OF N.Y. STAFF, REPORT NO. 836, THE ROLE OF TECHNOLOGY IN MORTGAGE LENDING 2–4 (2018), <https://www.fdic.gov/news/events/consumersymposium/2018/documents/plosser-paper.pdf>.

it to curb discriminatory behavior towards the race and neighborhood of the borrower.

Because using fintech can result in the issuance of a large volume of loans quite quickly—possibly more than ever in the history of loan-making—one might think that such loans would be hastily issued, resulting in higher rates of default. However, evidence suggests otherwise. Default rates on fintech loans are significantly lower than those underwritten by traditional, brick-and-mortar methods—25% lower, in fact, than loans handled by traditional methods.²⁷⁹

Fintech already has a proven history of providing the disenfranchised with improved financial services. Fintech advances have been adopted by federal and state governments to distribute public benefits more efficiently.²⁸⁰ For example, fintech tools have been used to deliver food stamps, emergency cash assistance programs, and welfare benefits, in effect providing the poor with low-cost banking services and the ability to save while simultaneously saving the federal government approximately \$100 million annually.²⁸¹

Unsurprisingly, fintech has its risks as well and has come under the view of the Consumer Financial Protection Bureau.²⁸² Scores of academics have discoursed upon the privacy issues of using such a broad spectrum of information to provide financial services;²⁸³ it is beyond the scope of this article to explore such risks here. It should be noted, however, that the Financial Action Task Force (FATF) was created to address intergovernmental global anti-money laundering and counter-terrorist financing standards and that this body continues to make research-based recommendations.²⁸⁴

d. Better Banking Services

Consumer credit in an inclusive economics infrastructure can adopt the same methodologies used in business credit as well—micro-finance and fintech. But the lack of consumer credit for the disenfranchised is also related to the dearth of banking services in general for the poor.

Inclusive economic policies should adopt deliberate strategies that would result in more banks providing low-cost banking services to the

279. *Id.* at 2–3.

280. See Michael A. Stegman, *Banking the Unbanked: Untapped Market Opportunities for North Carolina's Financial Institutions*, 5 N.C. BANKING INST. J. U. N.C. SCH. OF L. 23, 24 (2001), reprinted in U. N.C. CENT. FOR CMTY. CAP. (2001), <https://communitycapital.unc.edu/wp-content/uploads/sites/340/2001/08/BankingUnbankedNC.pdf>.

281. *Id.* at 24.

282. Christopher Bradley, *FinTech's Double Edges*, 93 CHI.-KENT L. REV. 61, 82–83 (2018).

283. See *id.* at 66.

284. Louis de Koker, *The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks Within the New Standards Framework*, 8 WASH. J. L. TECH. & ARTS 165, 167 (2013).

poor and middle class. Created through Cities for Financial Empowerment, BankOn is a community development financial institution that partly focuses on making safe, affordable, low-cost bank accounts available on a nationwide basis.²⁸⁵

Increased banking services would then enable the poor and middle class to more easily qualify for consumer credit at affordable rates that do not bring the borrower into the over-indebtedness that Payday lenders, pawnshops, and Rent-a-Centers do. In addition to enabling one to track spending patterns more easily, bank accounts also enable one to accrue savings securely and more easily. Bank accounts also simplify the payment of bills and enable one to make timely payments over a longer period of time more easily. All of these aspects enable one to obtain credit more easily and at better rates.

These services and products could be embedded in U.S. policy in a number of ways. Congress should first create detailed criteria for each type of product outlined above and then offer incentives to financial institutions for providing products that qualify under the criteria. Such incentives could come in multiple forms. Currently, this results in positive credit in the CRA analysis. Additional regulations in the CRA could require a hard percentage of a bank's reported profit to be dedicated to low-income households at affordable rates such as the types created by BankOn. These forward-thinking banking and credit products also could be required by the DOJ in settlements, or litigation remedies requested in antitrust cases, banking discrimination cases, and other consumer protection-related litigation. In ongoing mortgage discrimination cases, these could be included in the bevy of remedies imposed.

Congress should also consider issuing funds specifically for the creation of such products in the context of national stimulus packages, resembling the ARRA from 2009 or 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act²⁸⁶—the legislation passed in attempt to curb the economic downturn caused by the COVID-19 pandemic, which had a disproportionate effect on households of color. Because of the likely recurrence of COVID-19 and the need for another stimulus package, including this as part of an economic downturn prevention package is likely an upcoming opportunity.

Congress might also consider becoming a market participant in the banking sector. For example, postal banking was once a thriving operation of the U.S. government and could be again because the previous objections of the private sector not wanting competition in this

285. *About, BANKON*, <https://joinbankon.org/about/> (last visited Aug. 15, 2021, 10:59 AM).

286. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 318 (2020) (to be codified at I.R.C. § 6428(d) (Lexis)).

area are no longer a concern in today's world of banking.²⁸⁷ Once a ubiquitous service first provided under President Ulysses S. Grant, postal bank accounts had a dual purpose of providing low-cost banking services to Americans everywhere while simultaneously raising funds for major infrastructure such as the telegraph.²⁸⁸ In her book, *How the Other Half Banks*, Professor Baradaran has written extensively about the potential to revive U.S. Postal banking services to fill the gap of serving the low and middle classes.²⁸⁹

The federal government becoming a market participant to provide services to middle and lower-income households is not without precedent. The Obama administration's Affordable Care Act has created lower-cost access to healthcare to the middle and lower-middle-class on a level never before seen in the U.S.²⁹⁰ FHA-backed loans are the bedrock of the American housing market and the United States Department of Agriculture loans to the agricultural sector have supported U.S. farmers for the last thirty years.²⁹¹ The federal government has a history of providing large-scale financial services on a national basis that have filled a need unmet by the private sector, either through direct participation in the market through service provision or by collateralizing such products that are then issued by the private sector. It could do so again today if it so chose, and with the advent of fintech, do so in a relatively cost-efficient way.

e. Choice Architecture

Inclusive economic policies should be designed to enable people to make decisions in their best interests in matters where there is less public access to information. This strategy is best expressed through the tool of *choice architecture* as articulated by scholars in economics and law.

Through their book, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Nobel-prize winning, University of Chicago economist Professor Richard Thaler and Harvard Law School Professor Cass Sunstein evaluated the concept of the "rational" consumer that forms the core of economic theories of Adam Smith and Friedrich Hayek, considered to be the forefathers of laissez-faire capitalism. In his landmark treatise *Wealth of Nations*, Smith referred to the free market as an "invisible hand" that resulted in an economy based on the "rational" behavior of the average consumer. Hayek was one of the best-

287. BARADARAN, *supra* note 17, at 205.

288. *Id.* at 187–188.

289. *Id.* at 189–191.

290. See Miriam Reisman, *The Affordable Care Act, Five Years Later: Policies, Progress, and Politics*, 40 PHARM. & THERAPEUTICS 575, 575 (2015).

291. 1990 Farm Bill (P.L. 101-624, Sec. 2302), amending the Consolidated Farm and Rural Development Act of 1972 (7 U.S.C. § 1921 et seq.).

known defenders of this theory of classic economic liberalism, in which government withholds regulating the market to the greatest extent possible.²⁹² Smith and Hayek formed the basis for the economic policies of conservative leaders such as Margaret Thatcher and President Reagan.²⁹³

In *Nudge*, Thaler and Sunstein expound upon the principle of “libertarian paternalism”, which in essence states that people should be free to choose as they wish, but that “choice architecture” should enable the consumer to make decisions that serve her best interests.²⁹⁴ In other words, nudge theory behavioral economists argue that policies should facilitate better decisions for the consumer in terms of health, education, and overall happiness.²⁹⁵

Choice architecture principles have been adopted with laudable positive outcomes.²⁹⁶ In *Nudge*, Sunstein and Thaler discussed the looming fate of social security and the nationwide crisis of insufficient household savings.²⁹⁷ The authors explored the use of choice architecture to increase savings by making retirement contributions a default function that employees must opt-out of in order to choose not to save.²⁹⁸ Another mechanism, called *Save More Tomorrow*, was tailored for those who could not afford the increased default savings rate and instead created a default increase in savings with each pay raise.²⁹⁹ When the default rate was increased and *Save More Tomorrow* was implemented in retirement plans with behemoth providers, Vanguard and TIAA-CREF, employee participation increased from 23% to 78%.³⁰⁰

In Oregon, California, and Illinois, state legislatures adopted Nudge Theory principles in creating retirement programs for residents whose employers offer no retirement plans.³⁰¹ In these programs, 5% of an employee’s paycheck is automatically diverted into a basic retirement

292. Michael A. Peters, *Hayek as Classical Liberal Public Intellectual: Neoliberalism, the Privatization of Public Discourse and the Future of Democracy* 6 EDUC. PHIL. & THEORY (Dec. 9, 2009), <https://www.tandfonline.com/doi/pdf/10.1080/00131857.2019.1696303>.

293. *Id.* at 2.

294. See RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 4–6 (Penguin Books 2009) (ebook).

295. See *id.* at 255–56 (arguing that public officials can nudge people in directions that will improve their lives without making the decisions for them).

296. See *id.* at 105–08 (detailing how voluntary participation in retirement programs coupled with a hands-off approach from the federal government led to an increase in the enrollment of such programs).

297. *Id.* at 104.

298. *Id.* at 110.

299. *Id.* at 114–15.

300. *Id.* at 116.

301. Reid Wilson, *States Embrace Nudge Theory to Promote Retirement Savings*, THE HILL (Nov. 24, 2019, 9:05 PM), <https://thehill.com/homenews/state-watch/471545-states-embrace-nudge-theory-to-promote-retirement-savings>.

account with a few investing options.³⁰² Employees have the option of setting a different savings level or to opt-out altogether without penalty.³⁰³ The result was laudable: tens of thousands of workers accrued over \$40 million in retirement funds.³⁰⁴

A campaign of inclusive economics could utilize choice architecture to create better credit outcomes for low- and medium-income households. State legislatures should create similar policies creating default bank accounts for residents who receive paychecks but have no bank accounts, with automatic savings set aside that can eventually pave the way to a secured credit line. Low-cost or no-cost fintech bank accounts could be used, and the default set-aside could come in the form of a certificate of deposit (CD). Of course, non-recourse opt-out options should be provided throughout, with an alternative mechanism for future savings structured similarly to *Save More Tomorrow* in the event that the worker could not afford to save at the outset. Or, the default bank account could be a revived U.S. Postal Bank.

Choice architecture, dove-tailed with strong financial literacy programming and better, more inclusive, and targeted underwriting, forms a trinity of principles that could create the basis of inclusive economics in public policy. These concepts compliment each other and address a broad cross-section of the problems in the free market faced by the historically disenfranchised.

IX. CONCLUSION

Though not often considered a civil rights issue, in modern America, access to credit has a critical impact on one's ability to find shelter and employment, and accrue intergenerational economic stability. In the lives of the disenfranchised, systemic barriers to access continue to serve as one of the most effective tools enshrining segregation and inequality today. From Gandhi to Martin Luther King Jr., economic rights have been on the agenda of major civil rights leaders and activists, and limited legislation has created some enforceable rights through the CRA, the FHA, the ECOA, and the CARD Act. However, the enforcement of such litigation has been lackluster, in large part due to the limitation of the enforcement mechanisms and remedies created by the statutes. Alternative litigation strategies through constitutional principles should be explored to enforce these civil rights for inclusive economic opportunities. In addition to litigation, policymakers should adopt strategies of inclusive economics that incorporate more targeted, inclusive underwriting; widely accessible, high-quality financial literacy programming; increased access to low-cost banking; and choice

302. *Id.*

303. *Id.*

304. *Id.*

architecture that enables low- and middle-income households to obtain access to credit that is comparable to the quality of financial products available to the privileged and the wealthy and even their white counterparts. Enforcing the civil right to enjoy meaningful access to credit could be transformative in bringing about true equality to the historically disenfranchised in a novel and important way and give meaning to the principle that black livelihoods matter.