

Washington University

Law Review

VOLUME 98

NUMBER 2

2020

BANKING ON DEMOCRACY

MEHRSA BARADARAN

ABSTRACT

The financial system is unequal and exclusionary even as it is supported, funded, and subsidized by public institutions. This is not just a flaw in the financial sector; it is a foundational problem for democracy. Across the financial industry, entrepreneurs, regulators, media, and scholars promote the goal of “financial inclusion” or “access to credit.” Facebook’s Libra, Bitcoin, and fintech providers like Square, PayPal, Venmo, and thousands of other new products or startup companies are launched with the stated aim of increasing financial inclusion. These private companies are joined by the Congress, non-profits, and financial regulators with programs and laws promoting financial inclusion. In fact, financial inclusion and access to credit are among the increasingly rare issues that unite the political left and right. Yet, despite consensus and years of effort, many individuals and communities continue to be excluded from the mainstream financial system, which forces them to resort to high cost payday lenders, check cashers, or other fee-based financial transaction products. The financially disenfranchised pay the most for services that the wealthy and the middle class receive at a subsidized rate. This Article proposes a new model of financial inclusion, which situates issues of access and inclusion as central to the legal design of the financial system. This Article argues that these remedies have failed because the current model of financial inclusion is rooted in a mistaken and incomplete theory of the financial market. “Normals” and “mainstream” credit markets are conceived of simply as “markets,” governed by market rules and market dynamics. In contrast, strategies for inclusion or “access to credit” are viewed as ancillary

products, gap-filling, or subsidized add-ons for those who are outside of the credit market. This Article argues that the mainstream market and inclusion strategies are both part of the same financial market, which is itself a product of public policy. Instead of financial inclusion, this Article proposes to reframe the problem as a matter of financial redesign. The design of credit markets is an a priori choice embedded in law and policy that determines the contours and scope of the credit markets, including who is included. Reconceptualizing financial inclusion must thus proceed through democratic means because inclusion and access are a byproduct of institutional design rather than private market decision making.

TABLE OF CONTENTS

INTRODUCTION.....	355
PART I.....	364
A. <i>Three Types of Access to Credit</i>	367
1. <i>The Innovative Credit Product: Fintech</i>	367
2. <i>Gap-Filling Legislation and Regulations</i>	373
3. <i>Self-Help and Subsidiaries</i>	376
B. <i>Common Traits</i>	380
PART II.....	382
A. <i>Payments</i>	383
B. <i>Credit</i>	388
PART III.....	399
A. <i>Progressives, Populists, and Access to Credit</i>	400
B. <i>The Creation of The Federal Reserve</i>	406
C. <i>Financial Redesign</i>	409
CONCLUSION.....	418

INTRODUCTION

When Facebook launched its Libra currency, the head of the initiative testified to the Senate Banking Committee that “[o]ur first goal is to create utility and adoption, enabling people around the world—especially the unbanked and underbanked¹—to take part in the financial ecosystem.”² Mark Zuckerberg emphasized the point when he was called to testify to the House of Representatives a few months later: “The Libra project is about promoting financial inclusion through a safe, low-cost, and efficient way of sending and receiving payments around the world.”³ Since its inception in 2009, many in the cryptocurrency industry have promised that one of the

1. Terri Friedline, Mathieu Despard & Gina A. N. Chowa, *Preventative Policy Strategy for Baking the Unbanked: Savings Accounts for Teenagers?*, 20 J. POVERTY 1, 1–2 (2015) (“According to a national survey conducted by the FDIC, 8% of US households are considered unbanked, with one half of adult members reporting never having owned checking or savings accounts. Essentially, these households may be considered disconnected from the financial mainstream. . . . An even higher percentage (20%) reports being underbanked, defined as using either nonbank money orders, check-cashing services, payday loans, rent-to-own agreements, or pawn shop loans once or twice a year. Taken together, upwards of 28% to 36%—more than one fourth of adult-headed households—may be excluded from mainstream banking institutions at any given time.” (citations ommitted)).

2. *Examining Facebook’s Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. On Banking, Hous., & Urban Affairs*, 116th Cong. 49 (2019) (Prepared Statement of David A. Marcus, Head of Calibra, Facebook).

3. *Hearing Before the H. Comm. On Fin. Servs.*, 116th Cong. 2 (2019) (Testimony of Mark Zuckerberg, Founder, Chairman and Chief Executive Officer, Facebook), <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-zuckerbergm-20191023-u1.pdf> [<https://perma.cc/BN92-4FUP>].

main benefits of the distributive ledger technology is to facilitate financial inclusion of the unbanked.⁴ The language of fintech as financial inclusion is so widespread that one could be forgiven for assuming that increasing access to credit were the sole aim of these companies.⁵ Regulators have responded with their own encouraging reports pronouncing that fintech, mobile banking, or other innovative new products will eventually lead to financial inclusion.⁶ A commonly held belief in the world of finance is that what stands between the current landscape of financial exclusion to full financial inclusion is the right technology or innovation.⁷ This is misguided.

This Article seeks to reframe the problem of financial inclusion because the current framework misunderstands the problem to be fixed. In order to find adequate solutions to the current inequalities of finance, academics and policymakers must challenge the prevailing narratives about financial inclusion. This analysis proposes a theory of the political economy of finance and adds to an emerging body of work by other scholars engaged in

4. *Examining Regulatory Frameworks for Digital Currencies and Blockchain: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 116th Cong. 48 (2019) (Prepared Statement of Rebecca M. Nelson, Specialist in International Trade and Finance); GEORGETOWN UNIV. MCDONOUGH SCH. OF BUS., CTR. FOR FIN. MKTS. & POLICY, BLOCKCHAIN AND FINANCIAL INCLUSION: THE ROLE BLOCKCHAIN TECHNOLOGY CAN PLAY IN ACCELERATING FINANCIAL INCLUSION 5 (2017); Dmytro Spilka, *Blockchain and the Unbanked: Changes Coming to Global Finance*, IBM: BLOCKCHAIN PULSE (Mar. 17, 2020), <https://www.ibm.com/blogs/blockchain/2020/03/blockchain-and-the-unbanked-changes-coming-to-global-finance/> [<https://perma.cc/DB3G-MMN7>]; Pascal Thellmann, *How Blockchain Is Banking the Unbanked*, COINTELEGRAPH (Jan. 11, 2018), <https://cointelegraph.com/news/howblockchain-is-banking-the-unbanked> [<https://perma.cc/4ZV6-GDDU>].

5. See STEVEN T. MNUCHIN & CRAIG S. PHILLIPS, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION 9 (2018) (“Treasury supports encouraging the launch of new business models as well as enabling traditional financial institutions . . . to pursue innovative technologies to . . . improve access to credit and other services.”); Stijn Claessens, Jon Frost, Grant Turner, Feng Zhu, *Fintech Credit Markets Around the World: Size, Drivers and Policy Issues*, BIS Q. REV. (Sept. 2018) (finding financial technology as a pathway to greater financial inclusion); Stephanie MacConnell, *How FinTech Companies are Closing the Banking Gap*, FORBES (Oct. 23, 2017, 3:50 PM), <https://www.forbes.com/sites/stephaniemacconnell/2017/10/23/financial-inclusion-do-good-make-money/#1f023b13fc3> [<https://perma.cc/ML6Z-JXAC>] (“FinTech companies and investors are trying to find solutions to this problem so that those on the margins can become ‘bankable’”); Larry D. Wall, *FinTech and Financial Inclusion*, FED. RES. BANK ATLANTA (Aug. 2017), <https://www.frbatlanta.org/cenfis/publications/notesfromthevault/08-fintech-and-financial-inclusion-2017-08-30.aspx> [<https://perma.cc/X6F8-H545>] (“[F]intech has substantial potential to lower the cost of financial services to many lower-income and credit-constrained consumers”).

6. Lael Brainard, Governor, Bd. of Governors of the Fed. Reserve Sys., *The Opportunities and Challenges of Fintech* (Dec. 2, 2016) (transcript available at <https://www.federalreserve.gov/newsevents/speech/brainard20161202a.htm> [<https://perma.cc/ZQA7-BNNT>]) (“One particularly promising aspect of fintech is the potential to expand access to credit and other financial services for consumers and small businesses.”); Jelena McWilliams, Chairman, Fed. Deposit Ins. Corp., *Fintech and the New Financial Landscape* 4 (Nov. 13, 2018) (transcript available at <https://www.fdic.gov/news/speeches/spnov1318.pdf> [<https://perma.cc/FWQ6-8CLM>]) (“New technology has proven able to improve the customer experience, lower transaction costs, and increase credit availability. [Fintech] also offers a tremendous opportunity to expand access to the banking system.”).

7. See Manisha Patel, *Is Technology the Key to Accelerating Financial Inclusion?*, THE FINTECH TIMES (Nov. 25, 2017), <https://thefintechtimes.com/technology-key-accelerating-financial-inclusion/> [<https://perma.cc/V93W-TTWA>].

counteracting the prevailing market neoliberal ideology that governs narratives about markets, power, labor, and climate.⁸

The term “financial inclusion” is nebulous and overly broad, yet also relatively non-controversial. Financial inclusion is an umbrella concept that encompasses access to bank accounts, credit products, or financial services of any kind.⁹ Murky, too, is the identification of the problem; among a myriad of financial services, which should be available to all? What services are essential for participation in commerce? Generally, financial services can be divided into two categories: *the payments system* and *the credit system*. Both of these systems are exclusionary for low- and moderate-income (LMI) individuals and communities; aspects of each can be deemed as essential; and both of these systems have public or quasi-public features.

When referring to financial inclusion of the “unbanked,” the problem is lack of access to the *payments system*.¹⁰ Each purchase, sale, payment, and interaction with commerce is mediated by financial institutions and/or their proxies. Yet the unbanked and underbanked pay a fee or a premium each time they interact with the payments system.¹¹ They pay to cash checks, purchase prepaid debit cards, or send or receive money.¹² This class of fees and interest rates usually falls on LMI individuals who spend an average of 9.5% of their annual income on fees.¹³ Many communities have been completely abandoned by the community banks and credit unions that used to serve them and have been left with alternative service providers such as check cashers, payday lenders, or even gas station ATMs that charge

8. NELL ABERNATHY, DARRICK HAMILTON & JULIE MARGETTA MORGAN, *NEW RULES FOR 21ST CENTURY: CORPORATE POWER, PUBLIC POWER, AND THE FUTURE OF THE AMERICAN ECONOMY* 2 (2019); ANDERS FREMSTAD & MARK PAUL, *TRANSCENDING NEOLIBERALISM: HOW THE FREE-MARKET MYTH HAS PREVENTED CLIMATE ACTION* (2019); SUZANNE KAHN, *A PROGRESSIVE FRAMEWORK FOR FREE COLLEGE* 29 (2019); MIKE KONCZAL, KATY MILANI & ARIEL EVANS, *THE EMPIRICAL FAILURES OF NEOLIBERALISM* (2020); FELICIA WONG, *THE EMERGING WORLDVIEW: HOW NEW PROGRESSIVISM IS MOVING BEYOND NEOLIBERALISM* (2020).

9. See *Financial Inclusion: Overview*, WORLD BANK GROUP, <https://www.worldbank.org/en/topic/financialinclusion/overview> [https://perma.cc/BH2J-V6KV] (last updated Oct. 2, 2018).

10. See FED. DEPOSIT INS. CORP., 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 1 (2018) (finding that more than one quarter of Americans are unbanked or underbanked); MICHAEL S. BARR, *NO SLACK: THE FINANCIAL LIVES OF LOW-INCOME AMERICANS* 1 (2012); LISA SERVON, *THE UNBANKING OF AMERICA: HOW THE NEW MIDDLE CLASS SURVIVES* (2017).

11. See FED. DEPOSIT INS. CORP., *supra* note 10, at 37; see also Peggy Delinois Hamilton, *Why the Check Cashers Win: Regulatory Barriers to Banking the Unbanked*, 30 W. NEW ENG. L. REV. 119, 119–20 (2007) (explaining the underbanked spend approximately two percent of their income on check cashing alone); Emily Guy Birken, *The Costs Of Being Unbanked Or Underbanked*, FORBES (July 28, 2020), <https://www.forbes.com/advisor/banking/costs-of-being-unbanked-or-underbanked/> [https://perma.cc/92N7-BCNZ].

12. See OFFICE OF THE INSPECTOR GEN., U.S. POSTAL SERV., *PROVIDING NON-BANK FINANCIAL SERVICES FOR THE UNDERSERVED* 2 (2014) (noting the unbanked and underbanked spend 9.5% of their income on alternative financial services); Birken, *supra* note 11; Hamilton, *supra* note 11, at 119–20.

13. OFFICE OF THE INSPECTOR GEN., U.S. POSTAL SERV., *supra* note 12, at 2.

between \$5.25 to \$7.50 for every transaction.¹⁴ These transaction costs are only paid for by those without banking accounts, usually LMI families.¹⁵ They prove the adage that it is expensive to be poor. It is also time-consuming and stressful to mediate the various external services in the economy like check-cashers, Western Union remittance services, bill pay offices, and pre-paid debit cards.¹⁶ Policymakers, academics, and industry experts recognize that “financial inclusion” is a worthy policy and business goal and have offered various products, services, and even subsidies aimed at financial inclusion.¹⁷ Now, more than ever, the economy is digital, global, and mediated by technology. Those who do not have bank accounts pay a fee every time they participate in modern commerce. Just as the railroad, telephone, and electricity were once recognized as essential public utilities,¹⁸ access to payments should also be recognized as an essential public good.

Financial inclusion also includes *access to credit*, another policy goal actively pursued by legislators and regulators on the left and the right.¹⁹ There is little consensus on how best to achieve *access to credit*, but advocates on both the right and left have described a panoply of proposals as increasing access to credit, rendering the term almost meaningless on its own, or rather amorphous and decontextualized and up for grabs to promote any political agenda. While a policy on the left may propose that breaking up the banks will increase access to credit, one on the right might advocate

14. See Andrew Pentis, *Bank ATM Fees: How Much Do Banks Charge and How Can I Avoid Them?*, VALUEPENGUIN, <https://www.valuepenguin.com/banking/bank-atm-fees> [https://perma.cc/7HP9-UMWD] (last updated June 17, 2020); Birken, *supra* note 11; Janell Ross, *A Town with No Bank: How Itta Bena, Mississippi, Became a Banking Desert*, NBC NEWS (June 15, 2019), <https://www.nbcnews.com/news/nbcblk/how-itta-bena-mississippi-became-banking-desert-n1017686> [https://perma.cc/AJT4-8X5U].

15. MICHAEL S. BARR, JANE K. DOKKO & BENJAMIN J. KEYS, *AND BANKING FOR ALL?* 17 (2009); Birken, *supra* note 11.

16. See generally Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004) (discussing the complex and expensive regulatory environment of various alternative financial service providers such as pay-day lenders and check cashers).

17. See, e.g., MARIANNE CROWE, MARY KEPLER, & CYNTHIA MERRITT, *THE U.S. REGULATORY LANDSCAPE FOR MOBILE PAYMENTS* 8 (2012) (explaining how the government’s policy goal of financial inclusion can be aided by mobile technologies); see also Nizan Geslevich Packin & Yafit Lev-Aretz, *On Social Credit and the Right to Be Unnetworked*, 2016 COLUM. BUS. L. REV. 339, 356 (2016) (“[R]egulators, policymakers, academics, and consumers share the understanding that broader financial inclusion is socially desirable.”).

18. MAURICE ESTABROOKS, *ELECTRONIC TECHNOLOGY, CORPORATE STRATEGY, AND WORLD TRANSFORMATION* 27 (1995).

19. Alvin C. Harrell, *Consumer Credit in the 1990’s, Part Two--the Coming Bankruptcy Explosion and Its Implications for State Law*, 50 CONSUMER FIN. L.Q. REP. 2, 16 (1996) (“[T]he Clinton administration has strongly supported an expansion of consumer credit over the past two years.”); Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 30 (2009) (discussing how President Bush’s policies that lowered lending standards extended access to credit especially for mortgages).

complete deregulation of banking markets to increase access to credit.²⁰ In the business context, many innovative technologies premise their enterprise as increasing financial inclusion through a variety of apps, platforms or networks.²¹ A wide range of credit products like payday loans, peer-to-peer (P2P) loans, microcredit, mobile banking, alternative mortgage loans, bitcoin, and other non-bank credit products describe their services as *financial inclusion*, *access to credit*, or alternatively *democratizing credit*.²²

This Article describes three general categories for financial inclusion and access to credit in frequent use in the modern finance and policy corridors. First, the *product-innovation model* focuses on technology or new market innovations including fintech, mobile banking, blockchain technology and other tech products. The second face of inclusion is the “*gap filling*” model, which is usually focused on removing discriminatory elements of the “normal” credit system. For example, legislation like the Community Reinvestment Act (CRA) attempts to increase access to credit by persuading the mainstream banking system to lend into formerly redlined areas due to previous discrimination.²³ The Equal Credit Opportunity Act (ECOA) aims to censure banks that deny *access to credit* to individuals due to discrimination based on a protected class status.²⁴ The third category of financial inclusion efforts is the *subsidy model* which includes philanthropy and government subsidies that bolster microcredit or nonprofit community banking, technology, and other grassroots efforts.

20. See BIPARTISAN POLICY CTR., THE BIG BANK THEORY: BREAKING DOWN THE BREAKUP ARGUMENTS 34 (2014); Joel Anderson, *Trump Is Deregulating Banks: Here's What That Means for You*, NASDAQ (Feb. 12, 2019, 8:47 AM), <https://www.nasdaq.com/articles/trump-deregulating-banks-here-what-means-you-2019-02-12> [<https://perma.cc/L3LG-ULET>].

21. *Mobile Apps Are Key for Financial Inclusion*, ETNA, <https://www.etnasoft.com/financial-inclusion-mobile/> [<https://perma.cc/LJE9-TY6Q>]; EY, INNOVATION IN FINANCIAL INCLUSION: REVENUE GROWTH THROUGH INNOVATIVE INCLUSION (2017).

22. See also Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 THEORETICAL INQUIRIES L. 323, 335 (2006) (“[C]reditors sometimes portray [alternative financial services] as promoting the democratization of credit”); Omar Faridi, *Ray Youssef: CEO and Co-founder at Paxful Explains How Company's Global Bitcoin (BTC) Marketplace Is Enabling Greater Financial Inclusion*, CROWDFUND INSIDER (May 6, 2020), <https://www.crowdfundinsider.com/2020/05/161108-ray-youssef-ceo-and-co-founder-at-paxful-explains-how-companys-global-bitcoin-btc-marketplace-is-enabling-greater-financial-inclusion/> [<https://perma.cc/9H5H-M5AT>].

23. See Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 523 (2005) (discussing the CRA's purpose to increase access to credit to previously discriminated against racial minorities); Cassandra Jones Havard, *Advancing the CRA—Using the CRA's Strategic Plan Option to Promote Community Inclusion: The CRA and Community Inclusion*, 29 W. NEW ENG. L. REV. 37, 39 (2006) (“The CRA's basic premise [is to] mak[e] access to credit available across all neighborhoods”).

24. See Vlad A. Hertz, Note, *Fighting Unfair Classifications in Credit Reporting: Should the United States Adopt GDPR-Inspired Rights in Regulating Consumer Credit?*, 93 N.Y.U. L. REV. 1707, 1724 (2018) (“The ECOA prohibits discrimination based on protected characteristics such as race, color, religion, national origin, sex, marital status, or age.” (footnote omitted)).

The wide array of solutions and problems related to financial inclusion and access to credit are usually discussed separately because each has distinct characteristics and approaches. For example, fintech solutions and anti-discrimination laws seem to be completely unrelated in the problem they are attempting to remedy and the solution they offer. There is very little overlap in the interest groups or political parties pushing these various models for financial inclusion and access to credit. Yet this Article will make the case that all of these paradigms share a common flawed theoretical paradigm of credit markets. The misconception they share is in fact pervasive in “neoliberal” legal and financial discourse.²⁵ The foundational theory is that credit markets and the financial circuitry of the economy are a neutral byproduct of market forces.²⁶ This view conceives of financial inclusion or the lack thereof as a “bug” or a gap in the general circuitry. The solutions to the problem of financial exclusion range from creating new products outside the “normal” credit system to filling gaps that have been created by bad actors. Those who find themselves outside of the normal channels of credit and money therefore must be “included” in the credit market using a *different* device or method than what is offered to those who already have access to credit and financial services. Those who cannot access a normal loan can receive a microcredit, peer-to-peer, or payday loan. Those who do not have a bank account can be given an alternative route to transactions such as a check cashing service, a newly designed fintech product, or an alternative blockchain currency.²⁷

Not only does the confused rhetoric of access to credit and financial inclusion lead to failed policy to address financial exclusion, but it also elides an accurate understanding of the mainstream credit markets. Or rather, it does not discuss them at all, taking “the norm” for granted and focusing instead on the periphery. According to the standard neoliberal perspective, the scope, quantity and circumference of the credit markets are

25. Neoliberalism is a term overloaded with misuse and misunderstanding, and I use it with reservation because I believe it is still the best label for the theories under critique in this Article. There is a large body of recent academic work by historians, political scientists, economists, and legal scholars on neoliberalism that has created more clarity in the field and precision in the definition. The clearest definition of neoliberalism is a market-centered model of policy. The term is used generally in a derogatory manner by many on the political left. *See generally* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

26. *See* Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 888 (2019); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 784 n.2 (2003) (defining neoliberalism as the “contemporary reincarnation of the nineteenth-century ‘laissez-faire’ liberalism that advanced the primacy of ‘the market’ over ‘government regulation’”).

27. *See* Braucher, *supra* note 22, at 335; *See* DAVID W. PERKINS, CONG. RESEARCH SERV., R46332, FINTECH: OVERVIEW OF INNOVATIVE FINANCIAL TECHNOLOGY AND SELECTED POLICY ISSUES 23 (2020).

a neutral and natural byproduct of market forces.²⁸ Credit markets are seen through a prism of natural law²⁹—credit is given to the creditworthy and withheld from those who are not. There are gaps created by “market failures” that subsidies or financial education can overcome, but the credit market itself operates in neutral conditions. No one is deciding to exclude. In this model of financial inclusion, the design of the credit system is an innate characteristic of the market and not a result of decision making. A designing entity or policy-creator is absent or irrelevant—presumably credit decisions are guided by the invisible forces of the market. People who are excluded find themselves outside of the financial markets because they are not “creditworthy” either due to too little money or too high of a risk, or because there is a flaw in the system such as discrimination that excluded otherwise “credit-worthy” individuals.³⁰ They must pay more for credit and financial services because the market determines the price of the service and credit and those costs reflect the added risk. In order to achieve “financial inclusion,” lenders must either charge more to respond to higher risk (i.e., check-cashing), rely on subsidies to overcome market failure or the lack of information by consumers, rely on philanthropy, or rely on legislative gap-filling.³¹

This Article proposes a new theoretical approach to financial inclusion that recognizes financial inclusion as an a priori design decision as opposed to an after-the-fact remedy tacked on to a “normal credit system.” To use a tangible analogy, imagine a property contains those with access to credit and banking services inside the house and those who do not have access outside the house. The predominant financial inclusion model proposes that someone—either a charity or an entrepreneur—approach the people outside of the house with a financial product specifically designed for those outside the house, or make sure the house isn’t discriminating against outsiders who

28. See McCluskey, *supra* note 26, at 786.

29. See generally JONATHAN CROWE, *NATURAL LAW AND THE NATURE OF LAW* (2019).

30. See Nick Clements, *6 Reasons You Can Be Rejected with an Excellent Credit Score*, FORBES (Mar. 24, 2015, 12:51 PM), <https://www.forbes.com/sites/nickclements/2015/03/24/6-reasons-you-can-be-rejected-with-an-excellent-credit-score/#7170d305efe3> [<https://perma.cc/7LZP-4WEL>]; Jill Cornfield, *Low-Income Americans Get Double Squeeze From Poor Credit and High Fees*, CNBC (Sept. 19, 2018), <https://www.cnbc.com/2018/09/19/poor-credit-keeps-low-income-people-paying-higher-fee-s-and-stiff-inter-est-rates.html> [<https://perma.cc/9Y7D-E5JQ>]; Aaron Klein, *Credit Denial in the Age of AI*, BROOKINGS INST. (Apr. 11, 2019), <https://www.brookings.edu/research/credit-denial-in-the-age-of-ai/> [<https://perma.cc/S9EZ-NCP6>].

31. See ROCKEFELLER PHILANTHROPY ADVISORS, *FINANCIAL INCLUSION – OPPORTUNITIES & RISKS FOR DONORS*, <https://www.rockpa.org/wp-content/uploads/2016/03/GAFIS-Financial-Inclusion-guide.pdf>; Cornfield, *supra* note 30; Eric Dash, *Risky Borrowers Find Credit Again, at a Price*, N.Y. TIMES (Dec. 12, 2010), <https://www.nytimes.com/2010/12/13/business/13credit.html> [<https://perma.cc/RDR7-Q6JX>]; Peter Conti-Brown, *Can Fintech Increase Lending? How Courts Are Undermining Financial Inclusion*, BROOKINGS INST. (Apr. 16, 2019), <https://www.brookings.edu/research/can-fintech-increase-lending-how-courts-are-undermining-financial-inclusion/> [<https://perma.cc/2AJZ-7LMY>].

should be in the house for a reason such as their race or gender. The other option, which this Article proposes, is to design a house that fits everybody. If that sounds simplistic, it is. There are of course caveats and complexities, but not enough to invalidate the analogy. The design of the credit and financial marketplace determines who has access to credit and financial services. The current design was not an organic development, but a result of a series of policy and institutional decisions. In other words, the house of credit was built by a designer who decided who would fit inside and who would not. These foundational decisions have had distributional effects. Instead of filling gaps and offering new and different products to increase access to credit and services, we must change the design to ensure democratic access. The “democratization of credit” cannot be achieved through market products, but must be achieved through democracy itself.

This Article proposes a structural perspective on credit markets that relies on a theory of money as a democratic medium. This theory draws on pivotal Progressive-era political debates over the nature and structure of U.S. currency premised on the connection of monetary choices and distributional effects.³² The many charged debates about the monetary standard—either the gold standard, bimetallism (gold and silver) or fiat currency³³—were decisions about *how much* money and credit would be available and to whom. Gold was intrinsically limited and scarce while fiat currency was flexible and expansionary.³⁴ The choice to maintain the gold standard or abandon it for fiat currency or silver had distributional effects and was made democratically, though not without dispute. Those debates were resolved over several decades and several elections,³⁵ but the fact that the monetary system is a matter for debate was lost. The body populace can choose and has chosen the formula for its monetary system, yet having made the choice has taken its formulation for granted.

In rejecting the current model of financial inclusion, this Article advocates a renewed academic debate in the political economy of money and credit. The Article advocates a public and democratic process of decision making towards a theory of financial expansion instead of financial inclusion. It advocates a revived focus on the legal design decisions at the center of the money and credit markets as opposed to a market-centric focus on those excluded outside the normal credit system. This theory of money and credit has vast implications on money and credit system design and

32. See, e.g., William Graham Sumner, *A History of Banking in the United States*, in 1 A HISTORY OF BANKING IN ALL THE LEADING NATIONS 413 (N.Y.C., The Journal of Commerce & Commercial Bulletin, 1896).

33. *Id.* at 454.

34. *Id.* at 449.

35. See discussion *infra* section Progressives, Populists, and Access to Credit.

economic regulation, but it is not without historic precedent or theoretical support, which will be outlined below. Indeed, credit and money are more fungible and abstract the higher up one looks in the financial system. For the Federal Reserve System's (the Fed's) balance sheets and their accounts with JP Morgan, money creation is a credit on a balance sheet rather than a real constraint on spending.³⁶ The lower down one goes in the financial system, money becomes much more real. For a nurse or taxi driver paying her rent, utilities, and food bills with limited wages, every cent of money must go toward a tangible object. When average people take out credit, their interest payments remove real spending money from their wages that they cannot use for food or rent. When the Fed pays JP Morgan millions of dollars of interest on their reserves, it barely makes a dent.³⁷ The comparison between individuals with banks falls apart when we consider the role banks play in the economy, but if the focus is just on credit and money forms, it is helpful to keep in mind the stark contrasts. Access to credit is a decision made by policymakers.³⁸

This Article will make the case that a democratic financial system cannot be justified if it results in the exclusion of such a large segment of the populace, especially if those excluded are the poor and vulnerable. The Article then proposes a democratic design that relies on public finance and an inclusionary credit market.

In Part I, I will propose a taxonomy to understand the various models of financial inclusion, including the product-innovation model, the gap-filling model, and the subsidy model, and demonstrate their common theoretical foundations in neoliberal views of credit markets. Part II will describe the modern financial markets in both the payments system and the credit markets. This Part shows that the core of mainstream payment and credit systems are public, whereas those who fall outside of them must rely on private products. Incidentally, those who are excluded pay much more than those who receive subsidized public products.³⁹ Part III introduces a new theoretical understanding of money and credit production, which integrates the emerging literature on money as a democratic medium and Progressive Era debates about gold and silver to demonstrate the lost concept of money as a legal decision. This Part also demonstrates how the concept of financial

36. See Kerry Craig, *What Happens if the Fed Tries to Normalize Its Balance Sheet Again?*, JPMORGAN ASSET MGMT.: ON THE MINDS OF INVESTORS (Feb. 19, 2020), <https://am.jpmorgan.com/au/en/asset-management/adv/insights/market-insights/on-the-minds-of-investors/what-happens-if-the-fed-tries-to-normalize-its-balance-sheet-again-02192020/> [https://perma.cc/NTP6-Q4SD].

37. See David Henry, *Too Big to Lend? JPMorgan Cash Hit Fed Limits, Roiling U.S. Repos*, REUTERS (Oct. 1, 2019, 9:10 AM), <https://www.reuters.com/article/us-usa-repo-jpmorgan-analysis/too-big-to-lend-jpmorgan-cash-hit-fed-limits-roiling-us-repos-idUSKBN1WG439>.

38. NEAL WALTERS & SHARON HERMANSON, CREDIT SCORES AND MORTGAGE LENDING 5 (2001).

39. Birken, *supra* note 11.

redesign differs from the concept of financial inclusion and how a new foundational theory of inclusion can lead to more accurate policymaking. The concept of financial redesign views the question of access through the lens of money and credit design as a foundational decision at the core of the credit system. This Article concludes with a discussion of the normative implications of this new theoretical framework.

PART I

This part describes the current rhetoric on financial inclusion used by the industry, regulators, academics, and media. When discussing financial inclusion, regulators and private actors use the terms *access to credit*, the *democratization of credit*, *filling gaps*, or offering new technology or innovative products.⁴⁰ In order to depict the problem two-dimensionally, I have represented the “house” of financial inclusion below (Figure A) with an inner circle of credit access and an outer ring of lack of access; this is the space for financial inclusion efforts. Figure B places the different models of inclusion in the figure. Credit is represented as a finite good at the center with access diminishing the further out a consumer gets from the center. Proximity to access usually correlates with wealth and income. Financial inclusion is usually a problem for LMI individuals left out of the central credit markets.⁴¹ Those with access are more creditworthy⁴² than those

40. FED. DEPOSIT INS. CORP., FDIC STRATEGIC PLAN 2018 – 2022 20–21(2018); Barr, *supra* note 16, at 163 (urging legislators to pursue “alternative credit products” to increase access to credit to the poor); *see, e.g.*, Lael Brainard, Governor, Bd. of Governors of the Fed. Reserve Sys., *FinTech and the Search for Full Stack Financial Inclusion at FinTech, Financial Inclusion – and the Potential to Transform Financial Services* (Oct. 17, 2018) (transcript available at <https://www.federalreserve.gov/newsevents/speech/brainard20181017a.htm> [<https://perma.cc/E7LS-5F7N>]); Dan Schulman, *Time to Democratize the Banking System*, CNBC (July 21, 2015, 1:50 PM), <https://www.cnbc.com/2015/07/21/paypal-ceo-time-to-democratize-the-banking-system-commentary.html> [<https://perma.cc/QCZ2-5VCH>] (arguing for the use of technology to democratize credit); *see also Examining Opportunities and Challenges in the Financial Technology (“FinTech”) Marketplace: Hearing Before Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 115th Cong. (2018) (discussing the use of financial technology to increase access to credit); *infra* Part I.

41. CHERYL R. COOPER, CONG. RESEARCH SERV., R45979, FINANCIAL INCLUSION AND CREDIT ACCESS POLICY ISSUES 1 (2019).

42. Rajeev Dhir, *Creditworthiness*, INVESTOPEDIA (May 15, 2020), <https://www.investopedia.com/terms/c/credit-worthiness.asp> [<https://perma.cc/C5EN-Z8Y9>] (“Creditworthiness is how a lender determines that you will default on your debt obligations, or how worthy you are to receive new credit. Your creditworthiness is what creditors look at before they approve any new credit to you. Creditworthiness is determined by several factors including your repayment history and credit score. Some lending institutions also consider available assets and the number of liabilities you have when they determine the probability of default.”).

without access, with the exception of certain groups who have been discriminated against even despite their creditworthiness.⁴³

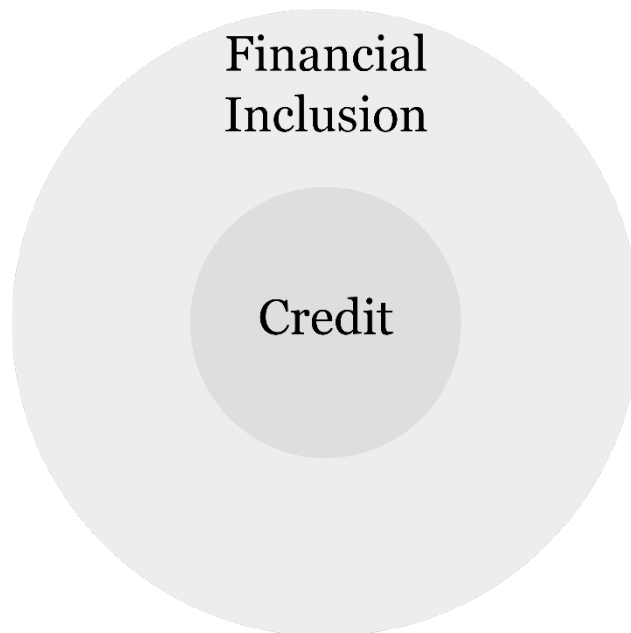


Figure A

This misleading conceptualization of access creates several problems. First, this model of credit and financial inclusion views access to credit as a sliding scale—merely a matter of more credit or less credit. To increase access and inclusion necessarily requires *more credit*. Access to credit measures have had a ratcheting up effect.⁴⁴ Payday lenders, title lenders, subprime lenders, and other high cost lenders use “access to credit” to justify their services.⁴⁵ Access to credit discourse usually does too little to discern between the quality of credit available, usually focusing primarily

43. See generally David G. Blanchflower, Phillip B. Levine & David J. Zimmerman, *Discrimination in the Small-Business Credit Market*, 85 REV. ECON. & STAT. 930 (2003); Neil Vigdor, *Apple Card Investigated After Gender Discrimination Complaints*, N.Y. TIMES (Nov. 10, 2019), <https://www.nytimes.com/2019/11/10/business/apple-credit-card-investigation.html>.

44. See generally LENDOL CALDER, *FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT* (1999); LUIS HYMAN, *DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK* (2012); Harrell, *supra* note 19; Moran, *supra* note 19.

45. See Neil Bhutta, Jacob Goldin & Tatiana Homonoff, *Consumer Borrowing After Payday Loan Bans*, 59 J.L. & ECON. 225, 226 (2016) (noting that supporters of payday lending emphasize its value to low-income households because it provides access to credit); Michael Kenneth, *Payday Lending: Can “Reputable” Banks End Cycles of Debt?*, 42 U.S.F. L. REV. 659, 710 (2008) (arguing that properly regulated payday lending expands credit and “should be [viewed as] a positive business practice under the CRA”).

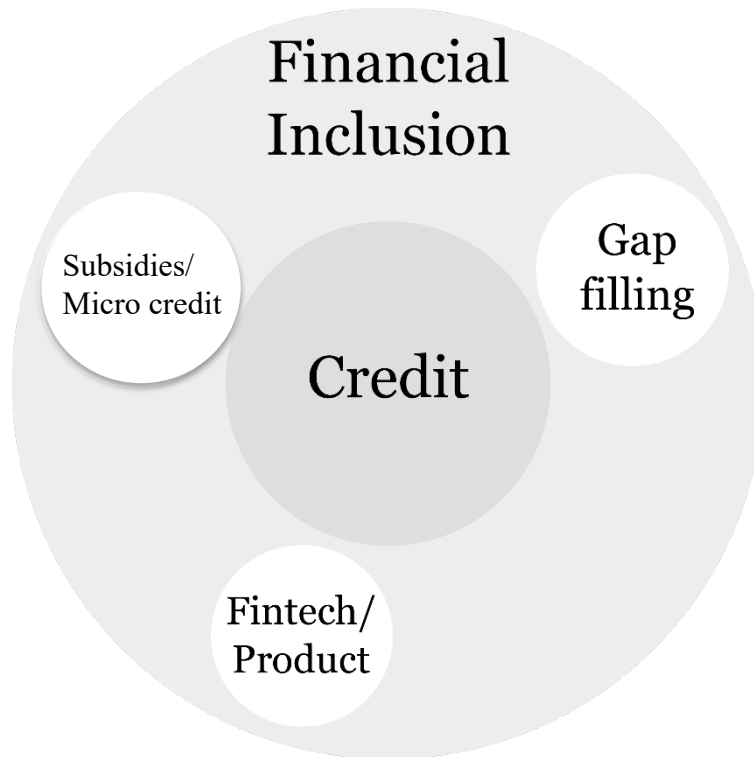


Figure B

on the quantity available. Second and more fundamentally, this model takes for granted the credit at the center. Instead, it shifts focus to the outer ring. It presupposes those at the center of the credit market deserve credit and access. As the next section illustrates, access to credit is a decision made by policymakers. In fact, as we move further away from the core toward the periphery, the federal subsidies diminish.⁴⁶ It is therefore misleading to focus regulatory efforts on financial inclusion as an ancillary product supplementing the normal credit markets without examining the entirety of the system as an integrated whole, all of which is a result of public policy. The rest of this section categorizes the three domains in which access to credit is discussed and explains the common theoretical underpinning of their vision of credit.

46. See *infra* note 129–132 and accompanying text.

A. *Three Types of Access to Credit*

1. *The Innovative Credit Product: Fintech*

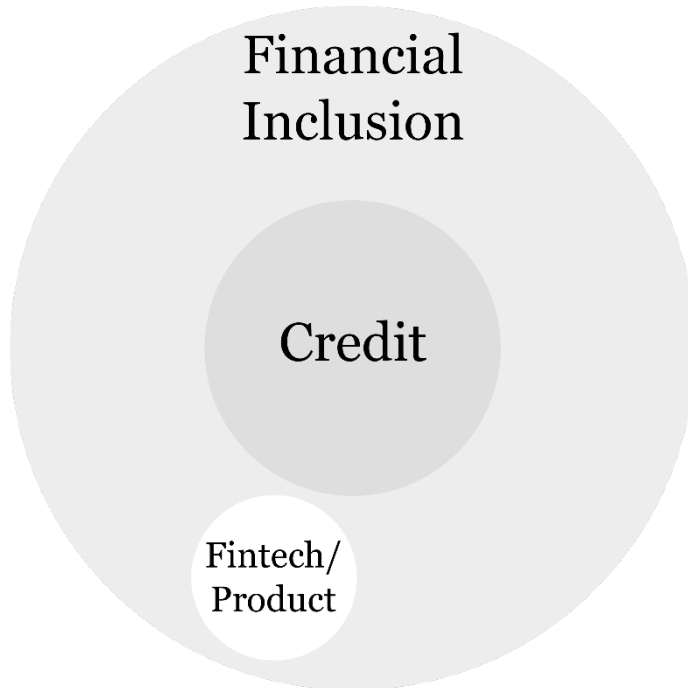


Figure B

In this model, financial inclusion envisions a *product* or new innovative design that promises inclusion or access to credit. The provider of the new product can be a bank, a technology company, or a non-profit.⁴⁷ These products either focus on a fee model, as in the case of PayPal; a network connecting borrowers and lenders, as in the case of P2P; or a newly designed system, such as blockchain or other alternative methods of access.⁴⁸ Getting the right product requires either technical innovation, marketing, or financial education. These models and products assume that those who fall outside the inner circle of credit have special or different needs and these products are meant specifically to match those needs. Broadly, these services are usually referred to as “fintech.” Fintech includes but is not

47. See generally NICKI COHEN ET AL., REIMAGINING FINANCIAL INCLUSION (2015) (arguing that proper product design will lead to greater financial inclusion).

48. EPHRAIM TURBAN, JUDY WHITESIDE, DAVID KING & JON OUTLAND, INTRODUCTION TO ELECTRONIC COMMERCE AND SOCIAL COMMERCE 216 (4th ed. 2017); Marco Iansiti & Karim R. Lakhani, *The Truth About Blockchain*, HARV. BUS. REV., <https://hbr.org/2017/01/the-truth-about-blockchain> [<https://perma.cc/765K-U2V9>].

limited to blockchain technology, mobile banking, internet mediated peer-to-peer lending, and algorithmic lending products.⁴⁹ This is currently the most popular model for increasing access.⁵⁰

When banking regulators and policymakers refer to access to credit, they often discuss fintech as the primary solution.⁵¹ Likewise, when fintech providers discuss their new products, they justify them as increasing access to credit or furthering financial inclusion.⁵² In 2018, the Office of the Comptroller of the Currency (OCC) offered a banking charter to fintech providers for the first time and justified their controversial decision using the rhetoric of financial inclusion.⁵³ Comptroller Otting said that fintech firms would provide “consumers greater choice, can promote financial inclusion, and create[] a more level playing field for financial services

49. Anton Didenko, *Regulating Fintech: Lessons from Africa*, 19 SAN DIEGO INT’L L.J. 311, 318 (2018) (“FinTech is commonly used today to refer to the more recent technological advancements in finance, such as online peer-to-peer lending platforms or automated robo-advisory”); John Schindler, *FinTech and Financial Innovation: Drivers and Depth 2* (Bd. of Governors of the Fed. Reserve Sys., Working Paper No. 2017-081, 2017) (defining fintech as including “online marketplace lending (called peer-to-peer lending by some), equity crowdfunding, robo-advice, financial applications of distributed ledger technology, and financial applications of machine learning (also referred to as artificial intelligence and machine intelligence.”); Stephanie Walden, *What Is Fintech and How Does It Affect How I Bank?*, FORBES (Aug. 3, 2020, 7:00 PM), <https://www.forbes.com/advisor/banking/what-is-fintech/> [<https://perma.cc/DX5M-2XR7>].

50. See George Walker, *Financial Technology Law – A New Beginning and A New Future*, 50 INT’L LAW. 137, 139 (2017) (noting the “substantial growth in FinTech technologies and applications in recent years”); Stephanie MacConnell, *How FinTech Companies Are Closing the Banking Gap*, FORBES (Oct. 23, 2017), <https://www.forbes.com/sites/stephaniemacconnell/2017/10/23/financial-inclusion-dogood-make-money/#71f023b13fc3> [<https://perma.cc/AA5Q-P63B>]; Schindler, *supra* note 49, at 1 (observing fintech as the “hot” topic in finance and the amount of attention fintech is currently receiving).

51. See DAVID W. PERKINS, CONG. RESEARCH SERV., R44614, MARKETPLACE LENDING: FINTECH IN CONSUMER AND SMALL-BUSINESS LENDING 8 (2018) (explaining Fintech can “increase[] credit availability for some borrowers without access to bank credit”); U.S. DEP’T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION 9 (2018) (recommending financial technology to increase access to credit); OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES 1 (2018); Wall, *supra* note 5; Tobias Berg et al., *On the Rise of the FinTechs—Credit Scoring Using Digital Footprints* 6 (Fed. Deposit Ins. Corp., Working Paper No. 2018–04, 2018) (“[Financial technology] can facilitate access to credit when credit bureau scores do not exist, thereby fostering financial inclusion and lowering inequality.”); Brainard, *supra* note 40; Alan Greenspan, Chairman, U.S. Fed. Reserve Bd., Remarks at the Federal Reserve System’s Fourth Annual Community Affairs Research Conference (Apr. 8, 2005) (transcript available at <https://www.federalreserve.gov/boarddocs/speeches/2005/20050408/default.htm> [<https://perma.cc/LQ4J-TNGA>]) (“Unquestionably, innovation and deregulation have vastly expanded credit availability to virtually all income classes.”).

52. See COHEN, *supra* note 47 and accompanying text.

53. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 51; see also Office of the Comptroller of Currency, *OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies*, (July 31, 2018), <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html#:~:text=WASHINGTON%E2%80%94The%20Office%20of%20the,in%20the%20business%20of%20banking> [<https://perma.cc/L2KJ-9RED>] (explaining the OCC’s decision to consider charter applications from financial technology companies in part, because of the OCC’s commitment to financial inclusion).

competition.”⁵⁴ In their policy decision, the OCC said that they expected the fintech companies seeking a banking charter “to demonstrate a commitment to financial inclusion.”⁵⁵

Industry experts, regulators, and academics often link financial inclusion with product design.⁵⁶ In study after study, consultants, regulators, and industry experts study the problem of financial inclusion through the lens of financial technology and product design.⁵⁷ These studies often point to the distinct behavior of the unbanked and underbanked and how financial inclusion efforts must be based on recognizing these differences.⁵⁸ Experts instruct entrepreneurs to bring the insights of behavioral economics to bear in designing new products. “Instead of trying to make LMI consumers fit the products financial institutions already offer,” the Reimaging Financial Inclusion report instructs, “we need to ask how new products could fit the needs of LMI consumers while also being profitable enough for financial institutions to offer broadly.”⁵⁹ These reports often focus on financial education and literacy as a means of financial inclusion.⁶⁰ In 2019, the head of the CFPB, Kathleen Kraninger explained that the agency’s goal would be financial education.⁶¹

54. Office of the Comptroller of Currency, *supra* note 53.

55. OFFICE OF THE COMPTROLLER OF CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES’ ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS (2018).

56. *See* COHEN, *supra* note 47, at 13.

57. *Id.* (arguing that proper product design will lead to greater financial inclusion); PHILIP OSAFO-KWAAKO, MARC SINGER, OLIVIA WHITE & YASSIR ZOUAOU, MOBILE MONEY IN EMERGING MARKETS: THE BUSINESS CASE FOR FINANCIAL INCLUSION 7 (2018) (explaining that “large scale digital finance promotes financial inclusion”); JAMES MANYIKA, SUSAN LUND, MARC SINGER, OLIVIA WHITE & CHRIS BERRY, DIGITAL FINANCE FOR ALL: POWERING INCLUSIVE GROWTH IN EMERGING ECONOMIES 6 (2016) (explaining the ability for digital financial products to “enable broad-based financial inclusion”); DAN RADCLIFFE & RODGER VOORHIES, A DIGITAL PATHWAY TO FINANCIAL INCLUSION 7 (2012) (“The expansion of digital payment platforms offers the opportunity to link poor people with providers of savings, credit, and insurance products.”).

58. *See, e.g.*, COHEN, *supra* note 47, at 13.

59. *Id.*

60. *See* Tony Goland, Jonathan Bays & Alberto Chaia, *From Millions to Billions: Achieving Full Financial Inclusion*, in MCKINSEY & COMPANY, GLOBAL FINANCIAL INCLUSION 6, 7 (2010) (discussing that any financial products must be accompanied by financial education to be truly effective); Trina R. Williams Shanks, Lewis Mandell, and Deborah Adams, *Financial Education and Financial Access: Lessons Learned from Child Development Account Research*, 8 INNOVATIONS: TECH., GOVERNANCE, GLOBALIZATION, no. 1–2, 2013, at 159, 170 (finding “the need for both financial education and access to financial products and services” for low income parents and children to be “truly inclusive” in order to achieve greater financial inclusion); Ryan Scott, *Addressing Poverty Through Digital and Financial Literacy*, FORBES (Jan. 7, 2016, 8:00 AM), <https://www.forbes.com/sites/causeintegration/2016/01/07/addressing-poverty-through-digital-and-financial-literacy/#1b18dcf310b3> [<https://perma.cc/L6ZM-VZ5S>] (“Financial literacy is critical to avoiding high levels of debt, excess fees for financial products, accessing credit and saving for retirement.”).

61. Kathleen L. Kraninger, Director, Consumer Fin. Prot. Bureau, Speech at the Bipartisan Policy Center (Apr. 17, 2019) (transcript available at <https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/> [<https://perma.cc/SZYM-XR5J>]).

Financial literacy and innovative design are usually tied to a behavioral economics understanding of financial inclusion. These models rely on behavioral economics both to describe the problem of financial access and to overcome it. Analysts promise that by “[d]rawing on the wealth of research on the financial lives of LMI consumers and insights from behavioral science,” they can create “an innovative product design that holds the promise of financial stability for consumers and significant profitability for institutions.”⁶² Specifically, a fintech product must help LMI customers to “manage their cash flow volatility and the behavioral issues this volatility drives.”⁶³ Fintech products with “[b]ehavioral ‘nudges’ like well-timed reminders can help institutions manage default risk and reduce expected losses associated with these loans.”⁶⁴ The concept of nudges builds on Cass Sunstein and Richard Thaler’s ideas in their book, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, and are meant to overcome behavioral tendencies creating “irrational behavior.”⁶⁵ The framework of behavioral economics further embeds neoliberalism because it centers the ideal of “homo-economicus.” Humans make rational economic choices, but with the exception of a few “bugs.”⁶⁶ The aim of the project is to make us aware of these bugs or biases so that we can resume being rational economic actors. This framework offers the poor and disenfranchised “nudges” to spur better decision making or financial literacy.

The product innovation model attempts to better understand LMI consumers and to design products to serve their needs. These products and services usually operate outside of or apart from the mainstream credit

62. See COHEN, *supra* note 47, at 13.

63. *Id.* at 7.

64. *Id.* at 45.

65. Behavioral economics has debunked the ideal of homo economicus, the rational market actor, and thus challenges mainstream economic thinking. Behavioral economics has been central to proposals for increased regulation and has become a pervasive topic in legal literature. Behavioral economics explains that people make irrational decisions based on several built-in biases. This rich and useful literature has been deployed to help refine and better legal decision making. However, in the realm of financial decision making, behavioral economics tends to focus only on the irrational decision making of the poor. See generally John McMahon, *Behavioral Economics as Neoliberalism: Producing and Governing Homo Economicus*, 14 CONTEMP. POL. THEORY 137 (2015); COHEN, *supra* note 47, at 45 (“Borrowers at a microlender in Uganda were more likely to pay on time if sent a monthly text message reminder that the payment was due, with an effect equivalent to a 25% interest rate reduction. A microlender in Texas found that a series of email and text reminders and redesigned monthly statements helped microloan borrowers avoid NSF fees. A consumer’s relationship with her financial institution is also important. 34% of unbanked consumers report dislike of or distrust in banks as a reason for being unbanked. Anecdotal, strong relationships between tellers and customers at a check-cashing facility in New York City were a primary driver of customer loyalty. Relationship-building techniques can reduce losses, and these techniques can be relatively cheap when delivered through phone calls or text messages.” (footnotes omitted)).

66. ANDREW W. LO, ADAPTIVE MARKETS: FINANCIAL EVOLUTION AT THE SPEED OF THOUGHT 186 (2019).

market. They are products or services that rely on creating a market or meeting a need in the market that is not otherwise served. Usually, the aim of this model is to make profits for the creators of the products, but there are several social entrepreneurs who are focused instead on modest profits through social good and helping LMI communities.⁶⁷ Some of these enterprises, like blockchain, aim for bigger utopian aims such as the democratization of all finance.⁶⁸ They aim to reach financial inclusion by decentering the banking sector.⁶⁹ To state the obvious, in order to make profits, these products must cost something. Or as an industry report quotes a bank executive, the “juice is not always worth the squeeze.”⁷⁰ This is the largest obstacle fintech products have faced in serving LMI consumers. They are trying to squeeze profits out of an already cash-strapped consumer group. Some fintech lenders have been able to compete with banks by using algorithmic underwriting, artificial intelligence (AI), or using consumers to make lending decisions.⁷¹ These practices have come under intense scrutiny because of the embedded discrimination in their data. These fintech companies perpetuate racism and exclusion because they rely on discriminatory assumptions about their customers.⁷²

To the extent fintech companies have been profitable, they have sold their products to higher income consumers. They have sold their products to higher income consumers and failed to increase access for lower income

67. See *Will the Real Social Entrepreneur Please Stand Up?*, WHARTON SCH. UNIV. PA. (Jan. 28, 2010), <https://knowledge.wharton.upenn.edu/article/will-the-real-social-entrepreneur-please-stand-up/> [https://perma.cc/Y3G3-M6XG].

68. See SALT LENDING, *SALT: BLOCKCHAIN-BACKED LOANS* (2017) (“At SALT, we believe that in the not too distant future, ownership of all assets will be recorded and transferred on various blockchains. The increasing recognition of personal assets, at low cost and in a secure and immutable way, will offer consumers greater financial freedom.”).

69. LBA FOUNDATION, *LIBRA CREDIT WHITEPAPER 2* (2018) (“Libra Credit is a decentralized lending ecosystem that facilitates open access to credit anywhere and anytime based on the Ethereum blockchain.”); SALT LENDING, *supra* note 68; Dirk Zetzsche, Ross P. Buckley, Douglas W. Arner & Linus Föhr, *The ICO Gold Rush: It’s a Scam, It’s a Bubble, It’s a Super Challenge for Regulators* 281–82 (Univ. of New S. Wales Law Research Series, Working Paper No. 2017-011, 2017) (noting that although “the traditional financial sector has been reluctant to invest in ICOs,” they “have the potential to be more accessible to the public in their somewhat democratic nature”); see Connor Blenkinsop, *Blockchain Ecosystem to Give Unbanked Access to Financial Services in Developing Countries*, COINTELEGRAPH (June 28, 2018), <https://cointelegraph.com/news/blockchain-ecosystem-to-give-unbanked-access-to-financial-services-in-developing-countries> [https://perma.cc/TMT7-5XDX].

70. Jeffrey Webber, *Sometimes ‘the Juice Ain’t Worth the Squeeze,’* BUS. & INDUSTRIAL CONNECTION MAG. (July 15, 2015, 7:39 PM), <https://www.bicmagazine.com/industry/investment-banking/juice-aint-worth-the-squeeze/> [https://perma.cc/NYM2-DBLF].

71. See generally Robert Bartlett, Adair Morse, Richard Stanton & Nancy Wallace, *Consumer-Lending Discrimination in the FinTech Era*, U.C. BERKELEY PUB. L. RES. PAPER 1 (2019).

72. *Id.* at 2–3; see also KAREN PETROU, *MAKING “RESPONSIBLE INNOVATION” A REALITY: BIG TECH, SMALL MONEY, AND U.S. ECONOMIC EQUALITY* 4 (2019) (“The power embedded in AI [artificial intelligence] also may combine with massive troves of data to enable seemingly-predictive methodologies that in fact target financial customers in ways that change availability, pricing, terms, and conditions in discriminatory ways.”).

consumers.⁷³ Services like Venmo, PayPal, Square, and others have provided alternative products that add ease and efficiency for customers with bank accounts. Those fintech products that have successfully increased access to credit or finance are those that are based on the non-profit model such as Kiva or GoFundMe.⁷⁴ The 2007 FDIC's Small-Dollar Loan Pilot Program was a temporary program focused on providing new accounts and small loans to excluded populations.⁷⁵ The two-year pilot began with thirty-one participant banks that were given regulatory latitude to design small dollar credit products to consumers to take the place of payday loans.⁷⁶ The point of the pilot was to determine whether banks could successfully make these loans—success was determined by whether banks could make these loans profitably.⁷⁷ The FDIC concluded that the pilot was a success and “demonstrated that banks can offer alternatives to high-cost, emergency credit products, such as payday loans or overdrafts.”⁷⁸ The FDIC determined that the “pilot resulted in a Safe, Affordable, and Feasible Small-Dollar Loan Template that other banks can replicate” and that “[l]oans originated under the program have a default risk similar to other types of unsecured credit.”⁷⁹ The program was not continued or replicated in any other agencies. Since the small dollar programs, most efforts at access to credit emanating from the banking regulators have focused on fintech. In fact, the FDIC followed up this small dollar loan program with several reports on mobile banking as the most promising path toward financial inclusion.⁸⁰ In outlining their financial inclusion programs, mobile banking for the FDIC has become basically synonymous with financial inclusion.⁸¹

73. See Imran Gulamhuseinwala, Thomas Bull & Steven Lewis, *FinTech is Gaining Traction and Young, High-Income Users are the Early Adopters*, 3 EY GLOB. FIN. SERVS. INST. 1 (2015); Jennifer Tescher, *Time To Talk (Again) About Fintech's White Privilege*, FORBES (June 17, 2020, 1:19 PM), <https://www.forbes.com/sites/jenniferteschert/2020/06/17/time-to-talk-again-about-fintechs-white-privilege/#213f16a040b2> [<https://perma.cc/M5J3-J9MK>].

74. Peter Gomber, Robert J. Kauffman, Chris Parker & Bruce Weber, *On the Fintech Revolution: Interpreting the Forces of Innovation, Disruption, and Transformation in Financial Services*, 35 J. MGMT. INFO. SYS. 220, 247 (2018).

75. See generally Susan Burhouse, Rae-Ann Miller & Aileen Sampson, *An Introduction to the FDIC's Small-Dollar Loan Pilot Program*, FDIC Q., no. 3, 2008, at 23, 26 (2008).

76. *Id.* at 23.

77. See *id.* at 26–27.

78. Rae-Ann Miller, Susan Burhouse, Luke Reynolds & Aileen Sampson, *A Template for Success: The FDIC's Small-Dollar Loan Pilot Program*, FDIC Q., no. 2, 2010, at 28, 37.

79. *Id.*

80. SUSAN BURHOUSE, BENJAMIN NAVARRO & YAZMIN OSAKI, OPPORTUNITIES FOR MOBILE FINANCIAL SERVICES TO ENGAGE UNDERSERVED CONSUMERS: QUALITATIVE RESEARCH FINDINGS 1 (2016) (“The results of this research show that great potential exists for MFS [mobile financial services] to improve account sustainability by helping underserved consumers obtain more control over their funds and better manage their bank accounts.”).

81. See SUSAN BURHOUSE, MATTHEW HOMER, YAZMIN OSAKI & MICHAEL BACHMAN, ASSESSING THE ECONOMIC INCLUSION POTENTIAL OF MOBILE FINANCIAL SERVICES 1 (2014) (stating

The FDIC began measuring the amount of “unbanked” or “underbanked” Americans annually starting in 2009 and has issued many reports about potential technological solutions.⁸² The FDIC has released several white papers and reports on mobile banking with the repeated key finding that “MFS[Mobile Financial Services] is best positioned to have an economic inclusion impact through its ability to meet the day-to-day financial services needs of underbanked consumers as well as consumers at risk of account closure.”⁸³

2. Gap-Filling Legislation and Regulations

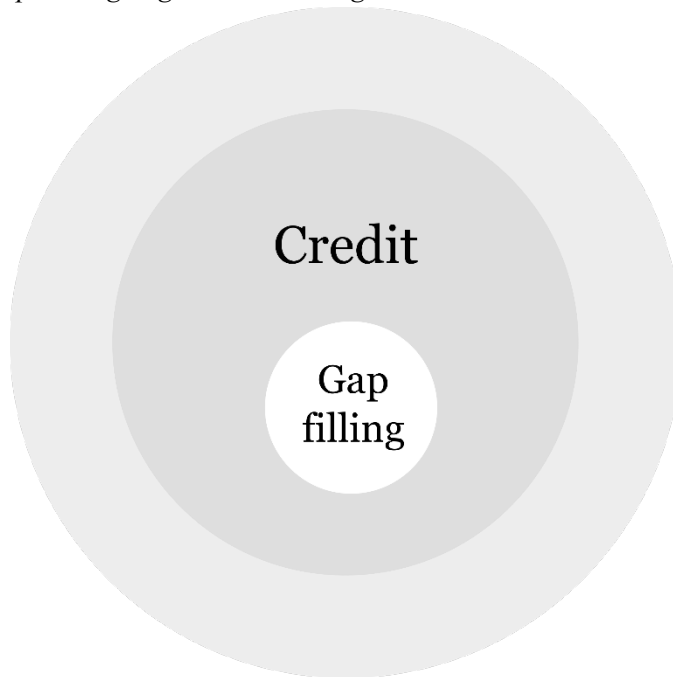


Figure C

There are several strands and categories of regulation and legislation aimed at financial inclusion and access to credit.⁸⁴ These acts differ in their enforcement provisions and their focus, but they share, in broad strokes, an understanding of the problem of access to credit. These bills aim to fill gaps

“MFS is best positioned to have an economic inclusion impact through its ability to meet the day-to-day financial services needs of underbanked consumers”).

82. FED. DEPOSIT INS. CORP., 2009 ANNUAL REPORT 8 (2010).

83. *See, e.g.*, BURHOUSE, *supra* note 81.

84. *See, e.g.*, The Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691–1691f (2018) (ECOA); Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2018) (FHA).

in the credit market—gaps due to discrimination—but solutions range from legal penalties for discrimination to inducements like tax credits for increased lending. The latter legislation aims to “unblock” the gap in access to credit by prohibiting discrimination while the former is intended to actively fill the gap with credit.⁸⁵

After the Civil Rights movement of the 1960s and the women’s movement of the 1970s, Congress passed legislation that prohibited credit discrimination based on race and gender. Two pivotal anti-discrimination bills were the 1968 Fair Housing Act⁸⁶ outlawing discrimination in housing and mortgage lending and the 1974 Equal Credit Opportunity Act,⁸⁷ which banned discrimination for all other credit products. These Acts created a constitutional right of equal access to credit.⁸⁸ Credit itself was not a right, but a lender could not deprive an individual of credit based on a protected trait. These acts were premised on *negative rights*, or *freedom from* discrimination.⁸⁹ Yet these rights did nothing to remedy past patterns of credit discrimination or induce the provision of credit. Insofar as access was restricted due to discrimination, these laws increased access to credit,⁹⁰ but in the event that access was restricted due to other causes, these laws did not increase access to credit. In the face of racial segregation and a history of credit discrimination, these laws did not offer a robust remedy.⁹¹ Due to historic segregation and racial exclusion, racial minorities had less wealth and lived in communities with concentrated poverty.⁹² Lenders could deny

85. See, e.g., the Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801–2811 (2018) (HMDA) and the Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901–2908 (2018) (CRA) which seeks to curb discriminatory lending practices by, respectively, mandating a certain level of lending in LMI neighborhoods and requiring public disclosure of mortgage data as it relates to ethnicity in order that the public can monitor for discriminatory patterns.

86. 42 U.S.C. § 3605 (2018).

87. 15 U.S.C. §§ 1691–1691f (2018).

88. *Your Equal Credit Opportunity Rights*, FED. TRADE COMM. (Jan. 2013), <https://www.consumer.ftc.gov/articles/0347-your-equal-credit-opportunity-rights> [<https://perma.cc/MM6Q-AFKZ>].

89. Michael S. Barr, *Modes of Credit Market Regulation*, in *BUILDING ASSETS, BUILDING CREDIT: CREATING WEALTH IN LOW-INCOME COMMUNITIES* 217 (Nicolas P. Retsinas & Eric S. Belsky eds., 2005) (noting that the ECOA and Fair Housing Act “prohibit[] the conduct rather than subsidizing adherence to the rule.”).

90. *Id.* at 218.

91. *Id.* (“Given the complex and proprietary nature of credit scoring systems, and the difficulty of proving that any two applicants are similarly situated except for their race, disparate treatment is hard to make out.”).

92. Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. FOR AM. PROGRESS (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/> [<https://perma.cc/9679-7EBC>].

an applicant due to a lower credit score or for simply having too little money or income without running afoul of these laws, and many did.⁹³

There was also legislation aimed at increasing access to credit through a *positive rights* or *freedom to* concept of credit. The 1977 Community Reinvestment Act (CRA) requires banks to take affirmative steps to increase credit and financial services to the LMI communities in their area of service.⁹⁴ The aim of the CRA was to remedy the historic effects of redlining.⁹⁵ The CRA proceeds on the theory that banks have discriminated against redlined communities, thereby cutting off credit to these communities. The CRA withholds certain regulatory approvals from banks that refuse to lend into these communities.⁹⁶ The vision of the bill is to fill gaps created by past discrimination.⁹⁷ The CRA is distinct from the anti-discrimination bills because it focuses on geographical zones of exclusion as opposed to discrimination of individuals. The CRA, like the anti-discrimination bills, is focused on gap-filling, but it is a positive rights focus. It asks banks to fill the gap, the gap being defined as discriminated regions deprived of credit due to historic wrongs.⁹⁸

93. MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 150 (2017) (explaining lender's use of zip codes to discriminate because segregation "had almost perfectly correlated geography and race").

94. 12 U.S.C. § 2901 (2018).

95. Warren L. Dennis, *The Community Re-Investment Act of 1977: Defining "Convenience and Needs of the Community,"* 95 *BANKING L.J.* 693, 697–698 (1978).

96. FIN. CRISIS INQUIRY COMM'N, *THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES* 524 (2011); Emily Flitter & Jeanna Smialek, *Bank Regulator's Battle with Anti-Redlining Law Comes to an End*, *N.Y. TIMES* (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/economy/community-reinvestment-act-joseph-otting.html> [<https://perma.cc/7TBL-MELG>].

97. See FIN. CRISIS INQUIRY COMM'N, *supra* note 96 (quoting a local community bank's report to its shareholders).

98. Dennis, *supra* note 95.

3. *Self-Help and Subsidies*

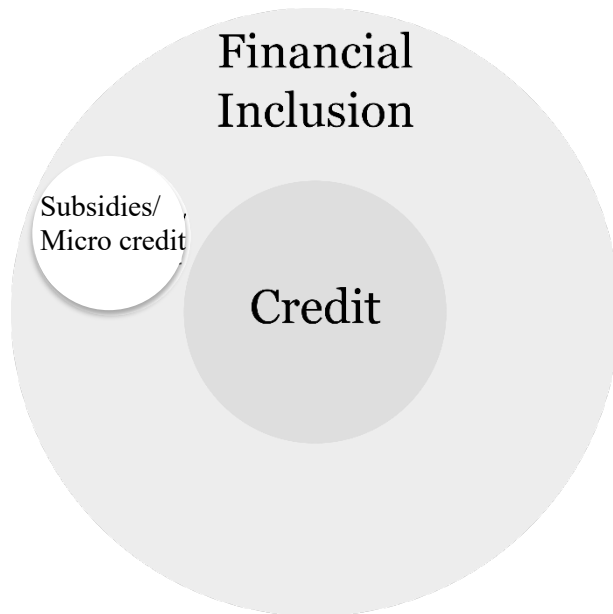


Figure D

The microcredit model is the reigning model abroad when it comes to socially beneficial credit.⁹⁹ The theory of microcredit is the motivating theory underlying the most prominent legislative and regulatory efforts at financial inclusion in the United States. Even as microcredit has fallen from its sanctified pedestal abroad, it is still the dominant answer to financial inclusion in the United States as expressed through the Community Development Financial Institution (CDFI) and minority banking programs.¹⁰⁰ As I have written extensively elsewhere, these efforts were especially prominent to neoliberal models of markets in the Reagan and Clinton administrations.¹⁰¹

There are various models for financial inclusion based on microcredit lending that range from informal lending circles to formal non-profits.

99. Olaf Weber, *Social Banking: Products and Services*, in *SOCIAL BANKS AND THE FUTURE OF SUSTAINABLE FINANCE* 114, 118 (Olaf Weber & Sven Remer eds., 2011) (ebook) (stating that “microfinance and especially microcredit became well known as a social-banking product that is able to fight poverty” and that “[m]icrofinance is probably one of the most popular social banking products and enjoys a very good reputation”).

100. See generally Calvin Cunningham, *How Banks Can Benefit from Partnership with Community Development Financial Institutions: The Bank Enterprise Awards Program*, 3 N.C. BANKING INST. 261 (1999).

101. See, e.g., BARADARAN, *supra* note 93.

Informal lending circles have existed in many communities where mainstream banking was not accessible or among disenfranchised populations excluded from mainstream banking services.¹⁰² The typical lending circle, the supposed inspiration for formal microcredit organizations, includes a small group of people who contribute funds into a collective and rotate a lump sum loan around the group of participants.¹⁰³ When the loans are repaid, the funds go back into the collective.¹⁰⁴ In the typical microcredit model,¹⁰⁵ first popularized by Muhammad Yunus of Grameen Bank, a group of indigenous poor women form a collective group and Grameen relies on the group's social cohesion and sometimes pressure to return the loan.¹⁰⁶ In the Grameen model, the loans are for entrepreneurship.¹⁰⁷ Yunus promulgated: "we are all entrepreneurs."¹⁰⁸

The microcredit organizations that are highlighted in the United States and abroad are usually not grass-roots organizations, but non-profits that bring together impoverished individuals with microloans provided through external sources.¹⁰⁹ In the United States, microlenders like Accion and Mission Asset Fund are non-profits that offer small loans to be used for entrepreneurial activity and paid back over time.¹¹⁰ Accion's interest rates are comparable to or higher than bank loans, the difference being that they offer smaller loans to borrowers who would not qualify for typical bank

102. See generally Dale W. Adams & Jerry R. Ladman, *Lending to Rural Poor Through Informal Groups: A Promising Financial Market Innovation?*, 3 SAVINGS & DEV. 85 (1979); see also Mary Ager Caplan, *Communities Respond to Predatory Lending*, 59 NAT'L ASS'N SOC. WORKERS 149, 153 (2014) (noting that "[a] 'lending circle' is a[n] . . . example of a community-based alternative to mainstream banks and predatory lenders").

103. Caplan, *supra* note 102, at 153 (explaining "a lending circle is composed of a group of unrelated people who contribute money to a common pot, which is then distributed on a regular or as-needed basis to a member of the group"); Patricia Cohen, *In Lending Circles, a Roundabout Way to a Higher Credit Score*, N.Y. TIMES (Oct. 10, 2014), <https://www.nytimes.com/2014/10/11/your-money/raising-a-credit-score-from-zero-to-789-in-26-months.html> [<https://perma.cc/QDR6-U4US>].

104. Caplan, *supra* note 102, at 153; Cohen, *supra* note 103.

105. Ahmed Mushfiq Mobarak & Vikas Dimble, *Can the Microcredit Model Be Improved?*, YALE INSIGHTS (Apr. 26, 2019), <https://insights.som.yale.edu/insights/can-the-microcredit-model-be-improved> [<https://perma.cc/AR7F-UHPP>] (The conventional microcredit model involves making small loans to some of the very poorest people in the world to enable them to start or run a small income-generating enterprise. Many organizations have used microcredit to target female clients, and have made credit available to them while achieving high overall repayment rates, exceeding ninety percent.).

106. See generally David Hulme, *The Story of the Grameen Bank: From Subsidized Microcredit to Market-Based Microfinance* (Brooks World Poverty Inst., Working Paper No. 60, 2008).

107. See Miriam Cosic, *'We are all entrepreneurs': Muhammad Yunus on Changing the World, One Microloan at a Time*, GUARDIAN (Mar. 28, 2017, 10:56 PM), <https://www.theguardian.com/sustainable-business/2017/mar/29/we-are-all-entrepreneurs-muhammad-yunus-on-changing-the-world-one-microloan-at-a-time> [<https://perma.cc/8HGE-Q6AT>].

108. *Id.*

109. Ben Pimentel, *13 Top U.S. Microlenders for Your Small Business*, MKT. WATCH (Jan. 5, 2017, 6:05 AM), <https://www.marketwatch.com/story/13-top-us-microlenders-for-your-small-business-2017-01-05> [<https://perma.cc/BNA3-CWT8>].

110. *Id.*; MISSION ASSET FUND, <https://missionassetfund.org/lending-circles/> [<https://perma.cc/9XVT-HNYP>].

loans.¹¹¹ There are thousands of microcredit organizations in the United States and abroad, some of which operate as non-profit organizations and others that offer small loans at a much higher interest than banks or credit cards.¹¹²

The United States does not have a robust microcredit market referred to as such. Rather, in the United States, the microcredit model was embedded into legislation. The Community Development Financial Institution Act (CDFI) introduced by President Clinton to achieve financial inclusion and access to credit was inspired by the microcredit model.¹¹³ The President claimed to be inspired by Yunus and ShoreBank, a community lending bank in Chicago, based on community lending, and he created the legislation in order to foster and subsidize more of these “development banks” to increase credit in communities.¹¹⁴ The CDFI bill was primarily focused on financial

111. See generally ACCION, <https://us.accion.org/small-business-loans/> [<https://perma.cc/K9A8-APD4>] (listing the interest rates range); Liz Knueven, *The Average Personal Loan Interest Rate by State, Lender, and Credit Score*, BUSINESS INSIDER (June 5, 2020, 8:05 PM), <https://www.businessinsider.com/personal-finance/average-personal-loan-interest-rates> [<https://perma.cc/5ME9-BNA3>].

112. Pimentel, *supra* note 109 (conceding “microloans have limitations”); see also Shaila Dewan, *Microcredit for Americans*, N.Y. TIMES (Oct. 28, 2013), <https://www.nytimes.com/2013/10/29/business/microcredit-for-americans.html> [<https://perma.cc/T2E7-8258>].

113. Lois J.D. Wacquant & William Julius Wilson, *Poverty, Joblessness, and the Social Transformation of the Inner City*, in WELFARE POLICY FOR THE 1990S 92 (Phoebe H. Cottingham & David T. Ellwood eds., 1989); James E. Post & Fiona S. Wilson, *Too Good to Fail*, STAN. SOC. INNOVATION REV. 66, 66 (2011); see also Interview by Charlie Rose with Bill Clinton, President of the United States, in N.Y.C., N.Y. (Dec. 15, 2007) (Bill Clinton: “First, it is almost universally effective where it’s done based on the same model that he and other big givers in Bangladesh have used. That is, where you realize you may be dealing with people who never have a balance sheet, but they have a good reputation in the community, you know they have a skill, and there is clearly a market for what they want to do. In the early ‘80s, the South Shore Bank in Chicago, now called Shore Bank started loaning -- make microcredit loans by American standards to black carpenters and Croatian electricians to work together to retrieve the South Side. Hillary found out about this and talked to me, and she went out and raised some money to create a rural microcredit bank in Arkansas, do the same thing with the same results. It’s still in place. Then when I became president, we gave two million microcredit loans a year overseas, and gave the first microcredit programs funding in America. It always works. Now, can it make a difference? It depends on whether they’re concentrated enough. I think in Bangladesh, the Grameen Bank and others have been giving money now for 30 years so that the volume of loans is so great now, I think it’s making a measurable contribution to the economy.”).

114. Ralph Chami & Jeffrey H. Fischer, *Community Banking, Monitoring, and the Clinton Plan*, 14 CATO J. 493, 493–95 (1995); Post & Wilson, *supra* note 113, at 66. The microcredit model thrives abroad. When the World Bank conducted a comprehensive report about financial inclusion worldwide, they concluded that: Despite best efforts, it seems likely that provision of some financial services to the very poor may require subsidies. Generally speaking, the use of subsidies in microcredit can dull the incentive for innovative new technologies in expanding access, with counterproductive long-term repercussions for the poor. Besides, evidence suggests that for poor households credit is not the only—or in many cases, the principal—financial service they need. For example, in order to participate in the modern market economy even the poor need—but often cannot access—reliable, inexpensive, and suitable savings and payments products. Subsidies may sometimes be better spent on establishing savings and payment products appropriate to the poor. See François Bourguignon & Michael Klein, *Foreword*, in WORLD BANK, FINANCE FOR ALL?: POLICIES AND PITFALLS IN EXPANDING ACCESS ix (2008); see also OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 51; Post & Wilson, *supra*

inclusion and provides subsidies and tax credits for “development banks” and to lend in “underdeveloped” regions and communities. The Fund has suffered severe cuts, but there are currently 950 CDFIs in the United States that operate in rural and urban communities.¹¹⁵ The CDFI coalition describes their banks as “private-sector, financial intermediaries with community development as their primary mission.”¹¹⁶ Though there are several models of development banks, “all are market-driven, locally-controlled, private-sector organizations.”¹¹⁷ The banks focus on a “‘double bottom line’: economic gains and contributions to . . . the local communit[ies].”¹¹⁸ What distinguishes CDFIs from mainstream banks is their focus on financial inclusion, which the coalition describes as “rebuilding disinvested communities and making loans to people with limited or poor credit histories.”¹¹⁹ The method these banks use to increase access to credit is to “adapt lending guidelines to the needs of borrowers; to accept unconventional collateral for loans; and to provide education, training, and assistance to potential borrowers.”¹²⁰

There are several other subsidy-based financial inclusion models. For example, the BankOn initiative is administered through community partnerships.¹²¹ Historically, there were charitable organizations and churches that provided credit to the poor.¹²² Pawn shops had charitable

note 113; James Ledbetter, *Bill Clinton on How Entrepreneurs Can Transform the Country*, CHICAGO TRIBUNE (Nov. 29, 2015, 1:00 PM), <https://www.chicagotribune.com/business/blue-sky/ct-inc-bill-clint-on-entrep-reneurs-transform-country-bsi-hub-20150908-story>.

115. See *What are CDFIs?*, CDFI COALITION, <http://cdfi.org/what-are-cdfis/> [<https://perma.cc/5UCT-ZGB4>].

116. *Id.*

117. *Economic Development: Encouraging Investment in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. 29 (2014) (prepared statement of Gerald Sherman, Vice Chairman, Native CDFI Network).

118. CDFI COALITION, *supra* note 115.

119. *Id.*; see VITO TANZI, GOVERNMENT VERSUS MARKETS: THE CHANGING ECONOMIC ROLE OF THE STATE 109 (2011).

120. CDFI COALITION, *supra* note 115.

121. See *About*, BANKON, <http://joinbankon.org/about/> [<https://perma.cc/73RJ-VB85>] (“The CFE Fund’s National Bank On platform supports local coalition and financial institution efforts to connect consumers to safe, affordable bank accounts.”). BankOn initiatives are financial access programs that focus on providing free or low-cost banking products, as well as financial education and financial counseling, to unbanked and underbanked residents in local cities. *Id.* These initiatives partner with other mainstream financial institutions and programs to embed financial empowerment strategies into local government infrastructure. *Id.*

122. See, e.g., Maria Ågren, *Providing Security for Others: Swedish Women in Early Modern Credit Networks*, in *WOMEN AND CREDIT IN PRE-INDUSTRIAL EUROPE* 121, 129 (Elise M. Dermineur ed., 2018) (“First pledged by the wife of a lower state servant to another wife, the ring was then deposited in the local church as security for . . . [a] loan.”); Brian Pullan, *Catholics, Protestants, and the Poor in Early Modern Europe*, 35 J. INTERDISC. HIST. 441, 446 (2005) (discussing the “controversial Monte di Pietà,” a “Christian pawn office funded by charitable gifts and cash deposits, which offered small loans to needy people and attempted to drag moneylending out of the sphere of usury and into that of Christian Charity”).

origins both in the United States and in Europe.¹²³ Today, there are some churches and community groups that offer small loans to members of the community.¹²⁴ These loans are low-interest and subsidized by the community or donations.¹²⁵ Kiva is a large internet-based microcredit organization that runs on charitable donations that make microloans.¹²⁶

Another iteration of the subsidy model includes regulatory attempts to cajole banks to lend to these communities at a loss. This is not a direct act of charity, but an implicit subsidy. The subsidy is not apparent, but the regulator is relying on the bank's inherent subsidies and persuading bankers to pass them on to customers they would not otherwise approach. The CRA, The FDIC Small Dollar Pilot, and the BankOn initiatives can fit into this model.¹²⁷ The CRA is decried as an unjust subsidy by its opponents.¹²⁸ This is a charge that the bill's sponsors and proponents would likely agree with—the difference between the two camps is whether the subsidy is justified or not.¹²⁹

B. Common Traits

Though advocates for each of these financial inclusion methods believe that they differ significantly from each other, these three different models of providing access to credit are built on similar theoretical understandings

123. Marieke Bos, Susan Payne Carter & Paige Marta Skiba, *The Pawn Industry and Its Customers: The United States and Europe* (Vand. L. & Econ., Working Paper No. 12 - 26, 2012) (“As humankind’s oldest financial institution, pawnbroking has served the financial needs of low-income families for centuries.”).

124. Caplan, *supra* note 102, at 152–53 (noting the San Francisco-based Low Income Investment Fund (“LIIF”) “makes over \$100 million in loans and grants . . . to build infrastructure and finance projects in four areas: child care, education, housing, and policy”); *see also* Jon McNamara, *Churches Issue Low Cost Loans and Assist with Predatory Lenders*, NEED HELP PAYING BILLS, https://www.needhelpayingbills.com/html/loans_from_churches.html [<https://perma.cc/DY6U-ZCZ6>] (describing Faith for Just Lending organization made up of several churches that provide loans and financial counseling to community members).

125. McNamara, *supra* note 124.

126. *See generally* KIVA, <https://www.kiva.org/about> [<https://perma.cc/4JH4-UYUV>].

127. *See* Barr, *supra* note 89 (introducing five credit market and subsidy programs); Jonathan R. Macey & Geoffrey P. Miller, *America’s Banking System: The Origins and Future of the Current Crisis*, 69 WASH. U. L.Q. 769, 775 (1991) [Macey, *America’s Banking System*] (explaining that the cheaper, federally insured deposits can be used to fund “increasingly risky investments”); Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA L. REV. 291, 296 (1993) [hereinafter Macey, *Economic Analysis*].

128. Kenneth Jones & Barry Koltach, *The Federal Safety Net, Banking Subsidies, and Implications for Financial Modernization*, FDIC BANKING REV., no. 1, 1999, at 1, 15 (1999) (suggesting if banks receive any net subsidy at all from a federal safety net, it is small); Macey, *America’s Banking System*, *supra* note 127, at 796–97 (suggesting the goal of subsidizing poor or disadvantaged citizens can be better accomplished by direct subsidy programs).

129. *Compare* Macey & Miller, *supra* note 127, with Michael S. Barr, *supra* note 89, at 521. Senator William Proxmire, the sponsor of both the CRA and the ECOA, believed that banks had public obligations and thus he was comfortable asking them to extend their services to the excluded even if it came as a cost. *See* Dennis, *supra* note 95, at 693–94.

of financial markets and the people that fall outside of them. The shared assumptions are the following:

First, these models assume that the poor require different products and services than those that are already “financially included.”¹³⁰ They assume that there are natural barriers that separate the financially excluded from normal credit markets. These initiatives are often coupled with financial education or literacy, or the products are designed to help their users overcome behavioral quirks that are assumed to create barriers to the “normal credit market.” Indeed, financial inclusion is practically synonymous with financial education or financial literacy. In nearly every method discussed above, the new product or micro-loan is coupled with financial education to help the borrower. These products either pathologize the poor—and assume that their poverty was created by individual choices—or treat their state of poverty or financial exclusion as a trait inherent in the excluded borrower. In other words, the problem of the gap is created by a trait of the excluded that makes them distinct from the norm.

Second, the product or subsidy providing credit is based on a different credit product or model than the credit products internal to the mainstream credit system. Financial inclusion includes products or services that are innovative, unique, or different from those inside the circle. Based in part on the assumption outlined above, financial products aimed at inclusion are different in form, function, and purpose than “normal credit mechanisms.” Microcredit, for example, is a much smaller loan than regular loans intended to start a small business. Peer-to-peer lending and other fintech products like mobile banking are intended to overcome different barriers than those presented by regular consumers. If the credit available inside the credit markets are business loans, home loans, and student loans, the credit outside the mainstream market are microloans for businesses, payday loans for emergencies, or consumer loans. Fintech products are also marketed to the population at large, but to the extent fintech firms focus on financial inclusion, the product is usually seen as new or different from historic credit markets. The new product or loan attempts to increase access to credit by being distinct from the traditional credit market.

Finally, except for the gap-filling model, these inclusion products do little to probe, change, or even examine the inner core of the credit system. It is simply assumed that they are not part of the “normal” credit system.

130. See e.g., Siegfried Zottel, *Improving the Odds of Being Formally Financially Included in Senegal*, WORLD BANK: BLOGS (Oct. 19, 2016), <https://blogs.worldbank.org/nasikiliza/what-are-the-odds-of-being-formally-financially-included-in-senegal> [<https://perma.cc/2KYU-LFVD>] (stating the low rate of access to financial inclusion, defined as having a bank account, in Senegal, could be improved by “[f]ormal savings products”); Greta Bull, *Great Expectations: Fintech and the Poor*, CGAP (Jan. 29, 2019), <https://www.cgap.org/blog/great-expectations-fintech-and-poor> [<https://perma.cc/M2AA-FSLQ>].

The gap-filling model comes closest to an examination of core credit markets, but only on the surface by patching up discrimination. The inner circle of credit is hardly even discussed when policymakers focus on financial inclusion. Microcredit is not credit that emanates from or has anything to do with the inner circle. It operates outside of and apart from the core. Likewise, fintech, P2P lending, and blockchain are purposefully non-bank credit. It is taken for granted that some consumers are simply not being served by the mainstream credit market and a different market is created for these customers. In sum, when we talk about financial services outside of the central core, we talk about financial inclusion and increasing access to credit through products or subsidies that are apart from the dominant credit system.

This Article focuses on this last point as the central problem with the rhetoric of financial inclusion. As Part II shows, the mainstream credit market, the central circle from which the poor are excluded, is operated essentially by the federal government.

PART II

This section looks at the credit at the center of the circle, or the “dominant,” “mainstream,” or “normal” credit market. There are two distinct services that banks provide: *payments* and *credit*. When discussing financial inclusion, regulators, industry advocates and commentators often lump both services together. This section will describe the two components of financial inclusion—payments and credit—and demonstrate their differences and similarities. Those excluded from the *payments* portion of the financial sector are those who are unbanked or “underbanked” and must use Alternative Financial Services (AFS) products for transactions, including cashing checks or the exchange and transmission of money. Access to *credit* usually means being eligible for and receiving credit from the banking system. Access to credit is a nebulous term because there are many forms of credit with varying degrees of accessibility. The ability to qualify for a standard mortgage loan differs from high-priced subprime credit or a payday loan. The inner circle of credit, referenced above, usually covers the standard loans of the middle class—these are loans that banks provide, including mortgage loans, student loans, and revolving credit offered by credit cards. These two separate branches of financial inclusion will be discussed below.

The bulk of payments and credit services and resources are managed and designed by federal government agencies or laws. Drawing on the concentric circle representations in Part I, the inner circle of payments and credit services are those provided by banks to the middle class. Outside the

circle is the domains of markets, subsidies, or charity. Figure F, below, depicts the trajectory from the core of the circle of mainstream credit to the outside. Because banks are heavily subsidized and supported by federal agencies and credit programs, the services at the top of the chart are the least costly (as measured by fees and interest) for customers. The public provisioning and subsidy decreases from top to bottom—or from mainstream credit to the periphery (the realm of financial inclusion.)

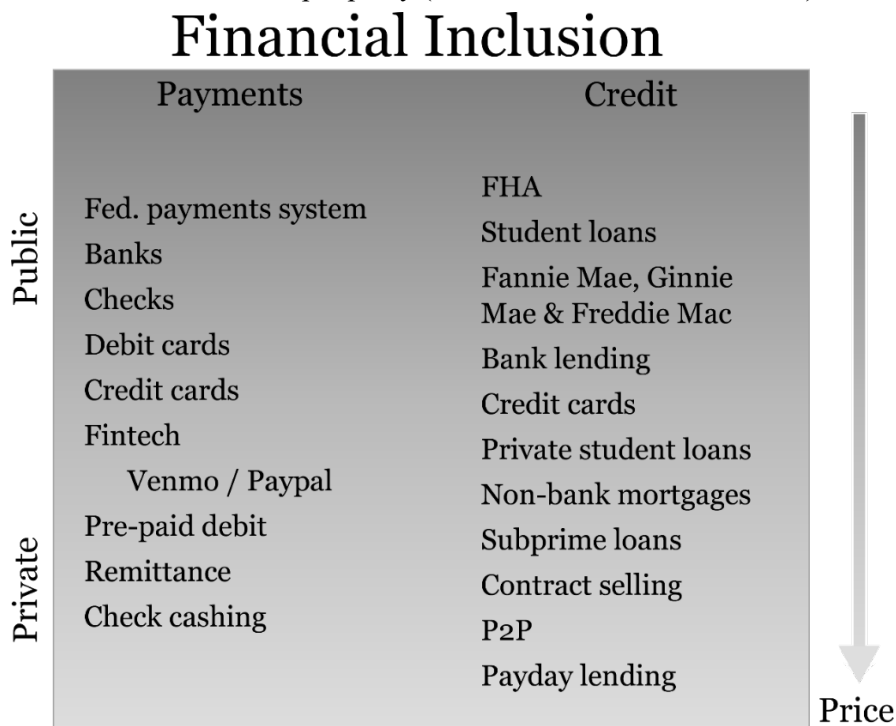


Figure E

A. Payments

The Federal Reserve is the primary regulator of the payments system and also operates the largest payments processing system.¹³¹ Historically, the federal reserve created and operated a check clearing system where banks would settle their balances of transfer.¹³² If a bank in Connecticut owed a

131. CAROL COYE BENSON, SCOTT LOFTESNESS, RUSS JONES, PAYMENTS SYSTEMS IN THE U.S. 3 (3rd ed. 2017) (“In the United States, the primary issuer of payments regulations is the Federal Reserve Board.”); Adam J. Levitin, *Public-Private Competition in Payments: The Role of the Federal Reserve* 3 (Geo. L. & Econ., Working Paper No. 1420061, 2009) (noting that the Federal Reserve system “occupies a central place in the nation’s payment systems, both as a regulator and as a market participant”).

132. Levitin, *supra* note 131, at 4.

bank in New York \$300 and the New York bank owed the Connecticut bank \$200, the Connecticut bank would simply transfer \$100 through the central bank clearinghouses where the accounts would be settled. According to the textbook, *Payments Systems in the U.S.: A Guide for the Payments Professional*, the Federal Reserve Bank system, formed in the early 20th century, played an important role by requiring its member banks throughout the country to accept checks for deposit at par. This meant that the deposit bank would credit its customer with “one hundred cents on the dollar” rather than some lesser percentage. The Fed’s requirement, coupled with the development of clearing houses across the country, transformed checking into a true national payments system.¹³³

Today, checks are not literally exchanged in a central location. These exchanges can be executed through an electronic central clearing system.¹³⁴ Money is still sent and exchanged through the electronic network operated and overseen by the Federal Reserve.¹³⁵ Even as money is no longer tangible and the majority of transactions are digital, every time money is sent or received in the economy, it must pass through a central clearinghouse.¹³⁶ Only an officially chartered bank or credit card company has access to this payments system.¹³⁷ In other words, though most transactions are processed by a public agency, only private banks and credit card issuers are given a charter to use it.¹³⁸ This protects the payments processing system from risks and frauds, but it also presents barriers for the unbanked.

The payments systems operate behind the scenes of daily consumer transactions. A customer will swipe a credit or debit card, write a check, or even use an app like Venmo or Square without realizing that she is using the bank-mediated payments system that is processing the transaction. Though certain fintech apps present themselves as non-banks, their

133. BENSON, *supra* note 131.

134. *Id.* (largest of these is the ACH clearing house); Levitin, *supra* note 131, at 5 (“The Fed is the dominant clearinghouse operation, with over 70% of the domestic market share as recently as 2002.”).

135. BENSON, *supra* note 131, at 5.

136. *Id.*

137. Anatoli Kuprianov, *The Monetary Control Act and the Role of the Federal Reserve in the Interbank Clearing Market*, ECON. REV., July–Aug. 1985, at 23, 26 (noting “[b]anks that were not members of the Federal Reserve System were required to maintain accounts with member banks for purposes of settlement . . .”).

138. The Federal Reserve operates the Automated Clearinghouse (“ACH”), which provides an electronic means to exchange debit and credit entries between depository institutions to settle customer transactions and is the Federal Reserve’s primary electronic payment system. The ACH processes approximately three-quarters of all electronic payments in the United States, including recurring mortgage payments, utility bills, payroll direct deposits, Social Security disbursements, and large inter-bank transfers. *See generally* FED. RES. BANK OF S.F., <https://www.frbsf.org/education/teacher-resource/s/what-is-the-fed/payment-services/> [<https://perma.cc/6HBX-PUT5>].

payments transactions still operate through a bank.¹³⁹ When a consumer downloads the Venmo app on their smartphone and before the app enables them to do “mobile banking,” they must link their bank account to the service.¹⁴⁰ The bank service is hidden in this process and the central bank clearing system is rendered invisible. Most people are not aware this is happening—such that the entrepreneurs of these services often mistakenly boast that they are making banks obsolete.¹⁴¹ Yet the traditional banking system that the edgy new apps are meant to supplant is actually providing the background access, the rails on which the fintech train can run.

The ubiquity of the central bank’s payments system only becomes apparent when you consider how people outside of the banking system engage with the economy. In the case of individuals without bank accounts, they must pay fees to cash checks or purchase debit cards and without bank

139. Internet platforms like Venmo and PayPal are most commonly used for person-to-person, business-to-customer, and business-to-business transactions. Venmo and PayPal users initiate payments or charges with other users whose balances are either credited or debited on the platform ledger (each of the users’ Venmo or PayPal profile balance). PayPal or Venmo delivers the transaction information to the users’ banks through the ACH system and the bank delivers the same information to the ACH network operator—the Federal Reserve. The Federal Reserve electronically processes the transaction, and both the banks and PayPal and Venmo users are notified of the transaction clearance. As of December 2013, Venmo has operated as a subsidiary of PayPal. See PAYPAL, https://www.paypalobjects.com/en_US/vh/help/paypalmanager_help/about_ach_payments.htm [<https://perma.cc/B5GB-3HR3>]; see also Christopher K. Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 781, 819 (2018) (discussing CFPB allegation against PayPal subsidiary “Bill Me Later” for “signing up customers for [Bill Me Later’s service of sending payments using borrowed money] without the individual realizing it”); Leena Rao, *PayPal Is Okay If Millennials Don’t Know It Owns Venmo*, FORTUNE (July 13, 2016, 12:21 PM), <https://fortune.com/2016/07/13/paypal-venmo-millennials/> [<https://perma.cc/3F9F-Z39U>].

140. In fact, most of these services use a few specialty banks called Industrial Loan Companies (ILCs) that have access to the payments system due to a legislative loophole. ILCs operate similarly to banks and have access to the Federal Reserve ACH payments system, but are not subject to oversight by Fed examiners. ILCs also benefit from federal deposit insurance and the Federal Reserve’s discount window, and in exchange, ILCs must conform to federal safety and soundness and consumer protection laws. However, unlike traditional banks, ILCs have no limits on their size or the activities they may conduct, which, in cases like WebBank, can include general commercial activities. Julie Stackhouse, *Fintech Interest in Industrial Loan Company Charters: Spurring the Growth of a New Shadow Banking System?*, FED. RES. BANK OF ST. LOUIS (Oct. 24, 2017), <https://www.stlouisfed.org/on-the-economy/2017/october/fintech-interest-industrial-loan-company-charters-spurring-new-shadow-banking-system> [<https://perma.cc/458H-QBDU>]. Non-bank payments system providers like PayPal are able to avoid federal regulation because they only provide a medium through which payments and charges originate, but they do not actually process transactions. After a PayPal user originates a transaction, PayPal delivers the transaction information to the user’s bank where the transaction is actually processed. PayPal and similar non-bank platforms thereby avoid federal regulation under the BSCA. Christopher M. Paridon, *New Changes and Challenges: Non-banks in the Payments System*, A.B.A. BANKING L. COMM. J., Nov. 2007, at 2–3.

141. See, e.g., Tony Raval, *How Banks Can Stay Relevant in the Digital Age*, FORBES (Jan. 16, 2019), <https://www.forbes.com/sites/forbestechcouncil/2019/01/16/how-banks-can-stay-relevant-in-the-digital-age/#5853d3365004> [<https://perma.cc/C3K5-Y9P3>] (noting “fintech startups . . . aim to make traditional banks obsolete”); Kate Rooney, *Square Stumbles into the Banking Business*, CNBC (May 18, 2018, 8:00 AM), <https://www.cnbc.com/2018/05/18/square-stumbles-into-the-banking-business.html> [<https://perma.cc/95GA-XA2P>] (explaining Cash App has been used like a bank account for customers and that CEO Jack Dorsey expects the trend to grow for the un-banked).

accounts, mobile apps are unavailable.¹⁴² Perhaps a better illustration of the costs of being left out of the payments system is in the case of an entire industry that is unable to access the payments system: marijuana distribution.

The marijuana business makes the prominence and centrality of the federal payments system clear because it is the only business allowed by a few states but not by the Federal government.¹⁴³ Marijuana businesses operate legally in several states, but banks all operate on a federal reserve payment system and with FDIC insurance.¹⁴⁴ All banks and payments providers rely on the federal systems for payments processing.¹⁴⁵ In the case of marijuana dispensaries, the federal government has not legalized marijuana, and thus banking regulators have not allowed banks to deal with those “illegal businesses.”¹⁴⁶ It is hard for Banks to interact with marijuana businesses and maintain their FDIC insurance coverage.¹⁴⁷ Thus, marijuana dispensaries must deal in cash.¹⁴⁸ They cannot process credit cards, debit cards, or checks from customers or pay for goods, rent, or do any transactions whatsoever, without dealing with the banking system.¹⁴⁹ Cash

142. Unbanked or underbanked customers who use alternative financial services for basic banking services incur substantial fees, including check cashing at a 1.5% to 3.5% face value charge. To access short-term, low value credit, underserved customers often turn to payday lenders for paycheck or tax return anticipation loans with effective Annual Percentage Rate's over 470%. See JULIA S. CHENEY, PAYMENT CARDS AND THE UNBANKED: PROSPECTS AND CHALLENGES 8 (2005).

143. See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 597 (2015); see also Daniel B. Pasternak, *Three New State Laws Legalize Marijuana Use, Sparking More Confusion and Igniting Further Conflict With Federal Law*, THE NAT'L L. REV. (Nov. 21, 2018), <https://www.natlawreview.com/article/three-new-state-laws-legalize-marijuana-use-sparking-more-confusion-and-igniting> [<https://perma.cc/M38E-XVB5>].

144. Hill, *supra* note 143, at 625–26.

145. *Id.* at 615; Erin Mundahl, *Federal Banking Law Still Keeps Budding Cannabis Industry from Opening Accounts*, INSIDE SOURCES (May 11, 2018), <https://www.insidesources.com/federal-banking-law-still-keeps-budding-cannabis-industry-from-opening-accounts/> [<https://perma.cc/3G6K-3ZEB>].

146. See JAMES M. COLE, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT (2013).

147. Moises Gali-Velazquez, *Changes Needed to Protect Banking and Financial Services When Dealing with the Marijuana Industry*, LEXIS PRAC. ADVISOR J. (2016).

148. Robb Mandelbaum, *Where Pot Entrepreneurs Go When the Banks Just Say No*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/magazine/where-pot-entrepreneurs-go-when-the-banks-just-say-no.html> [<https://perma.cc/VU6D-7JJB>].

149. It is still illegal to use a credit card to purchase marijuana directly because credit card carriers are intertwined with federally insured bank accounts and the Federal Reserve payments system. However, some marijuana vendors have developed work arounds that enable customers to use their credit cards to purchase digital credits, coins, or tokens that can then be exchanged as value for marijuana products—imagine cashing in game tokens or tickets at the arcade for a giant teddy bear—without breaking federal drug laws or implicating their banks in drug-related money laundering violations. Jenny Bloom, *New App Makes Paying for Weed with Credit Cards a Reality*, OR. CANNABIS CONNECTION (Sept. 25, 2017), <https://www.occnewspaper.com/new-app-makes-paying-for-weed-with-credit-cards-a-reality/> [<https://perma.cc/4FKB-7QFC>]; see Nathaniel Popper, *As Marijuana Sales Grow, Start-Ups Step in for Wary Banks*, N.Y. TIMES (Feb. 16, 2016), https://www.nytimes.com/2016/02/17/business/dealbook/as-marijuana-sales-grow-start-ups-step-in-for-wary-banks.html?_r=0 [<https://perma.cc/27DS-EY9R>].

is costly and dangerous, and many dispensaries have hired armed guards and purchased expensive safes.¹⁵⁰ In contrast, businesses and individuals with a bank account can use credit cards, debit cards, and mobile apps without cost.

Only banks and their customers have access to the payments systems, but banks are private businesses seeking profits and thus will not provide bank accounts at a cost to themselves. Maintaining simple checking or savings accounts costs banks money. They must hire staff, pay for buildings, update technology, build ATM's, and send monthly statements. A simple bank account costs a bank around \$250 every year.¹⁵¹ If there is too little money in an account, the profits are low or non-existent. Simple business math suggests that if a product (like a small account) is not profitable, it should be avoided—which is exactly what banks do. Consumers that are deemed unprofitable are either rejected by the bank outright or repelled by punishing fees. The most prevalent fee on small accounts are overdraft fees, which make up 75% of all bank fees.¹⁵² These costs are born primarily by the poor—90% of the fees are paid by 10% of the customers.¹⁵³ A 2014 report studied the annual costs of checking accounts at large banks among five categories of spenders and found that by far, the people in the lowest category, or the “cash strapped” category, paid the most to use a checking account.¹⁵⁴ The FDIC has noted that overdraft fees, service charges, and minimum balance requirements are among the top reasons people do not

150. Julie Turkewitz, *Veterans Back on Patrol, This Time to Protect Marijuana*, N.Y. TIMES (Sept. 7, 2016), <https://www.nytimes.com/2016/09/08/us/veterans-back-on-patrol-this-time-to-protect-marijuana.html> [<https://perma.cc/CM5D-BJ9L>]; see Mandelbaum, *supra* note 148.

151. Marcie Geffner, *Bank Account Costs \$250*, BANKRATE (Jul. 26, 2010), <http://www.bankrate.com/financing/banking/bank-account-costs-250/> [<https://perma.cc/TU7W-7HEW>] (“In fact, the ABA [American Bankers Association] says the annual cost of a checking account is actually \$250 to \$300.”). The ABA claims that the cost of opening an account runs between \$150 and \$200 and the annual cost of maintaining an account runs between \$250 and \$300. The ABA catalogues the costs of maintaining an account: “These costs reflect the expense of processing transactions, providing monthly statements, investing in payment system technology and software, paying the cost of tellers, ATMs, and online banking, staffing call centers, complying with countless regulations, ensuring privacy and data protection, and preventing fraud and covering fraud losses.” *Id.*

152. Mark Maremont & Tom McGinty, *Why Banks at Wal-Mart Are Among America's Top Fee Collectors*, WALL STREET J. (May 11, 2014, 10:38 PM), <https://www.wsj.com/articles/why-banks-at-wal-mart-are-among-americas-top-fee-collectors-1399861844> [<https://perma.cc/K5PR-ZUCC>].

153. Julianne Pepitone, *Bank Overdraft Fees to Total \$38.5 Billion*, CNN: MONEY (Aug. 10, 2009, 7:00 PM), https://money.cnn.com/2009/08/10/news/companies/bank_overdraft_fees_Moebs/index.htm [<https://perma.cc/E6FA-DBG4>]; Mark Wolff, *Consumers Need Protection From Excessive Overdraft Costs*, THE PEW CHARITABLE TRS. (Dec. 2016), https://www.pewtrusts.org/~media/assets/2016/12/consumers_need_protection_from_excessive_overdraft_costs.pdf [<https://perma.cc/TDG2-SDJ6>].

154. MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 141 (2015).

open bank accounts.¹⁵⁵ Those with small means are hearing the banks' message loud and clear. There are approximately 8.4 million Americans who do not have a bank account or access to traditional financial services.¹⁵⁶

Those without a bank account pay the most for payments services. Cashing a paycheck alone costs between 1.5 to 3.5% of the paycheck.¹⁵⁷ Not having a bank account reduces take-home pay and makes it difficult for families to save and establish a credit history.¹⁵⁸ In 2017, the undeserved consumers spent a total of \$173 billion on financial transactions alone.¹⁵⁹ It is this group of people, left out of the banks' payment infrastructure, that are the target of financial inclusion efforts.

B. Credit

In the credit market, the public/private continuum is much more pronounced. The credit market is heavily subsidized by the federal government and the private non-bank market is very expensive.¹⁶⁰ Each aspect of banking, deposits, loans, and simple financial transactions relies on a robust network of government support. Banks can take and lend customer deposits and engage in fractional reserve lending and money creation because customer deposits are insured by the FDIC.¹⁶¹ Unlike all other corporations, banks pay virtually nothing for their funding (customer deposits) because of this federal government.¹⁶² Federal deposit insurance

155. FED. DEPOSIT INS. CORP., 2011 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 28 (2012). Michael Barr's survey results from his book, *No Slack* shows that when the unbanked are asked what changes to bank accounts would induce them to open an account, 29% of respondents said lower fees, 20% convenience, 10% get money faster, 14% lower minimum balance, 16% less confusing fees, and 11% nothing. BARR, *supra* note 10, at 32.

156. FED. DEPOSIT INS. CORP., *supra* note 10, at 1 (estimating the number of unbanked and underbanked individuals in the U.S.).

157. BARR, *supra* note 10, at 3.

158. Michael S. Barr, *An Inclusive, Progressive National Savings and Financial Services Policy*, 1 HARV. L. & POL'Y REV. 161, 164 (2007).

159. ERIC WILSON & EVA WOLKOWITZ, 2017 FINANCIALLY UNDERSERVED MARKET SIZE STUDY 4 (2017).

160. See Mehrsa Baradaran, *How the Poor Got Cut out of Banking*, 62 EMORY L.J. 483, 494 (2013) ("This tendency has created two banking systems in America: a government subsidized, mainstream banking system for the rich and an unregulated, alternative banking system for the poor.").

161. See *What's Covered*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/deposit/covered/> [<https://perma.cc/QV4Q-BVLR>] (last updated May 8, 2020).

162. Banks do pay into the FDIC insurance fund through premiums, but most scholars agree that the premiums are underpriced. Furthermore, it is not just the actual funds that are paid out in the event of a failure that is of importance here. It is the fact that bank deposits are backed by the full faith and credit of the federal government making them a safe repository for their customers' funds.

Until the early 1990s, the FDIC levied flat-rate insurance premiums on banks as a function of deposits, but not the banks' risk. . . . [I]n 1991[, the FDICIA] required that the FDIC introduce risk-based premiums. To date, however, the range of the premiums remains much narrower than the range of risk exposures of the FDIC to individual bank failures. Under the Deposit

provided by the FDIC reduces the risk and costs associated with fractional reserve lending with the use of “other people’s money.”¹⁶³ Before the days of FDIC insurance, any real or perceived sign of bank failure would spook depositors who would “run” the bank leading to its quick and catastrophic failure.¹⁶⁴ Today, banks can safely operate using liquidity from customer deposits (among other sources of funds) without a threat of a run thanks to the FDIC guarantees. Banks pay virtually nothing for customer deposits (a source of bank credit) and thus enjoy the lowest cost liquidity option available on the market—all thanks to federal programs.¹⁶⁵ And when the FDIC fund goes into the red—as it did in 2008—these deposits are backstopped by the full faith and credit of the U.S. Treasury.¹⁶⁶ These explicit guarantees calmed markets even during a system-wide loss of trust.¹⁶⁷ Even with guaranteed deposits, banks still face liquidity crises.¹⁶⁸ In those scenarios, the Fed’s discount window provides banks emergency loans at 0.5% higher than the Federal Funds rate, which is below market rate.¹⁶⁹

On the asset side, most mortgages and student loans are guaranteed, bundled, or subsidized by the FHA or the Government Sponsored Entities (GSE’s) Fannie Mae, Freddie Mac, Ginnie Mae, and Sallie Mae.¹⁷⁰ The

Insurance Funding Act of 1996, when the FDIC reserve fund exceeds 1.25 percent of deposits, the safest of banks pay no deposit insurance premium. Recently, that meant that more than 90 percent of banks, which held well over 90 percent of total bank assets, paid no premiums.

Joe Peek & James A. Wilcox, *The Fall and Rise of Banking Safety Net Subsidies*, in *TOO BIG TO FAIL: POLICIES AND PRACTICES IN GOVERNMENT BAILOUTS* 177–78 (Benton E. Gup ed., 2004).

163. See Jonathan R. Macey, *The Political Science of Regulating Bank Risk*, 49 OHIO ST. L.J. 1277, 1283 (1989) (explaining banks benefit from deposit insurance because it allows them to take greater risks).

164. Tim Stobierski, *What Is the FDIC?*, ACORNS (Apr. 9, 2020), <https://www.acorns.com/money-basics/saving-and-budgeting/what-is-the-fdic/> [<https://perma.cc/JP36-R8H5>].

165. Wolf Richter, *Banks Are Vying for Deposits – and the Fight Could Mark a Shifting Industry*, BUS. INSIDER (Apr. 30, 2019, 3:34 PM), <https://www.businessinsider.com/banks-are-vying-for-deposits-and-the-fight-marks-a-shifting-industry-2018-4> [<https://perma.cc/PW9A-NE4U>] (“Deposits are a crucial and very cheap source of funding for banks, which make money by lending to their customers at higher rates than their cost of funding.”).

166. *Full Faith and Credit of U.S. Government Behind the FDIC Deposit Insurance Fund*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/regulations/laws/rules/4000-2660.html> [<https://perma.cc/8F4N-UBB4>] (last updated April 20, 2014).

167. See FED. DEPOSIT INS. CORP., *CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013* 33 (2017); Jonathan D. Rose, *Old-Fashioned Deposit Runs 2* (Fed. Reserve Bd. Divisions of Research & Statistics & Monetary Affairs, Working Paper No. 2015-111, 2015).

168. Rose, *supra* note 167.

169. Kimberly Amadeo, *Federal Reserve Discount Window and How It Works*, BALANCE (May 12, 2020), <https://www.thebalance.com/federal-reserve-discount-window-3305923> [<https://perma.cc/9L63-CXH4>]; *Open Market Operations*, BOARD GOVERNORS FED. RES. SYS., <http://www.federalreserve.gov/monetarypolicy/openmarket.htm> [<https://perma.cc/9K48-TLL7>].

170. Sallie Mae ceased being a GSE, and became fully privatized, when Congress terminated its charter on December 29, 2004. At that point, the GSE became “SLM Corporation”, “a fully private sector corporation.” PHILLIP QUINN, LARRY STAUFFER & SUZANNE MCQUEEN, U.S. DEP’T OF THE

majority of home loans¹⁷¹ and student loans¹⁷² are insured by and sold to the federal government. The Department of Education issues most student loans—\$1.2 trillion of a total of \$1.6 trillion student loan market are direct loans from the U.S. government.¹⁷³ The Department of Education originates the loans, holds the notes, and then contracts with third party servicers who collect on the contracts.¹⁷⁴ The Treasury collects the payments from borrowers and is involved in some collection practices such as tax refund offsets and wage garnishments.¹⁷⁵ This type of lending, unlike mortgage lending, is a direct budget line item on the Treasury's balance sheet.¹⁷⁶ The credit line is created by the federal government and lent to students, and then repayments flow back into the Federal Government's coffers.¹⁷⁷

These GSEs purchase almost every mortgage and student loan in the country and resell them to investors.¹⁷⁸ Before 2008, GSEs enjoyed the implicit backing of the Federal Government, but since 2008 they have been under direct conservatorship and thus all standard student and mortgage

TREASURY, OFFICE OF SALLIE MAE OVERSIGHT, LESSONS LEARNED FROM THE PRIVATIZATION OF SALLIE MAE I (2006). A table on page 3 of the above Treasury report distinguishes the former GSE-Sallie Mae from the fully privatized SLM corporation. Notable differences include: (1) the GSE's charter was created by an act of Congress; (2) the President appointed the GSE's board members; (3) the GSE could borrow up to \$1 billion from the Treasury, whereas the SLM corporation cannot borrow from the Treasury; (4) the GSE's debt was eligible for federal open market purchases; (5) the GSE was exempt from SEC registration and financial and other filings with the SEC; and (6) the GSE was exempted from federal, state, and local income taxes. *Id.* at 3.

171. CONG. BUDGET OFFICE, FANNIE MAE, FREDDIE MAC, AND THE FEDERAL ROLE IN THE SECONDARY MORTGAGE MARKET viii (2010) (“[T]wo GSEs owned or guaranteed roughly half of all outstanding mortgages in the United States . . .”).

172. Laura J. Feiveson, Alvarro Mezza, Kamila Sommer, *Student Loan Debt and Aggregate Consumption Growth*, BOARD GOVERNORS FED. RES. SYS. (Feb. 21, 2018), <https://www.federalreserve.gov/econres/notes/feds-notes/student-loan-debt-and-aggregate-consumption-growth-20180221.htm> [<https://perma.cc/R7AA-W3EV>] (“The federal government guarantees more than 90 percent of outstanding student loan debt . . .”).

173. Student Borrower Protection Center, Presentation at the UC Irvine School of Law Student Loan Law Initiative's Colloquium on Student Loan Law (Oct. 4, 2019) (on file with author).

174. *Student Loan System Presents Repayment Challenges*, PEW CHARITABLE TRUSTS (Nov. 6, 2019), <https://www.pewtrusts.org/en/research-and-analysis/reports/2019/11/student-loan-system-presents-repayment-challenges> [<https://perma.cc/L5RL-8X9D>].

175. See *Collections*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/default/collections> [<https://perma.cc/78XU-FQU6>].

176. *Financial Report of the United States Government*, BUREAU OF THE FISCAL SERVICE, <https://fiscal.treasury.gov/reports-statements/financial-report/2017/government-financial-position-and-conditions.html> [<https://perma.cc/RM98-YDGT>] (last modified June 3, 2019).

177. See JULIE MARGETTA MORGAN, WHO PAYS? HOW INDUSTRY INSIDERS RIG THE STUDENT LOAN SYSTEM—AND HOW TO STOP IT 2–3 (2018); David Rubenstein, *Supremacy, Inc.*, 67 UCLA L. REV. 4, 9 (2020); U.S. DEPT. OF EDUCATION, NOTES TO FINANCIAL STATEMENTS FOR THE YEARS ENDED SEPTEMBER 30, 2015 AND 2014 63 (“Authority to borrow from Treasury provides most of the funding for disbursements made under the Direct Loan program, FFEL, TEACH, and other loan programs. Subsidy and administrative costs of the programs are funded by appropriations. Borrowings are repaid using collections from borrowers, fees and interest on uninvested funds.”).

178. BARADARAN, *supra* note 154, at 18.

loans are guaranteed by the Federal government.¹⁷⁹ As a result, the majority of mortgage and student loans issued by banks are essentially risk free. The banks and investors are paid interest rates by borrowers even though GSEs protect lenders from default. “GSEs enable banks to lend exponentially more loans than what their customer deposits would allow. At the crux of our banking system, then, is a state-enabled credit system.”¹⁸⁰

Deposits and loans—assets and liabilities—are all supported by the Federal Government. And that’s just the tip of the iceberg. None of this takes into account the government bailout, the staggering magnitude of which went on full display after the 2008 financial crisis. Using its 13(3) emergency lending powers, the federal government bailed out a failing banking industry with over a trillion dollars of equity infusions, loans, guarantees, asset purchases, and other forms of financial support.¹⁸¹

“The help came on very favorable terms with interest rates not available on the market. The arrangement was so good that the CEO of one of the largest bailed out banks, upon seeing the terms of the deal, remarked, ‘This is very cheap credit!’”¹⁸²

Even the last decade of monetary policy has been designed to “prime the pump” and flood bank balance sheets with cheap funds in order to induce more lending on their part.¹⁸³ In other words, the Federal Reserve’s stimulus programs are premised on the model of banks as credit intermediaries. The money, created through the Federal Reserve programs, is supposed to pass through banks and to be used to lend to the market. Yet there is no requirement that the banks must lend these funds and there is evidence that the main result of these extraordinary measures has been to boost bank

179. Fannie Mae and Freddie Mac were spun off of the federal government and privatized, which meant that they were run by a board of shareholders. It did not mean that they operated in normal markets. The market still treated them like government entities, meaning, that they did not contemplate their failure. When they did fail because of the excessive risks their managers took, the government bailed them out without flinching. *See id.* at 233 n.19.

180. *Id.* at 18.

181. The actual amount of the bailout is difficult to determine because much of it was in guarantees. The special inspector general for Troubled Asset Relief Program (“TARP”) estimated a total potential support package of \$23.7 trillion, or over 150% of the United States GDP. However, many of these guarantees were never used. *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 174 (2010); MARC LABONTE, CONG. RESEARCH SERV., R44185, FEDERAL RESERVE: EMERGENCY LENDING 6 (March 27, 2020), <https://fas.org/sgp/crs/misc/R44185.pdf> [<https://perma.cc/R2ZJ-DXEF>].

182. BARADARAN, *supra* note 154, at 4 (citing DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE’S WAR ON THE GREAT PANIC 239 (2009) (quoting Vikram Pandit, CEO of Citigroup)).

183. Ben S. Bernanke, American Economic Association Presidential Address: The New Tools of Monetary Policy 22 (Jan. 4, 2020) (transcript available at https://www.brookings.edu/wp-content/uploads/2019/12/Bernanke_ASSA_lecture.pdf).

profitability.¹⁸⁴ After three rounds of Quantitative Easing (QE), the Fed is still holding over four trillion dollars in bank assets.¹⁸⁵

Another less well-known example of monetary policy is Interest On Excess Reserves (“IOER”). In a payment that seems to violate what people may assume to be the laws of the market and basic common sense, the Federal Reserve pays billions of dollars in interest to banks on their reserves.¹⁸⁶ In just one year, “the Federal Reserve paid about \$7 billion in interest to commercial banks, including more than \$100 million to Goldman Sachs and more than \$900 million to JPMorgan Chase.”¹⁸⁷ The point of this payment is that it will “pass through” the banks to the depositor, but the IOER is in fact not being passed on but being absorbed by the bank as profits, and thereby increasing inequality.¹⁸⁸ Because excess reserves pay higher interest than Treasury bills,¹⁸⁹ there is no reason banks would pass up a risk-free, high-interest opportunity. Each dollar held on reserve is a dollar not lent for real estate, infrastructure, or business operations in the American economy.¹⁹⁰

184. Juan A. Montecino & Gerald Epstein, *Have Large Scale Asset Purchases Increased Bank Profits?* 4–19 (Inst. for New Econ. Thinking, Working Paper No. 5, 2015); Matthew Johnston, *Why Banks Don't Need Your Money to Make Loans*, INVESTOPEDIA (Jul. 6, 2019), <https://www.investopedia.com/articles/investing/022416/why-banks-dont-need-your-money-make-loans.asp> [<https://perma.cc/676V-9MWV>].

185. Michael Ng & David Wessel, *The Hutchins Center Explains: The Fed's Balance Sheet*, BROOKINGS, (Aug. 18, 2017), <https://www.brookings.edu/blog/up-front/2017/08/18/the-hutchins-center-explains-the-feds-balance-sheet/> [<https://perma.cc/M2K6-DHPH>].

186. Due to the massive amounts of money created by QE, bank reserves swelled to over \$1.7 trillion as of October 2018. Michael Ng & David Wessel, *The Hutchins Center Explains: The Fed's balance sheet*, BROOKINGS INST. (Aug. 18, 2017), <https://www.brookings.edu/blog/up-front/2017/08/18/the-hutchins-center-explains-the-feds-balance-sheet/> [<https://perma.cc/V7PF-83MV>]. This overage is called excess reserves and even though it was created by the federal reserve, banks earn interest on these reserves. These reserves comprise a substantial portion of the nation's monetary base. The Federal Reserve is using this payment, called an “administered rate” as its primary monetary policy tool post QE. See *Required Reserves of Depository Institutions*, FED. RES. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/REQRESNS> (last visited July 30, 2020); James D. Hamilton, *Perspectives on U.S. Monetary Policy Tools and Instruments* (Nat'l Bureau of Econ. Research, Working Paper No. w25911, 2019), https://econweb.ucsd.edu/~jhamilto/mon_instruments.pdf [<https://perma.cc/VMP4-YZCZ>]. Banks are required to hold roughly 10% of their deposits in reserves at the central bank. The required reserves on just customer deposits would equal roughly \$189 billion. See Walker F. Todd, *The Problem of Excess Reserves, Then and Now 2* (Levy Econ. Inst. of Bard Coll., Working Paper No. 763, 2013) (Put another way, before August 2007, the Fed's reserve account was 5.1% of the monetary base, and in mid-2013.).

187. Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 797 (2018).

188. This policy, which was meant to encourage lending by banks has turned into a subsidy that in fact discourages lending because banks can earn more by “lending” customer deposits to the Federal Reserve than they can pursuing consumer or business loans. Excess funds can be rolled over at no cost and liquidated on the same day, making excess reserves more attractive than lending. Darrell Duffie & Arvind Krishnamurthy, *Pass-Through Efficiency in the Fed's New Monetary Policy Setting*, KAN. CITY FED. RES. SYMP., Aug. 2016, at 21; Ricks, *supra* note 187.

189. Todd, *supra* note 186, at 10.

190. Todd suggests the Federal Reserve sell about \$180 billion in mortgage-backed securities or longer maturity Treasury securities per year in order to prevent future inflation. See *id.* at 15–16.

It has been called monetary policy, but it can more accurately be described as credit policy. Through asset purchases, credit, guarantees, and reserves, the Federal Reserve controls the amount of money circulating in the economy.¹⁹¹ The Federal Reserve can and has increased the supply of money and credit as it has done through QE.¹⁹² It has done so by flushing banks with money with the hope that they will lend the surplus. Trillions of dollars of investments and loans have been pumped into the banking system over the last decade.¹⁹³

Thus, money, like credit, is a public good and its creation, supply, and stability is a function of the US Treasury in coordination with the Federal Reserve.¹⁹⁴ In an abstract sense, money is a credit instrument from the

191. Tony Carter, Demissew Ejara, Christina Reis & Walter Carter, *Customer Challenges in Times of Global Risk and Uncertainty*, in *THE ECONOMIC GEOGRAPHY OF GLOBALIZATION* 39, 48 (Piotr Pachura ed., 2011).

192. After reducing interest rates to virtually 0% did not spur a revival of the banking sector, the Federal Reserve began to pump money into the economy through three rounds of QE. The Federal Reserve created money by buying securities, like government bonds, from banks. The purpose was to spur bank lending by increasing the supply of money (even at the risk of inflation) and by the reduction of risk that was making banks overly cautious. These purchases were made with electronic cash that did not exist before and, once created, increased the total bank reserves by the quantity of assets purchased—thus “quantitative” easing. The Federal Reserve began QE in 2008 with the purchase of \$800 billion in bank debt, Treasury notes, and mortgage-backed securities (MBS) from Reserve member banks. QE was essentially a transfer of risk from bank balance sheets to the central bank’s balance sheets. In December 2013, the Federal Reserve announced it would wind down its QE purchases because the unemployment rate was at 7%, inflation had not risen above 2%, and national GDP growth was nearly 3%. After three rounds of QE, the Federal Reserve’s balance sheet grew to over \$4.473 trillion in May 2017. The Fed still holds over \$3.98 trillion in assets on its balance sheets due to its QE purchases. Moreover, QE generated around \$700 billion in profits for the Federal Reserve. Quantitative Easing is essentially the central bank’s purchase of public debt—the central bank is lending to the federal government. However, the goal of QE is not to help aid government spending, but the goal has been described as pushing bank lending. In other words, the federal reserve bought public debt in order to lower the costs of credit by private lenders to private borrowers. See Stephen Williamson, *Quantitative Easing: How Well Does This Tool Work?* FED. RES. BANK ST. LOUIS (Aug. 18, 2017) <https://www.stlouisfed.org/publications/regional-economist/third-quarter-2017/quantitative-easing-how-well-does-this-tool-work> [<https://perma.cc/64FN-HYVA>]. Remarkably, the current Fed balance sheet total of \$3.98 trillion is down a high of over \$4.5 trillion in January 2015. See MIKE KONCZAL & J.W. MASON, *A NEW DIRECTION FOR THE FEDERAL RESERVE: EXPANDING THE MONETARY POLICY TOOLKIT* (2017); *Credit and Liquidity Programs and the Balance Sheet*, BD. GOVERNORS FED. RES. SYS., https://www.federalreserve.gov/monetarypolicy/bst_recenttrends.htm [<https://perma.cc/5KMX-YZAA>] (last updated July 24, 2020); Jon Sindreu, *Central-Bank Rescues Prove Profitable: Windfalls from Stimulus Measures Have Been a Boon for Many Government Budgets*, WALL STREET J. (Sept. 20, 2016, 10:06 PM), <https://www.wsj.com/articles/central-bank-rescues-prove-profitable-1474380387> [<https://perma.cc/7Y6K-HH9R>].

193. See William Greider, “Unusual and Exigent”: *How the Fed Can Jump-Start the Real Economy*, LEVY ECON. INST. OF BARD COLL. (2013), http://www.levyinstitute.org/pubs/pn_13_8.pdf.

194. See James Tobin, *The Case for Preserving Regulatory Distinctions*, in *RESTRUCTURING THE FINANCIAL SYSTEM* 167, 172 (1987) (“I think the government should make available to the public a medium with the convenience of deposits and the safety of currency, essentially currency on deposit, transferable in any amount by check or other order. . . . The Federal Reserve Banks themselves could offer such deposits.”); Morgan Ricks, John Crawford & Lev Menand, *FedAccounts: Digital Dollars*, GEO. WASH. L. REV., (forthcoming), <https://ssrn.com/abstract=3192162>; see also Kenneth J. Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket*

central bank to the holders of money. The Federal Reserve's monetary policy can increase or decrease the monetary supply, which affects the amount of credit available.¹⁹⁵ When the Federal Reserve pays banks on their reserves or buys their assets through QE, they are creating new money that did not exist previously.

Viewed from this lens, it was the policies and actions of public agencies like the Treasury and the Federal Reserve that determined the scope and shape of the circle of credit, including who was left outside. The lending determinations of the Government Sponsored Entities and the legislatures that create their mandates determine the amount of available credit, its costs and availability. In my simplistic diagram, policy determines the size of the circle. These credit products are not just abetted by government agencies; they are created by them. The credit market at the center of the circle is guaranteed by government agencies. Even more crucially, the types of loans the government will guarantee and the kinds of borrowers that are eligible for the loan are determined through public policy. The federal government has \$1.24 trillion in direct loan programs and \$2.37 trillion in loans it guarantees—all in mortgage and student loans.¹⁹⁶ “These major credit programs are centered around both student loans and mortgages through the Federal Housing Administration (FHA), each representing more than a trillion dollars of loans.”¹⁹⁷ Through democratic decision making and legislative action, several types of loans have been promoted by public policy, including student loans, home loans, and certain small business loans. Republicans and Democrats over the last century have championed a variety of policies promoting and subsidizing home ownership and college education.¹⁹⁸ Beginning with President Hoover up to President Trump with notable programs by FDR and George Bush along the way, coordinated efforts by legislatures and federal agencies have set out to achieve these

Allocations, in, 1 SUBCOMM. ON ECON. IN GOV'T, 91ST CONG., THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURES: THE PPB SYSTEM 47, 48 (Comm. Print 1969) (“The creation of money is in many respects an example of a public good.”); CHARLES P. KINDLEBERGER & ROBERT Z. ALIBER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES 19 (6th ed. 2011) (“Money is a public good”); John Cochrane, Remarks at the Federal Reserve Bank of Minneapolis (May 16, 2016) (video available at <https://www.youtube.com/watch?v=QcidqjmxPyk>) (“There’s a few things that government has a natural monopoly in: . . . national defense, courts, property rights, and I think money is one [them].”).

195. Michael McLeay, Amar Radia & Ryland Thomas, *Money Creation in the Modern Economy*, 54 BANK OF ENGLAND Q. BULL. 14, 20–21 (2014).

196. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U. S. GOVERNMENT: FISCAL YEAR 2018 227 (2018).

197. KONCZAL & MASON, *supra* note 192, at 45.

198. Eric Best, *Debt and the American Dream*, 49 SOC’Y 349, 350 (2012), <https://doi.org/10.1007/s12115-012-9559-3>.

outcomes.¹⁹⁹ It is difficult to overstate the effect of these longstanding programs and their effects on American society, including their pernicious side-effects like the ongoing effects of racial segregation.²⁰⁰

The laws and policies of FHA mortgage financing provide an illustrative example of how policy decisions about what types of loans to guarantee can shape markets. The FHA mortgage guarantee fund created the modern mortgage market, the American suburb, and a pattern of race-based segregation through a program of mortgage guarantees.²⁰¹ The FHA was created as part of the National Housing Act of 1934 and was supplemented and expanded in 1944 through the Servicemen's Readjustment Act (the GI Bill) administered by the VA.²⁰² The FHA's mortgage guarantee fund, which was backed by the United States Treasury, shifted the risk of loan default from private bank lenders to the federal government.²⁰³ By creating a buffer to absorb default risks, this new government infrastructure opened the floodgates for an unprecedented amount of private capital to flood mortgage markets.²⁰⁴ Virtually overnight, mortgage loans became easy, risk-free, and abundant. "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."²⁰⁵ The federal guarantee fueled a world-wide market in mortgages, created the middle class, and produced a stable and profitable banking sector.²⁰⁶ The FHA did not lend money itself, but it created a large insurance fund backed by the United States Treasury that would guarantee all approved mortgage loans, shifting the bulk of the risk of loan default from banks to the government.²⁰⁷ This transformation was aided along by

199. See *id.*; Michael S. Carliner, *Development of Federal Homeownership "Policy,"* 9 HOUSING POL'Y DEBATE 299 (1998), <http://www.michaelcarliner.com/HPD98-OwnershipPolicy.pdf>.

200. See Baradaran, *supra* note 26.

201. See Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSPECTIVES 93, 95 (2005) ("[T]he government established the Federal Housing Administration (FHA) to provide the mortgage insurance necessary for investors to purchase mortgages with confidence."); *1934–1968: FHA Mortgage Insurance Requirements Utilize Redlining*, THE FAIR HOUSING CTR. OF GREATER BOS., <https://www.bostonfairhousing.org/timeline/1934-1968-FHA-Redlining.html> [<https://perma.cc/MU8P-8T7W>].

202. Green & Wachter, *supra* note 201, at 96 (discussing the creation and effect of the Servicemen's Readjustment Act); BARADARAN, *supra* note 95, at 106; *1934: Federal Housing Administration Created*, THE FAIR HOUSING CENTER OF GREATER BOS., <https://www.bostonfairhousing.org/timeline/1934-FHA.html> [<https://perma.cc/N75J-RCE6>].

203. Green & Wachter, *supra* note 202, at 97.

204. *Id.*

205. BARADARAN, *supra* note 93, at 315 n.18.

206. See HYMAN, *supra* note 44, at 53.

207. The federal guarantee revolutionized mortgages because the fund insured 90% of individual home mortgages. *Single Family Housing Guaranteed Loan Program: Overview*, USDA, <https://www.rd>

the 1938 creation of the Federal National Mortgage Association (FNMA or “Fannie Mae”), also referred to as a Government Sponsored Entity (GSE), which created a securitized secondary market in mortgage loans.²⁰⁸

These public credit programs created the modern mortgage market. Federal interventions unleashed unprecedented levels of private capital investment because they took the risk out of mortgage lending. Before the interventions of the FHA and the GSE’s, mortgages were hard to come by, but even when they were available, they were short-term loans of around five years and the home buyer needed up to 50% of a down payment.²⁰⁹ After the federal government programs, the mortgage market boomed. Hundreds of thousands of new private banks, thrifts, credit unions and private non-bank lenders entered the market due to these programs.²¹⁰ Private banks issued the mortgages, private funds invested in secondary mortgage markets, private lenders made credit decisions, and private market shareholders made profits; thus the credit market appeared to be a private market, but the truth is that without the government programs, the market would not have existed.²¹¹ This truth was apparent when one focused on the Black neighborhoods where the FHA refused to guarantee mortgages, as described below. Banks increasingly relied on the protocol and standards provided by the government agencies that were insuring the mortgages and managing their resale.²¹² Interest rates and terms converged as did the types of borrowers. Banks were much less likely to take risks on borrowers that did not fit the gold standard, which was white, middle-class, and male.²¹³ Yet to call those who qualified for these loans “the middle class” is an evasive and circular description. Many were blue collar wage workers, but it was precisely through these mortgages that they became the much-heralded American middle class.²¹⁴ These borrowers would not have been able to buy homes before these reforms; over half of mortgage borrowers

.usda.gov/programs-services/single-family-housing-guaranteed-loan-program. According to Julian Zimmerman, 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.” See HYMAN, *supra* note 44, at 53 (citing FHA, *FHA STORY IN SUMMARY, 1934–1959* 4 (1959)).

208. According to Louis Hyman, the FHA program “completely reversed” “[t]he conventional justification for government intrusions.” FHA money was “not the dole” and “not taxpayer money.” HYMAN, *supra* note 44, at 55.

209. *Id.* at 72.

210. See *Evolution of the U.S. Housing Finance System: A Historical Survey and Lessons for Emerging Mortgage Markets*, U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT (April 2006), https://www.huduser.gov/publications/pdf/US_evolution.pdf [<https://perma.cc/R9L-L7FV>].

211. BARADARAN, *supra* note 93, at 235.

212. *Id.* at 106.

213. *Id.* at 107.

214. *Id.*

earned less than \$2,500 per year.²¹⁵ After these programs, mortgage loans became far more accessible than they had ever been as banks significantly reduced down payment requirements, lengthened loan terms, and slashed interest rates.²¹⁶ “In the transformed mortgage market, they could pay less in mortgage payments than they were paying in rent. A borrower who moved from renting a small apartment in the city to owning a large home in the suburbs was actually saving money.”²¹⁷

The FHA developed discriminatory credit guidelines, which reflected the widespread racial discrimination of the era.²¹⁸ Government analysts decided that lending to Black borrowers was too risky, and thus coded Black neighborhoods as uncreditworthy.²¹⁹ This turned out to be a self-fulfilling prophesy. By not insuring home mortgages to Black communities, the FHA programs cut off the credit supply to these families and blocked the only route to building middle class wealth and equity available at the time. The lack of wealth thus led to higher cost credit, which cyclically led back to lower wealth, a segregated and self-perpetuating economic system, which I’ve called “Jim Crow Credit.”²²⁰ These subsidies and loan guarantees allowed eligible borrowers (mostly restricted to white men) to build wealth while paying less of their wages for housing costs.²²¹ They built and overdeveloped the country through suburbs through suburbanization and white flight, and they led to segregated communities, schools and credit markets.²²²

The FHA is an example of a government credit program with the power to redesign the entire credit landscape. By nature of these mortgages, many Americans built intergenerational wealth and gained social capital and access to other low-cost credit and services that have continued to enhance the lives of their progeny.²²³ Those left out of these wealth-building subsidies were pushed into alternative and higher cost credit markets.²²⁴ In

215. *Id.*

216. See HYMAN, *supra* note 44, at 56–57; KENNETH T. JACKSON, CRABGRASS FRONTIER 204–05 (1985).

217. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 17 (2nd ed. 2006).

218. RICHARD ROTHSTEIN, A COMMENT ON BANK OF AMERICA/COUNTRYWIDE’S DISCRIMINATORY MORTGAGE LENDING AND ITS IMPLICATIONS FOR RACIAL SEGREGATION 5–6 (Econ. Pol’y Inst. Briefing Paper #335, Jan. 23, 2012), <https://www.epi.org/files/2012/bp335.pdf>.

219. James A. Allen, *The Color of Algorithms: An Analysis and Proposed Research Agenda for Detering Algorithmic Redlining*, 46 FORDHAM URB. L.J. 219, 222 (2019).

220. Baradaran, *supra* note 26.

221. See *id.* at 900.

222. See *id.* at 890, 905.

223. MEHRSA BARADARAN, RETHINKING FINANCIAL INCLUSION: DESIGNING AN EQUITABLE FINANCIAL SYSTEM WITH PUBLIC POLICY 17 (2020), https://rooseveltinstitute.org/wp-content/uploads/2020/04/RI_FinancialInclusion_Working-Paper_202003.pdf.

224. Baradaran, *supra*, note 26, at 938–39.

fact, many of the legal structures and private market efforts aimed at financial inclusion and access to credit have these historically redlined communities in mind. Black Americans are disproportionately unbanked and underbanked and are more likely to have to resort to high interest credit products like payday loans.²²⁵ Black communities were also more likely to be sold subprime mortgages, contract sales, and other wealth-stripping mortgage products when the underlying nature of the credit markets shifted.²²⁶ These predatory high-cost subprime mortgages and payday loans were justified by the industry and the regulators that allowed them through the rhetoric of financial inclusion and increased access to credit.²²⁷ In other words, it was believed that the private market could fix disparities created by public policy, but the gaps that led to financial exclusion were the result of government credit and banking policies and not “natural market forces.” Even well-meaning financial inclusion programs, including robust anti-redlining measures like the CRA, remain firmly rooted in neoliberal logic that centers the private banking market in remedying the historic exclusion of Black communities.²²⁸

The FHA- and GSE-enabled federal mortgage markets were not an added product that provided credit to those outside the circle. It expanded, or created, a circle by changing the entire credit market. The FHA did not simply “increase access to credit.” Rather, it redesigned the modern mortgage credit market. Today, these programs are ongoing economic programs that are self-sustaining, though they have changed in significant ways. They have become the background economic engine that most Americans rely on to attend school or buy a home. The invisibility of these ongoing programs and supports hides the true nature of the credit markets as a byproduct of legal and regulatory design.

The point of cataloguing the public nature of credit and payments is to show that the banking system at its root and branches is shaped by public policy, subsidized by public funds, and built on a public monopoly. With this view of the mainstream banking system, we can turn our attention back out to the periphery and propose a new way of articulating the nature of financial inclusion and access to credit.

225. See BARADARAN, *supra* note 93, at 14. See generally FED. DEPOSIT INS. CORP., *supra* note 10, at 2–3.

226. BARADARAN, *supra* note 93, at 212–14.

227. See PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROWER, AND WHY 15 (2012).

228. BARADARAN, *supra* note 154, at 154–61; KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019).

PART III

If public policy determines the nature and the shape of credit markets, what is the meaning of financial inclusion? By focusing on the nature of credit at the center of the concentric circles of inclusion and contrasting that credit with what lies outside, it becomes clear why the prevailing view of financial inclusion is flawed. Who has access to credit and at what price is often a policy decision or is a result of a former policy determination. Likewise, access to the payment system is also an outcome of institutional design and policy. Yet in discussions about financial inclusion, the role of public policy is often evaded. As described in Part I, the rhetoric around financial inclusion and the programs and products proposed as remedies erase the role of the public provisioning of the financial system. Each model of financial inclusion relies on private or charitable services apart from the “normal” banking system. Financial inclusion is discussed as a separate and supplementary project disconnected from the central machinery of finance. Access to credit is the provision of credit that is more or different than what is provided in mainstream “markets.” Yet to speak of markets at all is misleading. Lending is a profitable venture for those engaged in it and market competition among the various banks and credit issuers, but the basic structure of the market is policy. Therefore, financial inclusion must be reconceptualized within a framework of policy-created credit and monetary policy. Credit policies like the FHA programs or lending supports mentioned above are different than monetary policy, but they are linked and inter-related in significant ways. This Part will talk about the political economy of money and credit because decisions regarding monetary policy determine credit availability and vice versa. Moreover, even at the basic level, money is a form of credit and vice versa. There are distinctions, but for the purpose of the financial design proposed in this Article, they are both a result of legal design. This Part thus aims to connect the “democratization of credit” to democratic functions.

Any discussion of financial inclusion and access to credit that is detached from political power and democratic governance is incomplete. Conversation about financial inclusion should not be relegated to the fringes of finance; rather it should be discussed within the domain of policymaking. Regardless of intent or even awareness, financial regulators are making decisions about credit and financial inclusion whenever they pull on their various monetary policy tools. These decisions affect the core of the economy and lead to the expansion or contraction of credit availability, interest rates, investment opportunities, wages, and other prices. The connection is not always direct and often monetary policy actions do not lead to desired or intended outcomes. The economy is complicated and the

role of individual policies to effect systemwide outcomes is weak and indirect. Yet, there are tangible effects to monetary policy decisions. Today, credit policy and monetary policy are not a regular part of democratic debate even though these policy decisions affect prices, the rate of unemployment, and the cost and availability of credit in fundamental ways.²²⁹ This was not always the case.

At certain moments in American history, decisions about the nature and quantity of money and credit in the economy were viewed as a matter of fierce political and legal debate.²³⁰ The debates about money were key issues around which the parties coalesced. Gold versus silver, specie versus fiat money, and national currencies versus state currencies were matters decided by the polity, usually during elections.²³¹ Political factions defined their ideology based on monetary policy. They understood that the type of money in circulation had effects on market prices, employment rates, credit availability, and even inequality levels.²³²

A. Progressives, Populists, and Access to Credit

The era of rising progressive politics from the 1890s until the 1940s marked a time of unprecedented economic growth and American power as well as a protracted debate about the nature of democracy and capitalism.²³³ Many of these progressive theories are embedded in today's financial system, including the creation of the federal reserve, federal lending programs, FDIC insurance, and fiat (or paper) money.²³⁴

Central to the progressive and populist movement were issues of money and credit. Progressives introduced public platforms advocating "access to credit" and looser monetary standards as a matter of policy.²³⁵ To these reformers, access to credit was not about the outer rungs of system; they had in mind a complete re-writing of the financial code and the design of banking. Some of these movement coalitions were even dubbed by the money standard they were advocating. Groups called the "free silverites"

229. See, e.g., BD. OF GOVERNORS OF THE FED. RES. SYS., *About the Fed*, <https://www.federalreserve.gov/faqs/why-is-it-important-to-separate-federal-reserve-monetary-policy-decisions-from-political-influence.htm> [<https://perma.cc/89N2-GT5D>].

230. See, e.g., Ellen E. Meade, *The FOMC: Preferences, Voting, and Consensus*, 87 FED. RES. BANK ST. LOUIS REV. 93, 93 (2005).

231. See Alan Gevinson, *Silverites, Populists, and the Movement for Free Silver*, TEACHING HISTORY, <https://teachinghistory.org/history-content/ask-a-historian/25222> [<https://perma.cc/3LA9-9V3B>].

232. See *id.*

233. JOHN D. HICKS, *THE POPULIST REVOLT: A HISTORY OF THE FARMER'S ALLIANCE AND THE PEOPLE'S PARTY* (1931).

234. See CRAIG K. ELWELL, CONG. RESEARCH SERV., 7-5700, *BRIEF HISTORY OF THE GOLD STANDARD IN THE UNITED STATES* (2011).

235. BARADARAN, *supra* note 223, at 18.

and “the greenbackers” were part of the base of the progressive party and were single-issue voters.²³⁶ It was amidst this era of upheaval and public debate that terms like “access to credit” and the “democratization of credit” entered the political lexicon.²³⁷

To progressive reformers, credit accessibility was a binary choice—gold or silver.²³⁸ Similarly, credit was not a product that was distinct from the monetary and banking system, but a direct outgrowth of it.²³⁹ If money was based on the gold standard, credit would be scarce. Gold was essentially restrictive and only the wealthy would have access to this type of money.²⁴⁰ Silver was more accessible.²⁴¹ Paper money was even more flexible.²⁴²

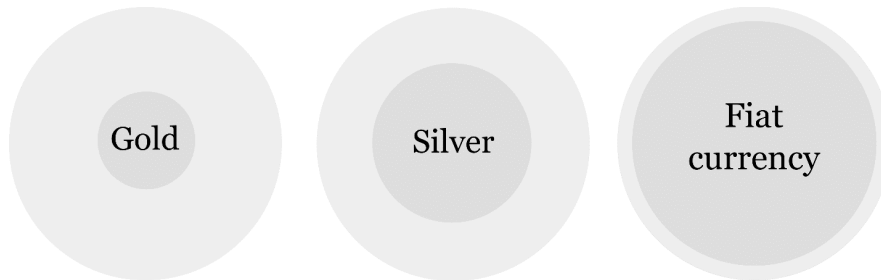


Figure F

The Progressive era money tradition pushed for an expansionary money system, a demand rooted in largely unstated but revolutionary ideas about money, specifically the flexibility of money forms, the connection between money and politics, and the distributional effects of monetary standards.²⁴³ Several crucial presidential elections featured monetary policy as a central issue of debate.²⁴⁴ The populist party platform of 1892 expressed the issue as follows:

236. Baradaran, *supra*, note 26 at 888; *Greenback Movement*, BRITANNICA <https://www.britannica.com/event/Greenback-movement> [<https://perma.cc/8VSG-YQHF>].

237. Corpus Linguistic search of “Access to Credit” and “Democratization of Credit” from Brigham Young U. database (Feb. 18, 2019) (on file with author).

238. See Gevinson, *supra* note 231.

239. John Aziz, Does the Federal Reserve Really Control the Money Supply?, *THE WEEK* (May 30, 2013), <https://theweek.com/articles/463787/does-federal-reserve-really-control-money-supply> [<https://perma.cc/46BR-P8VG>].

240. See William Jennings Bryan, “*Cross of Gold*” Address at the Democratic Nat’l. Convention (Jul. 9, 1896), <http://historymatters.gmu.edu/d/5354/> [<https://perma.cc/F3CT-UFAJ>].

241. Gevinson, *supra* note 231.

242. See GEORGE SELGIN, *THE RISE AND FALL OF THE GOLD STANDARD IN THE UNITED STATES* (Cato Inst. Pol’y Analysis No. 729, 2013).

243. MURRY N. ROTHBARD, *A HISTORY OF MONEY AND BANKING IN THE UNITED STATES: THE COLONIAL ERA TO WORLD WAR II 183–234* (2002); see also MICHAEL O’MALLEY, *FACE VALUE: THE ENTWINED HISTORIES OF MONEY AND RACE IN AMERICA* (2012).

244. SCOTT JOHN HAMMOND, ROBERT ROBERTS & VALERIE SULFARO, *CAMPAIGNING FOR PRESIDENT IN AMERICA 1788–2016* 563, 574–75, 585 (2016).

We demand a national currency, safe, sound, and flexible, issued by the general government only, a full legal tender for all debts, public and private, and that without the use of banking corporations, a just, equitable, and efficient means of distribution direct to the people. . . . We demand free and unlimited coinage of silver and gold at the present legal ratio of 16 to 1 We demand that the amount of circulating medium be speedily increased to not less than \$50 per capita. . . . We believe that the money of the country should be kept as much as possible in the hands of the people, and hence we demand that all State and national revenues shall be limited to the necessary expenses of the government, economically and honestly administered. . . . We demand that postal savings banks be established by the government for the safe deposit of the earnings of the people and to facilitate exchange.²⁴⁵

This, plus a provision on taxation, was the entire platform.²⁴⁶ Things came to a head in the 1896 Presidential election when William Jennings Bryan became the Democratic candidate after a rousing polemic on behalf of the common man against the bankers. “You shall not crucify mankind on a cross of gold,” he demanded on behalf of the small farmers he represented.²⁴⁷ This was the first time in American history that the Gold standard became a political lightning rod. This was a result of an act of legislation called “The Crime Act of 1873,” that created a minor change in codification with large political effects.²⁴⁸ Throughout American history, money could be backed by both gold and silver depending on the price and availability of each—and the nation toggled between the two.²⁴⁹ Officially, the United States began with a bimetallic money standard in which both gold and silver were used to define the monetary unit, as recommended by Treasury Secretary Alexander Hamilton in the first coinage act.²⁵⁰ Silver was more readily available from 1792 to 1834 and thus was the unofficial money standard.²⁵¹ Silver was the cheaper metal and more convenient to mint and exchange. From 1834 until 1862, Congress tipped the scales

245. KIRK H. PORTER & DONALD B. JOHNSON, NATIONAL PARTY PLATFORMS 1840-1964 91 (1966).

246. *Id.*

247. Brian Domitrovic, *As the Fed Splintered the Cross of Gold, Farmers Held the Bag*, FORBES (Feb. 14, 2011, 10:42 PM), <https://www.forbes.com/sites/briandomitrovic/2011/02/14/as-the-fed-splintered-the-cross-of-gold-farmers-held-the-bag/#24fe98221079> [<https://perma.cc/QBH3-VYEV>].

248. An Act Revising and Amending the Laws Relative to the Mints, Assay-offices, and Coinage of the United States, 17 Stat. 424, (February 1873). This is sometimes referred to as “The Crime of ‘73.” See ELWELL, *supra* note 234, at 6 n.26.

249. JOSEPH R. CONLIN, THE AMERICAN PAST: A SURVEY OF AMERICAN HISTORY 536 (10th ed. 2013).

250. ELWELL, *supra* note 234, at 2.

251. See Selgin, *supra* note 243.

toward gold by changing the ratio.²⁵² New gold discoveries in the west also led to gold being the dominant standard during this era.²⁵³ After the brief experiment with fiat currency²⁵⁴ was over, the Treasury went back to a gold standard in 1879 with two important changes: “(1) the government now was an issuer of paper money redeemable on demand and (2) the paper money was legal tender.”²⁵⁵ Congress ended fiat currency by legislation, but without debate, they chose only gold and not bimetallism as was the custom.

One of Bryan’s chief political issues was money. Bryan explained, “We say in our platform that we believe that the right to coin money and issue money is a function of government. We believe it. We believe it is a part of sovereignty and can no more with safety be delegated to private individuals than can the power to make penal statutes or levy laws for taxation.”²⁵⁶ He linked his platform, not erroneously, to Thomas Jefferson and Andrew Jackson. “I stand with Jefferson rather than with them,” referring to the class of bankers, “and tell them, as he did, that the issue of money is a function of the government and that the banks should go out of the governing business.”²⁵⁷ Despite his passion, Bryan lost the debate. Congress reaffirmed its commitment to gold by passing the “Gold Standard Act” in 1900, which fixed the standard of value to gold for all forms of money issued or coined by the United States, to refund the public debt, and all other purposes.²⁵⁸

The choice between the gold standard, silver standard, bimetallism (gold and silver), or fiat currency was a choice made by the legislature that affected how much credit would be available and ultimately to whom. The choice to move from gold to silver expanded the circle of credit available, and the move from silver to fiat currency expanded it even more. These expansions were not without cost. In fact, with each expansion, the currency was devalued.²⁵⁹ This was the point. Increasing the amount of money meant that those who held money would have less of it in proportion to the whole. Changes in the monetary standard, like inflation today, affected property rights and contract rights by diminishing the value of fortunes held or to be received. If money was seen as a contract or property right by the holder of the money and enforced by the sovereign, many argued that a legislative change in the basis of the currency was a breach of contract or a violation

252. ELWELL, *supra* note 234, at 3.

253. *Id.* at 2–3.

254. This period lasted from 1862 to 1879. *Id.* at 5.

255. *Id.* at 6.

256. ALBERT J. BEVERIDGE, GEORGE FRISBIE HOAR, WILLIAM JENNINGS BRYAN & WILLIAM BOURKE COCKRAN, GREAT POLITICAL ISSUES AND LEADERS OF THE CAMPAIGN OF 1900 422 (1900).

257. JOLYON P. GIRARD, DARRYL MACE, COURTNEY MICHELLE SMITH, 2 AMERICAN HISTORY THROUGH ITS GREATEST SPEECHES: A DOCUMENTARY HISTORY OF THE UNITED STATES 299 (2017).

258. Gold Standard Act, 31 Stat. 45 (1900).

259. ELWELL, *supra* note 234.

of a property right.²⁶⁰ These contractual arguments were used against the legal tender acts as well as the bimetallism proposals of the populists and progressives.²⁶¹

Backers of gold often rejected the popular demands for bimetallism by stating that the gold standard was “natural” and “scientific.”²⁶² In actuality, the gold standard was a result of a legal design. There was nothing inherently valuable or “money-like” to gold, but it became public policy that gold would be the money standard.²⁶³ The Progressive Era reformers were joined by several other factions, including Wall Street bankers, in pushing for more flexible monetary forms and a central bank in order to avoid constant financial panics and crises caused by limited gold supply.²⁶⁴ The gold standard proved to be overly restrictive and unstable with many scholars blaming the dogged insistence on gold for exacerbating the Great Depression.²⁶⁵ Along with passing many other progressive reforms, Franklin Roosevelt essentially ended the gold standard in 1933 without public debate.²⁶⁶

The crucial turn of the century debates about the monetary standard were a matter of public democratic debate. The monetary standard would be decided by law or policy, lead to money expansion or contraction, and have significant effects on the availability of credit. Small farmers would not have access to credit under the gold standard, but they would under bimetallism. Holders of gold would lose the value of investments if the standard shifted to silver. Inclusion and access to credit were linked to how much money was available in the economy. As Christine Desan explains in her historic account about the creation of fiat money in the 1600s, *Making Money*, decisions regarding the nature and availability of money are always

260. See, e.g., JOHN MAYNARD KEYNES, *THE ESSENTIAL KEYNES* (Robert Skidelsky ed., 2016).

261. *Id.*

262. O'MALLEY, *supra* note 243, at 134–38.

263. Gold was not just the monetary standard in the United States, but across the world as well. This is likely due to the Roman Empire's decision to use gold coins as currency and then the Bank of England's decision to peg their currency to their supply of gold. For an excellent history of the gold standard, see DESAN, *infra* note 268; PAID: TALES OF DONGLES, CHECKS, AND OTHER MONEY STUFF (Bill Maurer & Lana Swartz, eds. 2017).

264. Raghuram G. Rajan & Rodney Ramcharan, *Land and Credit: A Study of the Political Economy of Banking in the United States in the Early 20th Century* (Nat'l Bureau of Econ. Res., Working Paper No.15083, 2009), <https://www.nber.org/papers/w15083.pdf>; Murray N. Rothbard, *The Origins of the Federal Reserve*, MISES INSTITUTE (Nov. 13, 2009), <https://mises.org/library/origins-federal-reserve> [<https://perma.cc/V354-VEKD>].

265. E.g., Barry Eichengreen & Peter Temin, *Fetters of Gold and Paper*, 26 OXFORD REV. ECON. POL'Y 370, 372 (2010).

266. ELWELL, *supra* note 234, at 9–11; Milton Friedman, *Franklin D. Roosevelt, Silver, and China*, 100 J. POL. ECON. 62, 66 (1992).

legal and political.²⁶⁷ This approach, which she has called the Constitutional Approach of Money, challenges the prevailing story that describes money as a natural byproduct of the evolution of trade from barter to gold coins to fiat money.²⁶⁸ According to prevailing neoliberal theories of money, money is a neutral medium of exchange.²⁶⁹ Desan explains that historically, money forms gained legitimacy and became currency when they were issued by the government, enforced by the legal system, and redeemed by public treasuries for payment.²⁷⁰ “Rather than coming at money from the outside,” Desan explains, “the constitutional approach comes at it from the inside.”²⁷¹

The crucial point is that “money has an internal design: societies produce it by structuring claims of value in ways that make those claims commensurable, transferable, and available for certain private as well as public uses.”²⁷² Those design decisions have market-shaping consequences, and, more crucially for this project, policy decisions about money affect social inequality. Felix Martin compares the conventional view of money as a “fulcrum of the scales of political justice . . . just like the fulcrum on a physical pair of scales, it has to be fixed in place in order to be accurate.”²⁷³ Yet history does not support this view of money. Economic value has not been a natural fact, but rather, determinations of value are socially created. Money is not a natural element that needs to be excavated or discovered. It is a system of agreed-upon value that must be designed to meet the needs of a particular society or economy. Money does not just measure value, but it creates it. As Martin explains about the creation of new monetary regimes, “There is therefore nothing intrinsically wrong with moving the fulcrum of the scales of justice, since their purpose is not to achieve accuracy—a notion without meaning in the social world—but fairness and prosperity.”²⁷⁴ In other words, when there are inequalities created by the monetary regime

267. See CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* 127–31 (2014), (describing the history of the monetary system in England and early America).

268. See, e.g., *id.* at 113–18 (describing the constitutional approach to money); RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 57 (2015) (“Only in a crisis do citizens wonder why they should exchange valuable goods and services for pieces of paper with no intrinsic value.”); Julia Y. Lee, *Money Norms*, 49 *LOY. U. CHI. L.J.* 57, 62 (2017) (“Fiat money has no intrinsic value; it is ultimately a social construct whose value turns on beliefs, expectations, and social relations between its users.”); Simon H. Rifkind, *Money as a Device for Measuring Value*, 26 *COLUM. L. REV.* 559, 559 (1926) (observing that “money is the measuring device and the medium of expression for value”).

269. See DESAN, *supra* note 267, at 112–13 (noting the modern equilibrium theory is built on the notion that money is neutral).

270. *Id.* at 3.

271. *Id.*

272. *Id.*

273. FELIX MARTIN, *MONEY: THE UNAUTHORIZED BIOGRAPHY—FROM COINAGE TO CRYPTOCURRENCIES* 264–65 (2015).

274. *Id.* at 265.

(such as was created during the gold standard), it is legitimate and perhaps necessary “to move the fulcrum to restore balance.”²⁷⁵

B. *The Creation of the Federal Reserve*

The founding and establishment of the Federal Reserve was another pivotal policy that was debated on terms of access to credit.²⁷⁶ A crucial point of contention was whether to make the Federal Reserve a public institution or a private one, with progressives and populists arguing the former and Wall Street bankers arguing the latter.²⁷⁷ These were political decisions and the various groups of populists, progressive reformers, and Wall Street bankers understood them as such.²⁷⁸ For example, what types of liquidity support would the Federal Reserve be authorized to give and to whom?²⁷⁹ The types of assets the Federal Reserve would guarantee would also affect different types of borrowers differently.²⁸⁰ The legal definitions of asset that the Federal Reserve would guarantee created a property right with a market value. The legal determination embedded in the Fed’s mandate on this issue determined, according to Nadav Orian Peer, “what class of borrowers [would] enjoy preferred access to credit?”²⁸¹ The

275. *Id.* at 264–65.

276. See Robert Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility: Comprehending Corporate Wealth Maximization and Distribution for Stockholders, Stakeholders, and Society*, 76 TUL. L. REV. 1531, 1547 (2002) (describing the purpose of the Federal Reserve); see also, ROGER LOWENSTEIN, *AMERICA’S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE* (2015) (detailing the debates on access to credit).

277. Sarah Binder & Mark Spindel, *Monetary Politics: Origins of the Federal Reserve*, 27 STUD. AM. POL. DEV. 1, 3 (2013); J.P. Morgan, *The Panic of 1907, & The Federal Reserve Act*, CONSTITUTIONAL RIGHTS FOUNDATION 8 (2012), <https://www.crf-usa.org/images/pdf/pdf/jpmorgan.pdf> [<https://perma.cc/YXZ6-L7MX>].

278. See Binder & Spindel, *supra* note 277.

279. See generally JACOB HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); see also Ashford, *supra* note 276, at 1547 (“The purpose of the Federal Reserve Act, which was established to provide more broadly distributed (democratic) access to business credit and to promote economic growth consistent with a stable money supply in support of stable prices.”). For a discussion on public/private compromise, see ALAN M. MELTZER, *1 A HISTORY OF THE FEDERAL RESERVE* 3 (2003) (quoting President Woodrow Wilson) (“[A] currency which comes into existence in response to the call of every man who can show a going business and a concrete basis for extending credit to him, however obscure or prominent he may be . . .”); Binder & Spindel, *supra* note 277 (“Two key disputes emerged as the House and Senate worked on currency bills in 1913. First how should Congress balance the demands by eastern, primarily Republican, bankers for centralized authority against the demands by Populists and Democratic farmers for decentralized control of the flow of credit?” (footnote omitted)); Peter Conti-Brown, *The Twelve Federal Reserve Banks: Governance and Accountability in the 21st Century* (Hutchins Ctr on Fiscal & Monetary Policy at Brookings, Working Paper No. 10, 2015), https://www.brookings.edu/wp-content/uploads/2016/06/PCB_WorkingPaper10June24Final.pdf.

280. See Michael D. Bordo & David C. Wheelock, *The Promise and Performance of the Federal Reserve as Lender of Last Resort 1914-1933*, at 15–16 (Nat’l Bureau of Econ. Research, Working Paper No. 16763, 2011).

281. Nadav Orian Peer, *Negotiating the Lender of Last Resort: The 1913 Federal Reserve Act as a Debate Over Credit Distribution*, 15 N.Y.U. J.L. & BUS. 367, 411 (2019).

institutional law-made architecture “was part of an agenda of replacing corporate concentration with competition and decentralization,” Peer explains. “They were not only attempts at preventing panics but a program to redistribute credit away from the corporate capital market and into smaller scale commercial activity.”²⁸²

In other words, the legal design of the Federal Reserve would determine who had “access to credit.” In fact, that moment of debate is when the term entered the political lexicon. A search of all public documents in the largest database made recently available through the Corpus Linguistics project shows that the term “access to credit” was used only eleven times between 1800 and 1900. By 1920, it was used twenty-seven times and entered common usage by 1970. I researched every use of the term before 1900 and found that every instance of usage referred to foreign banks. In the American context, “access to credit” was first used in the debates about the Federal Reserve and increased thereafter.²⁸³

The Federal Reserve’s decision in 2008 to use its emergency powers to bail out the banks rather than underwater homeowners also had significant distributional consequences.²⁸⁴ Then, the Federal Reserve’s unprecedented monetary infusions through programs like QE created distributional effects that are yet to be fully accounted for and understood.²⁸⁵ These emergency credit programs and the monetary policy that followed were all a result of policymaking, legal structure, and institutional design.

The Federal Reserve’s role in the payments system was clearer than its evolving role in monetary policy. Congress instructed the Fed in the 1913 Federal Reserve Act to “increase the integrity, efficiency and equity of U.S. payments.”²⁸⁶ It was structured as a public institution by legal design. According to its own charter, “the Federal Reserve was established to serve

282. *Id.* at 411–12.

283. See Ashford, *supra* note 276, at 1547 (“[T]he purpose of the Federal Reserve Act, which was established to provide more broadly distributed (democratic) access to business credit and to promote economic growth consistent with a stable money supply in support of stable prices.”); Binder & Spindel, *supra* note 277; see also MELTZER, *supra* note 279 (“[A] currency which comes into existence in response to the call of every man who can show a going business and a concrete basis for extending credit to him, however obscure or prominent he may be . . .”).

284. See KONCZAL & MASON, *supra* note 192, at 46; PERRY MEHLING, *THE NEW LOMBARD STREET: HOW THE FED BECAME THE DEALER OF LAST RESORT* 28 (2011) (noting a severe contraction in private liquidity during the financial crisis and the distributional consequences of federal liquidity programs).

285. For legal academy treatment of money, see DESAN, *supra* note 267; McLeay et al., *supra* note 195; Ricks et al., *supra* note 187; Deborah D’Souza, *Modern Monetary Theory*, INVESTOPEDIA, (May 6, 2020), <https://www.investopedia.com/modern-monetary-theory-mmt-4588060> [<https://perma.cc/2BV4-VGCZ>].

286. *Examining Regulatory Frameworks for Digital Currencies and Blockchain: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 116th Cong. 8 (2019) (statement of Mehrsa Baradaran, Professor of Law, University of California Irvine School of law).

the public interest.”²⁸⁷ The Federal Reserve has interpreted its role in the payments system as a mandate “to bring to payments markets an overall concern for safety and soundness, promotion of operating efficiency, and equitable access.”²⁸⁸ The Fed states that “considerations relating to integrity, efficiency, and access to the payments system will remain at the core of the Federal Reserve’s role and responsibilities regarding the operation of the payments system.”²⁸⁹ The Fed also recognizes the need to adapt its mandate to changing conditions, stating, “given the size, speed, and interdependencies of payments, this mission is, and will likely continue to be, even more important than it was when the Federal Reserve was established in 1913.”²⁹⁰

Congress did not mandate the Federal Reserve to provide an account for every individual, but rather to ensure “equitable” access.²⁹¹ Since its inception, the Federal Reserve has chosen to use banks as intermediaries for credit allocation and for access to the payments system.²⁹² The banks operate as intermediaries between the central bank’s credit and payments system and the broader economy, but banks do not have an obligation to provide every customer with an account or with access to credit. At the time the Federal Reserve was chartered, access to the payments system was not crucial to participation in the economy. So long as a merchant could use cash or bills, she could participate in commerce. Today, the majority of transactions have been digitized.²⁹³ Paying bills, being paid for work, purchasing food or supplies—all of these financial transactions are conducted using a credit or debit card, an online platform, a mobile app, or a check. These all require access to the centralized payments system. As noted above, those without bank accounts pay a fee to make all of these transactions because the Federal Reserve does not allow individuals access to the payments system without a bank account.²⁹⁴ To the extent that this

287. FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 1–7 (10th ed. 2016), https://www.federalreserve.gov/aboutthefed/files/pf_complete.pdf [<https://perma.cc/X5DH-PMW4>].

288. *Policies: The Federal Reserve in the Payments System*, BD. GOVERNORS FED. RES. SYS. (1990), https://www.federalreserve.gov/paymentsystems/pfs_frpaysys.htm [<https://perma.cc/TD5B-LW4D>].

289. *Id.*

290. *Id.*

291. *See id.*

292. Aziz, *supra*, note 239.

293. *Peace Out, Paper: A Cashless Society Is on the Horizon*, BUSINESS.COM, (updated May 1, 2020), <https://www.business.com/articles/a-cashless-society-is-on-the-horizon/> [<https://perma.cc/5K72-DLMH>]; M. Szmigiera, *Cashless Payments in the United States - Statistics & Facts*, STATISTA (Dec. 16, 2019), <https://www.statista.com/topics/4586/cashless-payments-in-the-united-states/> [<https://perma.cc/HU7B-UWVV>] (“In 2018, credit cards were the most common method of payment in the United States, followed by debit cards and then cash.”).

294. *See* FED. RESERVE SYS., *supra* note 287, at 118–51.

system is exclusionary, the Federal Reserve can and should meet its legal mandate by opening its payments system to individuals. The next section will explain how this can be done.

C. *Financial Redesign*

The current understanding of financial inclusion and access to credit is flawed and incomplete because it focuses on access, inclusion, and gap filling without describing the essential nature of money and credit. Defining “access” has everything to do with defining “credit.” The prevailing neoliberal view of credit markets, especially with regards to consumer credit markets, conceives of credit as a natural and finite product of the market. Its cost and availability are determined by the lender.²⁹⁵ The borrower’s “creditworthiness” is the essential determinative factor in whether a credit product is available and how much it costs.²⁹⁶

The prevailing model of finance hides the essential nature of credit—its availability and cost on a systemic level. At the micro level where a borrower seeks a loan from a lender, this basic description is accurate: An individual lender has a limited quantity of money. If she decides to lend it for a profit, she must calculate the odds of getting the money back. She will determine whether to lend, how much to lend, and at what cost depending on the risks she faces of losing her money. If the risk is high, she will require higher interest to compensate her. If the risk is too high, she will not lend. This is the model of credit availability and cost when it comes to most non-bank lenders.²⁹⁷ A payday lender, a pawn shop, credit card companies, and other consumer lenders are taking risks with their own funds or their investors’ funds when they lend.²⁹⁸ However, the modern credit markets do not work this way. As demonstrated in Part II, banks create money when they lend.²⁹⁹ The money they are lending does not have to come from their pocketbook or their investors’ accounts.³⁰⁰ The money is created through

295. See Steven L. Schwarcz, *The Financial Crisis and Credit Unavailability: Cause or Effect?*, 72 BUS. LAW. 409, 412 (2017) (noting that credit availability depends on financial markets and banks).

296. See Baradaran, *supra* note 154, at 493–94 (noting that banks do not lend to the poor because of higher credit risks and narrower profit margins).

297. Jonnelle Marte, *Non-bank Lenders Are Back and Even Bigger Than Before*, WASH. POST (Sept. 21, 2018, 12:42 AM), https://www.washingtonpost.com/business/economy/non-bank-lenders-are-back-and-even-bigger-than-before/2018/09/21/5fc026a2-bc48-11e8-8792-78719177250f_story.html.

298. *Id.*

299. See BARADARAN, *supra* note 154, at 13–14 (“By lending, banks actually create money. . . . To repeat, commercial banks create money . . . by making new loans. For example, when a bank makes a mortgage loan, it does not just give someone \$100,000 in cash to go purchase a house. Instead it creates a credit—a deposit—in the borrower’s bank account for the size of the mortgage.”).

300. *Id.*

the loan or, on a macro-level, the available money is created by monetary policy and public spending.³⁰¹

At the systemic level, availability of and access to credit are directly linked to federal underwriting policy and the Federal Reserve's monetary policy.³⁰² The determination of creditworthiness and risk of repayment is usually being made through uniform standards and underwriting requirements without regard to the characteristics of individual borrowers.³⁰³ The federal government determines who qualifies for a mortgage—at least a mortgage that the GSE's will purchase or insure.³⁰⁴ The determination of creditworthiness—the size of the credit circle and who can fit inside—is made by policymakers.³⁰⁵ Those who do not fit the requirements are on the outside of the circle. This was most starkly demonstrated through the FHA redlining program, which still determines the “creditworthiness” of the initially excluded households and communities.³⁰⁶

Thus, the job of policymakers is to create a credit and monetary system that achieves justice and shared prosperity. The first step is a rejection of the current narrative about financial inclusion and “access to credit” that views lack of access as a market failure that can be remedied through subsidies or market innovation. As wealth and income gaps have increased, so too have the products and promises from Silicon Valley and Wall Street that a new app, cryptocurrency, or financial product will lead to financial inclusion. These communities do not need better blockchain design or mobile apps—they need simple access to a checking account and a debit card.³⁰⁷

Instead of financial inclusion, consumer advocates and policymakers should focus on financial redesign. Instead of looking to products, subsidies or innovations to include consumers, policymakers can design a more equitable and expansionary financial system. In both the realm of payments and credit, public policies are responsible for exclusion and can be changed to enable expansion. For example, the Fed's monetary policy could bypass

301. See McLeay et. al., *supra* note 195, at 14 (explaining how the majority of money in the economy is created by commercial banks making loans).

302. FED. HOUS. FIN. AGENCY, OFFICE OF THE INSPECTOR GEN., AUD 2012 003, FHFA'S OVERSIGHT OF FANNIE MAE'S SINGLE-FAMILY UNDERWRITING STANDARDS 2-3 (2012), https://www.fhfa.org/Content/Files/AUD-2012-003_0.pdf; *Monetary Policy*, BD. GOVERNORS FED. RES. SYS., <https://www.federalreserve.gov/monetarypolicy.htm> [<https://perma.cc/ZG7Z-P4RC>].

303. FED. HOUS. FIN. AGENCY AUD 2012 003, *supra* note 303.

304. *Id.*

305. *Id.*

306. THE FAIR HOUSING CTR. OF GREATER BOS., *supra* note 201.

307. COOPER, *supra* note 41. See also KEVIN FOSTER, ERIK MEIJER, SCOTT SCHUH & MICHAEL A. ZABEK, THE 2008 SURVEY OF CONSUMER PAYMENT CHOICE 9 (Fed. Reserve Bank of Bos., Discussion Paper No. 09-10, April 2010), <https://www.bostonfed.org/publications/public-policy-discussion-paper/2009/the-2008-survey-of-consumer-payment-choice.aspx>.

banks as an intermediary and directly stimulate the public through investments in education, healthcare, infrastructure, and housing.³⁰⁸ Credit programs with Treasury guarantees have already provided many people with the means to get career training, go to college, or buy a home, as government programs have done in the past.³⁰⁹ They can be used to promote policy goals, such as closing the racial wealth gap or reducing inequality in the future.

We must recognize that many aspects of the financial system, including certain credit programs, payments, and access to safe deposits, are essential services that must be provided for all. When confronting the power of banking trusts and monopoly power over credit, Justice Louis Brandeis proposed that certain industries are especially suited for a public utility nature.³¹⁰ Banking or railroads, for example, were considered services essential to full participation in commerce. In these cases, Brandeis offered an alternative to create a public utility. Such a utility could either compete with the market or offer an alternative. Brandeis believed banking to be among the industries that might be considered a public utility because, as he explained, “deposit banking should be recognized as one of the businesses ‘affected with a public interest.’”³¹¹ This was because banks gained their market power and their profits through the use of “other people’s money.”³¹²

In order to meaningfully participate in the economy, the excluded, unbanked, and communities living in banking deserts need access to the safe and subsidized payments system operated by the Fed. Financial redesign requires that the payments system operated by the Federal Reserve be opened to all. The central bank payments system already resembles a public utility, but it is currently only a public service open to banks who operate as an intermediary. Opening the payments system to the unbanked and underbanked would not cause any disruptions to the financial market, but would be a boon to LMI families who are currently paying to use a public resource.³¹³ In previous work, I have suggested a public option through

308. Konczal and Mason make just such a proposal. KONCZAL & MASON, *supra* note 192; *see also* Baradaran, *supra* note 26 at 943–51. *See generally* Robert C. HOCKETT & SAULE T. OMAROVA, WHITE PAPER: A NATIONAL INVESTMENT AUTHORITY (Cornell Legal Research Paper No. 18-10, 2018).

309. Nadav Orian Peer, *Public Purpose Finance: The Government’s Role as Lender*, 83 LAW & CONTEMP. PROBS. 101 (2020), <https://scholarship.law.duke.edu/lcp/vol83/iss1/7>.

310. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92–108 (1914).

311. *Id.* at 64.

312. *Id.* at 20.

313. *See* KRISTOPHER M. RENGERT & SHERRIE L. W. RHINE, BANK EFFORTS TO SERVE UNBANKED AND UNDERBANKED CONSUMERS 32 (2016), https://www.fdic.gov/consumers/community/research/qualitativeresearch_may2016.pdf [<https://perma.cc/82RG-CBRS>].

postal banking.³¹⁴ Postal banks would offer a free savings and checking account that would enable the unbanked and underbanked to engage in simple financial transactions through the public payments system instead of high cost non-bank options like check-cashing or pre-paid debit cards.³¹⁵ Such an option would put approximately \$89 billion per year back into the pockets—or bank accounts—of the unbanked.³¹⁶ Other researchers have built on the postal banking suggestion and improved on its basic structure.³¹⁷ Ricks, Crawford, and Menand have proposed a “Fed Accounts” system, which would be an individual account offered by the Federal Reserve by way of the post office to all individuals.³¹⁸

On the credit side, the Federal Reserve could operate as a public bank. A public bank need not be linked to the Federal Reserve, but given the history, capacity, and structure of the Federal Reserve, it is likely the institution best suited for such an endeavor. Public banking could remove banks as an intermediary in credit markets and offer direct services, including credit and transactional services directly. Policymakers already make decisions that affect the price of credit and the types of borrowers who are given subsidized loans. The federal government has decided to provide credit to the middle class for mortgages and student loans.³¹⁹ And indeed, these programs have been ongoing since the establishment of the Federal home loan, farm loan, and student loan programs.³²⁰ Federal Reserve monetary

314. See Baradaran, *supra* note 26, at 948; Baradaran, *supra* note 160; Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165, 166 (2014); Mehrsa Baradaran, *Postal Banking's Public Benefits*, 2 AMERICAN AFFAIRS 18 (2018); Mehrsa Baradaran, Opinion, *The Post Office Banks on the Poor*, N.Y. TIMES, Feb. 7, 2014, <https://www.nytimes.com/2014/02/08/opinion/the-post-office-banks-on-the-poor.html>.

315. See CAMPAIGN FOR POSTAL BANKING, POSTAL BANKING: KNOW THE FACTS, <http://www.campaignforpostalbanking.org/wp-content/uploads/2015/05/KnowtheFacts.pdf> [<https://perma.cc/TBA8-YUXG>].

316. See OFFICE OF INSPECTOR GEN., PROVIDING NON-BANK FINANCIAL SERVICE FOR THE UNDERSERVED 2 (2014), https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-14-007_0.pdf [<https://perma.cc/YM5Y-294W>].

317. See, e.g., Randall K. Johnson, *How the United States Postal Service (USPS) Could Encourage More Local Economic Development*, 92 CHI.-KENT L. REV. 593 (2017); David Dayen, *The Post Office Should Just Become a Bank*, THE NEW REPUBLIC (Jan. 28, 2014), <https://newrepublic.com/article/116374/postal-service-banking-how-usps-can-save-itself-and-help-poor> [<https://perma.cc/FF88-JX3B>].

318. See MORGAN RICKS, JOHN CRAWFORD & LEV MENAND, CENTRAL BANKING FOR ALL: A PUBLIC OPTION FOR BANK ACCOUNTS 1 (2018), <https://greatdemocracyinitiative.org/wp-content/uploads/2018/06/FedAccountsGDI.pdf> [<https://perma.cc/J9YP-WNSE>].

319. Rachel Fishman, *The Wealth Gap PLUS Debt*, NEW AMERICA (May 2018), https://d1y8sb8ig2f8e.cloudfront.net/documents/Wealth_Gap_Plus_Debt_FINAL.pdf [<https://perma.cc/JFF2-HWFH>].

320. See, e.g., BARADARAN, *supra* note 93, at 67 (“After creating the Federal Reserve, President Wilson and the 64th Congress passed the Federal Farm Loan Act of 1916 for the express purpose of increasing credit to rural family farmers. . . . The bill reduced interest rates on farm loans across the South and made credit much more accessible. This bill was the first federal government loan program, and thanks to southern senators, it left black farmers out. The legislators created loopholes and provisions

policy has also provided unprecedented funds to banks through payments on reserves, QE, and other programs.³²¹ The Fed has done so under their legal mandate to boost the economy.³²² Yet the Fed has deferred to the banks to make lending decisions.³²³ Those who have fallen on the outside of the circle must therefore rely on the market for their credit needs. These credit markets will provide access to credit and will price the credit according to risk.³²⁴ A public bank can boost the economy directly by offering direct loans and direct accounts.

Public banking can take many forms. Like the public state bank of North Dakota, a Federal Public bank can finance large or targeted infrastructure projects. It can do so by offering public bonds or using its flexible monetary policy mandate. For example, in my proposal for a Twenty First Century Homestead Act, I have suggested that federal reserve financing can help close the racial wealth gap by purchasing abandoned and blighted properties in formerly redlined cities.³²⁵ Other target projects might include roads, hospitals, rehabilitation facilities, public housing, and environmental cleanup projects.

These projects can be funded with a combination of Federal Reserve financing and Treasury guarantees. These investments can be structured much like other government credit programs that make returns sufficient enough to make the program profitable such that the fund can continue to invest in other sectors. Many such programs already exist.³²⁶ Infrastructure investment funds can issue investment shares through a securitized bond, which will be structured as a fixed rate, and variable terms of between 5 to 20 years open to all investors. The bond can be guaranteed by the US Treasury and maintain a Triple A rating. These investment funds can be

to exclude blacks and left the program to be administered in local offices in the South, with significant discretion given to local bureaucrats in lending, which effectively meant that blacks would not be given loans.” (footnote omitted).

321. See Kimberly Amadeo, *Explaining Quantitative Easing - QE*, BALANCE (June 1, 2020), <https://www.thebalance.com/what-is-quantitative-easing-definition-and-explanation-3305881> [<https://perma.cc/6BKX-XHMJ>].

322. See Mark Thoma, *Explainer: How Does the Fed Stimulate the Economy?*, CBS NEWS (Nov. 14, 2013, 5:58 PM), <https://www.cbsnews.com/news/explainer-how-does-the-fed-stimulate-the-economy/> [<https://perma.cc/5NHX-42LF>].

323. See BARADARAN, *supra* note 154, at 14.

324. DARRYL E. GETTER, CONG. RESEARCH SERV., 7-5700, IN FOCUS—CONSUMER CREDIT MARKETS AND LOAN PRICING: THE BASICS 1 (2018), <https://fas.org/sgp/crs/misc/IF10993.pdf> [<https://perma.cc/NNP4-9CE2>].

325. MEHRSA BARADARAN, A HOMESTEAD ACT FOR THE 21ST CENTURY 18–27 (2019), <https://greatdemocracyinitiative.org/wp-content/uploads/2019/05/Homestead-Act-050719.pdf> [<https://perma.cc/6MSH-PYCS>].

326. See, e.g., Binyamin Appelbaum, *The Fed Delivered \$80.2 Billion in Profits to the Treasury in 2017*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/business/fed-profits-treasury-2017.html> [<https://perma.cc/4V4E-Y8SU>] (stating that the Fed’s “portfolio of Treasuries and mortgage bonds it acquired after the 2008 crisis . . . are the source of most of the Fed’s revenues” that were being remitted to the treasury).

structured much like the Export-Import Bank and other New Deal Credit programs that became self-sustaining and even profitable. After a decade of initial funding through Congressional appropriation, the Import-Export Bank, and other credit programs have been self-sustaining, operating based on their own revenues.³²⁷ These bonds will be guaranteed by the Treasury. These guarantees lower the risk of investment, attracting much more private capital.³²⁸

The Federal Reserve can use a variety of methods modeled after existing stimulus programs. Over the past decade, the Federal Reserve has used its monetary policy tools and authority to boost economic activity. These programs, which included asset purchases, emergency loans, interest rate payments on bank reserves, and other unconventional and creative programs, have succeeded in their goals of economic recovery.³²⁹ However, while average real estate prices and stock market gains have recovered, the recovery has not been spread evenly.³³⁰ Specifically, the racial wealth gap and regional disparities have grown over the past decade.³³¹ One reason for this inequality is that the Fed's interventions have gone through banks as an intermediary. In order to spur development, lending and investment, the Federal Reserve should bypass the middlemen and fund the development directly.

The Federal Reserve can also use its 13(3) powers to extend emergency loans to municipalities facing acute financial pressure. When a city, state, or municipality is in a state of crisis, it does not get the same treatment from the Federal Reserve as did the failing banks—and even non-banks like AIG.³³² “It is hard to see why the failure of AIG or Bear Stearns was not acceptable, but the failure of financially-constrained governments to deliver basic public services to millions of Americans is,” commented economist Mike Konczal.³³³ The Federal Reserve has the tools to rescue cities in crisis, alleviate the toll of financial exclusion and mortgage foreclosures, and spur economic revitalization where needed by buying public debt. As one economist remarked, “Fed money is not exactly ‘free,’ but it has this great

327. EXPORT-IMPORT BANK OF THE UNITED STATES, 2017 ANNUAL REPORT 22 (2017), https://www.exim.gov/sites/default/files/reports/annual/2017/EXIM2017Annual-Report508-2-8-18_Spreads-1.pdf [<https://perma.cc/Q4XS-2JGM>].

328. Bermanke, *supra* note 182, at 28.

329. Gov. Elizabeth A. Duke, Containing the Crisis and Promoting Economic Recovery at the Women in Housing and Finance Annual Meeting (June 15, 2009) (available at <https://www.federalreserve.gov/newsevents/speech/duke20090616a.htm> [<https://perma.cc/BT5F-VB89>]).

330. See Fabian T. Pfeffer, Sheldon Danziger & Robert Schoeni, *Wealth Disparities Before and After the Great Recession*, 650 AM. ACAD. POL. & SOC. SCI. 98 (2014).

331. Calvin Schermerhorn, *Why The Racial Wealth Gap Persists, More Than 150 Years After Emancipation*, WASH. POST (Jun. 19, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation/>.

332. See KONZCAL & MASON, *supra* note 192.

333. *Id.*

virtue for government: it doesn't cost the taxpayers anything. Fed expenditures do not show up in the federal budget, nor do they add anything to the national debt."³³⁴ Konczal and Mason have suggested that the Fed can use its large portfolio of asset purchases acquired through their QE investments to buy student debt.³³⁵ This intervention would likely do more and do it more directly than investing in bank-held Mortgage Backed Securities that may or may not eventually lead banks to lend more.

For longer-term projects, the Fed could establish programs to purchase bonds to fund student debt relief, close the racial wealth gap, deal with the opioid crisis, or target environmental recovery. These can be modeled after its ongoing monetary policy actions. Providing the funds directly is thus a much more efficient way to meet the Fed's goal of stimulating the economy. Two recent examples of Federal Reserve stimulus programs are the Term Asset-Backed Securities Loan Facility ("TALF"),³³⁶ which involved the purchase of \$50 billion in securities,³³⁷ and QE, the Fed's purchase of public debt totaling around \$4.5 trillion.³³⁸ Another example of monetary policy is Interest On Excess Reserves ("IOER"), discussed above.³³⁹ Each dollar held on reserve is a dollar not lent for real estate, infrastructure, or business operations in the American economy.³⁴⁰

Such public financing through the Federal Reserve and Treasury programs are unconventional and will likely face political opposition. There

334. Greider, *supra* note 193.

335. See KONCZAL & MASON, *supra* note 192, at 45.

336. *Term Asset-Backed Securities Loan Facility*, BD. GOVERNORS FED. RES. SYS., <https://www.federalreserve.gov/monetarypolicy/talf.htm> [<https://perma.cc/2YZK-DXT6>].

337. See KONCZAL & MASON, *supra* note 192.

338. QE generated around \$700 billion in profits for the Federal Reserve. BD. OF GOVERNORS OF THE FED. RES. SYS., *Credit and Liquidity Programs and the Balance Sheet*, https://www.federalreserve.gov/monetarypolicy/bst_recenttrends.htm [<https://perma.cc/23DH-CYSG>]; Sindreu, *supra* note 192.

339. Due to the massive amounts of money created by QE, bank reserves swelled to over \$1.7 trillion as of October 2018. This overage is called excess reserves and even though it was created by the federal reserve, banks earn interest on these reserves. These reserves comprise a substantial portion of the nation's monetary base. The Federal Reserve is using this payment, called an "administered rate" as its primary monetary policy tool post QE. See FED. RES. BANK OF ST. LOUIS, *supra* note 134. Banks are required to hold roughly 10% of their deposits in reserves at the central bank. The required reserves on just customer deposits would equal roughly \$189 billion. See Todd, *supra* note 188 (Put another way, before August 2007, the Fed's reserve account was 5.1% of the monetary base, and in mid-2013, the reserve accounts were equal to 63% of the monetary base.).

340. Economists worried about such a large buildup of funds reserve have suggested that it is time for the Federal Reserve to begin selling government securities in order to withdraw some money from the reserve balance. Former Fed officials and economists have suggested using these funds to invest in the existing mortgage and student loan markets. Though student and mortgage debt investments would be a boon to the economy and the middle class and both programs are vastly more egalitarian than providing subsidies to banks, mortgage and student loan borrowers are more likely to be members of the middle and upper class. Drawing down almost \$200 billion in reserves by investing in the Homestead Act is much more likely to make a dent in the great divergence of wealth. See generally Todd, *supra* note 186. Todd suggests that the Federal Reserve sell about \$180 billion in mortgage-backed securities or longer maturity Treasury securities per year in order to prevent future inflation. *Id.* at 15–16.

is legal authority for Federal Reserve monetary policy, but the nature of this plan would be unprecedented. The Federal Reserve has used its monetary policy mandate to stimulate the economy in unprecedented ways, but those actions occurred in the aftermath of a recession. Though numerous cities are suffering more dire recession conditions than were present during the financial crisis,³⁴¹ the cause of the slump was not an emergency, but a slow decline. Moreover, these public finance programs differ from the Federal Reserve's past conduct because they require investment in public municipal funds or public banks whereas the prior programs have been conducted through private banks. Historically, the Federal Reserve's role as "lender of last resort" was to operate through the banks and not directly with the economy. This plan would diverge from that historical norm. Legally, these actions can be justified given the Federal Reserve's original legislation and if necessary, new authorizing legislation can be written, but these actions will likely face political backlash due to recent public distrust of the Federal Reserve³⁴² and lobbying pressure. However, Federal Reserve spending is not subject to Congressional appropriations and thus these investments can be shielded from the partisanship, pork barrel spending, and industry lobbying that infect Congressional action.

Furthermore, the Federal Reserve's participation is justified within its dual mandate as specified by Congress and authorized under the law. The Board of Governors of the Federal Reserve System and the Federal Open Market Committee is authorized to "maintain *long run growth* of the monetary and credit aggregates commensurate with the economy's long run potential to *increase production*, so as to promote effectively the goals of *maximum employment*, stable prices and moderate long-term interest rates."³⁴³ The Federal Reserve is also authorized, according to section 14(b) of the Act, to buy and sell bonds issued by municipalities, states, or other instruments backed by the Treasury.³⁴⁴ Moreover, Section 13(3) allows the

341. Michael B. Sauter, *10 Years Later, these 28 U.S. Cities Never Recovered from the Great Recession*, USA TODAY (Oct. 12, 2018), <https://www.usatoday.com/story/money/economy/2018/10/12/cities-never-recovered-great-recession/38094325/> [<https://perma.cc/7TBA-Q3US>].

342. Zoe Thomas, *Why Do Many Americans Mistrust the Federal Reserve?* BBC NEWS (Dec. 15, 2015); Dion Rabouin, *Americans Don't Trust the Federal Government to Look out for Them*, AXIOS (May 12, 2020).

343. BD. OF GOVERNORS OF THE FED. RES. SYS., *Section 2A. Monetary Policy Objectives*, <https://www.federalreserve.gov/aboutthefed/section2a.htm> [<https://perma.cc/ZLU9-5HBX>].

344. See Federal Reserve Act, 12 U.S.C. § 355 (1913). The Federal Reserve Act grants every state the following powers:

1. To buy and sell, at home or abroad, bonds and notes of the United States, bonds issued under the provisions of subsection (c) of section 4 of the Home Owners' Loan Act of 1933, as amended, and having maturities from date of purchase of no exceeding six months, and bills, notes, revenue bonds, and warrants with a maturity from date of purchase of not exceeding six months, issued in anticipation of the collection of taxes or in anticipation of the receipt of

Federal Reserve to lend at a discount in an emergency.³⁴⁵ This is the authority the Federal Reserve relied on for its extraordinary bailout provisions starting in 2008.³⁴⁶ Through longer term lending at a fixed rate, the Fed can tailor credit facilities to support public financing programs according to each communities' residential and economic development needs. Due in part to the Fed's credibility and market stabilizing presence, establishing community development credit facilities could result in benefits that greatly exceed the actual volume of loans extended by the federal government to new homeowners.³⁴⁷

These are by no means an exhaustive list of financial redesign possibilities, which is not the aim of this article. Rather, the above programs are examples of what might be possible through creative financial redesign with a focus on equality and financial inclusion. The current model assumes that entrepreneurs or new products can remedy financial exclusion, but financial exclusion is a result of policy decisions that have centered bank credit as a principle means of access. Financial redesign can change the assumptions on which the current system relies. Like moving from gold to

assured revenues by any State, county, district, political subdivision, or municipality in the continental United States, including irrigation, drainage and reclamation districts, and obligations of, or fully guaranteed as to principal and interest by, a foreign government or agency thereof, such purchases to be made in accordance with rules and regulations prescribed by the Board of Governors of the Federal Reserve System. Notwithstanding any other provision of this chapter, any bonds, notes, or other obligations which are direct obligations of the United States or which are fully guaranteed by the United States as to the principal and interest may be bought and sold without regard to maturities but only in the open market.

2. To buy and sell in the open market, under the direction and regulations of the Federal Open Market Committee, any obligation which is a direct obligation of, or fully guaranteed as to principal and interest by, any agency of the United States.

Id.

345. *See id.* at § 343. Section 343(3)(A) states the following:

In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System, by the affirmative vote of not less than five members, may authorize any Federal reserve bank, during such periods as the said board may determine, at rates established in accordance with the provisions of section 14, subdivision (d), of this Act, to discount for any participant in any program or facility with broad-based eligibility, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal Reserve bank: *Provided*, That before discounting any such note, draft, or bill of exchange, the Federal reserve bank shall obtain evidence that such participant in any program or facility with broad-based eligibility is unable to secure adequate credit accommodations from other banking institutions. All such discounts for any participant in any program or facility with broad-based eligibility shall be subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe.

Id. at § 343(3)(A).

346. Randall D. Gynn, *The Financial Panic of 2008 and Financial Regulatory Reform*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Nov. 20, 2010); LABONTE, *supra* note 181, at 6.

347. One obstacle is that the Fed is currently only authorized to purchase state and local government debt with a maturity date of less than six months. This law should be changed to enable the Fed to purchase long term debt as part of a land trust owned by the Fed, state, and city governments collectively. *See* Konczal & Mason, *supra* note 192, at 38.

silver, a change in the legal foundations of credit and financial policy can create a much more egalitarian economy than our current system.

CONCLUSION

This article analyzes the modern rhetoric of financial inclusion and access to credit and explains that they are based on a flawed vantage of credit markets. Financial inclusion undertakings take several disparate forms, such as subsidies, products, and anti-discrimination legislation; each of these rests on an assumption that credit markets are fixed. In fact, the nature of credit markets, including their availability, is a result of public policy and monetary decisions. In both aspects of financial services, payments and credit, the federal government creates the market. Those who have access to banking and credit are usually the current or past beneficiaries of public credit programs and publicly provided bank accounts. This article draws attention to the legal infrastructure of financial markets and connects the discourse of financial inclusion to the policy underpinnings of the finance that determined the nature of credit availability. The design of money and credit markets have distributional consequences, which was a central insight of progressive reforms largely ignored by modern financial inclusion advocacy. Law and policy were embedded in the structure of the Federal Reserve, in the New Deal-era credit programs, and in the laws governing banks. These laws and policies were often a compromise between progressive reformers advocating greater access to credit against the interests protecting money holdings that stood to lose from the changes. The stakes were high—the legal choices determined whether the poor and the excluded would remain so or be given access to wealth-building credit to pole-vault into the middle class. The latter ended up being the case for most but not all. Regardless of the outcomes, the contours of the debate were mutually understood: that credit, money, and banking policy was a decision to be made through democracy. This is the theory that has been obscured over time and that this article attempts to revive. Adopting a theory of financial redesign as opposed to the current model of financial inclusion has significant normative implications and can lead to a more egalitarian credit and financial system.