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Mehrsa Baradaran

The New Deal created a separate and unequal credit market—high-interest, non-bank, installment lenders in black ghettos and low-cost, securitized, and revolving credit card market in the white suburbs. Organized protest against this racialized inequality was an essential but forgotten part of the civil rights movement. After protests and riots drew attention to the reality that the poor were paying more for essential consumer products than the wealthy, the nation's policymakers began to pay attention. Congress held hearings and agencies, and academics issued reports examining the economic situation. These hearings led to new federal agencies and programs, executive actions, as well as several acts of legislation. These Congressional investigations and the theories and explanations emanating from policymakers and academics were the genesis of decades of legislation aimed at supporting minority banks and other institutions. The resulting policy framework is still in effect and includes: the Community Reinvestment Act (CRA), the Community Development Financial Institution Act (CDFIA), as well as several key provisions and mandates regarding minority banks in banking legislation. In this Article, I will argue that the foundational theoretical premise of these laws and policies is flawed. Though policymakers and scholars accurately diagnosed the root causes of the disparate credit market, the solutions did not correspond with the problem and have therefore been ineffective. These laws and policies were not aimed to address the systemic causes of the disparity but only served to treat its symptoms. The misguided focus on small community banking, minority-owned banks, and mission-oriented institutions as a response to structural inequality has been the dominant framework in banking reform.

In analyzing the varied, but theoretically consistent response to lending inequality, this Article also challenges a long-standing banking myth that "small community banking" or "microfinance" is the answer to poverty, specifically for marginalized communities. This idea was the foundational theory of the minority banking industry, the CRA, the CDFIA, and almost every legislative response to credit inequality for the past fifty years. The premise of these laws is that that marginalized communities, having been left out of the dominant banking industry, will pool their resources and collectively lift themselves out of poverty. As such, these laws are rooted in neoliberal and libertarian concepts of banking market even as they have been championed by progressive reformers and community activists. For most policymakers, activists, and scholars, the buzzword is "community empowerment" and they have legislated accordingly. In doing so, they have avoided addressing the root causes of the problem and have shifted the responsibility of a solution to the disenfranchised communities themselves instead of devising comprehensive federal policy solutions. This Article will trace the genealogy of this legislation and offer solutions that will address the root causes of this inequality.

THE NEW DEAL FOR WHITE AMERICA

The New Deal changed America's legal and political landscape, but it also transformed the nation's banking and credit markets. Banking reforms and regulations, proposed by progressives and populists for decades, finally passed into law with a defeated and shamed business sector. Southern democrats, populists, labor coalitions, and free silverites had been fighting "money trusts" and Wall Street power since the founding clash between Hamilton and Jefferson. Finally, the New Deal coalition, composed of a Southern Democrat bloc in the senate and FDR, overcame the banking lobby's opposition to government intervention. The New Deal coalition wanted to prevent the outsized influence and financial heft of Northern metropolis banks. They advocated a mixed economy of banks working with federal government institutions to provide credit to small farmers and landowners. Thus, the banking and credit reforms passed during the New Deal were a significant progressive reordering of business regulation. Its centrally-controlled economic planning, Keynesian stimulus programs, and foundational social welfare infrastructure made the New Deal the closest that America came to democratic socialism.[1]

Unfortunately, most of the significant New Deal policies were administered in such a way as to create categorical exclusion of blacks from government

1. *See also* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013).

subsidies.[2] This combination of progressive banking reform and a regressive racial hierarchy resulted in a banking legislative framework that propelled post-war American prosperity through an exclusionary mortgage and consumer credit apparatus. Through executive action and Congressional legislation, a new legal framework emerged during the New Deal era. These included several credit and banking agencies and regulators including: the Home Owners Loan Corporation (HOLC), the Federal Home Loan Banks (FHLB), the Federal National Mortgage Association (FNMA or Fannie Mae), the Federal Housing Administration (FHA), and the Federal Deposit Insurance Corporation (FDIC). These institutions worked together to promulgate the rapid and effective dissemination of low-cost credit to new homeowners. These agencies, combined with postwar economic growth, created a homeowning, capital-creating, and predominantly white middle-class. Having built the new middle-class on mortgage credit, these programs also exacerbated poverty in segregated black communities.[3] The government-fueled mortgage markets created homeowning white suburbs and a tenant-dominated black urban centers.

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2. *See* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 17, 51 (2005) ("[T]he wide array of significant and far-reaching public policies that were shaped and administered during the New Deal and the Fair Deal era of the 1930s and 1940s were crafted and administered in a deeply discriminatory manner."); *see also* KATZNELSON, *supra* note 1.

3. *See* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 51 (2013) (discussing how President Roosevelt and Congress could have made a different choice which would not have resulted in such stark inequality. For instance, Roosevelt could have channeled public funds towards building low-income housing and establishing much-needed infrastructure in urban-poor neighborhoods. He almost did just that. One of the most robust New Deal programs was the Public Works Administration (PWA), which was run by Secretary of the Interior Harold Ickes, a committed civil rights advocate and former president of the Chicago NAACP. The PWA was the federal government's largest construction effort to date with a $6 billion budget used to build thousands of bridges and roads that put millions of Americans to work. But the PWA's initial housing decision was to use funds to build homes and infrastructure in poverty-stricken areas, including inner-city ghettos. The PWA's purpose was to provide a job-creating economic stimulus while offering a benefit to the public. Ickes believed that the Roosevelt administration should use the New Deal to address America's urban poverty. He warned that if the slums were not rehabilitated, they would inhibit economic growth in America's cities); *see also* ROBERT CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 607–14 (1974) (discussing how investors were interested in revamping the single-family mortgage market, so the reforms followed this route. Unfortunately, these reforms worked directly against the urban poor. For example, the government used many PWA grants in major cities like New York and Chicago to route roads and bridges over and through the ghetto, a decision that favored bridge-and-tunnel commuters, neglected public transportation, and divided major thoroughfares in long-established communities); HYMAN, *supra*, at 51–53 (discussing how Ickes complained "that most of the projects that came before [the PWA] were conceived more for the speculative benefit of their promoters than for the advantage of the people who need modern housing at a low price." The opposition believed that the PWA's goal should be to get private investors involved by offering them a share of the profits. However, investors lacked interest in rebuilding inner cities, so the plan was scuttled); GAIL RADFORD, MODERN HOUSING IN AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA 85–110 (2008) (discussing how Ickes said that no less than "the future financial stability of many of our urban centers" depended on "the prompt reclamation of their slum areas." By 1933, Ickes set aside $485 million to build low-cost apartment buildings across the country. Critics fiercely opposed this plan. They said that it was not the federal government's responsibility to deal with urban housing problems).

Government documents and FHA manuals reveal that race became the primary determinant of mortgage eligibility. Thousands of FHA officials demarcated every neighborhood in the country by underwriting risk. Using standardized evaluation forms, officials from the FHA determined what homes the FHA would guarantee. The most important determination on each form was the percentage of "negro" or "foreign born" residents in each neighborhood as well as the likelihood of "infiltration" of each race.[4] Race became a proxy for credit risk in government underwriting. These maps had four color categories based on perceived risk: A (green), B (blue), C (yellow), and D (red); green being the most desirable and red being the least.[5]

Using race as a proxy to determine future price appreciation was a self-fulfilling prophecy. The scale ranged from green neighborhoods that were homogenous and white to neighborhoods marked too risky "red" that were predominantly black. The race of the area's residents was a greater factor in the color-coded desirability determinations than other quantifiable metrics like the home's age, proximity to city centers, resident's creditworthiness, transportation opportunities, public parks, or public services.[6] For example, one of the wealthiest black neighborhoods in the country was in the Atlanta area surrounding Morehouse and Spelman Colleges. The FHA form evaluating this area marked it as the "best negro area in Atlanta" and noted that the homes were mostly owned by "professional men." They even determined that it was a highly desirable location "for negroes." Yet they still demarcated the area as a red zone and advised banks not to underwrite mortgages therein.[7] This process of "redlining" eventually created a dual credit market based on race.[8]

These surveyors were both reflecting and entrenching segregation patterns that led to higher-valued white neighborhoods and lower-valued black ones. Housing segregation was institutionalized and became a defining feature of the legal credit framework. It was not just the FHA that used these maps. Because the mortgage insurance market changed the nature of home lending, any bank providing a mortgage required an FHA guarantee. It would be foolish not to. Banks, credit

4. Original FHA forms are available at https://dsl.richmond.edu/panorama/redlining/.

5. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 198, 202 (1985); *see also* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 64 (2017). Before the mortgage market went into full effect, the Home Owners Loan Corporation (HOLC) created maps of every neighborhood and categorized the risks of lending therein. HOLC appraisers used census data and elaborate questionnaires to predict property appreciation in neighborhoods across the country. The HOLC then used this data to create meticulous maps giving each metropolitan region and neighborhood across the country a value.

6. *See* JACKSON, *supra* note 5, at 198–99, 202.

7. Robert K. Nelson et al., *Mapping Inequality*, AMERICAN PANORAMA, https://dsl.richmond.edu/panorama/redlining/#loc=11/33.7535/-84.3565&opacity=0.8&city=atlanta-ga&sort=33&area=D17&adimage=3/75/-120 [https://perma.cc/LHP5-UTRM] (last visited Mar. 8, 2019).

8. *See* ROTHSTEIN, *supra* note 5, at 64–65, 77–91.

unions, thrifts, building and loans associations, and other mainstream mortgage lenders relied on these risk calculations when they determined branch locations and made all lending decisions.

The FHA did more to shape American life than any other New Deal agency. Congress created the FHA as part of its National Housing Act of 1934 and supplemented the FHA through the 1944 Servicemen's Readjustment Act (the GI Bill), administered by the United States Department of Veterans Affairs (VA). Between 1934 and 1968, the FHA and the VA programs created the modern mortgage market. The joint programs shaped the lending market for the next century. Through mortgage guarantees and standardization, Title I of the National Housing Act enabled the FHA to lower mortgage risk and increase capital investments in housing. The FHA credit insurance fund was backed by the full faith and credit of the U.S. Treasury, but it worked effectively to unleash billions of dollars of private capital investments worldwide.[9] By shielding banks and other mortgage lenders from the risk of default, these new agencies enabled unprecedented amounts of private capital to fund residential mortgages. Through credit insurance and secondary market creation, Congress and the alphabet soup of banking and credit agencies made mortgage loans simple, low-risk, and plentiful.[10]

Congress created Fannie Mae in 1938, which facilitated a secondary market that enabled investors and lenders to share the risk of mortgage default. Private and institutional investors in one part of the country could invest in mortgages in another, assuring that capital would always find yield. Treasury-backed insurance lowered risk and government-created secondary markets lowered transaction costs, which led to soaring bank profits and capital investments.[11] These markets remained intact even as some New Deal programs came to an end and the government-sponsored enterprises (GSE) were partially privatized.

Government agencies mandated uniformity to protect their investments. Even the construction of the homes was determined according to standard specifications. Lenders also had to comply with standard loan underwriting. The banking and mortgage agencies issued protocol and standards to align loan contracts. Interest rates and terms were dictated by federal standards. The standard issue mortgage

9. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 17 (2006) (discussing how new home construction doubled from 1936 to 1941. In 1936, the FHA had lent half a billion dollars in guaranteed mortgages. By 1939, they had already issued $4 billion in mortgages and home improvement loans. Housing starts were 332,000 in 1936 and 619,000 in 1941); *see also* JACKSON, *supra* note 5, at 205.

10. *See* FED. HOUS. ADMIN., FHA STORY IN SUMMARY, 1934–1959 at 4 (1959), *noted in* HYMAN, *supra* note 3, at 53 (explaining that the federal guarantee revolutionized mortgages because the fund insured 90% of individual home mortgages. According to Julian Zimmerman, the FHA commissioner in the 1950s, when the scheme was first proposed, "it was such an innovation that many considered it radical and unworkable." According to Zimmerman, "it was the last hope of private enterprise. The alternative was socialization of the housing industry.").

11. *See* HYMAN, *supra* note 3, at 55 (explaining that the FHA program "completely reversed . . . the conventional justification for government intrusions." FHA money was "not the dole" and "not taxpayer money").

created by these reforms included reduced down payment requirements, lengthened loan terms, and low interest rates.[12] A fixed rate mortgage with a 6% APR self-amortized over thirty years was typical. Banks were unlikely to lend to borrowers if the FHA did not insure the loan, and thus, banks were unlikely to stray from the mandated formula. In addition to standardized terms, the borrowers fit a certain "government-approved" mold, which was usually white, middle-class, and male. Yet to call those who qualified for these loans "the middle-class" is an evasive and circular description. These borrowers were formerly wage workers who lived near their place of employment, but through these low-cost mortgage loans, they became the much-heralded American middle-class. Most of these borrowers earned less than $2500 per year and could not have afforded to purchase a home even with a mortgage, which was hard to come by.[13] After the New Deal mortgage reforms, the new middle-class could pay less in mortgage payments than they had previously paid for rent. Typical was the former New York City resident who said of his new home in suburban New Jersey: "We had been paying $50 per month rent, and here we come up and live for $29.00 a month."[14] With a few thousand dollars in savings, a wage earner could buy a house, build wealth, raise their children in the suburbs, and generate taxable income.[15]

The FHA mortgage fundamentally changed American culture, creating the uniform white middle-class suburb and its attendant services—parks, schools, communities, and the bowling leagues lauded by Robert Putnam as essential for civic engagement and public trust.[16] Yet this government-manufactured prosperity excluded blacks. The low-cost and abundant flow of mortgage credit stopped at the red lines around black ghettos.

The FHA's 1939 Underwriting Manual explicitly prohibited lending in neighborhoods that were changing in racial composition.[17] The 1941 manual warned that "the rapidly rising Negro population ha[d] produced a problem in the

12. *See* JACKSON, *supra* note 5, at 204–05 (discussing how first, prior to their passage, a borrower would need a down payment anywhere from 30–70% of the home price to purchase a home. After these loans, a down payment of 10% was enough because the government would now essentially insure up to 90% of the collateral. Second, by extending the repayment period to thirty years and insisting that all loans be fully amortized, they reduced monthly payments and dramatically reduced default. Third, they created uniform housing standards that all new houses had to meet, which favored new, homogenous homes. And, Fourth, by eliminating high default risks, the programs brought mortgage interest down from 15% to 2–3%, making it possible for families of moderate means to become homeowners.); *see also* HYMAN, *supra* note 3, at 56–57.

13. *See* HYMAN, *supra* note 3, at 71.

14. *See* OLIVER & SHAPIRO, *supra* note 9, at 17.

15. *See id.*

16. ROBERT D. PUTNAM, BOWLING ALONE: AMERICA'S DECLINING SOCIAL CAPITAL, http://www.directory-online.com/Rotary/Accounts/6970/Downloads/4381/Bowling%20Alone%20Article.pdf [https://perma.cc/CAM2-7YYZ] (last visited May 14, 2019).

17. *See* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 37 (Univ. of Cal. Press 2010); *see also* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 54 (Harvard Univ. Press 1993).

maintenance of real estate values."[18] A good neighborhood, according to the FHA, was one that prevented "inharmonious racial or nationality groups," which meant that the only groups that did not threaten property values were white families.[19] The FHA even offered suggestions for the best way of achieving this result, which they said was through "[race-based] subdivision regulations and suitable restrictive covenants."[20] Maintaining the racial purity, or a "harmonious racial mix," became a vested interest for homeowners, realtors, and banks—all of whom held a financial stake in these mortgages. "If a neighborhood is to retain stability," said the FHA manual, "it is necessary that properties shall continue to be occupied by the same social and racial classes."[21] With government guarantees on the line, neighborhood groups vigilantly enforced racial covenants. Racial covenants were included in mortgage deeds, notes, and any sale transactions. The buyer contracted to only sell the home to those of the Caucasian race. The Supreme Court upheld these contracts in a 1926 case,[22] and they remained valid until a different Court invalidated them in the 1948 case Shelly v. Kramer. [23] However, the FHA continued to promote their use until the 1950s.[24]

As the white suburbs and black inner cities diverged in their mortgage access, two different credit markets emerged in both zones. Lower-risk mortgages led to higher wealth and stability in the white suburbs. These conditions also led to a healthy consumer credit market. In the redlined black ghettos, the economic climate was radically different. Without access to low-cost mortgages or even bank branches, the lenders that filled the gap in the ghetto were loan sharks, high-cost lenders, and contract sellers. By the 1950s, 85% of the homes sold to blacks in Chicago were sold on mortgage-mimicking contract sales with exploitative terms.[25] Speculators purchased properties for a few thousand dollars with private capital and then "sold" the home to a black buyer through contract for three to four times the price of the home.[26] The contract sale was akin to a rent-to-own sale.[27] The "buyer" was just a tenant with an option to own the home at some point in the future and

18. *See* CONLEY, *supra* note 17, at 37.

19. *See* ROTHSTEIN, *supra* note 5.

20. *See* OLIVER & SHAPIRO, *supra* note 9, at 18; *see also* FED. HOUS. AUTH., UNDERWRITING MANUAL, pt. II, ¶ 233 (1936), https://babel.hathitrust.org/cgi/pt?id=mdp.39015018409246;view=1up;seq=13 [https://perma.cc/NH99-EFBH]; JACKSON, *supra* note 5, at 208.

21. FED. HOUS. AUTH., *supra* note 20.

22. Corrigan v. Buckley, 271 U.S. 323 (1926).

23. Shelley v. Kraemer, 334 U.S. 1 (1948).

24. *See* BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE AND THE EXPLOITATION OF BLACK URBAN AMERICA 43 (2009), citing Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley and Brown*, *in* JOHN F. BAUMAN ET AL., FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 211–12 (2000); *see also id.*

25. *See* SATTER, *supra* note 24, at 38.

26. *See* DEMPSEY TRAVIS, AN AUTOBIOGRAPHY OF BLACK CHICAGO 128–29 (1981).

27. *See* SATTER, *supra* note 24, at 5 (discussing how the contract sellers "used the home as 'bait' to defraud the Negro out of a substantial sum of money and then push the [buyer] out into the street [in order to] defraud another party.").

only if they made every payment on time. Blacks were therefore paying more each month, and what they were getting in return was a more tenuous property interest.[28] Their rights to the land was a loophole-laden contract as opposed to a deed. With one missed payment, a borrower was deemed to be in default and could lose their entire investment—the property, down payment, and all home improvements.[29] The bankers and brokers defended these contracts as a consequence of market pricing. "In a free economy a house is worth what anyone will pay for it," said one contract seller.[30]

Yet mortgage lending was nothing like a "free economy" because the federal government was artificially lowering interest rates and prices through structural supports. It was exactly the lack of government mortgage guarantees in the redlined zones that created the market for these costly contract sales while suburban mortgages were artificially buoyed.[31]

THE TRANSFORMATION OF CONSUMER CREDIT

Title I of the National Housing Act of 1934

Before the New Deal credit reforms, most consumer lending took the form of installment loans, which is a loan that is paid off in small amounts over a short period of time. The same store that sold the merchandise provided the loan and assumed the risk of default. The interest rates were usually high, and the payback period was short. Often retailers would charge more than what was legal by simply

28. *Id.* at 242–44, 248–49.

29. *Id.* at 4; *see* TRAVIS, *supra* note 26, at 157.

30. *See* SATTER, *supra* note 24, at 137, citing interview with John W. Baird (Feb. 13, 2004); *see also* BAIRD & WARNER, INC., 1855–1980: CELEBRATING 125 YEARS IN REAL ESTATE (1980).

31. *See* HYMAN, *supra* note 3, at 141–44 (discussing how, though black families could get mortgages, they paid significantly more for them than their white neighbors. In fact, the data on these subpar loans is clear that being black was directly correlated with paying high interest, more so than any other factor. The black middle-class was left to find mortgage loans in the private market. Few institutional investors were willing to provide capital for black mortgages, and black institutions did not have enough capital to provide for all such loans. In sum, the main barrier to black mortgages in the 1950s, according to a representative of the National Association of Home Builders was "the lack of adequate financing" caused by "deep-rooted prejudice." White insurance companies had provided much of the initial investment funds for the FHA markets, but black insurance companies did not have adequate capital. By 1945, the 35 members of the National Negro Insurance Association (NNIA) had only $1.5 million in capital—they held a total of 424 mortgages. Mechanics and Farmer affiliate, North Carolina Mutual Life Insurance Company accounted for 55% of these funds. In contrast, just the top 12 white insurance companies alone held $633 million in mortgages. The debt cycle became self-reinforcing after the original exclusion. Over 70 percent of suburban black families had to borrow just so they could purchase cars, appliances, furniture, and other side effects of middle-class life. The black middle-class's debt caused lenders to charge the black middle-class higher interest on each new loan. More debt begets higher interest and vice versa. The added debt burden and high interest was a direct result of the lack of wealth and looping around once again, the debt made it even harder to accrue more wealth.).

elevating the base price of the goods. Most families with little wealth and low wages relied on installment loans to purchase appliances and furniture.[32]

The purpose of Title I of the National Housing Act of 1934 was to provide economic stimulus by insuring low-dollar consumer credit loans for improving real property.[33] These loans, administered by local banks and insured by the FHA, were intended to stimulate the construction industry by encouraging the flow of credit to the urban real estate market.[34] When it functioned as intended, Title I allowed owners of aging urban housing to stay in their homes, preserving the local urban tax base and preventing the spread of urban blight, all key FHA policy goals of the time.[35] Though Title I lapsed in 1937, it was renewed thereafter, and FHA continues to insure loans for home improvement under Title I to the present day.

Financial institutions who wished to participate in Title I had to be vetted, as the statutory language of the National Housing Act of 1934 required participants to be "reliable financial institutions." National and state banks, trust companies, and building and loan associations who already participated in the Federal Home Loan Bank System were automatically approved for FHA Title I insurance.[36] Other financial institutions had to be individually approved to participate.

In lieu of premium payments by participating financial institutions, the National Housing Act authorized the Reconstruction Finance Corporation to provide Title I's initial capital of up to $200,000,000.[37] While other FHA programs like the Title II Mutual Mortgage Insurance program maintained a series of capital reserves funded by mortgage fees, Title I had no similar fund of its own.[38] Based upon the FHA's first annual report, it appears instead that the FHA's Title I cap was funded exclusively by the Reconstruction Finance Corporation.[39]

Once approved, participating lenders were left to decide for themselves how to screen potential loan applicants.[40] The terms of the FHA insurance limited compensation for lender claims to 20% of the aggregate amount leant under Title I. This incentivized lenders to perform due diligence on potential applicants and

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32. *Id.* at 32.

33. *See* Hyman, *supra* note 3, at 96.

34. RAYMOND J. SAULNIER, HAROLD G. HALCROW & NEIL H. JACOBY, FEDERAL LENDING, LOAN INSURANCE AND LOAN GUARANTEES 288 (1958).

35. Judge Glock, *How the Federal Housing Administration Tried to Save America's Cities, 1934–1960*, 28 J. POL'Y HIST. 290 (2016), https://www.cambridge.org/core/journals/journal-of-policy-history/article/how-the-federal-housing-administration-tried-to-save-americas-cities 19341960/DF2237D887E2D45D4B422AB0CE1D9F52/core-reader [https://perma.cc/KW6F-4YJL]. Note: future citations of Judge Glock's article will not include page numbers, as the article is not numbered in its online form.

36. JOSEPH D. COPPOCK, GOVERNMENT AGENCIES OF CONSUMER INSTALMENT CREDIT 23 (1940).

37. National Housing Act, 12 U.S.C. §§1701–1750 (1934).

38. Glock, *supra* note 35.

39. H.R. Doc. No. 88, at 24–25 (Jan. 29, 1935), https://www.huduser.gov/portal/sites/default/files/pdf/First-Annual-Report-of-the-Federal-Housing-Administration.pdf [https://perma.cc/G6VL-E5YG].

40. COPPOCK, *supra* note 36, at 23.

attempt collection on past-due debts directly from the borrower when possible.[41] Lending institutions could also buy and sell the notes on loans made under Title I, creating a nascent secondary market.[42]

When unable to collect, lenders could file a claim with the FHA in Washington, D.C. no earlier than sixty days and no later than thirteen months after the last payment received.[43] Provided the claim did not exceed the statutory cap of 20% of an institution's aggregate loaned dollars under Title I, the FHA would pay any and all of the following: net unpaid amount of the funds advanced to the borrower; uncollected earned interest; uncollected late charges; uncollected court costs; attorney's fees; and handling costs.[44] The Government then assumed the debt and could attempt collection from the borrower.

Lenders, free to establish their own screening methods for borrowers, preferred borrowers with stable income and prospects of long-term employment rather than borrowers of a specific overall income level.[45] Thus, salary, not overall wealth or the ability to provide collateral, played a large role in a borrower's creditworthiness in the consumer credit market spawned and stimulated by Title I.[46] While the precise experience of a borrower seeking a home improvement or modernization loan under Title I varied with each financial institution, certain general features of the experience are worth noting.

First, the borrower filled out a form stating the amount sought and the uses to which he would put the money if approved.[47] If the borrower's statements signaled compliance with the parameters of the program, the lender would notify the FHA in Washington, D.C., which would adjust the lender's insurance reserve credit accordingly.[48] Because lending institutions generally paid the vendor of goods or services directly rather than giving borrowers cash, the borrower would often have to return to sign a form stating the work had been performed to a satisfactory standard.[49]

The novelty of Title I insured loans was that they were made with no collateral security, no co-signer, and paid off in equal monthly installments.[50] In addition to the promise of insurance, the FHA attempted to mitigate lender worries at undertaking these risks by capping loans at $2000. That 6433 of the 10,029 approved lenders actually ended up participating in Title I suggests that these measures

41. *Id.* at 26.
42. *Id.* at 23.
43. *Id.*
44. *Id.*
45. Hyman, *supra* note 3, at 100, citing a report by Irvin Bussing, a New York State Savings Bank Association economist.
46. *Id.* at 107.
47. COPPOCK, *supra* note 36, at 24–26.
48. *Id.*
49. *Id.*
50. HYMAN, *supra* note 3, at 116.

succeeded at alleviating lenders' fears.[51] On the other hand, certain lenders found Title I more appealing than others, as 84% of the number and volume of loans could be attributed to only 10% of participating lenders.[52]

To keep loans affordable for consumers, the FHA limited finance charges on Title I loans to 5%, reflecting a true interest rate of about 9.7% per annum on the unpaid balance.[53] The 5% limit included fees for the loan but not late fees. Data from Title I's initial run between 1934 and 1937 reveal the average size of all notes issued was $386, the average length of the loan thirty months, the average monthly payment $11, and the average time payment charge of $49.[54] By comparison, an inflation calculator from the Bureau of Labor Statistics indicates that a monthly payment of $11 in September 1934 would be the equivalent buying power of approximately $204.18 in September 2018.[55]

While the statutory maximum length of loans was five years, over 95% of all loans during Title I's initial run were for thirty-six months or less and over 75% of early loans were for under $300.[56] This information supports the contention that the averages cited above are reflective of the true experience of lenders and borrowers in mid-1930s and are not being distorted by a few extreme outliers.

Although only 34 of the 3074 counties in the United States had no loans insured by the FHA under Title I, loans concentrated in a few heavily-insured areas.[57] 21% of all Title I loans went to improve homes in New York, while 14% went to California.[58] In fact, 66% of all Title I loan dollars went to only ninety-eight counties nationwide, concentrating in densely populated areas experiencing rapid population growth and having relatively high per capita incomes.[59]

Title I's Impact on the Consumer Credit Market: Title I's ambition to offer consumer-grade credit was so groundbreaking, the FHA had to "borrow" the expertise of two bankers, J. Andrew Painter and Roger Steffan, from National City Bank in New York City to help implement the program.[60] At the time, National City Bank was one of the few private banks to have a successful, albeit small, consumer credit division, sustained more by its popularity as a community relations tool than for its profitability. In fact, Steffan's boss at National City Bank was the head of public relations, reinforcing their view that consumer loans were a publicity stunt first and a business opportunity second.[61]

51. COPPOCK, *supra* note 36, at 6.
52. *Id.* at 5.
53. *Id.* at 3.
54. *Id.* at 7–8.
55. CPI INFLATION CALCULATOR, https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=11&year1=193412&year2=201809 [https://perma.cc/KC3H-EGHR] (last visited Mar. 8, 2019).
56. COPPOCK, *supra* note 36, at 8.
57. *Id.* at 7.
58. *Id.*
59. *Id.*
60. See HYMAN, *supra* note 3, at 98.
61. *Id.*

From a business perspective, National City Bank's perspective is understandable, as small consumer loans cost banks as much to administer as large loans and tended to yield less profit. At 5% interest, Title I could not likely have drawn the attention or enthusiasm of the banking sector prior to the Depression, when commercial loans yielded far better returns.[62] Thus, the Great Depression's disruption to the natural order of banks' lending primarily to businesses likely contributed to the rise of Title I and consumer loans in general.

Banks benefitted institutionally from Title I. Many financial institutions had idle staff due to waning commercial lending activity, and servicing Title I loans provided a profitable diversion for these employees. Later, when consumer loans became established in the financial sector, banks would build upon this infrastructure to develop fully-fledged consumer credit departments that expanded beyond the limited purposes of Title I.[63]

Contemporary research by Joseph D. Coppock on behalf of the National Bureau of Economic Research casts doubt on whether the program stimulated lending or the construction industry as intended.[64] While Title I insurance offered lenders the safety net[65] to take a risk on making small, short-term, amortized consumer credit loans with no down payment,[66] bankers may have found consumer loans attractive for other reasons independent of the FHA's insurance—namely, because they were small and had a high repayment rate.[67] Consumer credit loans under Title I offered lenders a higher-interest, short-term investment to offset their lower-interest, long-term lending portfolios.[68] Louis Hyman notes in *Debtor Nation* that lenders rarely used the FHA's insurance provisions,[69] and contemporary data confirms this claim, revealing that only about 5.8% of all Title I notes (3.4% of the aggregate dollar volume) between 1934 and 1937 had claims paid against them.[70]

Even if Title I's effectiveness as a stimulus is debatable, it likely popularized the consumer grade credit loan in banking circles and created supply-side competition in the untapped consumer credit market.[71] Indeed, the FHA's popularization of consumer credit—not its insurance—may have been its most valuable contribution to the consumer credit market. Once the specter of the Depression receded and the post-World War II building boom commenced,

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62. *Id.* at 97.
63. *Id.* at 103.
64. COPPOCK, *supra* note 36.
65. HYMAN, *supra* note 3, at 102.
66. *Id.* at 105.
67. *Id.* at 102.
68. *Id.*
69. *Id.*
70. COPPOCK, *supra* note 36, at 8. Note: these statistics do not account for money paid by borrowers to the Government once it assumed the debt.
71. *Id.* at 5 (citing statements by then-Federal Housing Director Stewart McDonald's testimony before a subcommittee of the Senate Committee on Banking and Currency in 1936).

consumer loans became an increasingly important and ubiquitous feature of the American credit landscape.[72]

As financial institutions became more savvy to consumer loan best practices and sought profit through volume of sales, the process to apply for consumer loans became more data-driven and impersonal.[73] Inspired by the Ford assembly line, lenders began seeking a quick, accurate loan approval system that could find borrowers who were, on average, reliable enough to create profit.[74] In this way, the general consumer credit market that Title I spawned evolved to meet growing consumer demand for small-dollar, short-term loans.

Likewise, Title I itself evolved, ensuring its survival to the present. The individual loan limits, aggregate budgetary limits, and improvement parameters of Title I changed over the years, ebbing and flowing with the policy goals of subsequent administrations.[75] Simultaneously, the definition of acceptable renovation and modernization projects grew to include purchasing refrigerators, gas and oil heaters, and other upgrades;[76] conversion of property to multifamily dwellings, governmental uses, or commercial uses;[77] and slum clearance and rehabilitation. Eventually, Title I grew to embrace mobile homes and prefabricated homes.

The FHA transformed the consumer credit market by lowering its risks and enabling banks, finance companies, and credit card companies to profit from consumer loans for the first time. However, once the Title II provisions fueled the creation of the robust consumer credit market, the federal guarantees were no longer needed, and the market moved forward on its own momentum. Interest rates on small consumer loans fell because the market shared the risk, and no individual seller was implicated. If FHA home loans created suburban life, that life was enhanced by consumer loans that allowed the new middle-class to purchase luxuries like cars, appliances, and apparel. The consumer credit market for whites shifted from the rigid and expensive installment lending model to the flexible and less expensive "revolving credit" model enabled by the credit card. Credit card companies allowed borrowers to "revolve" their debt, or roll over their balances, for the first time. Credit cards also gave borrowers flexibility in purchasing and

72. HYMAN, *supra* note 3, at 99.

73. *Id.* at 100.

74. *Id.* at 106.

75. *See generally* Grace Milgram, HOUSE COMM. ON BANKING, FIN. AND URBAN AFFAIRS, *A Chronology of Housing Legislation and Selected Executive Actions, 1892–1992* (Dec. 1993), https://www.huduser.gov/portal//publications/pdf/HUD-11661.pdf [https://perma.cc/B5XW-GRPB].

76. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., *Fixing up Your Home and How to Finance It*, HUD.GOV, https://www.hud.gov/program_offices/housing/sfh/title/sfixhs [https://perma.cc/GEK3-SLN2] (last visited May 14, 2019).

77. Milgram, *supra* note 75; U.S. DEP'T OF HOUS. AND URBAN DEV., *Manufactured Home Loan Insurance (Title I)*, https://www.hud.gov/program_offices/housing/sfh/title/manuf14 [https://perma.cc/86PJ-B49F] (last visited Mar. 8, 2019). Note: mobile and manufactured homes were considered personal and not real property when these measures were added to Title I in the late 1969. *Id.*

significantly expanded purchasing power because they could be used at a variety of retailers.[78]

Most of these consumer loans went toward making purchases that made life easier and more enjoyable, but credit also created a buffer to protect wealth and livelihood against life's unpredictable tumults. Credit card and finance companies avoided redlined neighborhoods due to both racism and their risk-prone economy. These communities relied on extractive installment credit that came coupled with instability and continued poverty.[79] This was another instance in which the New Deal credit reforms created a wealth-producing credit market for whites and an inescapable debt trap for blacks. According to historian Louis Hyman, "[T]he modern credit system of the twentieth century was built by white men for white men, leaving other Americans to borrow in older, more expensive and dangerous ways."[80] The credit system did not just build wealth for whites, but it "constrained the credit options for poor, urban African Americans [in ways that] would have been inconceivable for the rest of America."[81]

Changes to Banking Regulation

New Deal banking reforms brought about federal governance of banks through newly created agencies that administered new restrictions, limits, and chartering requirements. Most significant of these reforms was federal deposit insurance, which effectively ended runs on banks and allowed banks to survive panics. Insurance subsidies came coupled with heavy government restrictions. The Glass Steagall Act of 1933 and the National Bank Act of 1935 restricted bank activities, capped interest rates, and reduced risks.[82] These laws also capped bank size, restricted conglomeration, and imposed branching restrictions, which enabled small community banks to survive and thrive.

All of these laws and subsidies created a nation of small community banks. The rationale of favoring community banking over large conglomerate banks was that smaller banks would favor the weak as opposed to the strong and that capital would remain within a region allowing communities to invest their savings in local projects. Small community banks were inherently less stable than larger conglomerates because their stability depended on a single community's economy. Markets naturally favored large conglomerate banks that could diversify their risks

78. *Id.* at 10–72 (showing Louis Hyman's explanation that in the post-war credit economy, the "lines of race would definitively cross lines of class."); *see also* Alan Greenspan, Chairman, Fed. Reserve, Address at the Economic Development Conference of the Greenlining Institute (Oct. 11, 1997).

79. *See* HYMAN, *supra* note 3, at 10–72.

80. *Id.* at 7.

81. *Id.*

82. *See* 12 U.S.C. § 264 (transferred to 12 U.S.C. §1811); McFadden Act of 1927, 12 U.S.C. § 36 (repealed 1994) (prohibiting branching across state lines); FEDERAL RESERVE HISTORY, S. REP. NO. 473, 69th CONG., at 6 (1st Sess.). The FDIC was created by the Glass Steagall Act and made permanent by the Banking Act of 1935. Federal Reserve History, Banking Act of 1933, § 12B. (a), at 7.

and move their funds and investments to their most profitable markets, which was usually Wall Street. These laws and protections were meant to counteract the natural markets. Larger banks had better access to liquidity and capital from a wide selection of robust financial markets. Smaller banks were constrained to investments in only their communities. Federal deposit insurance stabilized and supported community banks through federal subsidies. This is why the small bankers of the South and the Democratic Party that supported them fought for it.

With deposit insurance, small community banks could profit from their control over a community's resources while the federal government protected them from the constant failure and runs that besieged their industry up until that point. Yet localism was supplemented by the mammoth nationalized mortgage market enabled by the FHA.[83] The post-New Deal period was thus the golden age for community banks. The FHA guaranteed their loans, FDIC insurance prevented runs, and federal reserve liquidity protection saved them from a regional credit crunch. The federal government created the market for "small, community" banking.[84]

Civil Rights Protests Against Credit Markets

During the capital-building and prosperous decades of the 1940s to the 1960s fueled by the mixed economy, black communities were lending and borrowing in a *laissez faire* credit market.[85] Before the press and the nation focused on Martin Luther King's Civil Rights coalition, activists and community groups were protesting against exploitative credit and exclusionary lending transactions. The first protest led by blacks against white businesses occurred in Harlem in 1935.[86] The

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83. The banking industry debate between large and small banks mirrored the age-old national divide between industrial interests and agricultural interests. Bankers in the North wanted more permissive banking laws that allowed banks to readily expand and operate across several regions. Bankers in the South and West were concerned that expansive Northern banking conglomerates would pull capital from across the country due to the amount of services those banks already provided and drive regional banks out of business. Roosevelt sided with the South and West and successfully advocated for anti-competitive banking laws to protect regional banks. With Roosevelt on their side, Southern states fought for FDIC insurance, which made small banking possible. *See* CHARLES CALOMIRIS & STEPHEN HABER, FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES AND SCARCE CREDIT 16, 191 (2014).

84. *See* Banking Act of 1933, Pub. L. No. 73–6 (1933) (legislation explicitly prohibited bank conglomeration or branching of any kind and emphasized unit banking).

85. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 23–24 (2014); *see also* ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH 14 (2016). Modern research by Thomas Piketty, Robert Gordon, and others shows that the era from the New Deal until 1970 was an exceptional era of prosperity and wealth equality in American history; this boom was a temporary boost to middle-class wealth and standard of living.

86. *See* Stephen Robertson, Lecture at the German Historical Institute: Toward a Spatial Narrative of the 1935 Harlem Riot: Mapping and Storytelling after the Geospatial Turn (Oct. 20, 2016), *in* http://drstephenrobertson.com/presentation/toward-a-spatial-narrative-of-the-1935-harlem-riot [https://perma.cc/D2LJ-7GX6]; *see also* Stephen Robertson, Lecture at the National Council on Public

spark was lit when a teenage shoplifter was beaten by a store owner. The protest turned into violence, in a precursor of future events, rioters destroyed white business establishments while sparing black-owned businesses.[87] Most race riots before the Great Depression were white-led riots against blacks, so this was a change, though violent protests were rare. In northern cities, collective action was beginning to coalesce around specific economic demands in segregated black ghettos. These protesters focused on discriminatory hiring practices and exploitation by white lenders who sold goods at high interest with heavy markups.[88] These early efforts were focused on local and state action and enjoyed a few crucial victories. Harlem community groups persuaded the New York state legislature to enact consumer-protecting legislation that curtailed some of the most onerous contract terms provided by lenders.[89]

One side of the protests focused on encouraging more black businesses and called for "Bigger and Better Negro Business."[90] This movement was being waged by local black organizations that spanned the political spectrum from radical black nationalists to the conservative National Business League.[91] Another strand of collective action with the slogan "Don't Buy Where You Can't Work" demanded that white businesses operating in the ghetto hire more black workers. These groups put pressure on local businesses using boycotts.[92] Adam Clayton Powell emerged as the most vocal leader of the boycott movement and several years later, formed the "Greater New York Coordinating Committee for Employment" aimed at securing jobs through nonviolent protest.[93]

In 1935, several white merchants challenged a black boycott of their Baltimore businesses in the Maryland Court of Appeals.[94] The court ruled in favor of the boycotting community groups stating that the black community had "an

History Conference in Baltimore: Mapping a Riot: Harlem, 1935 (Mar. 19, 2016), http://drstephenrobertson.com/presentation/mapping-a-riot-harlem-1935 [https://perma.cc/2QM3-8NLP].

87. *Supra* note 86.

88. *See* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 315 n.18 (2017).

89. *See* ANNE FLEMING, CITY OF DEBTORS (2018).

90. ABRAM HARRIS, THE NEGRO AS CAPITALIST 177 (2010).

91. *See* THOMAS BAUMAN, THE PEKIN: THE RISE AND FALL OF CHICAGO'S FIRST BLACK OWNED THEATER 24 (2014).

92. *See* Albon Holsey, Business Manager, Crisis, THE NATIONAL ASSOCIATION OF TEACHERS IN COLORED SCHOOLS at Jackson, Miss. (July 1929) (explaining that the Harlem Labor Union made up of former Garveyites, had picketed white stores that refused to hire blacks in the 1932 "Don't Buy Where You Can't Work" movement. Soon black leaders across the country began talking about leveraging the "purchase power" of the black dollar to fight discrimination.).

93. *See* CHERYL GREENBERG, "OR DOES IT EXPLODE?": BLACK HARLEM IN THE GREAT DEPRESSION 135 (1997).

94. *See* Green v. Samuelson, 168 Md. 421 (Ct. Spec. App. 1935).

unquestionable right" to present their cause "in a peaceable way."[95] The judge even seemed to be encouraging black protestors to "persuade white employers to engage colored employees" and to orchestrate boycotts of those who did not "by organization, public meetings, propaganda and by personal solicitation." [96] In a troubling twist, however, the court seemed to put the onus on the black community to achieve their demands stating that "whether they succeed or fail will depend on the cooperation of their people." [97] The subtext seemed to be that it was the responsibility of the black population to work to end racism. The ruling set the stage for the civil rights movement's early strategy of leveraging black market power and using organized boycotts against Jim Crow buses in Montgomery, Alabama.

By the 1960s, black poverty was deeply entrenched, but more importantly, it was marked by its stark contrast to the white middle-class's prosperity.[98] Not only had the majority of black families not ridden the postwar economic boom; conditions in the ghetto had actually worsened.[99] By the early 1980s, almost half of black children lived in poverty in contrast with less than 15% of white children.[100] Black families had less than one-fifth the wealth of white families. The Federal Reserve studied the racial wealth gap in 1967 and concluded that "the evidence appears overwhelming that the net wealth position of black families is substantially poorer than that of white families of similar characteristics." [101] For whites and blacks earning more than $20,000 a year in 1967, whites had a net wealth of $100,009 and blacks had $30,195. At the bottom, for incomes less than $2499 a year, whites had $10,681 and blacks had $2148.[102] The Federal Reserve study concluded that the source of the wealth gap was historic inequalities in income and opportunities, "a legacy of past economic deprivation," which would not be fixed even if the income gap was eliminated. It could only be closed by a reversal of past privileges. A separate study on black wealth explained that the reason for the large wealth gap had nothing to do with black savings patterns. In fact, "the bulk of consumption studies show[ed] that blacks saved more at any given level of income." The study

95. *Id.* This case was followed by *New Negro All. v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), in which the Supreme Court held that blacks were allowed to picket businesses that employed an all-white staff under principles of labor law.

96. *Id.*

97. *Id.*

98. *See* FRANCES FOX PIVEN & RICHARD CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 269 (1977) (explaining that "Blacks became more indignant over their condition—not only as oppressed racial minority in a white society but as poor people in an affluent one.").

99. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 140–64 (2012).

100. *See* U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES: PEOPLE AND FAMILIES – 1959 TO 2017, tbl. 3, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html [https://perma.cc/6YFQ-WCJA] (last updated Aug. 28, 2018).

101. Henry S. Terrell, *Wealth Accumulation of Black and White Families: The Empirical Evidence*, 26 J. FIN. 377 (1971).

102. *See* RICHARD STERNER, THE NEGRO'S SHARE: A STUDY OF INCOME, CONSUMPTION, HOUSING, AND PUBLIC ASSISTANCE 93 (1943); *see also* Terrell, *supra* note 101.

concluded that "these rather stark findings on wealth accumulation suggest that economic equality for black families will not be achieved when the current annual income gap between black and white families is eliminated because a considerable wealth gap will remain as a legacy of past economic deprivation."[103] The wealth and opportunity gap would continue unabated without direct government action—in other words, something more than just stopping racial discrimination.

While the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were in fact the beginning of historic changes that continue today, they were also the high-water mark of the civil rights movement. As soon as the acts were passed, it was apparent that the laws did nothing to remedy past wrongs—they were not designed to do so. The Civil Rights Act and the Voting Rights Act finally guaranteed the black population the same rights they had already been granted in the 14th and 15th Amendments passed 100 years earlier. Even these laws would have been disregarded had they not been supported by Supreme Court decrees and, more importantly, federal troops. The South was just as adamant about fighting the decrees of Congress in the 1960s as it had been in the 1860s. Only this time, the federal government forced compliance and eventually got it. The doors of the white only schoolhouse and voting stations were opened, but what could be done about the redlined ghettos and the effects of centuries of exclusion and poverty? The decree of equal protection before the law was ineffective as a remedy to this history. In fact, it stood as a barrier to it, for how could the federal government remedy its race-based laws without new race-based laws? Soon, claims of racial discrimination would be used to block and contest all government attempts at race-based remedies and affirmative action.

Blacks were still unemployed at twice the rate of whites, they occupied low wage jobs, had little wealth, and these momentous laws provided no conceivable path out of poverty.[104] Abolishing racist laws was not the same thing as achieving equality. Ending segregation was not the same thing as integration. Ending job discrimination was not the same thing as having jobs. Ending credit discrimination was not the same thing as providing credit. A legal right to equality was meaningless to the destitute and marginalized unless it could chart a path to actual equality. The movement shifted toward "achieving the fact of equality" as Bayard Rustin wrote in 1965, rather than merely "removing the barriers to full opportunity."[105] If it was true, according to Rustin, that "freedom must be conceived in economic categories," the civil rights movement turned its focus to achieving justice as an

103. Terrell, *supra* note 101.

104. *See* LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND CONTROVERSY 11 (1967) (quoting "The year 1965," according to Lee Rainwater and William Yancey, "may be known in history as the time when the civil rights movement discovered, in this sense of becoming explicitly aware, that abolishing legal racism would not produce Negro equality.").

105. Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, 39 COMMENT. 3564, 3566 (1965).

economic matter.[106] The exploitative effects of housing segregation in the North were sown through legal contracts and bureaucratic zoning. Intractable poverty and inequality were just as oppressive as the South's brute hostility but a far less visible problem to address. However, it had to be addressed in order to achieve racial equality. Urban ghettos were zones with fewer public resources such as quality schools, roads, hospitals, universities, and infrastructure.[107] The segregated ghetto contained too little capital to appreciate, and its main export, labor, struggled to find work as industries left America's cities for the less costly suburbs before eventually moving offshore.[108]

These trends were self-reinforcing. White flight included not just homeowners, but their consumer power, and ultimately led to the drain of investment and business funds. The decline of the inner city was not just a byproduct of racial segregation, but had to do with the decline of industrial manufacturing in the inner city. Large industrial plants either moved to the suburbs, closed up shop, or moved abroad. These trends led to higher joblessness in the inner city and counterintuitively to increased costs. The state of the ghetto was one of high prices and general deterioration—it was expensive to be poor and isolated.[109] Suburban retailers could lower costs due to their access to an economically diverse set of customers and higher sales volume. Small businesses charged more for products because of their lower sales volumes and higher operating costs (due to the isolation of the ghetto). The black inner-city economy

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106. *See* Bayard Rustin, *Funding Full Citizenship*, 6 COUNCIL J. 3 (1967).

107. *See* CARO, *supra* note 3, at 20 (explaining that even urban renewal programs that upgraded and revived America's cities in the 1960s did so at the black population's expense. James Baldwin referred to "urban renewal" programs as "negro removal," for the effect of urban architects like Robert Moses was that highways and roads built through ghettos pushed, packed, and divided black residents into increasingly overcrowded and under-resourced neighborhoods.).

108. *See* FRANK G. DAVIS, THE ECONOMICS OF BLACK COMMUNITY DEVELOPMENT: AN ANALYSIS AND PROGRAM FOR AUTONOMOUS GROWTH AND DEVELOPMENT (1972) (noting that the "condition of economic stagnation and decay in the black ghettos of America is not self-correcting within the price system. Rather, the pull of economic forces sets up a permanent condition of inequality between a low-income labor-intensive black economy and the rest of the economy.").

109. Ed Glaeser, *Ghettos: The Changing Consequences of Ethnic Isolation*, 7 REGIONAL REV. (1997), https://www.bostonfed.org/publications/regional-review/1997/spring/ghettos-the-changing-consequences-of-ethnic-isolation.aspx [https://perma.cc/939Z-629X]. Note: Despite its negative connotations, I have chosen to use the term "ghetto" for several reasons, First, during the crucial years of reform and protest, the black activists across the political spectrum as well as the reformers and academics addressing the credit issues covered herein used the term "ghetto" to describe segregated black neighborhoods. Second, and more crucially, the alternative terms "black neighborhood" or "inner city" do not accurate connote the history of these black spaces. "Black neighborhood" is a term that erases the creation of these spaces. These areas were not chosen voluntarily by their residents—strict racial segregation has been a constant. And this racial segregation was enforced through violence—both state and private—and law—both private contract law, zoning, and legislation. The term ghetto may not be the right terminology, but to me it draws attention to the conditions of its formation through violence, law, and cohesion. I agree with critics of the word when it is used as a description for subpar goods or conditions, which is a modern usage of the term. I have not used the word ghetto in that way in this article and believe it is that usage that has burdened the term with associations of stigma and racism.

was a uniquely destructive mix of negative forces that impeded the economic mobility of the residents. In 1965, Kenneth Clark described the "dark ghettoes" as "social, political, educational, and—above all—economic colonies."[110] Though Clark was not a black nationalist, the black nationalist movement viewed the segregation of the ghetto through the prism of anti-colonization movements abroad. The ghetto did not resemble a colony in many ways, but one could be forgiven for drawing the analogy when observing the drastically different economies in the "dark ghetto" in contrast to the white suburbs.

Moreover, just like the violence that accompanied the anti-colonialization fights abroad, a violent resistance also ignited in the U.S. ghettos. This resistance was unlike anything the U.S. populace had experienced heretofore.[111] A CBS TV broadcast announced, "This was not a riot. It was an insurrection against all authority."[112] Johnson deployed the National Guard with military equipment to deal with the civil insurgency.[113] Doug McAdams's study of the civil rights movement after 1965 explained, "It would not seem an overstatement to argue that the level of open defiance of the established economic and political order was as great during this period as during any other in the country's history, save the Civil War."[114] Sixteen days after Congress passed the Civil Rights Act of 1964, Harlem erupted in violence. Five days after President Johnson signed the Voting Rights Act of 1965, the Watts district in Los Angeles exploded in a deadly riot that killed and injured many and destroyed millions of dollars' worth of property. Watts had been thoroughly segregated over the preceding decades, making poverty concentrated and extreme.[115] One in three people in Watts were unemployed, all but a single industrial plant had abandoned the Los Angeles district, and rioters targeted white property as they channeled their anger toward their perceived exploiters—white absentee property owners, pawn shops, and grocery stores. In Chicago's West Side, rioters claimed that they wanted to "drive white 'exploiters' out of the ghetto."[116]

Though rioting and looting in some places seemed like a random and rage-fueled destruction of imprecise orientation, observers noted that there were typically specific targets. Generally, rioters directed their pent up anger specifically at ghetto

110. *See* KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 11 (1965).

111. *See* Paul C. Tullier, *School Dropouts Build Explosive Unemployment in Ranks of Youth*, KAN. CITY TIMES, May 3, 1963, at 38.

112. *See* GERALD HORNE, FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S, at 36 (1997).

113. *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 71 (2016) (explaining that Gov. Jerry Brown called the rioters "terrorists" and promised to deal with them "forcefully").

114. *See* JOHN SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 73 (1996).

115. *See* Joseph A. Califano, *Report of the President's Task Force on the Los Angeles Riots* 6 (Aug. 11–15, 1965) in folder Califano Los Angeles Riots, Ramsey Clark Report, in box 47, in Office Files of Joseph A. Califano (accessed at Lyndon Baines Johnson Presidential Library).

116. *See* DAVID GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 439 (1986).

lenders.[117] The *Washington Post* reported that the stores that sold on credit were the "most popular victims of the riots."[118] Upon studying these accounts, the Federal Trade Commission (FTC) concluded that rioters were in fact engaged in "selective burning and looting" of stores they felt "had treated them unfairly" and that these rioters went to the lenders "not to loot, but to destroy the credit records of the stores they burned. This was their solution to oppressive debt."[119] Stores were seized by rioters who destroyed the records (books) on which their debts were recorded. Journalists reported crowds chanting "burn the damn records;" a mother told looters at a grocery store, "Don't grab the groceries, grab the book."[120] The protest against unequal interest and contract terms was the Birmingham struggle of the northern ghetto. However, this protest did not capture the national attention as did the fight between Bull Connor's dogs and clubs and the peaceful children marching in the South. One could be captured on the *New York Times* front page to expose the brutality of Southern Jim Crow, the lawlessness of the Southern justice system, and the obvious moral rectitude of the civil rights movement. The other—the riots, the destruction of property, the opaque legal mechanisms of the installment contract and debt financing—was not picture-worthy or easy to understand. Nevertheless, the Jim Crow credit market was also rooted in centuries of racial discrimination, and its eradication was just as necessary to the realization of the country's democratic ideals.

THE POOR PAY MORE

By the 1960s, credit card transactions were ubiquitous in American life and the nature of credit was separate and unequal. Credit cards did not cross the redlines of the ghetto and installment credit was almost unheard of in the middle-class white suburbs. Black buyers made almost every large purchase with high-cost installment credit, where the purchases were paid back over time with high additional interest costs. Even some small purchases, like groceries, doctor visits, and encyclopedias, were bought on installment credit.[121] Black families across all income levels had more debt than whites and paid higher interest.[122]

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117. *See Consumer Credit and the Poor 1*: *Hearing Before the S. Comm. on Banking and Currency*, 90th Cong. 2d Sess. 5 (1968) [hereinafter *Consumer Credit and the Poor 1*]; *see also* HYMAN, *supra* note 3, at 194.

118. *See* Murray Seeger, *Washington Ghetto Smoldering Ruins Block After Block*, L.A. TIMES, Apr. 7, 1968, at 18.

119. *See Federal Trade Commission Report on Credit Practices: Hearing Before the S. Subcomm. on Fin. Insts. of the S. Comm. on Banking and Currency*, 90th Cong. 18, 22 (1968).

120. *See* HYMAN, *supra* note 3, at 180.

121. *See* DAVID CAPLOVITZ, THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES 49–57 (1967) (explaining that the most common purchases were appliances and furniture and because families living in unstable housing in the ghettos moved more often, they bought more furniture).

122. *See* Andrew Brimmer, *Small Business and Economic Development in the Negro Community, in* BLACK BUSINESS ENTERPRISE: HISTORICAL AND CONTEMPORARY PERSPECTIVES 165–68 (1971).

In the 1964 study *The Poor Pay More*, Columbia professor David Caplovitz described the ghetto debt market as a "deviant one in which exploitation and fraud are the norm rather than the exception."[123] Specifically, he found that New York ghetto residents paid much higher prices—"unbelievably" high according to the author—for goods than anywhere else. These customers were not buying more goods than the average consumer or even relying more on credit, but they obtained "considerably less value for their dollar."[124] Another 1968 study conducted by the FTC reported that 93% of the sales in the black ghetto were on installment compared with only 27% in white suburbia. The FTC's study, which was also labeled "The Poor Pay More," calculated that for $100 of goods, the poor paid $300 compared to $150 paid by those buying from general retailers outside the ghetto.[125] The FTC report also found costs in the ghetto to be higher across the board for housing, food, and general services.[126] The FTC called these results "disturbing."[127]

This "disturbing" price of credit had to do with the distinct ghetto credit market that had developed as a result of credit redlining. Large retailers did not operate within the ghetto, so most purchases were financed at the same store that sold the goods.[128] Because these consumers were a "captive market," there was no price competition among these retailers. Lenders courted customers through advertising, promises of easy credit, and door-to-door salesmanship.[129] Borrowers fell into a continuous debt relationship with these merchants, a situation appropriately described as an "urban sharecropping system."[130]

Loan default was common and occurred at much higher rates than in the suburbs. Financial instability created by poverty and wage irregularities was partially responsible. But the higher cost of credit was also to blame. Resentment contributed to the instability as well. Ghetto retailers sold shoddy merchandise at high prices.[131] Senator William Proxmire, chairman of the Senate Banking Committee, believed that resentment and frustration also played a part in the higher default rate. Proxmire noted that these retailers often sold goods that were fraudulently described as in better condition than they were, which frustrated borrowers. When the appliance stopped working, Proxmire explained, "many [borrowers] stop making payments."[132] The high default led to immediate problems with repossession and threats of criminal penalties, but also led to future restrictions of

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123. *See* CAPLOVITZ, *supra* note 121, at xvii.

124. *See id.* at 81, 88, 96–97, 107–09, 16–17, 90–91, 110–12, 119, 125 (explaining that even among inner city borrowers, blacks paid more for credit than did whites).

125. *See* FED. TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS, at IX (1968).

126. *See Consumer Credit and the Poor 1*, *supra* note 117, at 9–10.

127. *Id.* at 3–4.

128. *See* CAPLOVITZ, *supra* note 121, at 49–57.

129. *Id.* at 58–80.

130. *Id.* at 25, 100.

131. *Id.* at 21.

132. *See Consumer Credit and the Poor 1*, *supra* note 117, at 7.

credit for ghetto borrowers and higher costs for all the retailers who spent money on collections and repossession.

Contract defaults often entailed repossession, wage garnishments, court judgments, and even shakedowns by lenders, all of which were unimaginable for suburban lenders.[133] Job loss could lead to default on a furniture loan, but a missed payment could also lead to job loss because it was common for an employer to fire an employee whose wages were garnished in order to avoid the hassle of paying more than one person and to keep a streamlined system.[134] Moreover, law enforcement and the court system were a part of the black credit system and thereby added the risk of criminal sanctions to credit transactions.[135] Ghetto lenders were the face of exploitation, humiliation, shame, and injustice, so it is unsurprising that they were the first targets of the violence.

However, these lenders were not the direct cause of the inequality and exploitation in the ghetto. This is not to say that merchants were not taking advantage of the poor. They were. There was predatory behavior, misleading advertisements, misrepresentation of prices, bait-and-switch advertising and sales, and fraud to be sure, but the ghetto's destructive economic undertow trapped both the high-interest lenders as well as the borrowers.[136] Several studies, including contemporary studies by the FTC, Congress, and other academics, as well as recent analysis by historians, show that these lenders were not even making high profits.[137] The poor paid more and the sellers made less. Historian Louis Hyman found that "between bad debt losses, lawyers' collection fees, higher insurance premiums, more accounting staff, and higher sales commissions, the higher costs of ghetto retailers accounted for 94 percent of the difference in the gross margins."[138] Poverty, segregation, and exclusion from robust credit markets meant high costs, low profits, and higher risks for everyone. Prices were high, quality was low, and profits were deceptively scarce.

These lenders had higher loan losses and collection costs in the ghetto than they did in the suburbs because black families did not have a broad wealth infrastructure that whites enjoyed. These costs included hiring repo men and taking customers to court for unpaid bills. These collection tactics and the "unbelievably"

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133. *See* HYMAN, *supra* note 3, at 181.

134. *See* CAPLOVITZ, *supra* note 121, at 157.

135. *See* FED. TRADE COMM'N, *supra* note 125, at 33–34 (describing how eleven low-income market retailers obtained 2,690 judgments in 1966 resulting in 1,568 garnishments and 306 repossessions. General market retailers reported only seventy judgments for the same year. The low-income retailers had one suit for every $2,599 of their net sales. The general market retailers averaged one suit for every $232,299 of sales.).

136. *See* CAPLOVITZ, *supra* note 121, at 179–92 (Caplovitz himself had misunderstood this dynamic and, when he offered reflections in the 1967 reprint of *The Poor Pay More*, he conceded that it was a mistake to see the ghetto credit merchants as "nefarious exploiters of the poor" and believed that a more thorough analysis could reveal more about the "economic constraints that operate on these men"); *see also* FED. TRADE COMM'N, *supra* note 125.

137. *See* HYMAN, *supra* note 3, at 181.

138. *See id.* at 193.

high merchandise prices these lenders charged caused much suffering for borrowers, but they also cut into the lenders' margins. They had to hire more staff, lost more money on default, and paid more to finance their own businesses—all these costs were passed on to borrowers.

Situating these lenders in the broader framework makes the disparity even more striking. The cost of credit is related to the risk of lending. The higher the risk of default, the higher the interest rate. However, this is not a one-way causal link. Higher interest can make a loan higher to repay and therefore lead to higher default regardless of the risks associated with the borrower. Moreover, loan costs are not perfectly matched with the borrower's ability to repay. Taking an analogy to today's credit markets, all payday lenders charge the same high rate of interest to their borrowers. A hedge fund manager walking into Cash America would get the same 300% APR loan as would a Wal-Mart employee. Of course, a hedge fund manager will not need an emergency loan of $500 because he can "borrow" the cash from his own holdings at no cost at all. If he is truly cash-poor, perhaps he could use his social capital to borrow $500 again at no cost from his network of wealthy friends or family. These are crude generalizations, but they largely match the demographic data of the wealthy and the poor—the wealthy tend to have wealthy friends and family and the poor tend to have similarly poor social networks. Thus, the cost of credit differs for the hedge fund manager and the Wal-Mart employee not because of the underwriting of the lender they go to, but because they have access to different types of lenders. A hedge fund employee, if he is going to borrow, will borrow large sums of money either from the Capital Markets, his investors, or the Federal Reserve if he owns a bank.[139] These loans will likely not even be loans, but bond sales, equity transfers, or just investments. The American poet Ogden Nash put it this way: "[O]ne rule which woe betides the banker who fails to heed it; Never lend any money to anybody unless they don't need it."[140]

On the other end of the income ladder, the poor pay most for small sums of credit. Due to a variety of forces, including bank conglomeration, redlining, and the deregulation of state usury laws, poor communities do not have access to small credit from banks. As such, their only option for a loan is to borrow from a high-cost title lender, payday lender, or pawn broker. This is the market in which they operate. To take an example in the middle, a middle-class office worker who wants to purchase a second car has an altogether different credit market to which she can turn than the hedge fund manager or the minimum wage employee. She can take out a home equity line of credit, a small loan from her bank, or liquidate any 401(k) stock holdings she might have at a penalty. These options cost more than what the wealthy pay for credit—to the extent they even need it—and much less than what the poor pay. A home equity loan costs less than 10% APR and can be structured

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139. MEHRA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY (2015).

140. Ogden Nash, *Bankers Are Just Like Anybody Else, Except Richer*, NEW YORKER MAG., Dec. 7, 1935, at 41.

to be paid over the life of a home mortgage. Compare this to a payday loan or a title loan that must be repaid in a short time period and whose interest rate is anywhere from 300% of the total loan to 2000%.

Thus, ghetto residents were paying more not just because they were higher risk borrowers, but because they operated in a higher risk credit market. Segregation had cordoned off the riskiest borrowers. Large national chains could avoid impoverished black neighborhoods entirely, and thus avoid the higher costs of underwriting, servicing, and collecting, which is exactly what they were doing. But not all of these borrowers were poor credit risks. In fact, with government insurance akin to what had undergirded the suburban credit market, residents of inner-city ghettos would also have been low-default borrowers. As it was, they paid more for loans, which meant a greater debt burden, and higher default. This then cost lenders more, further driving up prices.

Suburban consumer lenders could offer lower interest because of lower risks, and lower risks made for more profitable lending, which drove down prices even more. Because their loans were predictable, they could be securitized and sold into the secondary markets, which lowered their risk even more. Higher risk and geographic isolation, or more accurately racial segregation that led to geographic isolation and higher risks, prevented installment lenders from participating in the robust credit markets that were driving down credit prices in the suburbs. It was the secondary markets that were the main engines of the credit markets, and installment lenders did not participate in secondary markets.[141] Ghetto lenders paid more for capital because they could not sell their loans into the secondary market. The loans were too risky because black families did not have access to the network that lowered risks. They were stuck in an ancient debt market while the rest of the country had taken off into the modern world of risk sharing, secondary markets, and large finance companies that all worked to lower the risks and the costs of debt.

Meanwhile, a virtuous credit cycle had taken hold in American suburbs. But the network did not work without all of the pieces in place. This revolving credit market that had taken shape among retailers outside of the ghetto meant a lower burden for customers and lower default rates. The black ghetto was not part of this infrastructure. Americans lived in two different worlds of credit—separate and unequal. But the equal protection provisions of the Civil Rights Acts had not been designed to address the type of discrimination that had led to the Jim Crow credit market. In other words, color-blind laws and legal prohibitions on de jure discrimination did nothing to lower the costs of installment credit.

In the aftermath of the riots, the Banking and Currency Committee in the Senate held two separate hearings to discuss the problem of the poor paying more and what could be done about it. Senator Proxmire, a Wisconsin Democrat, led the hearings. Proxmire was an incorruptible reformer who was as committed a

141. *See* Saule Omarova & Bob Hockett, *The Finance Franchise*, 102 CORNELL L. REV. 1143 (2017) (analyzes how secondary markets have shaped the financial industry).

policymaker in the cause of fixing inequalities as any other, but he was a hawk when it came to public spending and a dogmatic believer in the power of small business as the lifeblood of the country.[142] Proxmire expressed "outrage" at the injustices faced by ghetto consumers, and he believed that the government must play a role in alleviating the suffering.[143] Proxmire and the other members of his committee expressed genuine puzzlement that market competition had not brought down prices in the ghetto. Yet in testimony after testimony, government agencies, academics, and economists explained that these lenders were not making profits even as they charged exorbitant prices. The legislators seemed to understand that the ghetto lending economy created a cycle of high prices and lack of competition. They understood that the cycle must break somehow and that the "economic illness of the ghetto" required a strong cure.[144] Yet when they began to discuss the antidote, they honed in on getting more black banks, credit unions, and lenders in the ghetto.[145]

In the end, the Congressional hearings made three specific findings. First, rioters targeted white-owned establishments.[146] Second, the rioters were targeting installment lenders.[147] Congress based future policy on these first two findings. Yet there was a third finding the report supported that Congress ignored or forgot when it came to crafting the policy response. The third finding was that these lenders were not profiting. It simply costs more to lend in the ghetto because of the structure of the segregated credit market. This was the finding that each report confirmed even as it confounded the legislators. There were no Bull Connor lenders. They were no George Baileys, but they were not predators. However, the policymakers, intending no ill will, but lacking a political mandate, urged policies that ignored these findings. Without addressing this finding, Congress's response was to keep the Jim Crow market intact and to throw more lenders into its maw, as though the lender's race would somehow change the fundamental economy.

In the end, after hearing testimony to the contrary, the senators misdiagnosed the problem in ghetto lending as one of white institutions exploiting the black ghetto. While "white-owned stores were burned and looted," said New York Republican Senator Jacob Javits, "'soul brother' establishments were spared."[148] Indeed, there was testimony bolstering this finding. Many black businesses even put signs up in their windows during riots to identify themselves as "soul brother"

142. Sen. Proxmire wrote about his belief in small business. *See*, *e.g.*, WILLIAM PROXMIRE, CAN SMALL BUSINESS SURVIVE? (1964).

143. *See Consumer Credit and the Poor 1*, *supra* note 117, at 6–7.

144. *Id.* at 17–20.

145. *See id.* at 80–85; *see also Financial Institutions and the Urban Crisis: Hearing Before the S. Subcomm. on Fin. Insts. of the S. Comm. on Banking and Currency*, 90th Cong. 2d Sess. 5, 151, 324–27 (1968) [hereinafter *Financial Institutions and the Urban Crisis*]; U.S. SENATOR PROXMIRE REPORTS TO YOU FROM WASHINGTON (1969), *microformed on* P91-4833 (Wis. Historical Soc'y).

146. *Supra* note 145.

147. *Id.*

148. *See Financial Institutions and the Urban Crisis*, *supra* note 145.

establishments.[149] However, this was tangentially related to the problem of the Jim Crow credit markets. Nevertheless, the senators converged on a plan to simply throw more black banks and lenders into this unequal credit market. It was already clear, however, that the cause of the onerous debt terms was not the lenders' race but the lenders' costs. The misreading of the problem as a lack of enough black lenders would lead to decades of misguided policy. But at least in the aftermath of the late 1960s "urban crisis," Congress intended for such programs to work alongside other more robust anti-poverty measures.[150]

Senator Javits put forward a plan to spur black-owned small business, but he emphasized that only a robust federal intervention aimed specifically at the ghetto could reverse the trend of decline because "no conceivable increase in the gross national product would stir these backwaters" without targeted assistance.[151] President Johnson's Small Business Administration (SBA) Director, Howard J. Samuels, said that the "inner cities of this country will be dead economically" and would remain "forever ghettos" unless blacks became "owners of American businesses."[152] The SBA's response was a small business lending program called Project OWN, which ran alongside a larger War on Poverty program. Samuels promoted a program of "compensatory capitalism" aimed at the "economic emancipation" of the black population.[153] John Jacob of the Washington Urban League believed that credit card issuers discriminated against blacks and suggested instead a "credit card for the poor—extended by a black credit card company in the black community."[154]

An avid believer in small business, Proxmire put his faith in credit unions.[155] Proxmire introduced a bill after the hearings that he said was "designed to help the poor break out of this vicious cycle" by "authorizing a strong federal program to encourage the formation of credit unions and consumer counseling programs for the poor."[156] The bill was a continuation of Project Moneywise, which created 218

149. *See* Michael Zweig, *Black Capitalism and Ownership of Property in Harlem* (Stony Brook, Working Paper No. 16, 1970) (explaining how a study of Harlem found that more than eighty-five percent of the businesses and properties in Harlem were owned by outsiders or nonresidents of Harlem).

150. *See Financial Institutions and the Urban Crisis*, *supra* note 145, at 428.

151. *Id.* at 9, 13.

152. *Id.* at 89–91.

153. *Id.* at 94–95; *see also* ROBERT WEEMS, BUSINESS IN BLACK AND WHITE 89–109 (2009) (describing how in 1967, SBA chief, Howard J. Samuels created "Project OWN" as the government's minority business aid program. The program was intended to funnel loans to black and white enterprises in ghetto areas. Though Johnson had supported the program, his heart was not into it and it seemed that he was only using minority enterprise as "a crisis management" tool to deal with unrest. Largely a political ploy, the program was not robust—by the end of 1968, only 5.7 percent of SBA money went to minority businesses.).

154. *See Financial Institutions and the Urban Crisis*, *supra* note 145, at 236.

155. Proxmire even wrote a book committed to small business. *See* PROXMIRE, *supra* note 142.

156. *See* U.S. SENATOR PROXMIRE REPORTS TO YOU FROM WASHINGTON, *supra* note 145.

credit unions in poverty-stricken areas with the help of "indigenous leaders."[157] The program's director said that the goal was for these credit unions to use consumer education and to rely on the "latent savings in the community" to build wealth.[158] Of course, there were few savings, and such a plan had been tried for a hundred years without any results.

By 1968, most of these credit unions were struggling to remain viable, and the program was nearing its end, but Proxmire was still convinced that credit unions were the solution. As he told the credit union industry representative, "[W]e really count on credit unions heavily to solve a large part of this problem." [159] After all, he said, "[T] his is one of the purposes for which credit unions were initially established, in order that people with modest incomes could establish credit and be able to operate in this free enterprise economy."[160] The myth of the credit union was that through local control of collective money, a marginalized community could eventually gather enough capital to join the economy. But this was not actually how credit unions had created the middle-class—they had done it through federally subsidized mortgage loans. However, the allure of this banking model as an answer to poverty was so strong that even the learned chair of the Senate Banking Committee, an honest reformer who understood the forces of this deviant ghetto market, could not break the credit union's spell as the answer to poverty. Proxmire knew that these urban installment lenders were not making money, a fact he repeated many times during the hearings. He also understood that the problem's heart was concentrated poverty and not a few mischievous lenders' profitable exploitation. Yet he maintained a somewhat magical faith that locally owned credit unions would break the "vicious cycle." [161] Perhaps it was because any other solution was politically impractical or cost too much, or perhaps he believed that credit unions could overcome these obstacles through their community commitment. To Proxmire's credit, this was only his first proposal, with many more to follow.

Just a few years later, Proxmire honed in on eliminating credit discrimination and pushed for passage of the 1970 Fair Credit Reporting Act (FCRA) and the 1974 Equal Credit Opportunity Act (ECOA).[162] The burgeoning women's rights movement pushed these laws through Congress. These equal credit laws eliminated race and gender identification from loan applications and required lenders to use objective credit scores instead of identity. Before their passage, even affluent women could not get a credit card. Women of means were being denied credit due

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157. *See Financial Institutions and the Urban Crisis*, *supra* note 145, at 74; *see also Consumer Credit and the Poor 1*, *supra* note 117, at 30–38.

158. *See Financial Institutions and the Urban Crisis*, *supra* note 145, at 74–82, 101–06; *see also Consumer Credit and the Poor 1*, *supra* note 117, at 5–6, 34–36.

159. *Financial Institutions and the Urban Crisis*, *supra* note 145, at 134.

160. *See id.* For a treatment of the Credit Union myth, see BARADARAN, *supra* note 139.

161. *See Financial Institutions and the Urban Crisis*, *supra note* 145, at 134.

162. *See* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 149 (2017).

solely to their gender and not their ability to repay. Wealthy black consumers also suffered from such blatant discrimination, however, the majority of blacks suffered from a different breed of discrimination as described above. These antidiscrimination provisions also applied to minorities, but the exclusion of minorities from credit was not the same as what women faced. Creditors indeed discriminated against creditworthy women and blacks based solely on negative stereotypes. But for blacks, discrimination created a plethora of other conditions that materially affected their default risk. The solution to the Jim Crow credit market was not to simply remove the "whites only" signs. Racism was the problem's root cause, but over decades, that racism had entrenched a segregated and undercapitalized ghetto economy that was responsible for much of the disparity. In order to reach parity, that economy or the segregated black ghetto itself would have to be disassembled. Unable or unwilling to eliminate the ghetto credit market in its entirety, Congress focused exclusively on credit application discrimination. However, nondiscrimination laws would not and could not change the fundamentals of the Jim Crow credit markets. Lenders simply found other means of avoiding lending to blacks—they used zip codes as a proxy for race.[163] Due to decades of racial segregation and the subsequent reinforcement of this racial geography through redlining, zip codes were almost perfect indicators of a community's racial and economic makeup.[164]

Misunderstanding the problem entirely, the FTC encouraged lawmakers to create "financial education" programs so that blacks would not enter into such exploitative contracts.[165] The FTC's own detailed study of lending disparity found that the poor knew that they were paying too much for credit, but that they lacked other options.[166] Caplovitz also concluded his study by proposing financial education, suggesting that ghetto consumers should be taught to shop at retailers outside of the ghetto.[167] Ultimately, Caplovitz conceded, however, that all these suggestions would be futile "until poverty itself is eradicated."[168] Financial education is useful insofar as consumers are making bad choices because they do not know of better options. However, high-cost borrowing is usually a result of a lack of better choices. In a survey of ghetto consumers, only 15% thought it was a "good idea" to buy goods on credit.[169] The rest said it was a good idea only in certain circumstances or a bad idea altogether.[170] When asked why, more than half of those surveyed said that "it costs too much" or "you pay too much in carrying charges."[171] Though these

163. *Id.* at 150.

164. *See* HYMAN, *supra* note 3, at 204.

165. *See* Lauren Willis, *The Financial Education Fallacy*, 101 AM. ECON. REV. 3, 429–34 (2011) (analyzes the inutility of financial education programs); *see also* MEHRSA BARADARAN, note 139.

166. *See Consumer Credit and the Poor 1*, *supra* note 117, at 9–10.

167. *See* CAPLOVITZ, *supra* note 121, at 183–84.

168. *Id.* at 192.

169. *Id.* at 95.

170. *Id.*

171. *Id.*

consumers seemed to understand the exact nature of their problem, they admitted that this was "the only way poor people could buy."[172] Financial education is still proposed as a solution to structural problems despite several convincing studies that financial education does not work.[173]

In reality, all of these solutions were incomplete and shortsighted. The only way to adequately counter credit disparity was to eliminate the wealth inequality between the ghetto and the suburbs which would eliminate the Jim Crow credit market. One path toward equality was to integrate the credit market, which is what the Kerner Commission report had suggested as the only solution to the problem of inequality.[174] If black borrowers could integrate into the general market and large retailers were allowed to do individual credit evaluations, then black borrowers could have paid less for credit. This would have allowed lenders to diversify their risks, thus driving down prices for everyone. Increased diversity would even have been preferable for the large finance companies, as most lenders prefer some borrowers who pay off their balance and many who roll over their balances and pay interest. This is exactly what secondary markets had wrought outside of the red lines. However, integrating a zip code-based credit market would have been difficult to do without physical integration, which was simply not politically feasible.[175]

The other alternative was to give black residents a direct capital infusion to jump-start wealth creation and break the poverty cycle directly. State law and policy created the racial wealth gap, and so a reversal of the wealth gap through a program of reparations would have been justifiable. But, while forced integration would have been unfeasible and unlikely, subsidizing black communities was inconceivable. Moreover, such a race-based redistribution of wealth had to contend with the bedrock principle of the civil rights movement: color-blind equality. The promise of equal protection before the law encapsulated in the Civil Rights and Voting Rights Acts opened doors to full participation in the economy and the democracy, but it gave the courts and legislatures the rhetorical and legal tools to close the doors to any claims for redress of historic injustice. Colorblindness and "equality" before the law was often used against black demands for justice. The theory is encapsulated in Chief Justice Roberts' statement in 2004 that "the way to stop discrimination on the basis of race is to stop discriminating on the basis on race."[176] Demands for racial equality taken from the theoretical underpinnings of the civil rights laws have been used by litigants with the blessing of the Supreme Court to declare government action attempting to address past injustice as unconstitutional.[177]

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172. *Id.*

173. Willis, *supra* note 165, at 429–34; BARADARAN, *supra* note 139.

174. *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, THE KERNER REPORT (1988).

175. *See* BARADARAN, *supra* note 139, at 164–214.

176. Ilya Shapiro, *The Way to Stop Discrimination on the Basis of Race Is to Stop Discrimination on the Basis of Race*, CATO AT LIBERTY (Apr. 22, 2009), https://www.cato.org/blog/way-stop-discrimination-basis-race-stop-discriminating-basis-race [https://perma.cc/7849-MW8P].

177. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 531 (2013) ("Nearly 50 years later, things have changed dramatically." Shelby County contends that the preclearance requirement, even without

BLACK CAPITALISM

During the 1968 election, each presidential candidate had a platform to address the racial wealth gap through economic self-determination. Prior to his assassination, Robert Kennedy was the Democratic frontrunner. Among the candidates, his Community Development program was the most holistic.[178] It included tax incentives for businesses, Community Development Corporations, job training programs, and government funding for poverty relief programs. Other candidates had similar black capitalism programs. Hubert Humphrey, the eventual Democratic candidate, called his proposal "Black Entrepreneurship: Need and Opportunity for Government Help" and proposed plans geared towards "enhanc[ing] black pride and quell[ing] black insurgency."[179] His plan included more funding for businesses through the SBA programs that had been started during the Johnson administration.[180] Furthermore, his plan called for the creation of an "urban development bank" to fund businesses in the ghetto.[181] For Humphrey, black capitalism was a part of his reform package, which included a continuation of War on Poverty programs. In the presidential race, Humphrey referred to Nixon's black capitalism plan as "double talk." When Nixon promised voters that his program would cost little, Humphrey retorted, "Of course it will take money. Talking about black capitalism without capital is just kiting political checks."[182]

Nonetheless, Nixon's black capitalism program was a vital part of his Southern strategy, which used race as a wedge issue without actually talking about race.[183] Other scholars have noted Nixon's racist dog whistling on "law and order" as a signal to attract white voters who were fearful of blacks.[184] Nixon's economic program sought to link black poverty to welfare dependency and to resist demands for integration or reparations by advocating "black capitalism" instead.

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regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "'[v]oter turnout and registration rates . . . now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.' Northwest Austin, 557 U.S., at 202, 129 S.Ct. 2504. The tests and devices that blocked ballot access to the ballot have been forbidden nationwide for over 40 years."). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) ("Accordingly, we would reverse the judgment of the Supreme Court of California holding the Medical School's special admissions program unconstitutional and directing respondent's admission, as well as that portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process.").

178. *See* BARADARAN, *supra* note 139.

179. *See* WEEMS, *supra* note 153, at 91.

180. *Id.* at 90–95, 107–09.

181. *Id.*

182. *See* Memorandum from Howard J. Samuels, Admin., Small Bus. Admin., to Matthew Nimetz, Staff Assistant, Lyndon B. Johnson (Sept. 27, 1968), *quoted in* WEEMS, *supra* note 153, at 105.

183. *See* DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS (2000); *see also* IAN HANEY-LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE WRECKED THE MIDDLE CLASS (2014).

184. *See generally* LOPEZ, *supra* note 183; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

By using the racially neutral rhetoric of free market capitalism, he could reject government aid programs.

Alan Greenspan, who served as Nixon's economic advisor, addressed claims by black activists for reparations in a private campaign memo to candidate Nixon in 1967 called "The Urban Riots of the 1960s." [185] He wrote that capitalism itself was under attack by demands made by black militants and that "ghetto riots have become a rallying cry for an attack upon America's system of free enterprise and individual rights."[186] Greenspan outlined his reasoning:

> The critical question is, of course, whether the Negroes are correct in claiming that they have been exploited and that their violent reaction is the rational response. There can be little doubt that discrimination has been rampant. However, the charge of exploitation in the sense of value being extracted from the Negroes without their consent for the profit of the whites is clearly false . . . . This distinction between discrimination and exploitation is all the difference in the world. [187]

In other words, because whites had not profited directly from black misery, reparations should be rejected. Moreover, he underscored in the memo that any capitulation to demands for federal spending in the ghetto were a threat to free enterprise.

Greenspan believed that the cries of exploitation were not only misguided, but had destroyed the status of the "more moderate old-line Negro civil rights leaders" and turned the black middle-class anti-capitalist.[188] This was because black activists had misunderstood capitalism and the natural market of the ghetto and had erroneously and unfairly blamed whites for exploitation. He was correct when he said that "profit rates in slum areas are doubtless distressingly low considering the risks," but he erred when he concluded based on that observation that the white community was not gaining any "advantage and profit" and that therefore cries of "injustice" were "erroneous."[189] He could not see that the same system that discriminated against blacks had brought benefits to whites. Nor did he acknowledge that for blacks who were being crushed by the ghetto debt trap, it could still feel like an "injustice" even though the lenders were not making direct profits. He rejected the liberal notion that "the Negro ghetto must be elevated to the level of affluence of middle-class America" because "this can only be done by massive governmental expenditures."[190] Instead, he advised Nixon to pursue programs to "help Negroes help themselves."[191]

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185. *See* Letter from Alan Greenspan, Chairman, Townsend-Greenspan & Co., to Richard Nixon, Republican Presidential Candidate, on the Urban Riots of the 1960s (Sept. 26, 1967) (on file with the Richard Nixon Presidential Library).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

Capitalist theory was used to fight basic antidiscrimination laws in Milton Friedman's foundational 1962 book, "*Capitalism and Freedom*." The intellectual father of neoliberalism opposed such laws as a violation of free market capitalism. He decried discrimination as a matter of bad taste but said that civil rights laws were an "interference with the freedom of individuals to enter into voluntary contracts with one another."[192] He compared laws prohibiting discrimination to laws requiring discrimination—it was all unjustified government intervention. Friedman believed that markets would themselves root out discrimination because it was costly and inefficient. Friedman claimed that anyone who opposed buying goods from black businessmen or employing black employees was expressing an inefficient preference and would therefore pay a higher price for that preference. Theoretically, this was true, but historically it was not. Because the ghetto had cordoned off a segment of risky borrowers, whites actually paid significantly less for goods, credit, and housing. Racial discrimination had not cost whites but had actually brought many advantages through all-white suburbs, such as lower competition for lucrative jobs, and for a time, even labor protections that benefited whites at the expense of blacks.[193]

Friedman, Greenspan, and other market capitalists grounded their arguments in economic theory. They were chasing a libertarian vision of the economy, but what they were describing was a hypothetical future—it had no relationship to the actual lived experience of American history. This was a common trope of the Chicago school economists, which relied on models that often assumed perfect information and rational behavior and did not account for the decision-making flaws of average humans.[194] The historical American reality was that blacks had never fully participated in free market capitalism and that whites had benefited from heavy government interventions that had worked to the direct disadvantage of blacks. The arteries of trade and commerce had not flown freely through the ghetto. At least not in the realm of credit and banking. The credit markets laid atop a federal government apparatus including guarantees, secondary markets, deposit insurance, and federal reserve support. The only places where those forces were not working were inside the ghettos. The ghetto itself had been an unnatural creation of anti-market impositions of racist policies. Indeed, discrimination was incredibly costly, but only to blacks.

The neoliberal faith in capitalism and market efficiency was rooted in an ideal much like the egalitarian principles of the founding documents. They were aspirational faiths, but they were not accurate descriptions of the real world. In theory, it was costly to refuse to buy products from blacks if they were offering the

192. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 109–15 (1962).

193. *Id.* (explaining that the only exception was when black collective action increased the cost of discrimination by staging wide-scale boycotts, but that was hardly what Friedman was referring to).

194. *See* JUSTIN FOX, THE MYTH OF THE RATIONAL MARKETS: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET (2009) (recounting the rise and eventual fall of rational and efficient market theories and the Chicago school's embrace).

same or lower prices. In reality, whites often refused to associate with blacks at any cost. Besides, even if discrimination did suddenly disappear, the broken markets of the ghetto would not. Discrimination had created macro market forces that were now operating on their own. Yet neoliberal dogma and market fundamentalism demanded adhesion to market theory, which meant an aversion to any and all "government intervention" aimed at black poverty.

Barry Goldwater's failed presidential run in 1964 was the watershed moment for libertarian market principles on the national political stage and created a movement that only grew stronger over time.[195] Goldwater demanded smaller government involvement and spending in all spheres. Without spewing the racial animus of the George Wallace wing of his party, he opposed civil rights laws, integration, and any government program meant to address poverty—all in the name of free market capitalism. There is no reason to doubt that Goldwater was a true believer in market fundamentalism. However, Goldwater won back the South for the Republican Party based on his opposition to integration and civil rights. He used the principles of libertarianism as a weapon against racial equality and did so to court the votes of the white supremacist wing of the party.[196]

Since any redress for past economic exclusion required heavy federal government action, an immediate libertarian backlash began to delegitimize all government action. Conservatives began to demand a bill of rights that guaranteed the right to free use of property, including the right to segregated neighborhoods. The movement could hardly be seen as anything but a direct response to the economic demands of the black movement and the government anti-poverty program.[197] Nixon was not a libertarian—he expanded the federal bureaucracy and created more government agencies than any modern president—but he still opposed government interference of any kind when it came to integration or anti-poverty measures. Republican strategist Lee Atwater gave away the playbook in a 1981 interview:

> You start out in 1954 saying nig***, nig***, nig***. By 1968, you can't say nig***—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're

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195. *See generally* E.J. DIONNE JR., WHY THE RIGHT WENT WRONG: CONSERVATISM—FROM GOLDWATER TO THE TEA PARTY AND BEYOND (2016) (making the case that the modern Republican party is essentially the party of Goldwater).

196. *See* LOPEZ, *supra* note 184, at 21, 17–22 ("Goldwater's conservatism operated in the South less like a genuine political ideology and more like Wallace's soft porn racism: as a set of codes that voters readily understood as defending white supremacy. Goldwater didn't win the South as a small-government libertarian, but as a racist.").

197. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RADICAL RIGHT 94–111, 167–96 (2016) (discussing how the John Birch society was an example of the early alliance between segregationists like Wallace with libertarianism. Another link was John Olin, who began to funnel money toward libertarian organizations including his own Olin foundation and the Federalist Society after witnessing the 1969 takeover of the Cornell campus by a black power group during alumni weekend. Olin also funded Charles Murray's research, which produced several tracts on racial inferiority, including the Bell Curve.).

> talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt more than whites.[198]

The theory of economic dogma, which James Kwak has called "Economism," began to be adhered to like a religious dogma and used to fight each and every government intervention to remedy past sins.[199] Economism even provided a new justification for stark wealth inequality and exploitation. Inequality along racial lines has been a constant on the American scene, but different eras have justified it with different myths. Christianity was corrupted to hold that white men had a divine right—even duty—to subjugate and enslave blacks. When religious theory fell out of favor, social Darwinism and skull measurements held that blacks were an inferior species who had lost the evolutionary race and thus their subjugation was nature's will. Now, economic theory held that "the free market" decreed that blacks hold the bottom rung because, for example, it was the laws of supply and demand that caused blacks to pay more for credit and the market that determined how much their labor was worth and that integration was anti-market. Any effort to change these markets were delegitimized and labeled as harmful government interference with what President Regan called "the magic of the marketplace."[200] And just as "God's will" was difficult to challenge in the 1800s, so too was free market economic theory in the 1960s lest one be labeled a heretic or a communist.

For the ascendant libertarians that were taking hold of American politics, the only acceptable remedy for a history of exclusion was black capitalism. But what these white policymakers surely meant by black capitalism was capitalism only for blacks. Government intervention in markets had been the norm as were government-imposed Jim Crow laws. Capitalism had not created the ghetto and black poverty—racist laws and state intervention in the markets had created both. There had never been free market capitalism for blacks. After years of exclusion, Jim Crow, segregation, and the deviant markets these state interventions had created, the Nixon administration was actually proposing that maintaining that segregated market was the remedy—that somehow by attaching the word "black" to "capitalism" would remedy past wrongs.

Nixon unveiled his plan in a series of campaign ads and speeches. One ad, entitled "The Wrong Road," showcased images of mostly brown and black poverty-stricken faces and a sign saying "Government Checks Cashed Here."[201] In addition to this imagery, Nixon's voice explained, "For the past five years we've been

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198. *See* The Nation, *Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, YOUTUBE (Nov. 13, 2012), https://www.youtube.com/watch?v=X_8E3ENrKrQ [https://perma.cc/4W62-PZNK].

199. JAMES KWAK, ECONOMISM: BAD ECONOMICS AND THE RISE OF INEQUALITY 7 (2017).

200. President Ronald Reagan, Remarks at the Annual Meeting of the Boards of Governors of the World Bank Group and International Monetary Fund (Sept. 29, 1981).

201. *Presidential Campaign Commercials 1968*, C-SPAN (Jan. 1, 1968, 1:22 PM), https://www.c-span.org/video/?153104-1/presidential-campaign-commercials-1968 [https://perma.cc/P5SV-4EF3].

deluged by programs for the unemployed—programs for the cities—programs for the poor. And we have reaped from these programs an ugly harvest of frustration, violence and failure across the land."[202] The rhetoric of this ad was a subtle subversion of the Kerner commission language, which called violence the harvest of racism. Now, according to Nixon, violence was a direct result of government aid—never mind that the violence preceded the poverty programs. At the end of the ad, as the music became more upbeat, and the camera panned across images of construction sites, a factory line, and a shipyard, Nixon pronounced, "We should enlist private enterprise to solve the problems of America."[203] In a subsequent ad called "Black Capitalism," Nixon promised to save the ghetto with a "hand-up," not a "handout."[204] More specifically, he promised "to get private enterprise into the ghetto and the ghetto into private enterprise."[205] He said that integration of the races must come, "but in order for it to come on sound and equal basis the black community has to build from within."[206] Presumably, he meant that blacks would have to work toward integration themselves as though segregation had been an act of nature, not a system imposed and enforced by racism and the government.[207]

Nixon believed that the government's "overpromising and under-producing" had caused the rioting and vowed "not [to] overpromise."[208] He was clear that the "federal government [did] not have the funds . . . to appropriate billions of dollars for our cities."[209] He believed that it was time to see what "private enterprise and individuals" could do to "provide hope" and "reconciliation."[210] In a speech called *Human Dignity*, he explained that the country needed to "go beyond civil rights."[211] Actually, in the initial draft of the speech in Nixon's presidential files, the speech said, "Forget civil rights."[212] Nixon highlighted the word "forget" and replaced it with "go beyond."[213] The message was the same. He said that "Civil Rights is no longer an issue" and that Jim Crow and segregation were over. [214] To him, it was time to focus on self-determination and "dignity." But, by dignity, Nixon was communicating that blacks needed to learn to survive on their own and that asking

202. *Id.*
203. *Id.*
204. BARADARAN, *supra* note 139.
205. *Id.*
206. *Id.*
207. Both commercials in Nixon archives: https://ws.onehub.com/folders/nwsx31jv (start at 55:43).
208. Transcript Q&A with Students at the University of Oregon, File 8, ARRA 24, 1968. (transcript) (on file with the Richard Nixon Presidential Library).
209. *Id.*
210. *Id.*
211. David Lindsey Snead, Eisenhower and the Gaither Report: The Influence of a Committee of Experts on National Security Policy in the Late 1950s (1997) (unpublished Ph.D. dissertation, University of Virginia).
212. President Richard Nixon, Human Dignity (Apr. 6, 1968) (draft speech) (on file with author).
213. *Id.*
214. *Id.*

the government for help was depriving them of their dignity. "At long last, the Negro has his bill of rights—but he cannot pay the bill."[215]

In a radio program in April of 1968, Nixon promised "more black ownership, black pride, black jobs, black opportunity, and yes, black power, in the best, the constructive sense of that often misapplied term."[216] Nixon essentially borrowed his rhetoric from Malcolm X who had stated that the "black man should be focusing his every effort toward building his own business, and decent homes for himself" although Nixon left out the part where Malcolm had said, "[S]how me a capitalist, I'll show you a bloodsucker."[217] He also ignored the part of the black power platform that demands land, reparations, and political sovereignty. Notably, Nixon enthusiastically embraced voluntary segregation, self-reliance, and private enterprise. Nixon and his advisors intended black capitalism to completely replace Johnson's anti-poverty programs. According to a Nixon biographer, he "presented black capitalism as both a panacea and a fait accompli."[218] Nixon's speechwriter, Raymond K. Price, explained that the path forward involved replacing "the Negro habit of dependence" with "one of independence" and "personal responsibility."

According to Nixon, the history of the black community was a perpetual state of dependency on government largesse. This perspective was inconceivably shortsighted. In reality, the black community had been trying to "help themselves" for generations, but they were repeatedly blocked by racist laws and thwarted by racist policy. The meager "handouts" had only begun a few years prior, and most notably, the ghetto was the only pocket in the entire American landscape that had never received government subsidies. In fact, the complete and utter lack of any "handouts" had created the ghetto in the first place; it had only ever had an economic system of unchecked and unmitigated capitalism. Yet with the eruption of violence, policymakers proposed a cure to end the ghetto's ailments: blacks must learn how to be capitalists.

Black capitalism was a hit with the media and the voters and won Nixon the Republican primary and the White House. It all sounded great to the press. The *Wall Street Journal* and *Time* magazine embraced Nixon's black capitalism rhetoric by calling it "thoughtful" and "promising."[219] Even the Democrat-leaning *New York Times*, which usually showed the same disdain for the president that the

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215. *Id.*

216. *Nixon Urges "Black Ownership" to Help Solve Racial Problems*, N.Y. TIMES (Apr. 26, 1968), http://query.nytimes.com/mem/archive/pdf?res=9C05E5D91E39E134BC4E51DFB2668383679EDE [https://perma.cc/9B5J-TK5R].

217. EARL OFARI, THE MYTH OF BLACK CAPITALISM 3 (1970).

218. DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 133 (2002).

219. Monroe W. Karmin, *Best Laid Plans…*, WALL STREET J., Dec. 24, 1970, at 1. (reporting that much of the appeal of Nixon's Voluntary Action program "rested in his view that it could serve as a substitute for costly Federal aid programs. Black Capitalism held the same allure."); *Black Capitalism: A Disappointing Start*, TIME (Aug. 15, 1969), http://content.time.com/time/magazine/article/0,9171,901274,00.html [https://perma.cc/P5CE-BJ9J].

president showed for it, endorsed black capitalism. The paper's associate editor, Tom Wicker, wrote, "Richard Nixon's radio speech on the need for the development of Black Capitalism and ownership in the ghetto could prove to be more constructive than anything yet said by other Presidential candidates on the crisis of the cities." [220]

Republicans embraced black capitalism wholeheartedly. Nelson Rockefeller's strategist called black capitalism "a stroke of political genius," and Rockefeller himself supported the idea.[221] Conservative New York Senator James L. Buckley praised the "spirit" of "militant black leaders who have been preaching black initiative, black capitalism, and yes, black power."[222] Buckley aligned black capitalism with a libertarian small government philosophy, and he proposed that the program need not go to the entire black populace because "scattered success can give universal hope."[223] This was the key objective: the government did not need to underwrite black businesses, just the community's hope in black businesses. Nixon's top aide, John Ehlrichman, explained that "[w]ith a relatively small budget impact, this is one program which can put the Administration in good light with Blacks without carrying a severe negative impact on the majority community, as is often the case with civil rights issues."[224] The budget certainly was small as was the impact. Nixon and his administration placed more emphasis on black capitalism in advertising and press response than in policymaking.[225]

In 1969, President Nixon signed Executive Order 11458 establishing the Office of Minority Business Enterprise (OMBE) within the Department of Commerce. The OMBE was not allocated any direct funds; instead, it was instructed to seek private business contributions and help from other federal agencies. In real political terms, this lack of direct funding meant that the "OMBE was given responsibility for 'advising,' 'encouraging,' 'mobilizing,' 'evaluating,' 'collecting' information, and 'coordinating' activities," but beyond this vague mission, it did not have a mandate or a budget with which to make unilateral decisions or to make any loans or grants.[226] Any money on the OMBE received came from the Office of Economic Opportunity's (OEO) anti-poverty budget.[227] Nonetheless, the House

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220. Tom Wicker, *In the Nation: A Coalition for What?*, N.Y. TIMES (May 19, 1968), http://queary.nytimes.com/mem/archive/pdf?res=9F01E7DE1330EE3BBC4152DFB3668383679EDE.

221. GERALD S. STROBER ET AL., NIXON: AN ORAL HISTORY OF HIS PRESIDENCY 110 (1994); Dean J. Kotlowski, *Black Power Nixon Style: The Nixon Administration and Minority Business Enterprise*, 72 BUS. HIST. REV. 409, 418 (1998).

222. William F. Buckley Jr., *On Black Capitalism*, NAT'L REV., Mar. 25, 1969.

223. *Id.*

224. Kotlowski, *supra* note 218, at 135–36.

225. ARTHUR I. BLAUSTEIN & GEOFFREY FAUX, THE STAR-SPANGLED HUSTLE 128 (1972). ("The Black Capitalism program was more alive in the typewriters of the press than in the minds of the President and his chief aides.").

226. *Id.* at 131.

227. *Id.* at 132; WEEMS, *supra* note 153; Kotlowski, *supra* note 221, at 138.

Select Committee on Small Business immediately opposed the agency, calling it "discrimination in reverse."[228]

By 1970, a recession had hit the country. The unemployment statistics were so bad by 1971 that the Nixon administration decided to stop reporting them. The new aspiring entrepreneurs in the ghetto suffered most acutely as inflation soared, and banks closed the credit pipeline. A black accounting firm in New York summarized the situation by explaining that "the people least likely to succeed in business were trying to make it at a time when seasoned businessmen were having trouble."[229]

The least controversial and most durable black capitalism program was the 1970 Minority Bank Deposit Program (MBDP). Ever since Washington policymakers had linked ghetto rioting with credit exploitation, multiple programs had been proposed to fix credit inequalities. These proposed programs involved creating new banking institutions, providing loan guarantees, capital infusions, or Marshall Plans for the ghetto. The Nixon administration rejected all of these proposals, choosing to ask government agencies to deposit their accounts in black banks instead. In 1968, a black banker remarked that these agency deposits would not provide a good basis for financing banks in the ghetto due to their instability.[230] Even so, the agency deposits occurred. The initial goal was to encourage federal agencies to deposit $100 million of their accounts in black banks, but the yield was a mere $35 million by 1971.[231]

The first agency to volunteer, the Post Office, announced that it would deposit $75 million in black banks. [232] In reality, it only deposited $150,000.[233] Even so, they kept this small sum rotating through the different banks. "One businessman quipped about the deposit, 'It was like me saying I'll lend you $365,000 for the next year and then lending you a dollar every morning and taking it back every night.'"[234] These deposits were the same type that had been crippling the black banks for years and thus were not the deposits that the black banks desperately needed. The president of Unity Bank in Roxbury complained that the Post Office even refused to bring the money to the bank: "They expected us to hire a security service to collect deposits that we couldn't even make any money on."[235] After complaints about the added cost burden of postal deposits, the program promised the banks that it would send more valuable deposits from other agencies, which they did.

228. Kotlowski, *supra* note 221, at 137.

229. *Black Capitalism: The Crowning Blow*, NEWSWEEK, Oct. 4, 1971.

230. GERALD S. STROBER ET AL., NIXON: AN ORAL HISTORY OF HIS PRESIDENCY 110 (1994).

231. BARADARAN, *supra* note 139, at 185.

232. *Id.*; *see also id.* at 183–209 (noting that the post office saving bank had been phased out in 1966 and the deposits were still in flux until they were formally discontinued in 1971, so the postal deposits were small accounts from the low-income and small cash amounts collected from the post office's money order sales).

233. BARADARAN, *supra* note 139, at 183-209.

234. *Id.*

235. BLAUSTEIN & FAUX, *supra* note 225, at 203–05.

However, all of the government deposits ended up costing banks more than they were worth.

An expert of political détente, Nixon used black capitalism to let out just enough steam from the pent-up pressure cooker of rage in the poverty-stricken ghetto to squelch the brewing revolution.[236] Ultimately, black capitalism was weak and entirely unresponsive to the needs of the black community. But it was vague enough to offer just enough hope to cool the boiling anger just as it was about to spill over. With black capitalism alone, Nixon weakened the black radicals' demand for black power, abandoned Johnson's anti-poverty programs, maintained his opposition to integration, and even won the support of many black leaders.

The promise of black capitalism was so politically appealing that every presidential administration since that of Nixon has adopted it in one form or another, be it "community capitalism," "enterprise zones," or "minority enterprise." President Reagan called black business and black banking the "key to black economic progress" and promised that black banks could have a "beneficial multiplier effect" in black ghettos.[237] President Clinton created robust legislation to promote "community empowerment" through banking—an infrastructure that Presidents George W. Bush and Barack Obama bolstered and maintained.[238] Even the precedent-breaking President Trump has followed suit. In his "New Deal with Black America," Trump promised tax breaks for inner-city investments and credit support for black businesses.[239] Amidst a widening racial wealth gap, the promotion of black banking and microenterprise has been a consistent policy Band-Aid. These "solutions" have turned out to be a decoy response to the fundamental challenge of overcoming America's legacy of slavery and institutional racism. Instead of providing meaningful financial inclusion, key policymakers continue to believe that bankers will save the ghetto. The next section will describe the two most pivotal legislative acts aimed to foster financial inclusion and to reverse the effects of redlining and describe how each was rooted in Nixon's black capitalism infrastructure and the neoliberal understanding of market supremacy. As a result of the flawed premise of both of these acts, they have been ineffective yet championed across partisan lines.

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236. STEPHEN E. AMBROSE, NIXON VOL. 2: THE TRIUMPH OF A POLITICIAN 1962-1972. At 125–26 (1989); Robert E. Weems & Lewis A. Randolph, *The National Response to Richard M. Nixon's Black Capitalism Initiative: The Success of Domestic Detente*, 32 J. BLACK STUD. 66 (2001).

237. President Ronald Reagan, Remarks at the Annual Convention of the National Association for the Advancement of Colored People in Denver, Colorado (June 29, 1982)

238. *Background on The Clinton-Gore Administration's Community Development Record*, THE WHITE HOUSE (Nov. 4, 1999), https://clintonwhitehouse3.archives.gov/WH/New/New_Markets_Nov/factsheets/comdevl.html [https://perma.cc/R593-SLU3] (noting that the initiatives included Empowerment Zones, Enterprise Communities initiative, Expansions of the Low-Income Housing Tax Credit, and the Community Development Financial Institution Fund).

239. Donald J. Trump for President, Inc., *Trump's New Deal for Black America With A Plan for Urban Renewal,* TRUMP PENCE MAKE AMERICA GREAT AGAIN! 2016*,* https://assets.donaldjtrump.com/Plan_For_Urban_Renewal.pdf [https://perma.cc/K9FW-77M8].

TWO POLICIES FOR TWO AMERICAS: THE COMMUNITY REINVESTMENT ACT AND THE COMMUNITY DEVELOPMENT FINANCIAL INSTITUTION ACT

President Reagan enthusiastically supported black business even while cutting poverty aid. Speaking to the NAACP in 1981, he praised black business leaders and said that minority business development "is a key to black economic progress. Black-owned businesses are especially important in neighborhood economies where the dollars, as I said, spent have a beneficial multiplier effect."[240] President Reagan linked his belief in market deregulation with civil rights, declaring "[a] free economy helps defeat discrimination by fostering opportunity for all."[241] President Reagan promised that lower taxes and fewer regulations would revitalize the area and attract more small businesses. He referred to inner city ghettos as "enterprise zones." In fact, the 1984 GOP platform called on Congress to pass legislation to help "enterprise zones, to draw a green line of prosperity around the red-lined areas of our cities and to help create jobs and entrepreneurial opportunities."[242] The civil rights plank in the 1988 GOP platform promised to "increase, strengthen, and reinvigorate minority business development efforts to afford socially and economically disadvantaged individuals the opportunity for full participation in our free enterprise system."[243] Reagan did not offer any specific plans to create jobs or opportunities in the ghetto besides tax cuts. Based on Milton Friedman's free market theories, the presumption was that unrestrained capitalism would eradicate racial inequality.

In a 1982 speech, Reagan declared that for the rest of his administration, the first week of October would be "Minority Enterprise Development Week."[244] In 1983, he issued an executive order requiring federal agencies to provide annual goals on increasing procurements from minority businesses.[245] Even though the theory and infrastructure of black capitalism continued unabated for decades, its original aim as a remedy to the ghetto economy and a response to the black power movement changed over time. For example, both President Carter and President

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240. *See* Reagan, *supra* note 237. Remarks at the Annual Convention of the National Association for the Advancement of Colored People in Denver, Colorado (June 29, 1982); *see also* BARADARAN, *supra* note 139, 69–100 (discussing black banking and the money multiplier effect).

241. REPUBLICAN NAT'L COMM., REPUBLICAN PARTY PLATFORM OF 1988: AN AMERICAN VISION: FOR OUR CHILDREN AND OUR FUTURE (Aug. 16. 1988), available at https://www.presidency.ucsb.edu/documents/republican-party-platform-1988 [https://perma.cc/F5QY-RDVT].

242. *Id.* (noting that Carter's Secretary of State, Brian Kemp, used the phrase "enterprise zones" to refer to inner city ghettos that would ostensibly spur commerce within the walls of the ghetto).

243. *Id.*

244. ENCYCLOPEDIA OF AFRICAN AMERICAN BUSINESS 536 (Jesse Carney Smith ed., 2006) ("Each year the U.S. Department of Commerce's Minority Business Development Agency and the U.S. Small Business Administration's (SBA) Office of Government Contracting and Business Development collaborate to hold regional conferences and activities. The recognition also aims to promote the growth of minority-owned businesses as well as encourage equal access to federal contracts, capital, management, and technical assistance."); *see also* WEEMS, *supra* note 153, at 219.

245. WEEMS, *supra* note 153.

Reagan passed initiatives to include women in most of the SBA and MDBA grant programs.[246] President Reagan's Women's Business Ownership Act of 1988 mandated that the SBA provide additional aid to female-owned enterprise.[247] Originally, black capitalism initiatives were designed to provide a politically neutralizing response to one of the biggest racial uprisings in history. Now, however, these programs provide business support for all minority groups, including women. The theory of black enterprise ceased to be discussed as an anti-poverty measure and certainly not as a black power initiative. Instead, it transformed into positive role models for minority communities and "diversifying" white-male dominated fields.

Along the way, the legislature incorporated features of the black capitalism program into law. For example, in 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) as a response to the savings and loan crisis. The act primarily focused on regulating the failed thrift sector, but it also included a provision about minority banks. Section 308 of FIRREA, entitled *Preserving Minority Ownership of Minority Financial Institutions*, contained the first legislative decree concerning minority banks.[248] Section 308 did not authorize any financial help to black banks, but rather it instructed the FDIC, the Treasury, and the now defunct Office of Thrift Supervision to pay attention to the sector.[249] More specifically, Section 308 instructed the agencies to work toward preserving "the present number" and the "character" of minority deposit institutions.[250] For example, in the event a minority institution was threatened by failure, the law instructed bank regulators to ensure that the bank's minority nature was preserved by, if possible, merging it with another minority bank in the region. The act also mandated that federal regulators provide "training, technical assistance and education programs" to all minority banks as well as to work towards promoting and encouraging new minority deposit insurance.[251]

The act constituted the first time that Congress provided a legal definition for minority banks. The definition itself revealed just how muddled the issue of black banking had become and how far the concept of black capitalism had migrated from its initial aim. During the era of Jim Crow and segregation, a legal definition for a black bank was unnecessary—a black bank served black customers in a black

246. *The Administration of Jimmy Carter*, 1 PUB. PAPERS 74 (1980).

247. Women's Business Ownership Act of 1988, Pub. L. No. 100-533 (1988) (current version at 41 U.S.C. § 1713).

248. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 308 (2013).

249. *Id.*

250. *Id.*

251. *See* BARADARAN, *supra* note 139, at 340 n.53 ("Specifically, it requires banking regulators to (1) preserve the number of minority depository institutions; (2) preserve the minority character in cases of merger or acquisition; (3) provide technical assistance to prevent insolvency of institutions not now insolvent; (4) promote and encourage the creation of new minority deposit institutions; and (5) provide training, technical assistance, and education programs. FIRREA, 12 U.S.C. 308 (2013).").

community. When Nixon issued Executive Order 11458 establishing the OMBE and the black capitalism framework, he did not include a legal definition.[252] Everyone knew that he was talking about establishing black-owned institutions in the ghetto.[253] However, after the initial crisis had passed, the Nixon administration began speaking more vaguely about "minority business enterprise." Some observers believed this was due to Nixon's desire to court the Mexican vote. Notably, his only minority appointment to his administration was conservative Mexican Hilary Sandoval to head the SBA.[254]

With the revision of the black capitalism program in Executive Order 11625, Nixon defined "minority business enterprise" for the first time in 1971 as a business that was "owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts."[255] Unsurprisingly, this vague and convoluted definition offers little clarity. Such a definition was to be expected from a program that began as an ill-defined political response to an acute national crisis. Other than being ambiguous, the definition also revealed the perplexity and double-speak of the black capitalism federal policy framework. Section 308(b) defined a minority institution as a bank that is 51% owned by "one or more socially and economically disadvantaged individuals."[256] For public banks, it required a majority of stockholders to be "socially and economically disadvantaged."[257] The statute did not go on to define what this meant or how it should be interpreted. To further the confusion, when the act defined minority "cooperatives" or "mutually owned minority banks" in the very next sentence of the section, it changed the definition of a minority bank to one where a "majority of the Board of Directors, account holders, and the community which [the bank] services is predominantly minority."[258] The act then defined "minority" as "any black American, Native American, Hispanic American, or Asian American."[259] The act underscores the conflicting agendas that bred black capitalism by defining a minority institution simultaneously as one that serves economically disadvantaged individuals and one that serves a defined group of minorities.

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252. Exec. Order No. 11,458, 34 Fed. Reg. 4937 (Mar. 5, 1969).

253. EUGENE BOYD, CONGRESSIONAL RESEARCH SERVICE, MINORITY BUSINESS DEVELOPMENT AGENCY: AN OVERVIEW OF ITS HISTORY AND CURRENT ISSUES 1–2 (2017).

254. JONATHAN J. BEAN, BIG GOVERNMENT AND AFFIRMATIVE ACTION 71 (2001).

255. Exec Order No. 11,625, 3 C.F.R. 616 (1971), *reprinted in* 15 U.S.C.A. § 631 (West 1976).

256. Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C. §§ 308(1)(A)-(B) (2013).

257. *Id.* ((1)(A) holds that if a bank is privately owned, the 51 percent ownership applies to individuals and (1)(B) holds that it applies to 51 percent majority stock ownership).

258. *Id.* § 308(b)(1)(C).

259. *Id.* § 308(b)(2).

Faced with conflicting definitions in the statute, the regulators simply created their own definition in order to enforce Congress's mandate. For example, the FDIC determined that a minority deposit institution was one that is majority owned by U.S. citizens who are "Black American, Asian American, Hispanic American, or Native American."[260] The Office of Thrift Supervision (OTS) did the same.[261]

President Clinton brought some much-needed clarity to black capitalism policy as he revitalized the programs. He talked about black banks the way that Nixon initially had, as a means of confronting black ghetto poverty, but he did so without mentioning race. President Clinton, calling himself a "New Democrat," proposed a "third way" platform between Republicans and Democrats. Clinton slashed welfare benefits, which he believed caused a cycle of dependence.[262] Clinton expanded the Earned Income Tax Credit, Head Start, and increased minimum wage, which he said properly "emphasize[d] work and independence."[263] However, Clinton tried to steer the party away from Johnson's war against poverty. In fact, both Clinton's and Carter's rhetoric and policies on racial equality followed President Nixon's lead as opposed to their Democratic predecessors.

Clinton embedded his urban poverty programs firmly in neoliberal market ideology. The country's racial ghettos, whose walls still remained intact, came to be referred to as enterprise zones, emerging markets, and niche industries. These were places that could certainly yield a profit if creative entrepreneurs looked hard enough. Clinton passed a series of laws that provided tax inducements to encourage private firms to invest in impoverished communities.[264] Essentially, Clinton's policies provided an incentive-based boost to Nixon's black capitalism framework. Nixon had tried—with minimal effort and minimal success—to induce large white-owned firms to voluntarily contribute to black businesses. Even the firms themselves had viewed their involvement as charitable and entirely voluntary. In contrast, Clinton's program did not appeal to philanthropic aims at all. Instead, he promised profits. Clinton's Department of Housing and Urban Development (HUD) secretary, Andrew Cuomo, told reporters, it "is not about charity. It's about investment."[265] Academics and progressive reformers agreed that ghetto poverty was a result of misaligned market incentives and could only be addressed through

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260. FDIC, POLICY STATEMENT REGARDING MINORITY DEPOSITORY INSTITUTIONS (2002),

261. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-6, MINORITY BANKS: REGULATORS NEED TO BETTER ASSESS EFFECTIVENESS OF SUPPORT EFFORTS (2006).

262. KATHRYN J. EDIN & H. LUKE SHAEFER, $2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 17 (2015).

263. *The Text of President Clinton's Announcement on Welfare Legislation*, N.Y. TIMES, Aug. 1, 1996.

264. *see* THE WHITE HOUSE, *supra* note 238.

265. JULIA S. RUBIN & GREGORY M. STANKEWICZ, EVALUATING THE IMPACT OF FEDERAL COMMUNITY ECONOMIC DEVELOPMENT POLICIES ON TARGETED POPULATIONS: THE CASE OF THE NEW MARKETS INITIATIVES OF 2000 (2003).

private enterprise. For example, influential Harvard professor Michael Porter wrote that instead of aid or social investments, the only way to build the economy of the ghetto was "through private, for-profit initiatives and investment based on economic self-interest and genuine advantage . . . . The cornerstone of such a model is to identify and exploit the competitive advantages of inner cities that will translate into truly profitable businesses."[266] Ghettos were labeled "emerging markets" and "untapped markets," which contained hidden opportunities that creative profit-oriented private enterprises could exploit. This rhetoric emphasized a win-win of profits for the entrepreneurs and poverty alleviation for the ghetto. Policymakers sought to fix all of the ghetto's problems with entrepreneurs, instead of working to break down the walls of segregation and the poverty trap.

Because the Supreme Court found remedying past wrongs to be unconstitutional, an era of colorblindness ensued.[267] As a result, these programs directed towards the country's ghettos had to be race neutral. Black capitalism became "community capitalism." A 1997 conference, entitled the American Assembly, brought together business and community leaders and academics to discuss poverty and community development. The final conference report defined community capitalism as a "for-profit, business-driven expansion of investment, job creation, and economic opportunities in distressed communities, with government and the community sectors playing key supportive roles."[268] Vice President Al Gore endorsed the report, stating, "The greatest untapped markets in the world are right here at home, in our distressed communities."[269]

Just like Nixon's black capitalism, Clinton's "community capitalism" was a bipartisan winner. Missouri Republican Representative James Talent praised the bill as "not only the most comprehensive antipoverty package coming out of the federal government . . . in a generation, but it also . . . has assimilated the lessons that people on both sides of the aisle have learned over the last generations."[270] Jesse

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266. Michael E. Porter, *The Competitive Advantage of the Inner City*, 73 HARV. BUS. REV. 55, 55–71 (1995) ("We must stop trying to cure the inner city's problems by perpetually increasing social investment and hoping for economic activity to follow. Instead, an economic model must begin with the premise that inner city businesses should be profitable and positioned to compete on a regional, national, and even international scale.").

267. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–06 (1989) (In *City of Richmond v. Croson*, the Supreme Court agreed and ended the contract set-aside program. The Court rejected Richmond's claim that "past societal discrimination" could justify a racial preference. Justice O'Connor even summoned Dr. King's rhetoric in order to reject any program that would favor blacks over whites, stating that "the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.")

268. NINETY-FIRST AM. ASSEMBLY, COMMUNITY CAPITALISM: REDISCOVERING THE MARKETS OF AMERICA'S URBAN NEIGHBORHOODS 3 (Columbia Univ. Press ed., 1997).

269. BARADARAN, *supra* note 139, at 341 n.65; NINETY-FIRST AM. ASSEMBLY, *supra* note 268 ("According to Clinton official Gene Sperling, the legislation was meant to create "incentives that would encourage the private sector to find profits and create opportunities.").

270. Tammy Draut et al., *Crossing Divides: New Common Ground on Poverty and Economy Security*, DEMOS, Sept. 1, 2002, at 3.

Jackson enthusiastically joined Clinton's community enterprise agenda with his 1998 "Close the Gaps. Leave No American Behind" campaign. Jackson proposed that the president create "vehicles to move capital" into disadvantaged areas.[271]

Clinton's "community capitalism" program as applied to banks was the Riegle Community Development and Regulatory Improvement Act of 1994, commonly known as the Community Development Banking Act (CDBA).[272] The Act provided tax incentives for banks, or Community Development Financial Institutions (CDFIs), that served disadvantaged areas.[273] According to Clinton, a South Side Chicago bank that was putting the theory of community capitalism into practice inspired the promulgation of the bill. This bank, called Shorebank, was the country's most famous "black bank," even though it was not black owned.[274]

Shorebank's motto—"Let's Change the World"—was not an empty marketing pitch. As the exemplar of community capitalism, Shorebank promoted a "triple bottom line: profitability, community development impact, and an environmental return."[275] Shorebank's primary aim centered on fighting urban decline. At its peak, it had $4.1 billion invested in inner-city Chicago.[276] The bank's ambitious mission drew many admirers, including Grameen Bank founder Muhammad Yunus, who visited the bank before launching microcredit in Bangladesh and receiving a Nobel Peace Prize for his innovative approach to poverty.[277]

The bank certainly had its struggles, particularly against the same profitability trap that had ensnared black banks for nearly a century. For the first decade, the bank lost money because its loans were risky, deposits were small, and operation costs were high.[278] In short, Shorebank's founders came to the same realization that many had reached before them—that operating a profitable bank in a poor and segregated ghetto is a challenge. However, Shorebank enjoyed more outside "socially inclined" capital investment than most black-owned banks. For example, Shorebank had private funders who "invested with the understanding that the primary purpose of their investment is to do development and not maximize return

271. BARADARAN, *supra* note 139, at 149.

272. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (codified as amended in scattered sections of 12 U.S.C.).

273. James E. Post & Fiona S. Wilson, *Too Good to Fail*, STAN. SOC. INNOVATION REV. (2011).

274. Loic J.D. Wacquant & William J. Wilson, *Poverty, Joblessness, and the Social Transformation of the Inner City*, *in* WELFARE POLICY FOR THE 1990S 70, 92 (Phoebe H. Cottingham & David T. Ellwood eds., 1989); David Moberg, *The Left Bank*, CHI. READER (May 26, 1994), https://www.chicagoreader.com/chicago/the-left-bank/Content?oid=884620 [https://perma.cc/5AFG-JNSV].

275. Robert A. Solomon, *The Fall (and Rise?) of Community Banking: The Continued Importance of Local Institutions*, 2 U.C. IRVINE L. REV. 945, 955 (2012).

276. Post & Wilson, *supra* note 273, at 66.

277. Katharine Esty, *Lessons from Muhammad Yunus and the Grameen Bank: Leading Long-term Organizational Change Successfully*, 43 OD PRACTITIONER 24 (2011).

278. Post & Wilson, *supra* note 273.

on capital."[279] As Governor of Arkansas, Bill Clinton visited the bank in 1985 and called it "the most important bank in America." [280] In promoting the Shorebank model, Clinton outlined his early vision for community empowerment:

> You have to go into these areas with strategies that enable people to take control of their own destiny . . . . We need to create a small-business entrepreneurial economy in every underclass urban area and rural area in the country through the use of banks like the South Shore Bank, which played a major role in revitalizing the South Side of Chicago. To most people, "empowerment" sounds like a buzzword, but the truth is that America can't get very far with a dependent or helpless population. Trying to create an entrepreneurial economy around a different sort of banking system.[281]

To President Clinton, a "different sort of banking system" meant one in which a community's banks were "owned and operated by the people who live there."[282] This philosophy was not new. In fact, it had been the theory of black capitalism all along—the premise being that control of banking within a community would lead to "empowerment" and economic equality. But, unlike previous administrations, Clinton chose to support his vision for community capitalism with actions, such as significant tax credits, as opposed to mere rhetoric.

While on the campaign trail in 1992, Clinton promised to establish one hundred banks modeled after Shorebank.[283] This promise manifested itself in the CDBA, which promised to "promote economic revitalization and community development through investment in and assistance to community development financial institutions."[284] As required by the Supreme Court, the law was race-neutral, but its clear mission was to propagate more banks like Shorebank in the ghetto. These banks, called CDFIs, were defined as institutions that (1) had "a primary mission of promoting community development"; (2) "[served] an investment area or targeted population"; and (3) "provide[d] development services in conjunction with equity investments or loans."[285]

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279. BARADARAN, *supra* note 139, at 164.

280. RICHARD DOUTHWAITE, SHORT CIRCUIT: STRENGTHENING LOCAL ECONOMIES FOR SECURITY IN AN UNSTABLE WORLD 153 (1996); *see also* Sharon Stangenes, *South Shore Bank Thrust into Spotlight*, CHI. TRIB. (Nov. 15, 1992), https://www.chicagotribune.com/news/ct-xpm-1992-11-15-9204130554-story.html [https://perma.cc/B8QB-2DZH] (discussing Bill Clinton's advocacy of South Shore Bank during his 1992 presidential campaign).

281. Jann S. Wenner, *Bill Clinton: The Rolling Stone Interview*, ROLLING STONE (Sept. 17, 1992), http://www.jannswenner.com/archives/bill_clinton.aspx [https://perma.cc/44TZ-AZMJ].

282. *Id.*

283. *Banking on the Inner City*, WASH. POST, July 19, 1993 ("The CDFI Fund of $382 million proposed by Clinton is] significantly less ambitious than Mr. Clinton's campaign proposal to use $850 million of federal money to establish 100 community development banks around the country modeled after Chicago's successful South Shore Bank.").

284. 12 U.S.C. § 4701(b) (2006).

285. *Id.* § 4702(5)(A)(i)–(iii).

This new approach to black banking found proponents across both sides of the racial and political spectrum. African American Senator Carol Mosely-Braun remarked that the bill "suggests that the financial institutions can do well and do good simultaneously . . . that financial institutions can make money by expanding credit opportunities to underserved communities."[286] Republican Congressman Tom Ridge commented that "communities without credit are very much like land without rain, nothing grows."[287] Democratic Senator Ted Kennedy said that "whole segments of our people in this country are unfairly denied access to credit, [it is our job] to make certain that financial institutions make credit available to all of those people who can afford to pay it back."[288] One senator described the present issue as "not whether community development banks are a good idea . . . but rather how do we establish them . . . ."[289]

The central theory behind the CDFIs was that they would discover hidden profits in the ghetto. Former Treasury Secretary Lawrence Summers envisioned "[a] successful CDFI [as] perhaps best compared to a niche venture capital firm that deploys its superior knowledge of an emerging market niche to invest and manage risk better than other investors."[290] Summers labeled these banks "market scouts" that would seek out profits in overlooked markets. Yet black banks had long been attempting to make profits in the ghetto, only to find that the stubborn financial landscape of the ghetto economy had always stood in the way, as CDFIs would soon learn. As with black banks, CDFIs have struggled to remain profitable despite help from the tax code. CDFIs routinely show weaker financial performance across the board compared with their more conventional peers.[291] Remarkably, minority banks have been essentially shut out of the CDFI fund. Since its inception, only between 2% and 6% of these funds have been awarded to minority banks.[292] The issue stems from the Treasury consistently choosing projects that promised more profits and had less risk due to its institutional concern of maintaining the fund's

286. BARADARAN, *supra* note 139, at 231.

287. *Id.*

288. *Id.*

289. *Id.*

290. Lawrence H. Summers, U.S. Sec'y of Treasury, Building Emerging Markets in America's Inner Cities, Remarks to the National Council for Urban Economic Development (Mar. 2, 1998), http://www.treasury.gov/press-center/press-releases/Pages/rr2262.aspx [https://perma.cc/Y7Z8-V7TT].

291. Lehn Benjamin et al., *Community Development Financial Institutions: Current Issues and Future Prospects*, 26 J. URB. AFF. 177, 189 (2004); Robert Barba & Joe Adler, *Resolution Deal Shows ShoreBank Was Savvy to the End*, AM. BANKER (Aug. 23, 2010), https://www.americanbanker.com/news/resolution-deal-shows-shorebank-was-savvy-to-the-end [https://perma.cc/S8Y6-22QN]; *Surviving the Recession: How Microlenders are Coping with Changing Demand, Risk and Funding*, ASPEN INST. (July 1, 2010), https://www.aspeninstitute.org/publications/surviving-recession-microlenders-coping-changing-demand-risk-funding/ [https://perma.cc/YYA4-BSH4].

292. Carolyn M. Brown, *Black Banks Shut Out of New Federal Tax Credit Program*, BLACK ENTERPRISE (July 15, 2015), https://www.blackenterprise.com/minority-banks-shut-out-of-new-federal-tax-credit-program/2/[https://perma.cc/8HF9-74LQ]("By our estimates, less than 2% of the $450 billion in NMTCs issued over the past [12] years has gone to minority banks," said Doyle Mitchell, CEO of Industrial Bank of Washington, D.C. and immediate past Chairman of the NBA).

profitability. This practice has only exacerbated the profit leakage from segregated minority neighborhoods.[293]

If the CDFI fund was rooted in the black capitalism model, the CRA was rooted in the original affirmative action model. Its justification was to remedy a history of discriminatory redlining, and its mission was to require mainstream banks to lend a fair portion of their loans to the ghetto. Although redlining had been based on explicit racial discrimination, policymakers designed the CRA to be color-blind. Much like affirmative action, the act has been one of the most vilified banking laws, even as it was criticized by civil rights groups as "toothless" in counteracting the legacy of past injustices.[294]

In 1977, Senator Proxmire sponsored the bill when he served as chair of the Senate Banking Committee. Proxmire had helped pass the Home Mortgage Disclosure Act (HMDA) in 1975, which had forced banks to divulge loan information based on race. Armed with HMDA data that revealed that banks were deliberately avoiding making loans in black communities, Proxmire crafted a legislative remedy. He reasoned that banks had a duty to remedy the problem because they had created it to begin with. He also believed that banks had an "obligation to help meet the credit needs" of their local communities.[295] He said that the CRA was based on the "widely shared assumption" that "a public charter conveys numerous economic benefits and in return it is legitimate for public policy and regulatory practice to require some public purpose . . . ."[296] Proxmire acknowledged that banks benefited from a healthy amount of public support. As a result, banks, he believed, should serve public needs, or at least not discriminate against disadvantaged members of the public. This perspective clashed with the prevailing neoliberal market philosophy that held that the only obligations banks had were to their shareholders.

To ensure that banks lent a fair portion of their loans to the ghetto, the bill required banks to prepare annual reports describing whether they were meeting the credit needs of low- to moderate-income residents. The bill instructed bank regulators to rate each bank from "Outstanding" to "Substantial Noncompliance" based on the quantity of loans they were issuing in low-income areas.[297] The bill did not force banks to lend or open branches in any particular community, but a negative CRA rating could be used by a bank regulator to deny a bank's application for merger or any other change that required regulatory approval.[298]

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293. THEODORE L. CROSS, BLACK CAPITALISM: STRATEGY FOR BUSINESS IN THE GHETTO 16 (1969) (According to one observer, the result of the grants has been to "take profits out of the slum when the real objective should have been to build profits into it.").

294. *Civil Rights Chief Faults CRA as Toothless Legislation*, AM. BANKER, May 21, 1992 ("[R]egulators are not enforcing the law aggressively.").

295. 123 CONG. REC. 1958 (statement of Sen. Proxmire).

296. *Id.*

297. FDIC, *Community Reinvestment Act (CRA) Performance Ratings*, FDIC, https://www5.fdic.gov/crapes/ [https://perma.cc/TQ5G-8AQV] (last visited May 15, 2019).

298. RICHARD SCOTT CARNELL ET AL., THE LAW OF FINANCIAL INSTITUTIONS 385

When it was introduced, the bill was openly and strongly condemned by many bankers and their allies. Republican Senator Phil Graham called the act "an evil like slavery in the pre-Civil War era."[299] "It's unbelievable," fumed one anonymous Southern banker, "[t]hese people are trying to enforce a change in social policy over the back of the banking industry."[300] Other opponents raised additional issues with the bill. They claimed that the bill clashed with efficient market forces and forced banks to make unprofitable loans. This is evidenced by the fact that if the loans were profitable, banks would not have needed regulatory nudges to make them.[301]

At the other end of the spectrum, community groups have expressed concern that the CRA is more geared towards process than real reform.[302] Banks, for example, receive a rating based on how often they meet with a community group rather than on the actual results of those meetings. In addition, loans are measured quantitatively, not qualitatively.

The CRA still finds itself between a group of people who believe it does not achieve nearly enough and another group that believe it requires too much.[303] As a result, the resemblance to affirmative action in college admission is striking. Much like affirmative action, there is a perceived feeling that institutions are being forced to hire lower-quality employees or make lower-quality loans to appease some vague sense of social morality that is not meritocratic and poses unjustified social burdens on the bottom line. Detractors of affirmative action argue that schools should only select students based on academic merit. Similarly, banks should only lend based on profitability. At the core of their argument, critics claim that affirmative action and the CRA conflict with a natural meritocracy or an efficient market.

Opponents of affirmative action claim that it harms both the school and the minority applicant. They reason that the pool of minority applicants performs worse than white applicants, and when underperforming minority students gain admission,

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(5th ed. 2013); Charles W. Calomiris et al., *Housing-Finance Intervention and Private Incentives: Helping Minorities and the Poor*, 26 J. MONEY, CREDIT & BANKING 634, 654–56 (1994).

299. Financial Services Modernization Act of 1999, 145 CONG. REC. S4736 (May 5, 1999).

300. Jeffrey Marshall, *Lenders Cry Foul Over Fair Lending Prosecutions*, AM. BANKER, Oct. 1, 1994.

301. Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 295 (1993) (claiming that the bill "promotes the concentration of assets in geographically nondiversified locations, encourages banks to make unprofitable and risky investment and product-line decisions, and penalizes banks that seek to reduce costs by consolidating services or closing or relocating branches.").

302. *Preserving and Expanding Minority Banks: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Fin. Services*, 110th Cong. (2007) [hereinafter *Preserving and Expanding Minority Banks*].

303. *See* CARNELL ET AL., *supra* note 298; Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 603 (2005) ("CRA's broad standards and 'enforcement' mechanisms . . . have long been derided by both proponents and detractors of CRA. Community advocates urge stricter rules and harsher consequences of failure. Bankers lament the lack of clear rules or safe harbors and the intrusive role of the public."); Calomiris et al., *supra* note 298, at 673 (stating that "the vagueness of the CRA has led to arbitrary enforcement . . . .").

there is a "mismatch" of capacity.[304] According to this widely cited "mismatch theory," whites should continue to fill elite universities until blacks catch up naturally. Banks often follow a similar line of logic by claiming that they should avoid lending into distressed areas. Banks posit that they are not discriminating, but rather they are avoiding nonprofitable areas and avoiding riskier loans. Residents of these areas are more likely to default on a loan because they have fewer resources. Applying the mismatch theory to banking results in the notion that borrowers should work to earn bank loans instead of being offered the loans prematurely. This mismatch can hurt the bank, society, and the borrower.

These arguments only touch on surface-level problems and fail to explore why black students and black borrowers lag behind whites in the first place. A history of segregation explains why the ghetto does not yield profitable loans. More specifically, segregation was enacted through lending discrimination perpetuated by the very firms now being asked to close the gap. Once the Supreme Court decided that past injustice could not be rectified through the law, the nation appeared to erase its memory of the past injustice and allow for these types of shortsighted arguments in opposition to any program designed to address a historic wrong. The long debate over the CRA erupted after the financial crisis, with some even implausibly blaming the CRA for precipitating the financial crisis.

Scholars as well as influential policymakers like the Federal Reserve Chair and the Treasury Secretary have debunked the theory that the CRA or government mortgage policy led to the financial crisis.[305] In fact, every serious and trustworthy analysis has concluded that the CRA did not cause the rise in subprime lending. Such a theory that the CRA led to the financial crisis is implausible. The Act was passed in 1977, and subprime lending began to rise more than twenty years later. Also, most of the crisis-causing subprime loans were not made by lenders with any CRA obligations. In fact, only 6% of subprime loans were even CRA loans.[306] Even so, commentators and politicians continue to blame the one law that was aimed at increasing minority lending for the financial crisis. A portion of the public likely still

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304. *See generally* RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012).

305. TIMOTHY F. GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISES 391–92 (2014); *see also* BEN S. BERNANKE, THE COURAGE TO ACT: A MEMOIR OF A CRISIS AND ITS AFTERMATH (2015); David Min, *Why Wallison Is Wrong About the Genesis of the U.S. Housing Crisis*, CTR. FOR AM. PROGRESS (July 12, 2011, 9:00 AM), https://www.americanprogress.org/issues/economy/reports/2011/07/12/10011/why-wallison-is-wrong-about-the-genesis-of-the-u-s-housing-crisis/ [https://perma.cc/L7Z2-5CPS]; Press Release, Robert Menendez, Fed Chairman Bernanke Confirms to Menendez that Community Reinvestment Act Is Not to Blame for Foreclosure Crisis (Dec. 2, 2008), https://www.menendez.senate.gov/news-and-events/press/fed-chairman-bernanke-confirms-to-menendez-that-community-reinvestment-act-is-not-to-blame-for-foreclosure-crisis [https://perma.cc/VLN4-5PNB].

306. Neil Bhutta & Glenn B. Canner, *Did the CRA Cause the Mortgage Meltdown?*, COMMUNITY DIVIDEND (Mar. 1, 2009), https://www.minneapolisfed.org/publications/community-dividend/did-the-cra-cause-the-mortgage-market-meltdown [https://perma.cc/PA3Z-UL26]; *see also* Governor Randall S. Kroszner, Speech at the Confronting Concentrated Poverty Forum (Dec. 3, 2008).

believes that blacks and other minorities do not deserve government benefits and that they take more than their share. This narrative paints low-income subprime borrowers as exploiters of taxpayer money and government largesse.[307] It is a convenient fiction that protects banks from appropriate regulation and ignores a history of injustice.

Those who espouse this fiction simply do not understand the banking industry. [308] In reality, the banks wanted subprime loans because they were making unprecedented profits. Subprime lenders appeared in ghettos because they were able to convince more people to take out subprime loans in the ghettos, not because the government or community activists wanted the subprime lenders there. In fact, many activist and consumer groups tried to fight these subprime lenders.[309]

The rise of subprime mortgage lending occurred because banker and investor demand increased. Profits drove the narrative. Wall Street banks only became interested in this market once subprime loans became profitable. In the years preceding the crisis, the subprime market began overheating due to increased demand for investments by what economists have labeled a "savings glut." Foreign investors flooded U.S. markets with money. This oversupply of cheap cash lowered U.S. Treasury note yields. As a result, the money flowed into the next safest investment—asset-backed securities, or home mortgages. To meet the demand, the financial sector sold, bundled, insured, and created new "structured products," and then originated more mortgage loans. This demand created the subprime mortgage market. The crisis was not created by poor minorities demanding housing loans, but by Wall Street demanding more loans and then lobbying for government policies that lowered underwriting standards.[310]

THE POOR STILL PAY MORE

The effects of the segregated debt market can still be felt today and have created two separate and unequal systems of banking and credit: the regulated and heavily subsidized mainstream banking industry and the unregulated, costly, and often predatory fringe industry. Having been left out of the former, the black

307. ANITA HILL, REIMAGINING EQUALITY: STORIES OF GENDER, RACE, AND FINDING HOME (2011) (discussing the myth of the "Welfare Queen" and how it is similar to "subprime borrower" myths).

308. Peter J. Wallison, *The True Origins of This Financial Crisis*, AM. SPECTATOR, Feb. 6, 2009.

309. Jason Szep, *Activists Challenge Lenders in Mortgage Crisis*, REUTERS (Mar. 31, 2007), https://www.reuters.com/article/us-usa-subprime-activists/activists-challenge-lenders-in-mortgage-crisis-idUSN2941217420070331 [https://perma.cc/5K4V-XDBC].

310. FIN. SERVS. AUTH., THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS (Mar. 2009), http://www.fsa.gov.uk/pubs/other/turner_review.pdf [https://perma.cc/TX5H-A4US]; Oiao Yu et al., *Global Saving Glut, Monetary Policy, and Housing Bubble: Further Evidence*, BROOKINGS (July 10, 2015), https://www.brookings.edu/research/global-saving-glut-monetary-policy-and-housing-bubble-further-evidence/ [https://perma.cc/2YYK-XL52].

community has historically occupied the latter. This has come at their great expense. Cass Sunstein and Richard Thaler found that on average blacks pay an extra $425 for a loan than white customers.[311]

Most black neighborhoods are "banking deserts," or neighborhoods abandoned by mainstream banks.[312] A survey conducted by the FDIC revealed that 53.6% of blacks are either unbanked or under-banked.[313] In striking contrast, only 3% of whites do not have a bank account and 15% are underbanked. Those without bank accounts pay up to 10% of their income or around $2500 per year, just to use their money.[314] That is a meaningful amount of money for low-income Americans, and it is being sucked up by alternative financial services. This problem has only worsened since the financial crisis of 2008, when 93% of all bank closings were in low-income minority neighborhoods.[315]

When banks leave a neighborhood, high cost payday lenders, title lenders, and other fringe banks usually fill the void. Once the subprime profits disappeared after the crisis, banks began avoiding the ghetto again. By 2016, an investigation of mortgage lending in St. Louis found that banks made fewer loans to borrowers in black neighborhoods than white ones.[316] Moreover, mortgage applicants from minority zip codes were denied mortgages at significantly higher rates than applicants in white neighborhoods.[317]

In banking deserts, blacks rely disproportionately on payday lenders. In fact, the black community is more than twice as likely as any other race to use payday loans.[318] With such costly credit options, it makes sense that debt collectors extract

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311. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 134 (2008).

312. Russell D. Kashian et al., *Banking the Unbanked: Bank Deserts in the United States 1* (Univ. of Wis., Whitewater, Working Paper No. 90, 2015), http://swfa2015.uno.edu/F_Banking/paper_90.pdf [https://perma.cc/LZ2A-TER3].

313. SUSAN BURHOUSE ET AL., FDIC, 2013 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS (Oct. 2014), https://www.fdic.gov/householdsurvey/2013report.pdf [https://perma.cc/W7QD-JUPD].

314. *Serving the Underserved Market*, KPMG (2011), http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/serving-underserved-market.pdf [https://perma.cc/NF2W-AU8Y]; *What Do Consumers Without Bank Accounts Think About Mobile Payments?*, PEW CHARITABLE TRUSTS (June 2016), https://www.pewtrusts.org/~/media/assets/2016/06/fsp_what_do_consumers_without_bank_accounts_think_about_mobile_payments.pdf [https://perma.cc/P2R6-LAAY].

315. Frank Bass & Dakin Campbell, *Bank Branches Disappear from Poor Neighborhoods Like Longwood, Bronx*, BLOOMBERG (May 9, 2013), https://www.bloomberg.com/news/articles/2013-05-09/bank-branches-disappear-from-poor-neighborhoods-like-longwood-bronx [https://perma.cc/PW7Q-JQDT].

316. Peter Eavis, *Race Strongly Influences Mortgage Lending in St. Louis, Study Finds*, N.Y. TIMES (July 19, 2016), https://www.nytimes.com/2016/07/19/business/dealbook/race-strongly-influences-mortgage-lending-in-st-louis-study-finds.html [https://perma.cc/UD57-M7WC].

317. *Id.*

318. *Payday Lending in America: Who Borrows, Where They Borrower, and Why*, PEW CHARITABLE TRUSTS (July 2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf [https://perma.cc/52NC-K2M7].

as much as five times more judgements against black neighborhoods than white ones. According to two studies conducted between 2015 and 2016, blacks were much more likely to be sued by debt collectors than any other racial group. These studies showed that this was true even when differences in income were accounted for. Specifically, debt collectors sued one in four black residents in the studied communities. Most of the other lawsuits were similar: large debt collectors suing for small amounts.[319] The study found that debt collectors were not intentionally discriminating, but that "white consumers are, in general, better able to resolve smaller debts."[320] The study confirmed that black communities have less wealth than white ones and are thus more vulnerable to hardship.[321]

The black community faces two distinct challenges as a result of the racial wealth gap. Black families have greater difficulty ascending the economic ladder; it also means that it is much easier for these families to fall. Because wealth provides a buffer against life's hardest edges, those without it find themselves exposed to devastating financial shocks like bankruptcy, eviction, and apparently lots of lawsuits. These lawsuits further increase the financial pressure through wage garnishments, aggressive collection practices, and criminal prosecutions. In turn, these hardships create a "web of indebtedness," according to one black resident in the study.[322] Although a wage garnishment can feel like extortion, creditors are increasingly using actual extortion. Often the original debt collector, such as a municipality, sells its debts to an underworld of unregulated debt collectors who threaten debtors with criminal prosecution in order to intimidate them into paying their debts.[323] Despite the fact that these threats are often baseless and illegal, the unscrupulous bounty hunters continually harass debtors.

Today, much of the legislation and programs remain the same. Banking agencies are still carrying out their FIRREA legislative mandate to support minority banks. The MBDP remains, which means that federal agencies and federal grant recipients are being encouraged to deposit funds into banks owned or controlled by women or minorities.[324] Similarly, the FDIC runs its own minority bank deposit

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319. Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Blacks Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods [https://perma.cc/N93Z-CUVK]; *see also* Breno Braga et al., *Local Conditions and Debt in Collections* (Urban Inst., Working Paper, 2016), https://www.urban.org/sites/default/files/publication/81886/2000841-Local-Conditions-and-Debt-in-Collections.pdf [https://perma.cc/HGB4-8UER].

320. Braga et al., *supra* note 319.

321. *Id.*

322. *Id.*

323. JAKE HALPERN, BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD (2014).

324. *Chapter III - Financial Requirements and Payments*, NAT'L SCI. FOUND. (Jan. 2008), http://www.nsf.gov/pubs/policydocs/pappguide/nsf08_1/aag_3.jsp [https://perma.cc/PD24-WZAZ]; *Minority Bank Deposit Program (MBDP)*, U.S. DEP'T OF THE TREASURY, https://fiscal.treasury.gov/mbdp/ [https://perma.cc/NK6P-YH9Y] (last visited May 15, 2019).

program entitled the Minority Depository Institution Program (MDIP).[325] The MBDA, the successor to the OMBE, is still active and advertises on its website that it is "the only federal agency created specifically to foster the establishment and growth of minority-owned business in America."[326] Its most advertised feature is a website for minority entrepreneurs called the "Minority Business Internet Portal," which is described as "an e-commerce solution designed for the MBE [Minority Business Enterprise] community."[327]

In 2007, the Congressional Committee on Financial Services held a hearing to assess whether regulatory agencies were meeting the FIRREA mandate of "preserving and expanding minority banks."[328] Black bank representatives and top agency officials testified about the state of minority banks with a focus on black-owned banks. An expansive Government Accountability Office (GAO) report accompanied the hearing.

Each agency offered its own explanation of how it was working towards the FIRREA mandate. The FDIC testified that it was offering "technical assistance" and "training and educational programs" to minority banks.[329] As for its charge to preserve and promote minority banks, it explained that no formal process existed. Instead, it made decisions on a case-by-case basis. The Office of the Comptroller of the Currency (OCC) explained that it had held conferences and offered technical assistance. It further noted that after periodic bank examinations, the examiners contacted minority institutions to "make sure that the institution understands any issues or concerns that we have highlighted in the report."[330] Similarly, the OTS explained that its program involved technical assistance and education.

The hearing revealed that the theme of the support being given to black banks involved education, guidance, training, and counseling. Apparently, it was not just minority subprime borrowers that needed education, but also minority banks. Because of Section 308's vague requirements and a lack of any clear mandate from the president or Congress, the regulators have essentially designated themselves as high school guidance counselors—available for advice or technical assistance with the occasional workshops for good measure.

Unsurprisingly, the minority banks chose not to rely on their regulators for help. In fact, the GAO reported that only 30% of minority banks had used the technical assistance offered by regulators.[331] Moreover, no agency had ever assessed whether its "assistance" actually helped these banks. The GAO report revealed that the agencies had "not undertaken the more difficult and time-consuming, but

325. FDIC, *supra* note 260.

326. MD. SMALL BUS. DEV. CTR., http://www.mdsbdc.umd.edu/resources/minority-and-other-specialized-business-sectors [https://perma.cc/SS4T-XAKH].

327. *Id.*

328. *Preserving and Expanding Minority Banks*, *supra* note 302.

329. *Id.* at 7.

330. *Id.* at 30

331. *Id.* at 31.

ultimately much more important, task of truly understanding the unique challenges these institutions face" or of trying to tailor their "regulations, supervision and examinations" to help black banks.[332] Notably, less than one-third thought the regulators were doing a "very good" or "good" job.[333] Robert Cooper, representing the National Bankers Association, the main trade group for black-owned banks, put it bluntly: "To be honest," said Cooper, "we have not seen much benefit from FIRREA Section 308."[334] Regulators had not applied "any different rules or approaches to minority institutions than majority institutions."[335] Regulators were just doing the bare minimum required by law, which amounted to "technical assistance," and had "steadfastly refused" to use their power to benefit minority banks.[336] Unsurprisingly, the regulatory support was a facade as was the premise underlying the entire framework.

Even before the financial crisis wiped out the industry, several government studies showed that black banks were lagging significantly behind their peers in profitability. According to S&P data, the average median return on equity in 2016 was 8.04% for the banking industry. For black-owned banks, the median was just 1.19%.[337] Over the course of a century of operation, the reasons black banks remained unprofitable had not changed. Cooper told Congress that the biggest struggles black banks faced were (1) the economically depressed communities they operate in, (2) their need to keep high reserves for losses, (3) higher general expenses than other banks, and (4) higher transaction costs because they deal with a higher proportion of retail customers on a face-to-face basis.[338] The CEO of Liberty Bank, one of the largest and most successful black-owned banks, describes his bank's struggle: "[M]y expenses are twice as much because I have to do more counseling to my borrower. I may have to have guard service because I am in a high crime area. My deposits are much smaller."[339]

It was clear that the black banks knew exactly what their problems were, and it was not a lack of technical knowledge. However, just as it is unfair to place the burden of the racial wealth gap on black banks, it is unfair to blame bank regulators for not helping enough. The regulators' sole focus is to manage bank risks. They simply do not have the tools, mandate, or even the education to understand and fix the unique hardships that black banks face.

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332. *Written Testimony of Robert Patrick Cooper Chairman Elect National Bankers Association Before the Subcomm. Gov't Oversight and Investigations of the Comm. on Fin. Services of the U.S. H.R.* (2007) [hereinafter *Written Testimony*].

333. U.S. GOV'T ACCOUNTABILITY OFFICE, MINORITY BANKS: REGULATORS' ASSESSMENTS OF THE EFFECTIVENESS OF THEIR SUPPORT EFFORTS HAVE BEEN LIMITED 4 (2006).

334. *Written Testimony*, *supra* note 332.

335. *Id.*

336. *Id.*

337. *Preserving and Expanding Minority Banks*, *supra* note 302.

338. *Id.* at 26.

339. Patricia Gaines, *What Happened to the Black Banks?*, EBONY (June 16, 2016), https://www.ebony.com/career-finance/black-banks-pt-1/ [https://perma.cc/P4L6-XGF8].

Before the legislature could resolve any of the issues presented at the hearing, the 2008 financial crisis rocked the country, particularly the established banking regulatory framework. Congress responded with the 2010 Dodd-Frank Act. The Dodd-Frank Act contained a few provisions centered on minority banks, but they were far from robust. The Act ignored almost all of the recommendations that arose during the hearings. In fact, Section 367(4)(A) marked the only change to the regulatory framework. This section amended Section 308 of FIRREA to apply to all the banking agencies, not just the OTS and the FDIC.[340] Additionally, Section 342 of Dodd-Frank required each banking agency to establish an Office of Minority and Women Inclusion (OMWI), which was designed to increase diversity of agency staff and to offer assistance to minority and women controlled banks. Because of Dodd-Frank, every agency now offers technical assistance. However, there are still no tax breaks, no help with capital, and no structural reforms.

TOWARD FUNDAMENTAL REFORM

Instead of recognizing that white majoritarian institutions have been complicit in and even benefited from black America's poverty, the state has repeatedly placed the burden to close the wealth gap on the black community itself. During pivotal moments in our nation's history when the country was in the mood to address racial injustices, real economic reform aimed at wealth and land redistribution was thwarted in favor of half measures and pseudo-reforms. During Reconstruction, instead of the promised forty acres and a mule, the freed slaves got a bank. In order to pass his monumental and redistributive New Deal agenda, FDR chose to leave blacks out of the bounty in order to get southern Democrat approval of his sweeping reforms. Then during the 1960s, when the focus of the black rights movement shifted from civil to economic equality, a complex and combustible political environment led Richard Nixon to choose black capitalism over housing integration. Instead of George Romney's open communities, Nixon gave black banks government agency deposits. Successive administrations discontinued the War on Poverty before it could bear fruit and replaced it with a war on crime, drugs, and taxes; all of which had devastating effects on the most vulnerable black communities.

These diversions were not always done out of malice. There have been major political and social roadblocks to dealing effectively with the wealth gap, and each of history's potential reformers have faced them. The biggest roadblock is inherent in majoritarian democracy itself. Once race was used to divide up the population, tribalism assured that blacks would always be in the minority. Though America's constitutional democracy has safeguards for the protection of minorities, there are also heavy majoritarian constraints. For example, for nearly a century, the Senate was the dam against progress. Even when the dam had been breached, the results

340. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 367(4)(A), 124 Stat. 1556 (2010).

have fallen short of full justice to blacks. Demands for integration or reparations faced vociferous public and electoral opposition because they came at a price. Scuttling those claims, legislators pushed forward weak versions of redress like affirmative action, which had enough consensus to pass, but would not lead to real economic equality. Even those have become lightning rods of political opposition.

A 2016 study glibly predicted that based on the current racial wealth gap, it would take 228 years for blacks to have as much wealth as whites today. The prediction is inaccurate on two dimensions.[341] If nothing changes, no amount of time will close the wealth gap because of the self-perpetuating cycles of poverty and lack of wealth. However, heretofore untried changes can close the wealth gap very quickly. In 1894, a London newspaper predicted that "in fifty years, every street in London will be buried under nine feet of manure."[342] This dire outcome did not consider that horses would not be the primary mode of transportation in fifty years and that the automobile, an invention that was right around the corner, would transform life. Once motivated to deal with the wealth gap, radical solutions may emerge. There is no reason to believe that the future is just horse manure—even though that is all we have ever used to tackle the racial wealth gap.

An essential first step in dealing with the wealth gap is to acknowledge that it was created through racist public policy. Full justice demands recognition of the historic breach of the social contract between America's constitutional democracy and black Americans. And contract breach requires a remedy. Without that recognition, the Constitution itself stands as a roadblock to redress because it demands that all individuals be neither harmed nor benefited based on group characteristics. But it is unfair to be held to a contract that has already been violated. Blacks have been harmed in direct contradiction to the Constitution's promise of equal treatment yet they have still had to contend with its demand of equal treatment in seeking a remedy.

There has been a powerful political resistance against any form of compensatory damages for past wrongs such as housing integration or reparations. But economic equality must proceed down one of those paths.[343] It is time to confront history directly, to recognize a breach, and provide compensation. The United States has not yet formally apologized for slavery or the years of Jim Crow laws and segregation. Because it has not done so, that history continues to linger. Not just through the wealth gap, but through continuing racism. Theories of racial inferiority were used to justify the injustices of slavery and Jim Crow, and even while both of those institutions were defeated, the theories lingered on because they were

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341. Ben Johnson, *The Great Horse Manure Crisis of 1894*, HISTORIC UK; Dedrick Asante-Muhammad et al., *The Ever-Growing Gap: Without Change, African-American and Latino Families Won't Match White Wealth for Centuries*, CFED & INST. FOR POL'Y STUD. 6, 11 (Aug. 2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf [https://perma.cc/PWY4-GA6F].

342. Johnson, *supra* note 341.

343. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014.

never confronted directly. White supremacy not only lingered, but increased in the years after slavery was ended. And a forceful backlash followed the civil rights era reforms of the 1960s. American institutions failed to acknowledge that a breach had occurred, a breach justified with claims of racial inferiority. The Nuremburg trials in Germany and South Africa's Truth and Reconciliation Committee allowed these countries to confront their racial atrocities forthrightly. Americans of all races would be well served through such a public airing.

There are a few examples of how such a reckoning might take place and what it could achieve. In 2016, Georgetown University admitted that it had purchased 272 slaves in 1838 and promised to give each descendant of these slaves preferred treatment in admissions.[344] The university is planning a "Mass Reconciliation" where it will recognize and apologize for its history. Georgetown's President, John DeGioia, explained, "We cannot do our best work if we refuse to take ownership of such a critical part of our history."[345] Another example is tied to private companies that benefited financially from the convict labor system. The spoils of the system have enriched some of the largest Southern companies, including the First Atlanta Bank, which held the fortune of one of the largest convict-slave holders in the South, James English. After Wachovia acquired First Atlanta, the bank decided to formally recognize its ill-gotten gains. In 2005, Wachovia issued a formal apology to "all Americans and especially to African Americans and people of African descent" and established a scholarship for minorities.[346] Ken Thomas, former CEO and white Southerner explained that he was "overwhelmed by the emotional impact our apology had for African American employees."[347] After the apology and internal group discussions with employees, "workers cried, held hands, embraced one another regardless of company rank, and, in an unprecedented way, began speaking to one another."[348] A formal apology and a scholarship fund do not erase the injustice of the past, but at Wachovia, it led to healing and harmony.

Beyond a formal apology, however, designing a compensation program would present significant practical and legal hurdles. Distinctions based on color or race were a fiction to begin with such that trying to use strict racial categories to separate people would lead to absurd results. Some modern descendants of slaves would be overcompensated, and some would be undercompensated because their racial identity has shifted over time. Moreover, the recently created myth of colorblindness is so doggedly defended by the Courts and the American public that it would prove difficult to dismantle. These practical and philosophical barriers

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344. Rachel L. Swarns, *272 Slaves Were Sold to Save Georgetown: What Does It Owe Their Descendants?*, N.Y. TIMES, Apr. 16, 2016.

345. Kathryn Vasel, *Georgetown to Offer Slave Descendants Preferential Admission Status*, CNN (Sept. 1, 2016), https://money.cnn.com/2016/09/01/pf/college/georgetown-university-slave-descendants-admissions/index.html [https://perma.cc/E2T4-J5NH].

346. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 392 (2008).

347. *Id.*

348. *Id.*

would certainly diminish public support for an already unpopular idea. A 2016 Marist/PBS poll found that 81% of white Americans opposed reparations for slavery. Of blacks, 58 % supported it.[349] As Al Brophy explains in Reparations: Pro & Con, "[T]he cost of a meaningful program of reparations—and racial justice—will be colossal, though so will the benefits."[350]

However, it is possible to avoid the tricky racial identity quagmire and to link redress to more recent injustices instead of a historically remote harm like slavery. The point of this Article has not been to propose a particular proposal, but rather to demonstrate that past efforts have fallen short and that any plan to bridge the wealth gap must include integration or a means to acquire capital. Based on these findings, there are a few policy designs worth considering. One is to just follow the red lines and focus on home ownership. Most of the neighborhoods that were initially redlined in 1934 have been perpetually denied credit and thus remain pockets of poverty. Racial ghettos, once created, have had remarkable staying power. Across the country, these black ghettos are still the territories where the wealth and well-being gap are most drastically highlighted. These are the districts where poverty is still concentrated, schools are segregated, and properties continue to be devalued. By focusing a reparations program on geography as opposed to identity, policymakers can not only avoid the sacred cow of colorblindness, but they can link reparations with integration.

Moreover, a program focused on home ownership or mortgage credit instead of a cash payment, which is how reparations have typically been conceived, will likely yield better outcomes both in garnering public support and in effectively breaking the intergenerational wealth gap. A cash transfer might lead to a positive outcome for the generation that receives it, but only if that generation uses it as an investment yielding future benefits. Home and land ownership, on the other hand, have the potential to lead to long-term intergenerational benefits as the home and land get passed down. A home can also be used as collateral for other life-enhancing loans, like consumer or student loans. There is a historic precedent for such a program. Because land grants and mortgage subsidies were the process through which white Americans gained a wealth advantage over black Americans, there is every reason to use land or mortgages as a program that would level the playing field.

Through a process called "greenlining," public and private funds could be deployed to spur wealth creation among individuals and communities. In the same way that FHA loan guarantees spurred a robust mortgage market, greenlining can

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349. Renee Stepler, *5 Key Takeaways about Views of Race and Inequality in America*, PEW RES. CTR. (June 27, 2016), http://www.pewresearch.org/fact-tank/2016/06/27/key-takeaways-race-and-inequality/ [https://perma.cc/3KZU-X984]; Jesse J. Holland, *Poll: Millennials More Open to Idea of Slavery Reparations*, AP NEWS (May 11, 2016), https://www.apnews.com/b183a022831d4748963fc8807c204b08 [https://perma.cc/8JZT-25MG]; *Race Relations*, GALLUP (2016), http://www.gallup.com/poll/1687/race-relations.aspx [https://perma.cc/PK3E-VD66].

350. ALFRED L. BROPHY, REPARATIONS: PRO & CON 179 (2008).

lower the cost of mortgage lending. This can be done through a variety of financial mechanisms. In the most direct analogy to previous FHA programs, HUD, in conjunction with the GSE's, would guarantee mortgages through participating banks. Banks would issue the loan, which would be guaranteed against default by the federal government. Unlike the subprime mortgage lending preceding the crisis, these loans would be priced according to their risk, which would be very small due to the government guarantee. These loans would have to be made available to current residents of the area so as to not displace residents and induce outsiders to take advantage of the guarantees. In the event of loan default, the government would suffer the risk of losses of these mortgages, however.

Another option with even lower costs or risks to the government is to offer "shared equity mortgages" (SEMs) or "shared appreciation mortgages," a hybrid debt/equity mortgage. The essential structure is that an investor together with a borrower own a property jointly. A borrower who might not be able to come up with a down payment on her own would enter into a joint mortgage agreement with either a private investor (a bank or a non-profit) or a public investor (like federal, state, or local government fund) who would supply the down payment. The borrower who occupied the property would make mortgage payments instead of monthly rental payments. At the end of the mortgage cycle or upon sale, the equity would be split between the investor and the borrower. In case of borrower default, the investor could take possession of the home and the debt. All equity retrieved from a home sale or even a foreclosure would be split evenly between the parties. This arrangement would allow low-income individuals who otherwise could not own a home to own half of the value of a home and begin to accrue wealth. Investors would be protected from the downside because they own the property as a joint tenant, which means that they own it in full if the borrower stops paying the mortgage payments.

One important benefit of an SEM in green-lined areas would be that it would provide an incentive for the investing partner, either a non-profit, bank, or government agency, to make sure that the property appreciated in value. Property values rise when schools, parks, public facilities, and other indicators of community health improve. Research and history show that when individuals own their homes, they are more invested in their community. This double investment would link individuals, private corporations, non-profits, and government entities in improving neighborhoods unlike the subprime lenders or contract sellers whose main motivation was one-time profits.

One problem in the above programs is that neighborhoods remain racially segregated at least until the wealth gap begins to disappear. One option to disrupt segregation is a housing voucher program, which has been tested by some municipalities. In its current form, these vouchers have only applied to rental properties or Section 8 housing. However, in order to build wealth, these vouchers would need to be tied to a wealth-creating property. Vouchers could take the form of an SEM arrangement and the borrower could choose a home in any neighborhood. The focus is to reverse blighted communities stuck in cycles of poverty due to segregation. These trends can change by upsetting racial segregation patterns or by enriching the residents of the urban ghetto so they themselves can choose to move out while others move in. To maintain racial neutrality in vouchers, the program would focus on residents of formerly redlined areas. Another selection possibility is to create criteria based on a mix of factors aimed at selecting individuals of any race, but who meet an income threshold and are below an asset and income maximum. In other words, any individual would qualify for a voucher so long as they had sufficient income to make a modest mortgage payment but had income below the national average. This casts the net much wider and would therefore be more expensive, but such is the cost of demanding colorblindness.

Public institutions could also deliver these loans directly. For example, instead of using banks or investors as middlemen, federal, state, or local funds could be used to lend into these areas with the profits returning to the public treasury instead of being shared by the bank. A state or municipality can even establish a public bank for this purpose. North Dakota has a public state bank, and one of its most successful functions has been to offer credit to regions of the state that private banks have neglected, such as with rural mortgages.[351] Public banking actually works best when there is a well-defined mission that the market is not meeting. This has been the model for development banks abroad as well as our own historic GSE's, FHA lending programs, postal banking operations, and even federally backed funds like the FDIC and the Federal Reserve that have stepped in to fill a void created by the private market. Indeed, it would be fitting for a quasi-public entity like the FHA to be created to fix the problem the FHA itself created.

The drawback of all of these plans is that they attempt to break the cycle of poverty, unemployment, and community decline through mortgage debt. This is what the FHA did after the Great Depression and it yielded the desired results, but can mortgages lead to prosperity today? Credit today is not what credit was in post-war America. In a growing and dynamic economy, credit meant wealth creation. Prominent economist Robert Gordon has made the case that America is headed toward an era of stagnant growth, which could mean that it would be unwise to attempt to create wealth through mortgage debt without changing the fundamental structure of the economy. If a program only increases debt without adding opportunities, such as increased incomes and wealth generation through property appreciation, the expected gains will not be realized. However, there is reason to believe that some of this stagnant growth can be remedied by focusing on inequality. In other words, by bringing back the New Deal era ethos of a mixed economy, or

351. Eric Hardmeyer, *Why Public Banking Works in North Dakota*, N.Y. TIMES (Oct. 1, 2013), https://www.nytimes.com/roomfordebate/2013/10/01/should-states-operate-public-banks/why-public-banking-works-in-north-dakota [https://perma.cc/RBE5-APLS].

a government-private partnership, the economy can be spurred toward creation. Dealing with inequality can have trickle-up effects and raise all boats.[352]

The assumption on which all of these schemes are based is that the home would increase in value. This has not been the case with black homes. This is what led Emory professor Dorothy Brown to suggest that blacks avoid purchasing homes and instead focus on building wealth through stock ownership. She argued that black homes have not increased in value and so homeownership has been a drain on black wealth. She suggested that even though stocks may be riskier than property, for blacks, they were a safer long-term investment.[353] This sound advice was the best indictment of the home value gap in America today.

However, there is reason to believe that homeownership can still create wealth. Despite occasional asset bubbles, home values have continued their steady rise in America.[354] Further, home prices follow a positive feedback loop such that the more people own homes in a community, the more home values rise across the board, creating more wealth. Higher wealth then leads to a bigger tax base, which leads to better schools, which in turn lead to higher incomes down the road. Children who grow up in communities of homeowners have better outcomes across the board. Thus, the cycle is reversed. In addition, there is reason to believe that racism has diminished enough such that black properties would not force a decline on neighborhood values.

We decidedly do not live in a post-racial society, but it is important to step back and note the undeniable progress in social, scientific, and political thought. Take the case of interracial marriage. Fears of miscegenation were the backdrop to the Jim Crow framework and the fuel that fed much of the violence toward black men. In 1958, only 4% of Americans approved of interracial marriage. By 2013, a Gallup poll found that 87% of Americans approve.[355] Having mapped the human genome, modern science has now fully dispelled the myth that race is a meaningful genetic trait.[356] Race has never been a biological fact, but only a political weapon,

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352. GORDON, *supra* note 85 (explaining that global inequality will continue to push against growth); Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS, May 8, 2014; *see also* JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER (2016); PIKETTY, *supra* note 85; Joseph E. Stiglitz, *Inequality and Economic Growth*, 86 POL. Q. 134 (2015); Paul Krugman, *Is Vast Inequality Necessary?*, N.Y. TIMES (Jan. 15, 2016), https://www.nytimes.com/2016/01/15/opinion/is-vast-inequality-necessary.html [https://perma.cc/PZY8-P7JQ].

353. Dorothy Brown, *How Home Ownership Keeps Blacks Poorer than Whites*, FORBES (Dec. 10, 2012), https://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites/#79868cca4cce [https://perma.cc/ZVN8-EAZ3].

354. Ilyce Glink, *9 Real Estate Trends to Expect in 2017*, CBS NEWS (Dec. 19, 2016), https://www.cbsnews.com/media/9-real-estate-trends-to-expect-in-2017/ [https://perma.cc/4KZU-SX79].

355. Frank Newport, *In U.S., 87% Approve of Black-White Marriage vs. 4% in 1958*, GALLUP, July 25, 2013.

356. KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 9 (2014); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE

and that knowledge will soon change public hearts and minds. Politically, Americans are much more tolerant and pluralistic. The majority of the American public also elected Barack Obama to office twice. Putting aside the ugly racist backlash engendered by his presidency, a black president would not have been possible in any previous era.

We have made strides in recognizing the humanity of others, which only improves our own humanity. Slavery was possible for so long because whites refused to acknowledge the humanity of their black slaves. In earlier eras, whites could push blacks and other immigrants into ghettos and ignore the disease, squalor, and poverty that resulted—sometimes even using the inevitable decrepitude of the ghetto to justify further dehumanization of minorities.[357] As a society, we can no longer tolerate this—if only because our digital interconnectedness means we can no longer ignore the suffering of others. When images surface of white officers killing unarmed black men, the world sees it immediately and the injustice is difficult to ignore.

It is easy, however, to ignore signs of racial progress. Behavioral economists speak of an availability heuristic, which means that when people are asked their views on a particular issue, they usually use a mental shortcut that over-relies on immediate and available examples instead of a full range of available information. This cognitive gap, along with the human mind's well-documented tendency to focus on the negative and threatening instead of the positive and mundane, can lead many people to believe that racism is as bad today as it has ever been. Indeed, the majority of the population believes that racism is as bad or worse today than it was twenty years ago.[358] Perhaps this is because the first available images that come to mind when we consider race relations are the most salient: police brutality, racist internet memes or tweets, race riots, hate crimes, or pictures of police marching into American cities with military grade weapons. But taking a long historical view, research shows that human history has thus far been a steady march toward more justice and more peace with some marked outliers that catch more light than they should. Indeed, the moral arch of the universe does seem to bend toward justice, often in a way that is hard to detect and sometimes taking some very tortuous detours. However, we are less violent, more compassionate, and more tolerant on the whole than we have been at any point in history.

Racism is not only harmful to blacks, but it is a corrosive influence on white culture. Frederick Douglass explained that he watched as his white mistress change as she became a slave master. Her ownership of a human being warped and

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HISTORY OF RACIST IDEAS IN AMERICA 476 (2016); SIDDHARTHA MUKHERJEE, THE GENE: AN INTIMATE HISTORY 341–50 (2016).

357. STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 170 (2012).

358. Jennifer Agiesta, *Race and Reality in America: Five Key Findings*, CNN (Nov. 25, 2015), https://www.cnn.com/2015/11/24/us/race-reality-key-findings/index.html [https://perma.cc/LQ58-JH7R].

corrupted her previously decent character and turned her into hateful person.[359] C. Vann Woodward described how the South lost its soul in its obsessive and pervasive enforcement of Jim Crow.[360] James Baldwin worried about "the death of the heart" that racism had wrought on American culture for "whoever debases others is debasing himself."[361] Baldwin also understood that the "future of the negro in this country is precisely as bright or as dark as the future of the country."[362] The sooner Americans recognize that the fate of black America is tied to the fate of white America, the faster it can achieve true democracy and shed the weight of historic injustices.

Americans must decide whether to keep embracing our history of racial tribalism or to shed these divisions and go forward as one people, indivisible. Can America's majoritarian democracy support a program intended solely to benefit the black minority? It certainly did not in 1870, 1930, or 1960. However, there is reason to hope that this is more likely now than ever. We are facing another pivot point. The racial détente of the 1960s has fallen apart. The myth of post-racial America has been dispelled and renewed tensions have erupted on the national stage as well as in segregated pockets of poverty in America.

Modernity will inevitably bring us closer together, which can either lead to greater resentment or greater cooperation. Perhaps more people will realize that what benefits a minority will also benefit the majority. Full racial integration will eventually remove pockets of blight, crime, and deprivation across the country. This will benefit the entire American population. Integrated schools benefit all students and increased equality will spur economic growth.[363] We must shed these destructive myths that separate can be equal, that a segregated economy will reach prosperity on its own, or that black banks can lead to black prosperity without fundamental economic changes. We cannot deflect the responsibility of economic equality onto these communities alone. W.E.B Dubois declared in 1948 that the great problem of American democracy was that "it had not yet been tried."[364] Perhaps it is time to try.

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359. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 32–36 (5th ed. 2001).

360. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 49–51 (5th ed. 1961).

361. JAMES BALDWIN, THE FIRE NEXT TIME 82 (1992).

362. *Id.* at 93.

363. Melinda D. Anderson, *The Promise of Integrated Schools: New Research Shows More Districts Opting for Diverse Schools, as Others Face Resistance*, ATLANTIC (Feb. 16, 2016), https://www.theatlantic.com/education/archive/2016/02/promise-of-integrated-schools/462681/ [https://perma.cc/424Y-BDPY].

364. W.E.B. Du Bois, *Is Man Free?*, 66 SCI. MONTHLY 432, 432–33 (1984).