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## Advertising Injustices: Marketing Race and Credit in America

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## Advertising Injustices: Marketing Race and Credit in America

### Erratum

Originally published on 09/14/2021, the repository-archived version of this article was updated on 09/30/2021 at the author's request to correct the following errors in the text: the addition of footnotes 109-111 to Table 1 on page 1639; the addition of footnotes 117-118 to Table 2 on page 1640.

# ADVERTISING INJUSTICES: MARKETING RACE AND CREDIT IN AMERICA

*Jim Hawkins\**  
*Tiffany C. Penner\*\**

## ABSTRACT

*Access to affordable credit played a central role in the Civil Rights Movement. But today, racial and ethnic minorities oversubscribe to high-cost lending products like payday loans and underuse more affordable credit options that traditional banks offer. These trends remain even when controlling for demographic variables like income, credit score, and education. While research verifies that these disparities exist, little work explains why.*

*This Essay argues that advertising entrenches these racial inequities. Two empirical studies we conducted of advertising by banks and payday lenders suggest that payday lenders steer African Americans and Latinos to their products while banks market to whites. For instance, though African Americans make up only 23% of payday lending customers, 35% of the “model” customers featured in advertising on these lenders’ websites depict African Americans. Meanwhile, almost 30% of mainstream bank websites featured no African American models. Almost 75% featured no Latino models. Only 3% did not feature a white model. Even after the outcry over racial injustice in 2020, banks did not appreciably increase the representation of people of color on their websites.*

*This needs to change. We argue that lenders themselves are the first and simplest source for racial justice in advertising credit. Both payday lenders and banks can easily ensure that their advertising reflects the communities they serve. Congress and the Consumer Financial Protection Bureau also have a role to play. Amendments we propose to the Equal Credit Opportunity Act, the Community Reinvestment Act, and the regulations that implement them call for advertising that welcomes people of color to affordable credit sources.*

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## INTRODUCTION

Advertising matters for racial justice, and no market reveals this reality more clearly than consumer credit. Lenders offering credit at extremely high prices, such as payday lenders, target members of racial minority groups.<sup>1</sup> African Americans<sup>2</sup> and Latinos<sup>3</sup> use these “fringe banks”<sup>4</sup> at a disproportionately high rate.<sup>5</sup> Mainstream banks, however, often omit minorities entirely from their marketing efforts.<sup>6</sup>

Consumer credit played a central role in the civil rights movement.<sup>7</sup> As credit became more important in society, “access to fair credit emerged as an important

<sup>1</sup> See *infra* Part II.

<sup>2</sup> There is no consensus in the debate over the use of “African American,” “Black,” and “black” as labels to describe Americans who are regarded as having or who consider themselves as having African ancestry. See John Eligon, *A Debate over Identity and Race Asks, Are African-Americans “Black” or “black”?*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/black-african-american-style-debate.html>; see also Cydney Adams, *Not All Black People Are African American. Here’s the Difference*, CBS NEWS (June 18, 2020, 3:20 PM), <https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/>. We use “Black” in graphs and “African American” in writing. We sincerely hope that these labels will not distract from the purpose of our research: to highlight the need for more diverse representation of “model” consumers on mainstream bank websites.

<sup>3</sup> The terms “Latino” and “Hispanic” are often conflated. See, e.g., Mark Hugo Lopez, Jens Manuel Krogstad & Jeffrey S. Passel, *Who is Hispanic?*, PEW RSCH. CTR. (Sept. 15, 2020), [https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/](https://www.pewresearch.org/fact-tank/2020/09/15/who-is-hispanic/#:~:text=Some%20have%20drawn%20sharp%20distinctions,regardless%20of%20language%20( describing a question in the 2020 U.S. Census that conflates the terms by asking: “Is this person “Spanish/Hispanic/Latino?”). Acknowledging the nuance of race and heritage, we relied on research that refers to “Latino,” “Latinx,” and “Hispanic” to describe people who trace their origin to Spanish-speaking countries or other countries in Latin America. We use the term “Latino” throughout this Essay instead of “Latinx” because “Latinx” is neither widely used nor well-known by “U.S. adults who self-identify as Hispanic or Latino.” Luis Noe-Bustamante, Lauren Mora & Mark Hugo Lopez, <i>About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It</i>, PEW RSCH. CTR. (Aug. 11, 2020), <a href=).

<sup>4</sup> Though not a strictly defined term, we use this phrase to refer to credit and financial product providers outside of the mainstream banking market, such as payday lenders, auto title lenders, pawnshops, rent-to-own stores, and tax refund anticipation lenders. For the origins of the word, see JOHN P. CASKEY, *FRINGE BANKING: CHECK-CASHING OUTLETS, PAWNSHOPS, AND THE POOR* (1994).

<sup>5</sup> Kyoung Tae Kim, Jonghee Lee & Jae Min Lee, *Exploring Racial/Ethnic Disparities in the Use of Alternative Financial Services: The Moderating Role of Financial Knowledge*, 11 RACE & SOC. PROBS. 149, 149 (2019) (studying data from the 2015 National Financial Capability Study dataset and finding that “[B]lack people were more likely to use payday loans, pawnshops and rent-to-own stores than whites,” and that “Hispanics were more likely to use payday loans and pawnshops, while Asians/others were more likely to use payday loans compared to whites”).

<sup>6</sup> See *infra* Part II.

<sup>7</sup> Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1134 (2019); cf. Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. REV. 587, 620 (2019) (“Throughout American history, civil rights movements and advocacy have promoted economic citizenship as a key component of civil rights.”); FREDERICK F. WHERRY, KRISTIN S. SEEFELDT & ANTHONY S. ALVAREZ, *CREDIT WHERE IT’S DUE: RETHINKING FINANCIAL CITIZENSHIP* 17 (2019) (“The fight against inequality has expanded to the provision of credit visibility, the recognition of dignity, and the extension of choice.”).

platform from which to address persistent social and economic inequality.”<sup>8</sup> Sustainable, reasonably priced credit remains essential to modern economic life in America: “The ability to purchase a home depends, for most individuals, on access to credit, as does the ability to purchase a car, to obtain post-secondary education, or to start a business.”<sup>9</sup> In addition to helping acquire assets, credit allows people to deal with uneven income patterns and to survive financial emergencies.<sup>10</sup> Pushing African Americans and Latinos outside mainstream banking services and into high-cost, high-risk products creates a second-class tier of banking.<sup>11</sup>

America has a long history of economic exploitation of African Americans through slavery, sharecropping, and crop-lien agreements.<sup>12</sup> Lenders historically segregated the market for debt based on race by redlining certain neighborhoods, and the effects of that history remain today.<sup>13</sup> One result of this segregation is the high use of fringe banks by African Americans.<sup>14</sup>

While there is consensus that African Americans and Latinos use fringe banks at a disproportionately high level,<sup>15</sup> researchers have not entirely discovered why. Even after controlling for other socioeconomic factors like wealth, education, and credit scores, economically significant disparities remain between how majority and minority racial groups use credit.<sup>16</sup> Economists have suggested that supply-side factors may provide the explanation.<sup>17</sup> Yet, academics have largely neglected the effects of an important aspect of the credit business—how lenders market credit.<sup>18</sup>

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<sup>8</sup> Atkinson, *supra* note 7, at 1135. Atkinson’s criticism of credit is acknowledged in Part III.C.

<sup>9</sup> ADAM J. LEVITIN, *CONSUMER FINANCE LAW: MARKETS AND REGULATION* 487 (2018).

<sup>10</sup> Ryan Goodstein, Alicia Lloro, Sherrie L.W. Rhine & Jeffrey Weinstein, *What Accounts for Racial and Ethnic Differences in Credit Use?* 1 (FDIC Div. Depositor & Consumer Prot., Working Paper No. 2018-01, 2018), <https://ssrn.com/abstract=3220050> (reporting that 32% of Americans have income that varies by month, 43% have expenses that vary by month, and 46% could not cover emergency expenses of \$400).

<sup>11</sup> Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1071 (2017) (arguing that “racism against credit card applicants and consumers is a core piece of the systemic inequality that perpetuates dramatic disparities in wealth, employment, health, and education”).

<sup>12</sup> Paulina E. Davis, *Racism, Capitalism, and Predatory Lending: How the U.S. Government’s Failure to Regulate the Disproportionate Negative Effects of Payday Lending in Black Communities Violates the International Convention on the Elimination of All Forms of Racial Discrimination*, 4 HUM. RTS. & GLOBALIZATION L. REV. 61, 67–76 (2011).

<sup>13</sup> Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 938–39 (2019).

<sup>14</sup> See *infra* Part I.B.

<sup>15</sup> *Id.*

<sup>16</sup> Goodstein et al., *supra* note 10, at 21.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (“In particular, because the residual disparities are likely attributable in part to unobserved supply-side factors, policymakers could benefit from a better understanding of how households are affected by the ways lenders market and extend credit. This is an important topic for future research.”); cf. Judy Foster Davis, *Selling*

The small body of literature that addresses race and fringe banking almost uniformly overlooks the importance of advertising.<sup>19</sup> Recently, a few papers have empirically assessed the relationship between race and marketing credit, mostly in the context of credit card offers sent through the mail. Examining credit card mailings to households, Song Han and coauthors found that “white consumers are almost three percentage points more likely to receive an offer than otherwise identical nonwhite consumers.”<sup>20</sup> Simon Firestone’s more in-depth analysis of mailings yielded similar findings:

Blacks were approximately 27% less likely to receive offers from credit card lenders during the sample period, even after controlling for variables such as credit history, household income, and local economic conditions. Hispanics were 17% less likely to receive an offer, after including controls. The discrepancy is robust to lender-specific regressions and the inclusion of a large number of explanatory variables.<sup>21</sup>

Despite this preliminary analysis, however, these sources point to the significant need for research into race and marketing credit.<sup>22</sup>

This Essay seeks to meet that need. We present evidence from two studies of lenders in Houston, Texas—one of fringe banks and one of mainstream banks. We found that payday and title lending advertising targets African American and Latino customers. For instance, while African Americans make up only 15.6% of auto title lending customers and 23% of payday lending customers, 34.8% of the photographs on these lenders’ websites depict African Americans. Similarly, 77.3% of the advertisements at physical locations in our study targeted racial minority groups. However, mainstream banks often focus advertising on

*Whiteness? – A Critical Review of the Literature on Marketing and Racism*, 34 J. MKTG. MGMT. 134, 135 (2018) (noting that the “scholarly work addressing racism and marketing has been sporadic or lacking in systematic review, critique and theoretical development”); Davis, *supra* note 12, at 61 (“These two concepts, race relations and predatory capitalism, rarely converge in debate or conversation; yet, the two have a relationship that extends back before the founding of the United States.”).

<sup>19</sup> One notable exception in the law review literature is Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. POVERTY L. & POL’Y 165, 170–74 (2010) (describing how fringe banks use celebrities from minority groups, minority events, and churches to target racial minorities with predatory financial products).

<sup>20</sup> Song Han, Benjamin Keys & Geng Li, *Information, Contract Design, and Unsecured Credit Supply: Evidence from Credit Card Mailings* 21 (Fin. & Econ. Discussion Series, Working Paper No. 2015-103, 2015), <http://dx.doi.org/10.17016/FEDS.2015.103>.

<sup>21</sup> Simon Firestone, *Race, Ethnicity, and Credit Card Marketing*, 46 J. MONEY, CREDIT & BANKING 1205, 1205 (2014).

<sup>22</sup> Han et al., *supra* note 20 (“[W]hile the use of some socioeconomic variables, such as race, is prohibited, the driving factors behind these results warrant further research.”); Firestone, *supra* note 21, at 1205 (“My findings imply that marketing is an important area for analysis of discrimination in consumer credit.”).

whites.<sup>23</sup> For example, our review of mainstream lender websites featuring white, African American, and Latino models found that almost 30% featured no African American models. Almost 75% featured no Latino models. In contrast, only 3%—a single bank’s website—did not feature a white model.<sup>24</sup> Even after the outcry over racial injustice in 2020, banks did not appreciably increase the representation of people of color on their websites. This needs to change.

While other social justice reforms require complicated solutions or deep social and cultural transformations, reforming advertising laws is a relatively simple way to make an immediate and meaningful impact on the economic lives of minorities. Lawmakers have blueprints for stopping discriminatory advertising, but they have simply overlooked these reforms. Advertising that entrenches racial economic subordination needs to end in American credit markets. This Essay proposes two politically appealing ways that lawmakers could ensure more equitable credit markets for all Americans.

Part I introduces the fringe banking industry, including the dangers and drawbacks of the market. It also surveys the evidence that African American and Latino borrowers turn to this industry in greater proportion than other borrowers. Part II argues that advertising steers people of color away from mainstream banking and toward fringe banks. Here we present the methodology and findings of our two studies. Finally, Part III suggests that policymakers, as well as lenders, can change advertising practices to stop overuse of fringe credit by racial minority groups.

## I. FRINGE BANKING AND RACE

Consumer financial services in America operate in two major segments: mainstream banks and fringe banks. Mainstream banks offer checking and savings accounts, credit cards, and installment loans. While the cost of these services varies, they are relatively inexpensive compared to fringe banks.<sup>25</sup>

The other segment is fringe banking, a part of the credit market that operates on the margins of what we might consider normal banking practices.<sup>26</sup> For many years, people with poor credit, no credit files, or no bank account have turned to fringe banks when they face liquidity crises.

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<sup>23</sup> We do not capitalize “white” throughout this essay, in accordance with Associated Press guidelines. See *Explaining AP Style on Black and White*, AP NEWS (July 20, 2020), <https://apnews.com/article/9105661462>.

<sup>24</sup> See *infra* Part II.C (discussing our mainstream bank study).

<sup>25</sup> Cassandra Jones Havard, *Doin’ Banks*, 5 U. PA. J.L. & PUB. AFFS. 317, 320–22 (2020).

<sup>26</sup> See Ronald H. Silverman, *Toward Curing Predatory Lending*, 122 BANKING L.J. 483, 486 (2005); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 857 (2007).



The first section below provides an overview of the relative harms, costs, and risks of fringe banking, as compared to mainstream banking. The second section explains that minorities disproportionately use fringe banks.

### A. *Banking on the Fringe*

The expression “fringe banking” is somewhat misleading because these institutions are hardly on the periphery. According to the FDIC’s National Survey of Unbanked and Underbanked Households, 14.1 million adults in the United States are considered “unbanked,” meaning that no one in their household had a bank account.<sup>27</sup> Moreover, 48.9 million adults live in households that are “underbanked,” meaning that they used a fringe bank in the prior 12 months.<sup>28</sup> In reality, there are more payday lenders in the United States than McDonald’s or Starbucks.<sup>29</sup>

Several types of lenders make up the fringe credit market. Payday lenders offer high-cost, short-term credit to borrowers.<sup>30</sup> Lenders base the amount and the timing for payment on the borrower’s next paycheck.<sup>31</sup> The annual percentage rate for a payday loan varies by state and lender, but it is usually around 400%.<sup>32</sup> Auto title lenders offer slightly longer and slightly less expensive loans based primarily on the value of the vehicle that the borrower offers as collateral for the loan.<sup>33</sup> If the borrower fails to repay the loan, the auto title lender can repossess the car.<sup>34</sup> Pawnshops offer credit at even a slightly lower rate than auto title loans; the amount of their loans depends on the value of personal property pledged, like jewelry or tools.<sup>35</sup> Rent-to-own stores offer leases on durable goods that, if paid completely off, give the renter ownership of the goods.<sup>36</sup> The final type of lender occupying this space is tax refund

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<sup>27</sup> FED. DEPOSIT INS. CORP., 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 1 (2017), <https://www.fdic.gov/householdsurvey/2017/2017report.pdf>.

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

<sup>29</sup> Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 WASH. & LEE L. REV. 1023, 1030–31 n.22 (2012).

<sup>30</sup> *Consumer Financial Regulation — CFPB’s Final Payday Lending Rule Deems It an “Unfair” and “Abusive” Practice to Make Payday Loans Without Determining Borrower Ability to Repay*, 131 HARV. L. REV. 1852, 1852–54 (2018).

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

<sup>32</sup> *Id.*

<sup>33</sup> Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535, 535 (2012).

<sup>34</sup> *Id.*

<sup>35</sup> Rocco d’Este, *The Effects of Stolen-Goods Markets on Crime: Pawnshops, Property Theft, and the Gold Rush of the 2000s*, 63 J.L. & ECON. 449, 452 (2020).

<sup>36</sup> Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041, 2044 (2008); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 56 (2008).

anticipation lenders who offer short-term loans based on the expected tax refund that the borrower will receive.<sup>37</sup>

Fringe banking services—while arguably filling a gap in services to those excluded by mainstream banks<sup>38</sup>—offer inferior financial products than those offered by mainstream banks. At least three variables support this distinction in quality: (1) costs, (2) risks, and (3) wealth-building opportunities.

The biggest problem with most fringe banking products is cost.<sup>39</sup> Even supporters of free markets for fringe credit recognize that these services cost a lot of money and that borrowers should avoid them if other credit options are available.<sup>40</sup> The high costs of fringe credit matter because they have long-term economic consequences and affect amassing wealth.<sup>41</sup> Borrowers are bad at assessing these costs because they cannot accurately predict how long it will take them to pay off their loans, leading people to underestimate the true price and make irrational decisions.<sup>42</sup>

In addition to cost, the repayment terms often introduce risk for borrowers. Traditionally, payday and title loans were non-amortizing, so borrowers would have to pay off the entire amount of the loan to pay off their debt.<sup>43</sup> Because people in financial trouble often cannot come up with large sums of money at one time, they rollover their loans, paying only the interest and none of the

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<sup>37</sup> Leslie Book, *Refund Anticipation Loans and the Tax Gap*, 20 STAN. L. & POL'Y REV. 85, 86 (2009).

<sup>38</sup> See, e.g., Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 496 (2013) (“The payday lending industry claims that it is serving the needs of the poor and promoting the democratization of credit.”); Jones Havard, *supra* note 25, at 319 (“Fringe banks are more accessible geographically, take into account consumers’ needs for immediate liquidity, and provide reliable products with transparent pricing.”).

<sup>39</sup> Hawkins, *supra* note 33, at 592.

<sup>40</sup> G. Michael Flores, Todd J. Zywicki & Brian M. Deignan, *Overdraft Protection and Consumer Protection: A Critique of the CFPB’s Analysis of Overdraft Programs*, 33 BANKING & FIN. SERVS. POL’Y REP. 10, 10, 12 (2014).

<sup>41</sup> Firestone, *supra* note 21, at 1206.

<sup>42</sup> See Kathryn Fritzdixon, Jim Hawkins & Paige Marta Skiba, *Dude, Where’s My Car Title?: The Law, Behavior, and Economics of Title Lending Markets*, 2014 U. ILL. L. REV. 1013, 1017 (2014); Bar-Gill & Warren, *supra* note 36, at 56 (“Suboptimal prepayment decisions alone can cost borrowers tens of thousands of dollars or up to 25% of the loan’s value.”); see also Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 577 (2010) (reporting that only 60% of payday loan borrowers were unaware of the annual percentage rate for their loan, and another 20% of borrowers underestimated the rate by at least 200%); Hawkins, *supra* note 33, at 557, 598 (finding that only 25% of title loan users comprehended the high interest rate the loans offered).

<sup>43</sup> Carlie Malone & Paige Marta Skiba, *Regulation and Recent Trends in High-Interest Credit Markets*, 16 ANN. REV. L. & SOC. SCI. 311, 312–13 (2020) (“Triple digit interest combined with the low income of borrowers and the exceedingly short time frame of the loans—a maturation period of just a week or two—may give borrowers little bandwidth to manage their financial situation and successfully retire debt. In fact, the vast majority of payday borrowers are unable to repay their loan on the first due date.”).

principal due.<sup>44</sup> If borrowers cannot repay some types of fringe credit, they face harsh collection mechanisms like losing their vehicles.<sup>45</sup>

Finally, participating in fringe banking markets can prevent borrowers from establishing a credit history and getting less expensive credit in the future. While fringe banking does not harm an individual's credit score because most lenders do not report any loan information to credit bureaus, successfully repaying debt also does not help borrowers build positive credit scores.<sup>46</sup> Mainstream lenders either reject or charge higher amounts to applicants with thin credit files.<sup>47</sup> Indeed, credit visibility—or having a credit file that enables a person to get credit—has become an important component in establishing equality in society.<sup>48</sup> The risk of bad credit scores or thin credit files is particularly salient for minority borrowers.<sup>49</sup> Richard R. W. Brooks explains: “Credit profiles and racial profiles are used as proxies for creditworthiness, and when the former is lacking, blacks are disproportionately harmed by reliance on the latter.”<sup>50</sup>

In contrast, mainstream banks provide customers with valuable systems for managing their financial affairs. Cassandra Jones Havard explains:

Participation in the financial mainstream has macro and micro effects. Mainstream consumers are often financially stable and have economic mobility. They build wealth, acquire assets, establish credit, and obtain affordable loans. They accumulate savings and have insurance to buffer a crisis. Society benefits when individuals have the necessary tools to develop the skills needed to manage their resources and risks. A basic bank account is one such tool.<sup>51</sup>

Mainstream bank products are not only less costly for consumers, but they are also critical for building financial security.<sup>52</sup> There is a strong causal

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<sup>44</sup> *Id.*

<sup>45</sup> Fritzdixon et al., *supra* note 42, at 1015.

<sup>46</sup> Richard R. W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994, 997–98 (2006).

<sup>47</sup> WHERRY ET AL., *supra* note 7, at 1–4 (discussing the problems created when individuals do not have and cannot establish credit histories).

<sup>48</sup> *Id.*

<sup>49</sup> See Brooks, *supra* note 46, at 999.

<sup>50</sup> *Id.*

<sup>51</sup> Jones Havard, *supra* note 25, at 320–21; see also *id.* at 338–52 (describing the private and public benefits of participation within the mainstream banking system).

<sup>52</sup> See Michael S. Barr, *Banking the Poor*, 21 YALE J. REGUL. 121, 138 (2004) (“A bank account is a significant factor—more so, in fact, than household net worth, income, or education level—in predicting whether an individual also holds mortgage loans, automobile loans, and certificates of deposit.”); Colleen M. Heflin & Mary Pattillo, *Kin Effects on Black-White Account and Home Ownership*, 72 SOC. INQUIRY 220, 221 (“Having some type of bank account is an elemental signifier of mainstream socioeconomic participation—e.g., as a safe depository and a structured way of money management, or for paying bills or qualifying for an apartment.”).

relationship between access to a bank account and increased consumption of “affordable” credit.<sup>53</sup>

In short, people who bank on the fringe face higher risks and higher prices than people using the mainstream banking system.

### *B. Overuse of Fringe Banking by Members of Racial Minority Groups*

Research in a variety of contexts demonstrates that African Americans and Latinos have been excluded from advantageous financial products. For years, banks redlined neighborhoods of color, advising against offering low-cost mortgages in certain areas; eventually, high-cost mortgages filled the space.<sup>54</sup> Given this history, it is perhaps unsurprising that numerous studies demonstrate that African American and Latino mortgage borrowers took out more high-cost subprime loans before the Great Recession than white borrowers, a practice called “reverse redlining.”<sup>55</sup> This oversubscription to subprime loans caused minority Americans to suffer more from the subprime crisis than whites.<sup>56</sup>

Similarly, African American and Latino consumers use fringe credit products more frequently than their white counterparts.<sup>57</sup> Both groups also use credit cards at a lower rate than whites, even after controlling for other factors.<sup>58</sup> These two phenomena are related: exclusion from mainstream banks is directly tied to the use of fringe banking.<sup>59</sup> African Americans’ experiences with payday

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<sup>53</sup> See Katie Fitzpatrick, *The Effect of Bank Account Ownership on Credit and Consumption: Evidence from the UK*, 82 S. ECON. J. 55, 57, 77–78 (2015).

<sup>54</sup> Baradaran, *supra* note 13, at 890, 893.

<sup>55</sup> Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL’Y 121, 125–27 (2009).

<sup>56</sup> andré douglas pond cummings, *Families of Color in Crisis: Bearing the Weight of the Financial Market Meltdown*, 55 HOW. L.J. 303, 308 (2012).

<sup>57</sup> See Michael A. Satz, *How the Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and Its Use of Consumer Arbitration to Further Discriminatory Lending Practices*, 20 TEMP. POL. & C.R. L. REV. 123, 138 (2010) (“Studies overwhelming indicate, however, that the payday lenders *do* target minority consumers, and in particular those with African American and Hispanic backgrounds.”). *But see* Donald P. Morgan & Kevin J. Pan, *Do Payday Lenders Target Minorities?*, LIBERTY ST. ECON. (Feb. 8, 2012), <http://libertystreeteconomics.newyorkfed.org/2012/02/do-payday-lenders-target-minorities.html#.VZP1DPiVikp> (finding that African Americans and Latinos use payday lenders more than whites but that there is not a significant difference after controlling for other factors).

<sup>58</sup> Firestone, *supra* note 21 (noting that “42% of households headed by Blacks have at least one credit card, and 44% of households headed by non-Black Hispanics have at least one credit card,” whereas “72% of households headed by non-Black, non-Hispanic individuals have a credit card”); Goodstein et al., *supra* note 10, at 14 (“Without controlling for any other factors, [B]lack households are 30.1[%] less than likely than white households to use bank credit, relative to a mean of 74.8[%] among white households . . . . Hispanic households are 24.8[%] less than likely than white households to use bank credit.”).

<sup>59</sup> Kim et al., *supra* note 5, at 149 (“The prevalence of [alternative financial services (AFS)] use can be

loans are particularly damaging because they are more likely than members of other racial groups to be delinquent on their loans.<sup>60</sup>

Researchers have identified multiple factors that contribute to disproportionate use of fringe credit by African Americans and Latinos. Much of the exclusion from inexpensive credit faced by minority groups reflects historical discrimination: “[M]inority communities are poorer today in part because they were denied credit in the past and that makes it harder for them to qualify for credit today, much less on equal terms.”<sup>61</sup>

Beyond the legacy of past discrimination, some studies point to the presence of payday lenders<sup>62</sup> and the absence of mainstream banks<sup>63</sup> in predominantly African American and Latino neighborhoods.<sup>64</sup> Another commentator notes that the “paycheck-to-paycheck environment that prevails in urban communities” is part of what makes “the environment[] ripe for predatory lending products to

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attributed to households’ exclusion from, or limited access to, mainstream financial institutions. Approximately 57% of unbanked households used AFS in 2015, compared to approximately 21% of banked households.”)

<sup>60</sup> Okechukwu D. Anyamele, *Racial/Ethnic Differences on Payday Loan Delinquency Rate: Evidence from 2007 and 2010 Survey of Consumer Finances (SCF)*, 4 *ADVANCES IN MGMT. & APPLIED ECON.* 1, 8, 10–11 (2014), [http://www.scienpress.com/Upload/AMAE/Vol%204\\_6\\_1.pdf](http://www.scienpress.com/Upload/AMAE/Vol%204_6_1.pdf) (finding African Americans have higher payday loan delinquency rates than other races).

<sup>61</sup> LEVITIN, *supra* note 9, at 482.

<sup>62</sup> Jane Cover, Amy Furchman Spring & Rachel Garshick Kleit, *Minorities on the Margins? The Spatial Organization of Fringe Banking Services*, 33 *J. URB. AFFS.* 317, 317 (2011) (“This study employs geographic information systems (GIS) and multiple regression to untangle the spatial relationship between minority communities and traditional and fringe banks in four small-to-moderate-sized metropolitan areas. We find that, though market factors are indeed powerful determinants of fringe bank location, there are nonetheless persistent ethnic effects in two of the four cities and these effects cannot be attributed to factors correlated with a large minority presence.”); Mark L. Burkey & Scott P. Simkins, *Factors Affecting the Location of Payday Lending and Traditional Banking Services in North Carolina*, 34 *REV. REG’L STUD.* 191, 191, 202 (2004) (“A key finding is that after controlling for many covariates, race is still a powerful predictor of the locations of both banks and payday lenders.”).

<sup>63</sup> Baradaran, *supra* note 13, at 939 (“Most [B]lack neighborhoods are ‘banking deserts,’ or neighborhoods abandoned by mainstream banks.”). After the 2008 mortgage crisis, “93% of all bank closings were in low-income minority neighborhoods.” *Id.*

<sup>64</sup> *But see* W. Parker Wheatley, *Economic and Regional Determinants of the Location of Payday Lenders and Banking Institutions in Mississippi: Reconsidering the Role of Race and Other Factors in Firm Location*, 40 *REV. REG’L STUD.* 53, 53–54, 62 (2010) (“Evidence indicates that banks are less likely to locate in African American areas, but the results show that race is neither a positive nor a statistically significant determinant of location for payday lenders. . . . The findings of this research counter some of the findings by Burkey and Simkins and suggest that race is not particularly important in terms of store location for payday lenders, and other standard economic factors play a much larger role.”).

flourish.”<sup>65</sup> One untested hypothesis is that minorities are less likely to think credit is opportunity-enhancing.<sup>66</sup>

Despite these explanations, however, statistical models cannot account for disparate credit use between white and African American or Latino borrowers. Differences remain even after incorporating a wide variety of factors, including (1) socioeconomic differences (annual income, monthly income volatility, wealth, liquidity, and education); (2) differences in preferences for credit; (3) differences in ability to qualify for credit; and (4) differences in metropolitan status, neighborhood characteristics, and financial service providers in the local area.<sup>67</sup>

So why do African American and Latino consumers turn to payday lenders more than their white counterparts? Marketing provides a major variable that researchers hypothesize may drive Latino and African American borrowers to fringe banks,<sup>68</sup> but research linking advertising and race is sparse. The next Part provides empirical evidence showing that fringe banks target African Americans and Latinos through advertising, while mainstream banks target whites.

## II. ADVERTISING RACE AND CREDIT

The central claim of this Essay is that advertising steers African American and Latino borrowers to fringe banks and away from mainstream banks. Other research has linked advertising campaigns to disparate patterns of use of certain products. For instance, Maria Luisa Alaniz and Chris Wilkes, among others, have argued that the alcohol industry targets African American, Latino, and Native American populations with advertising, causing devastating effects.<sup>69</sup> Olivia Li also recently explored how “racially targeted marketing campaigns”

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<sup>65</sup> Johnson, *supra* note 19, at 166–67; cf. Kristin Johnson, Frank Pasquale & Jennifer Chapman, *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 *FORDHAM L. REV.* 499, 504 (2019) (suggesting Fintech companies are poised to gain strength in consumer financial service markets because of “general distrust of legacy financial institutions, frustration with scandals in financial markets, and the pervasive abuses and exclusion of underserved communities by financial institutions”).

<sup>66</sup> Goodstein et al., *supra* note 10, at 5.

<sup>67</sup> *Id.* at 18–19.

<sup>68</sup> *Id.* at 20–21.

<sup>69</sup> Maria Luisa Alaniz & Chris Wilkes, *Pro-Drinking Messages and Message Environments for Young Adults: The Case of Alcohol Industry Advertising in African American, Latino, and Native American Communities*, 19 *J. PUB. HEALTH POL’Y* 447, 451–55 (1998); Katherine Culliton, *The Impact of Alcohol and Tobacco Advertising on the Latino Community as a Civil Rights Issue*, 16 *BERKELEY LA RAZA L.J.* 71, 71–77 (2005); see also Jonathan S. Goldman, *Take That Tobacco Settlement and Super-Size It!: The Deep-Frying of the Fast Food Industry?*, 13 *TEMP. POL. & C.R. L. REV.* 113, 118 (2003) (describing advertising by fast food companies aimed at Latinos).

caused African Americans to use menthol cigarettes at higher rates.<sup>70</sup> Li explains that menthol cigarette makers featured African American models in *Ebony* to persuade African Americans to buy menthol cigarettes.<sup>71</sup>

This Part offers evidence for the claim that advertising steers certain racial minority groups to fringe banks. The study focuses on the contrast between the race of individuals pictured on Houston payday lenders' and auto title lenders' websites and the race of individuals featured on Houston-area mainstream banking websites. First, we explain our choice to use pictures on websites to assess advertising. Second, we explain the methodology behind the study. Finally, we present the findings and discuss their implications.

#### A. Using Websites to Assess Credit Marketing

Evaluating the race of persons pictured on websites is a reliable way to assess discriminatory effects of marketing programs. Both the advertising literature on race and the legal decisions discussing discrimination commend this approach.

First, social scientists have long demonstrated that the behavior and opinions of other people, especially those who are similar to us, affect our behavior.<sup>72</sup> This decision-making shortcut, called the social proof heuristic, unconsciously guides people to select the same choices that they see others select.<sup>73</sup> For instance, one recent study found that grocery store shoppers “seemed to follow the social proof cues,” making a healthier choice when given proof that others had made the same healthy choice.<sup>74</sup> Namely, when the low-fat cheese had a sign indicating that many people bought that cheese, customers were more likely to make the choice to buy it.<sup>75</sup>

The social proof heuristic operates most powerfully when we observe people *who look like us* acting a specific way.<sup>76</sup> In the context of advertising and race,

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<sup>70</sup> Olivia Li, *From Housing to Health: Imagining Antidiscrimination Provisions for Menthol Cigarette Marketing*, 9 COLUM. J. RACE & L. 369, 371–72 (2019).

<sup>71</sup> *Id.* at 375.

<sup>72</sup> SIX DEGREES OF SOCIAL INFLUENCE: SCIENCE, APPLICATION, AND THE PSYCHOLOGY OF ROBERT CIALDINI 76 (Douglas T. Kenrick, Noah J. Goldstein & Sanford L. Braver eds., 2012); *see also* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1854 (2006) (“Advertisements or billboards depicting exclusively Caucasian models will tend to attract Caucasians, whereas those depicting exclusively (or largely) African American models will attract African Americans.”).

<sup>73</sup> Stefanie J. Salmon, Emely De Vet, Marieke A. Adriaanse, Bob M. Fennis, Martijn Veltkamp & Denise T.D. De Ridder, *Social Proof in the Supermarket: Promoting Healthy Choices Under Low Self-Control Conditions*, 45 FOOD QUALITY & PREFERENCE 113, 114 (2015).

<sup>74</sup> *Id.* at 117.

<sup>75</sup> *Id.*

<sup>76</sup> Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88

the social proof principle suggests that advertisements will most effectively motivate us to purchase services when we see people of our same race using those services.<sup>77</sup> Thus, in this Essay's context, when members of racial minority groups see people of their race using payday lenders and not using banks, the social proof heuristic will lead some people to fringe lenders and away from mainstream banks.<sup>78</sup> Because creditors know that people identify with the models in advertisements and that pictures have tremendous influence over consumption, they use pictures to communicate to potential customers.<sup>79</sup>

A second behavioral model—distinctiveness theory—explains why the racial representation of the models in an advertisement is more likely to have a steering effect on minority consumers than white consumers. Distinctiveness theory posits that a person with unique, underrepresented traits will be more affected when those traits are displayed in the media than a person with more commonly represented traits.<sup>80</sup> For instance, an ad featuring a left-handed person will be very salient to a left-handed viewer. But a right-handed viewer is less likely to notice when an ad features a right-handed person because right-handedness is a commonly represented trait.<sup>81</sup> In the context of race or ethnicity, African Americans, as “numeric minorit[ies] in the United States and in the media” are more likely to notice and “connect with” media that reflects the “symbols, characters, and values” of their cultural background.<sup>82</sup> In this Essay's

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IND. L.J. 1147, 1169–70 (citing ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 140 (2007)).

<sup>77</sup> Sonya A. Grier, Anne M. Brumbaugh & Corliss G. Thornton, *Crossover Dreams: Consumer Responses to Ethnic-Oriented Products*, 70 J. MKTG. 35, 37 (2006) (“[R]esearch shows that consumers respond less favorably to spokespersons of another ethnic group than to spokespersons of their own ethnic groups and suggests that people prefer products associated with their own ethnic group over products associated with other ethnic groups.”)

<sup>78</sup> Guillaume D. Johnson & Sonya A. Grier, “What About the Intended Consequences?”: *Examining the Effects of Race-Stereotyped Portrayals on Advertising Effectiveness*, 41 J. ADVERT. 91, 92 (2012) (“[I]ndividuals tend to classify others into in- and out-groups on the basis of their similarities or dissimilarities. After others are categorized into groups, members of groups are seen as similar to one another, differences between groups are exaggerated, and information processing is biased. Research shows how social categorization influences ad effectiveness, with viewers evaluating ads featuring in-group actors more positively than ads featuring out-group actors.”)

<sup>79</sup> Katherine G. Stearns, *Countering Implicit Discrimination in Real Estate Advertisements: A Call for the Issuance of Human Model Injunctions*, 88 NW. U. L. REV. 1200, 1215–16 (1994).

<sup>80</sup> See Osei Appiah, *Effects of Ethnic Identification on Web Browsers' Attitudes Toward and Navigational Patterns on Race-Targeted Sites*, 31 COMM'N RSCH. 312, 314 (2014).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; see also *id.* at 317 (“Blacks are more likely [than whites] to connect with targeted media and make links between the targeted media and themselves.”). Advertising research also indicates that minority consumers are more likely to recall advertising that features minority models. See, e.g., Yuvay Jeanine Meyers, *Skin Tone as the Signifier of Race: The Effect of Consumer Ethnic Identity on Targeted Marketing*, 15 ACAD. MKTG. STUD. J. 77, 78–79 (2011) (reporting that African American consumers are more likely to recall and to “feel positively



context, distinctiveness theory indicates that bank websites featuring nonwhite models are likely to attract nonwhite consumers without deterring white consumers.

Creola Johnson explains how advertisements using African American models can particularly influence African Americans.<sup>83</sup> African Americans are likely, she explains, “to see race as the key identifying characteristic,” and research suggests that “participants who highly identif[y] with a certain group [are] persuaded by the message of a fellow in-group member.”<sup>84</sup> Thus, if a company’s advertisements feature African American models frequently, it is likely that those advertisements will generate interest from African Americans.

Using pictures of models to assess whether advertisers are targeting Latinos is more complicated because Latino is not a race but instead reflects country of origin or ethnicity.<sup>85</sup> The U.S. Census does not list Latino or Hispanic as a race but instead counts people whose ancestors are from a wide variety of Spanish-speaking countries as Hispanic or Latino.<sup>86</sup>

Despite Latinos’ varying backgrounds, academic commentary has identified ways in which marketers target the Latino community. One important indicator that an advertiser is targeting Latinos is the use of Spanish in advertisements because speaking Spanish is a common characteristic that many Latinos share.<sup>87</sup>

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towards” advertisements that feature African American models).

<sup>83</sup> Johnson, *supra* note 19, at 191–92.

<sup>84</sup> *Id.* at 191.

<sup>85</sup> Laura Sonderup, *Hispanic Marketing: Capturing the Loyalty of a Critical Market Segment*, 60 CONSUMER FIN. L.Q. REP. 508, 508 (2006). This necessarily complicates the data gathering in our studies because a model of Hispanic or Latino heritage may have blond hair, blue eyes, black skin, or other traits that a researcher could perceive as exclusively “white” or “Black.”

<sup>86</sup> U.S. Census, *Hispanic or Latino Origin*, <https://www.census.gov/quickfacts/fact/note/US/RHI725219> (last visited June 22, 2021).

<sup>87</sup> Sonderup, *supra* note 85, at 508–09 (“What, if anything, unifies Hispanics? For the most part, the language. Spanish stands as a symbol of difference for U.S. Hispanics; wherever they’re from and regardless of their history, the Spanish language is a key to their individual and collective pasts. . . . When asked about advertising effectiveness, thirty-eight percent of Hispanics surveyed found English language ads less effective than Spanish ads in terms of *recall* and seventy percent less effective than Spanish ads in terms of *persuasion*. Many younger and acculturated Latinos mix languages into a form of ‘Spanglish,’ in which they speak English peppered with Spanish words. But when it comes to selling effectiveness, fifty-six percent of Latino adults respond best to advertising when it is presented in Spanish.”); *see also* MARISA A. ABRAJANO, CAMPAIGNING TO THE NEW AMERICAN ELECTORATE: ADVERTISING TO LATINO VOTERS 34 (2010) (quoting Lionel Sosa, Ronald Reagan’s political consultant charged with winning Latino voters, as saying “to reach [Latinos] in English . . . you have to convince them in Spanish”); Greg Jones, *Mortgage Lending: Confusing in Every Language*, 24 LOY. CONSUMER L. REV. 661, 673 (2012) (“[B]anks began advertising in a very targeted way toward Latinos. It is now common for banks to advertise to Latinos in a language that they can understand.”).

In the consumer protection context, advocates have argued that more lenders should share information in Spanish.<sup>88</sup> Additionally, Consumer Financial Protection Bureau (CFPB) regulations permit, but do not require, that lenders provide mandated disclosures in languages other than English.<sup>89</sup> Thus, Spanish-speaking consumers may be reluctant to use lending services that do not directly target them in advertisements.

Scholarship has also recognized that using pictures of Latinos in advertising is a targeting mechanism.<sup>90</sup> Viewers may identify models as Latino because of the clothing, context, or other cultural cues in the advertising.<sup>91</sup> Thus, advertisers have used Latino celebrities to target the Latino community.<sup>92</sup> This use of language and pictures reflects the social proof heuristic and distinctiveness theory: companies believe that advertisements featuring Latinos and things

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<sup>88</sup> See Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1044–45 (1996) (arguing that consumer protection laws do too little to ensure that Spanish-only consumers receive information in Spanish).

<sup>89</sup> Erin Lovejoy, *Taking Advantage of Laws, Not People: Curbing Language Discrimination Against Texas Consumers*, 69 BAYLOR L. REV. 437, 454 (2017) (quoting the Truth in Lending Act enabling Regulation Z, “[d]isclosures required by this part may be made in a language other than English, provided that the disclosures are made available in English upon the consumer’s request” (emphasis added)); *id.* at 454 n.125 (pointing out that the language is similarly non-binding and merely suggestive in “Regulations B (Equal Opportunity Credit Act), E (Electronic Fund Transfers), M (Consumer Leasing), X (Real Estate Settlement Procedures Act), and DD (Truth in Savings)”).

<sup>90</sup> See Culliton, *supra* note 69, at 81 (“A recent surge of advertisements glamorizing cigarettes has been directed at Latinas. In 1999-2000, Philip Morris ran a magazine ad campaign for Virginia Slims featuring Latinas and other ethnic women, which used the slogan ‘Find Your Voice,’ and the ad was withdrawn after being criticized for targeting ethnic women.”); Leslie M. Inzunza, *Marketing to the Hispanic Community ¿Habra Usted Espanol? Sure, It Helps, but How Well Your Firm Connects with the Local Hispanic Community Is Much More Critical to Your Marketing Success*, TRIAL, Nov. 2007, at 58, 63 (suggesting that law firms “use culturally relevant graphics and visuals that truly represent the local population” to attract Latino clients).

<sup>91</sup> Goldman, *supra* note 69, at 118; see Culliton, *supra* note 69, at 80–81. Research on how cultural identity affects Latino consumers’ behavior in the marketplace indicates that those with “strong ethnic identifiers” are likely to purchase goods marketed to their cultural group and targeted through the reflection of “customs, language, dress, foods, [and] religion.” Appiah, *supra* note 80, at 314 (citing Naveen Donthu & Joseph Cherian, *Hispanic Coupon Usage: The Impact of Strong and Weak Ethnic Identification*, 9 PSYCH. & MKTG. 501, 501–10 (1992); Rohit Deshpande, Wayne D. Hoyer & Naveen Donthu, *The Intensity of Ethnic Affiliation: A Study of the Sociology of Hispanic Consumption*, 13 J. CONSUMER RSCH. 214, 214–20 (1986)); *id.* at 315 (“[T]argeted media are most effective when the symbols, characters, and values depicted in the media are drawn from the intended audience’s cultural background.”); see also Silvia Betti, *The Image of Hispanics in Advertising in the United States*, INFORMES DEL OBSERVATORIO 8–9 (2015), [http://cervantesobservatorio.fas.harvard.edu/sites/default/files/009\\_reports\\_hispanic\\_advertising\\_0.pdf](http://cervantesobservatorio.fas.harvard.edu/sites/default/files/009_reports_hispanic_advertising_0.pdf) (noting that some researchers argue that appealing to Latino consumers requires more than a sensitivity to language or willingness to translate in ads; rather, “[a]dvertisers must appeal to these Hispanic groups using their culture, their customs, and their way of being”).

<sup>92</sup> Goldman, *supra* note 69, at 118. A recent Honda ad campaign targeting young Latinos featured Mexican comedian Felipe Esparaza. Betti, *supra* note 91, at 5.

associated with Latinos will induce group members to purchase the goods or services.<sup>93</sup>

In addition to this theoretical literature, courts have recognized that the race of advertising models can be evidence of discrimination for almost half a century. The Fair Housing Act (FHA) makes it illegal for advertisements to indicate “any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin.”<sup>94</sup> Courts have concluded that the race of models, and not just the words, featured in advertisements matters when assessing discriminatory effect.<sup>95</sup> For example, the U.S. District Court for the Eastern District of New York allowed plaintiffs to go forward despite a motion to dismiss because of evidence that the defendants “used advertising featuring minority consumers” as part of a conspiracy to sell minorities “over-valued, defective homes financed with predatory loans.”<sup>96</sup> In another case, a federal District Court in the District of Columbia ordered a company to use African American models in its future advertising because the company had violated the FHA’s advertising rules through pictures.<sup>97</sup>

In an often-cited case,<sup>98</sup> *Hargraves v. Capital City Mortgage Corp.*, the court held that there was “a genuine dispute of fact as to whether the defendants acted on the basis of race.”<sup>99</sup> Evidence in the case indicated that the defendants located

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<sup>93</sup> Meyers, *supra* note 82, at 85 (“[C]onsumers tend to favor advertisements that feature models who look like them.”).

<sup>94</sup> 42 U.S.C. § 3604(c).

<sup>95</sup> *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1000 (2d Cir. 1991) (stating that “Section 3604(c) reaches the use of models as a medium for the expression of a racial preference”); *see also* *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28, 35 (D.C. Cir. 1990) (describing the plaintiffs’ complaint “that the ‘repeated and continued depiction of white models and the complete absence of [B]lack models’ in defendants’ advertisements ‘indicate a preference based on race’ in violation of the statute”); *Tyus v. Urb. Search Mgmt.*, 102 F.3d 256, 260 (7th Cir. 1996) (summarizing the plaintiffs’ complaint, which argued that the defendants exclusively used “[w]hite human models in its billboard and newspaper advertisements” over the course of three years).

<sup>96</sup> *Barkley v. Olympia Mortg. Co.*, No. 04 CV 875 (RJD)(KAM), 2007 WL 2437810, at \*1, \*11 (E.D.N.Y. Aug. 22, 2007); *cf.* *Harvey v. Home Savers Consulting Corp.*, No. 07-CV-2645 (JG), 2011 WL 13298705, at \*10 (E.D.N.Y. Mar. 3, 2011) (permitting a civil rights claim to go forward on the allegation that the defendants “engaged in racially targeted advertising by taking out ads in publications with a primarily African-American readership”); *McGlaw'n v. Pa. Hum. Rels. Comm'n*, 891 A.2d 757, 772 (Pa. Commw. Ct. 2006) (“In reverse redlining cases, evidence of the defendant’s advertising efforts in African American communities is sufficient to show intentional targeting on the basis of race.”).

<sup>97</sup> *NAACP v. ITT Cmty. Dev. Corp.*, 399 F. Supp. 366, 368 (D.D.C. 1975). Similarly, an arbitrator in one FHA case ordered the defendant to use African American models in the same “manner, size and setting” as white models were used. John A. Obee, *Advertising Discrimination in Housing* Fair Housing Center of Metropolitan Detroit v. Henry Ford Village: *A Model for Effective, Affirmative Relief Under the Federal Fair Housing Statute*, 51 WAYNE L. REV. 1483, 1519 (2005) (citing *Fair Hous. Ctr. of Metro. Detroit v. Henry Ford Vill., Inc.*, No. 95-72865 (E.D. Mich. Feb. 3, 1997)).

<sup>98</sup> *McGlaw'n*, 891 A.2d at 765 (calling *Hargraves* the “seminal case” on reverse redlining).

<sup>99</sup> 140 F. Supp. 2d 7, 21–22 (D.D.C. 2000), *on reconsideration in part*, 147 F. Supp. 2d 1 (D.D.C. 2001);

offices and distributed marketing material in predominately African American neighborhoods and displayed pictures of the lender with prominent African American politicians throughout the lender's office.<sup>100</sup> Another court succinctly notes the reasoning for these kinds of decisions:

It requires no expert to recognize that human models in advertising attempt to create an identification between the model, the consumer, and the product. In other words, advertisers choose models with whom the targeted consumers will positively identify, hoping to convey the message that people like the depicted models consume and enjoy the advertised product.<sup>101</sup>

In sum, both the literature analyzing race and advertising and half a century of court cases establish that pictures of models in advertisements can provide proof of the discriminatory effects of an advertisement.

We often think of discrimination cases involving wrongdoers stopping someone from enjoying a good or service, but the cases described here often involve steering certain groups to inferior products. Courts have embraced the notion that encouraging someone to purchase suboptimal goods or services can also be discrimination.<sup>102</sup>

Our studies involve both steering from and steering to. Mainstream banks, the study reveals, dissuade minorities from mainstream banking products while fringe banks lead minorities to suboptimal, higher-cost products. The next section explains the methodology of both studies.

### *B. Methodology*

There were two components to our empirical research. One component, the Fringe Bank Study, evaluated advertising on payday lending and auto title lending websites and in their stores in Houston, Texas, in fall 2014. The other component, the Mainstream Bank Study, evaluated the advertising on websites of banks located in Houston, Texas, in both fall 2014 and fall 2020.

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*see also* Steed v. EverHome Mortg. Co., 308 Fed. App'x 364, 368 (11th Cir. 2009) (approving of *Hargrave's* approach to reverse redlining and appearing to accept evidence of advertisement as a basis for proving discrimination).

<sup>100</sup> *Hargraves*, 140 F. Supp. 2d at 21–22.

<sup>101</sup> *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1058 (E.D. Va. 1987).

<sup>102</sup> Li, *supra* note 70, at 394 (“Ordinarily, liability for steering arises when brokers attempt to dissuade potential buyers from following through on a transaction because of their race. However, courts have found liability for steering in housing when real estate listing services selectively advertise housing to a particular race and therefore further entrench racial segregation. In other words, the FHA punishes the practice of attracting people to homes because of their race, not just discouraging them from purchasing certain homes.”).

For the Fringe Bank Study, 6 research assistants<sup>103</sup> visited 189 payday and auto title lending stores in Houston and took pictures of the advertisements at those locations.<sup>104</sup> Also, Hawkins and two research assistants coded information from these lenders' websites.

To generate the storefronts and websites we studied, Hawkins used a search engine maintained by the Texas Office of Consumer Credit Commissioner (OCCC), the administrative agency in Texas charged with regulating payday and auto title lenders.<sup>105</sup> The research assistants went to every store on the Texas OCCC's list for Houston lenders unless the lender had more than ten locations, in which case they only visited ten locations. Using standard Internet search engines or calling the lenders, Hawkins located the websites for thirty of thirty-seven lenders operating in Houston; the other seven did not have active websites.

Most of the advertising at the storefronts did not contain pictures, instead consisting of written advertising. To assess whether advertisements targeted minorities, Hawkins relied on the language of the advertising as a proxy for racial targeting. As discussed in Part II.A., language is particularly important when assessing advertisements targeting Latinos. For the websites, we recorded the race and gender of the people pictured on the website. We only recorded pictures of people appearing as customers (not employees or owners), and we recorded all pictures even if they were only part of a person (*e.g.*, a hand).

For the Mainstream Bank Study, Penner recorded the race and gender of people pictured on websites of banks located in the Houston, Texas, area.<sup>106</sup> To obtain a list of banks in the Houston area, Hawkins searched Google Maps for "banks" in Houston, which generated more than 400 results. Next, Hawkins recorded each bank on the list (not each branch) until no new banks appeared. This process yielded forty-six banks.

Because we wanted to compare payday and title lenders' websites from 2014 with banks' websites from 2014, Penner used the Internet Archive Wayback Machine<sup>107</sup> to find a version of the banks' websites from fall 2014 or early 2015.

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<sup>103</sup> The research assistants involved in the Fringe Bank Study were a variety of races, including white, Latino, and African American.

<sup>104</sup> For a more detailed account of this study's methodology and some findings not relevant to this immediate project, see Jim Hawkins, *Are Bigger Companies Better for Low-Income Borrowers?: Evidence from Payday and Title Loan Advertisements*, 11 J.L. ECON. & POL'Y 303, 306 (2015).

<sup>105</sup> *Advanced Search*, TEX. OFF. CONSUMER CREDIT COMM'R, <https://alecs.occce.texas.gov/Generic/AdvanceSearch?fromSource=true#> (last visited June 22, 2021).

<sup>106</sup> Penner is a white, female law student. Hawkins is a white, male law professor. The authors acknowledge that it is a limitation in the research design to not have researchers of multiple racial backgrounds.

<sup>107</sup> *Internet Archive*, WAYBACK MACHINE, <http://web.archive.org/> (last visited June 22, 2021).

For nine of the banks, the Wayback Machine did not have any records from fall 2014 or early 2015, so we excluded those banks from the study. We also excluded ten other banks that had no pictures on their websites in fall 2014, leaving twenty-seven banks in the study.

Using the 2014 websites, Penner followed the same protocol that the research assistants in the Fringe Bank Study followed to code information about the race and gender of any individuals pictured on the websites' homepages. Again, this protocol excluded images of employees and owners. To assess change over time, Penner performed the same analysis for the websites in fall 2020. Hawkins reviewed the results and checked for consistency with the Fringe Banking Study. Also, Hawkins viewed each website to see if any of the advertising was in Spanish.

### *C. Study Results*

The pictures of customers on fringe and mainstream bank websites reveal that fringe banks target African Americans and Latinos, while mainstream banks often focus their advertising on whites. While African Americans make up roughly 12% of the Texas population, almost 35% of the pictures on payday and title lender websites were of African American models. While Latinos comprise less than 20% of payday and title lending customers, more than 30% of the pictures were of Latino customers. On the other hand, at mainstream banks, almost 30% of the websites did not have a single picture of an African American model. Almost 75% of mainstream banks did not feature a single picture of a Latino individual.

As one example, in 2014, a mainstream bank website's homepage pictured five people sitting in a circle—four white men and one white woman. Six years later, the homepage in 2020 opened with a picture of a white woman, scrolls automatically to a picture of two white men, then to a picture of an Indian man and a Latina, and finally to another picture of a white woman.<sup>108</sup>

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<sup>108</sup> 2014 Mainstream Bank Study Observation #25.

Table 1 summarizes the results from the Fringe Bank and Mainstream Bank studies.

*Table 1: Racial Groups Pictured on Websites in 2014 Compared to Texas Population and Customer Base*

	<b>Percentage of People in Texas Population in 2014<sup>109</sup></b>	<b>Percentage of Auto Title Lending Customers<sup>110</sup></b>	<b>Percentage of Payday Lending Customers<sup>111</sup></b>	<b>Percentage of Pictures on Fringe Bank Websites in 2014</b>	<b>Percentage of Pictures on Mainstream Bank Websites in 2014</b>
<b>White</b>	75.20%	57.80%	55.00%	36.40%	54.05%
<b>Latino</b>	38.60%	17.80%	14.00%	28.80%	6.08% <sup>112</sup>
<b>Black</b>	12.00%	15.60%	23.00%	34.80%	18.24%
<b>Asian</b>	4.30%	0.70%	6.00% ("other")	0.00%	18.24%

One might object to our suggestion that the models in advertisements reflect the racial make-up of the general population or the customer base. "Quotas" certainly can have a negative connotation for some people.<sup>113</sup> But merely pointing out the disconnect between advertising models and actual population is not a suggestion that courts or legislatures mandate specific advertising proportions. This approach simply shows the large gap between how fringe and mainstream creditors market using race. Moreover, the Department of Housing and Urban Development historically required the races of models in advertisements to mirror the populations, so our approach is not outside established norms:

Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness on the basis of race, color,

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<sup>109</sup> *Explore Census Data*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/> (last visited Mar. 11, 2021) (insert "Texas" into the "Explore Census Data" search box, click ACS DEMOGRAPHIC AND HOUSING ESTIMATES from the results, and then select "2014: ACS 1-Year Estimates Data Profiles" from the Program dropdown).

<sup>110</sup> Fritzdixon et. al., *supra* note 42, at 1029.

<sup>111</sup> PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 35 (2012), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2012/PewPaydayLendingReportpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/PewPaydayLendingReportpdf.pdf).

<sup>112</sup> The fact there are so few Latino pictures is surprising, but prior studies have similar findings. Despite being the largest minority group in America, one study surveying the results of many prior advertising studies concluded, "Hispanics appeared in less than 1% of TV commercials and were typically situated in inconsequential roles." Foster Davis, *supra* note 18, at 151.

<sup>113</sup> Obee, *supra* note 97, at 1521.

religion, sex, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in a metropolitan area and both sexes. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, or national origin, and is not for the exclusive use of one such group.<sup>114</sup>

In addition to the pictures, the advertising at payday and title lending storefronts in 2014 reveals these lenders' focus on Latino borrowers.<sup>115</sup> The vast majority of these locations, 77.30%, had advertisements in Spanish. In contrast, not a single mainstream bank website in 2014 had an advertisement in Spanish. Of the websites, 70.40% (n=19) did not even have one word in Spanish on the entire homepage, and 29.60% of the websites (n=8) merely had one or two words ("Español" or "En Español") to take a determined customer to a Spanish version of the website.

George Floyd's killing, as well as other violence against African Americans in 2020, and the resulting national protests had the potential to awaken mainstream banks to the importance of diversity in their advertising.<sup>116</sup> Table 2 shows it did not.

*Table 2: Racial Groups Pictured on Mainstream Bank Websites in 2014 and 2020 Compared to Texas Population*

	<b>Percentage of People in Texas Population in 2014<sup>117</sup></b>	<b>Percentage of Pictures on Mainstream Bank Websites in 2014</b>	<b>Percentage of People in Texas Population in 2019<sup>118</sup></b>	<b>Percentage of Pictures on Mainstream Bank Websites in 2020</b>
<b>White</b>	75.20%	54.05%	73.40%	56.82%
<b>Latino</b>	38.60%	6.08%	39.70%	4.87%
<b>Black</b>	12.00%	18.24%	12.30%	22.08%
<b>Asian</b>	4.30%	18.24%	5.00%	11.04%

<sup>114</sup> Margot S. Rubin, *Advertising and Title VIII: The Discriminatory Use of Models in Real Estate Advertisements*, 98 YALE L.J. 165, 169 (1988) (quoting 24 C.F.R. § 109.30(b) (1987)).

<sup>115</sup> Commentary recognizes that language can affect advertising's inclusivity. Emily A. Vernon, *Exclusionary Advertising?: The Case for Cautious Enforcement of 42 USC § 3604(c) Against Minority-Language Housing Advertisements*, 87 U. CHI. L. REV. 223, 243 (2020).

<sup>116</sup> Tiffany Hsu, *Corporate Voices Get Behind 'Black Lives Matter' Cause*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html>.

<sup>117</sup> U.S. CENSUS BUREAU, *supra* note 109.

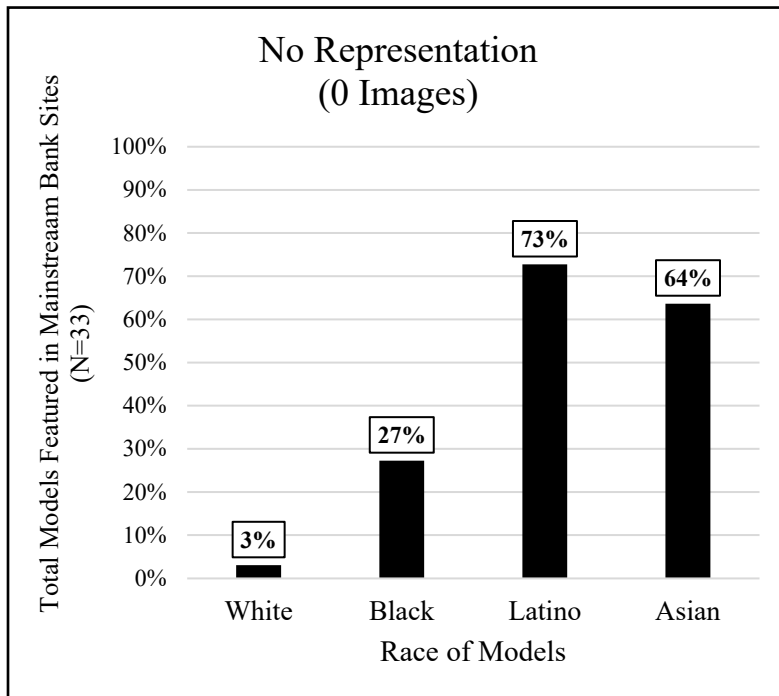
<sup>118</sup> *Id.*



As Table 2 sets out, the percentage of pictures of African Americans on bank websites rose less than 4% from 2014 to 2020, while the percentage of pictures of Latinos fell more than a point. Even in the face of substantial social unrest, many banks primarily feature images of white customers, marginalizing other racial groups.

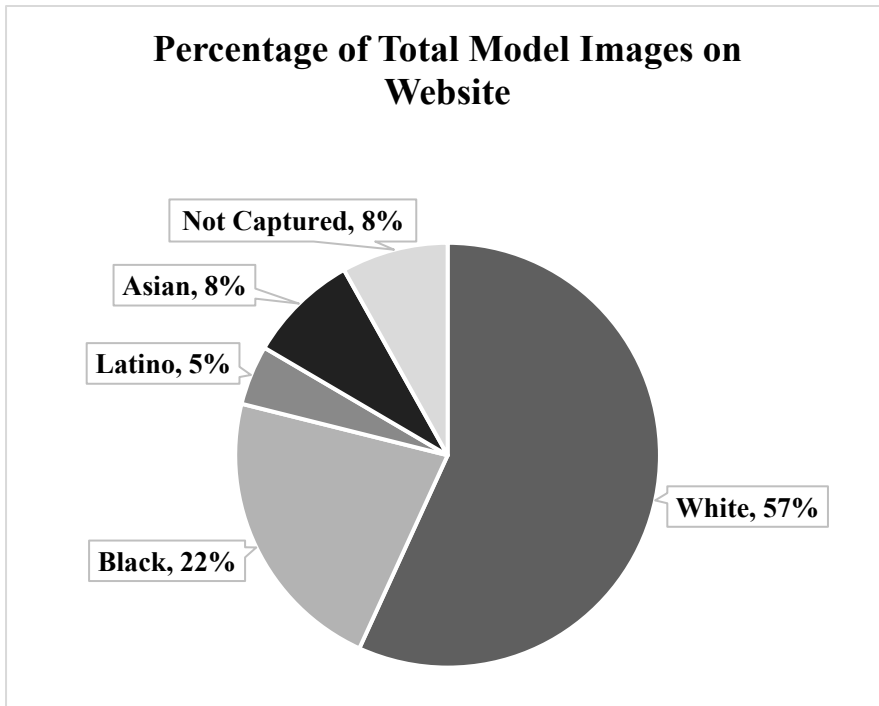
In 2020, many mainstream bank advertisements did not feature a single minority model. For the below data, we reviewed thirty-five bank websites, chosen because they each featured at least one model who we identified as white, African American, Latino, or Asian. Two websites were excluded because they featured only models of an unidentifiable or other racial group. Data from the remaining thirty-three bank websites allowed us to ask how often an African American, Latino, or Asian Houstonian will see themselves in the “model” customers featured on a mainstream bank website. The answer: infrequently. Tables 3 and 4 show that white customers are almost sure to see models who look like them on the site. The same is not true for African Americans, Latinos, or Asians. Table 3 shows how often a site featured no models of a given group.

*Table 3: Racial Groups Not Represented on Mainstream Bank Websites*



While certain lender websites may have particularly poor minority representation, the aggregate data tells the same story: white models are the “model consumer” featured on mainstream bank websites. Table 4 shows the percentage of representation by racial group in all of the images reviewed during the 2020 Mainstream Bank Study. The “not captured” group represents models who were not identifiable or who represented racial groups not included in the study.

*Table 4: Aggregate Racial Group Representation in Mainstream Bank Website Images*



Both the language and the pictures fringe banks use communicate that African Americans and Latinos should use these high-cost credit options. Many mainstream banks, on the other hand, subtly communicate that white customers should use their products. Confoundingly, fringe and mainstream banks both seem to largely ignore Asian consumers. This Part concludes by considering the implications of advertising that steers African Americans and Latinos to payday loans and away from banks.

*D. The Consequences of Advertising Only Predatory Products to Minority Groups*

Two important negative consequences emerge from targeting African Americans and Latinos for payday and title loans while pictorially excluding them from mainstream banks.

First, the advertising works. As discussed in Part I.A, African Americans and Latinos use payday and title loans more frequently than whites even after controlling for other factors. Advertising payday loans is effective, appealing both to rational concerns of potential borrowers and exploiting borrowers' cognitive weaknesses.<sup>119</sup>

Advertising that excludes African Americans and Latinos from mainstream banks harms these groups by not educating them about the products that these banks offer: "Lack of familiarity with appropriate financial products and services often results in financial exclusion."<sup>120</sup> In the current lending environment, discrimination may not occur because a credit card company decides to deny African American applicants unjustifiably; instead, banks can discriminate against African Americans by not informing them of the opportunity to apply.<sup>121</sup>

This advertising is particularly damaging because of the history of discrimination against African Americans and Latinos. Discriminatory lending practices in the past have created distrust of banks.<sup>122</sup> So when mainstream financial institutions' advertisements omit African Americans and Latinos, these groups are likely to see that advertising as a continuation of racist policies. In turn, members of these groups are less likely to use mainstream banks and more likely to turn to fringe creditors. Stephanie Stern argues that advertising discrimination has a direct "self-sorting" effect: "[I]t is evident that . . . borrowers from protected groups who read or hear about advertisements discriminating against their group will perceive discrimination norms as more

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<sup>119</sup> Jim Hawkins, *Using Advertisements to Diagnose Behavioral Market Failure in the Payday Lending Market*, 51 WAKE FOREST L. REV. 57, 84–85 (2016). Advertising has become even more important because lenders using Big Data are even more likely to do targeted advertising to specific market segments. Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHL-KENT L. REV. 3, 21–22 (2018).

<sup>120</sup> Jones Havard, *supra* note 25, at 332.

<sup>121</sup> Timothy C. Lambert, *Fair Marketing: Challenging Pre-Application Lending Practices*, 87 GEO. L.J. 2181, 2182–83 (1999).

<sup>122</sup> Jones Havard, *supra* note 25, at 332 ("The lack of trust and aversion that minorities, regardless of income, have towards the formal banking system is directly related to this country's sordid history of regulated, discriminatory lending.").

prevalent than they would have otherwise[;] . . . indeed, this may be the cause of some of the ‘self-sorting’ by race observed in the research literature.”<sup>123</sup> This self-sorting may be especially apparent for African Americans who, even when they have access to a mainstream bank or credit union, are 50% more likely than the general population to turn to fringe sources of credit for a loan.<sup>124</sup> Research has also shown that African Americans “systematically underestimate their credit worthiness.”<sup>125</sup>

The second negative consequence is broader and more insidious. Advertising affects people’s perception of racial minority groups and those groups’ self-understanding. As Deseriee Kennedy notes, “Symbols and models used in advertising are important in shaping perceptions of oneself and others.”<sup>126</sup> Thus, advertising that targets African Americans and Latinos for fringe credit products, and not for mainstream products, creates the perception of second-class financial citizenship.

Advertising scholars have noted that when advertising uses racist images, the advertising normalizes those images for people using the advertised goods or services.<sup>127</sup> Advertising images can replace even people’s own experiences with members of minority groups,<sup>128</sup> so the race of models who are featured in an advertisement matters. Judy Foster Davis may be overstating the case, but she makes an important observation:

[A]dvertising is more influential in society than great works of art and cultural artifacts located in world class museums and educational

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<sup>123</sup> Stephanie M. Stern, *A Social Norm Theory of Regulating Housing Speech Under the Fair Housing Act*, 84 MO. L. REV. 435, 460 (2019) (discussing the FHA prohibition on discriminatory advertising). Advertising exclusion may also exacerbate interpersonal feelings of exclusion. In a study of “banked” women of color who continued to rely on fringe banking services, “all focus groups” cited feeling excluded and unwelcome as a “barrier to access.” See Heather E. Bullock, Erin E. Toolis, Brando Senicon & Maria T. Cadenas, *The High Price of Economic Marginalization: Low-Income Latinas’ Experiences with Mainstream Banking and Alternative Financial Services*, 26 PEACE & CONFLICT: J. PEACE PSYCH. 136, 141 (2020) (“Intersecting institutional and interpersonal discrimination deepened exclusion, with respondents expressing distrust in providers they perceived as unwelcoming and lacking transparency.”).

<sup>124</sup> See Bar-Gill & Warren *supra* 36, at 67 (citing AARP, 2003 CONSUMER EXPERIENCE SURVEY: INSIGHTS ON CONSUMER CREDIT BEHAVIOR, FRAUD AND FINANCIAL PLANNING 41 (2003), [https://assets.aarp.org/rgcenter/consume/cons\\_exp.pdf](https://assets.aarp.org/rgcenter/consume/cons_exp.pdf)).

<sup>125</sup> *Id.*

<sup>126</sup> Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 616 (2000).

<sup>127</sup> Foster Davis, *supra* note 18, at 146.

<sup>128</sup> See Jonathan E. Schroeder & Janet L. Borgerson, *An Ethics of Representation for International Marketing Communication*, 22 INT’L MKTG. REV. 578, 581 (2005) (“Images in marketing communication frequently stand in for experience, especially when other sources have less prominence, and serve as a foundation for future attempts to comprehend and construct the world around us.”).

institutions, since the latter tend to be seen infrequently by relatively small numbers of people. In comparison, advertising is prevalent, repetitive, and easily accessible by members of society in public spaces and through popular media . . . . As such, advertising images become so ubiquitous that they blend into the background of life, becoming routine and normalized as part of the usual landscape and rarely questioned or challenged.<sup>129</sup>

Not only does current advertising steer African Americans and Latinos to overuse fringe banks, but it also creates the impression that these groups are economically inferior to white borrowers. Advertising credit needs to change, and the next Part outlines a politically attractive path forward to encourage that change to happen.

### III. ADVERTISING TOWARD EQUITY

Both policymakers and banks themselves have a role to play in changing advertising practices that perpetuate economic subordination by steering African American and Latino communities to fringe banks and away from mainstream banks. The social climate of 2020 provided fertile grounds to urge businesses and governments to enact changes. Of course, many people are exploring more radical and extensive solutions, but this Part makes the argument that changing advertising can bring substantial gains for racial minority communities with minimal business and political resistance.

#### *A. Self-Regulation by Banks*

Banks—both mainstream banks and alternative financial service providers—should make two relatively simple changes to prevent minority groups from overconsuming fringe credit products. First, they should audit their websites to determine whether the pictures on them are representative of the population of their states or their customers. For example, the mainstream banks that only had pictures of white people on their websites in 2020<sup>130</sup> should consider adding pictures of people of color to create the impression that the banks want their business. Likewise, the thirty banks that did not feature either African American or Latino models should consider, if possible, adding those groups to invite consumers in these communities to join mainstream banking.

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<sup>129</sup> Judy Foster Davis, *Representation Matters: An Illustrated History of Race and Ethnicity in Advertising*, 21 *ADVERT. & SOC'Y Q.* (2020); see also Kennedy, *supra* note 120, at 618 (“The repeated images in advertisements that bombard us reinforce social norms and mores, flooding us with messages about society and societal roles.”).

<sup>130</sup> 2020 Mainstream Bank Study Observations 9, 11, 24, and 31.

Second, all the banks had either no uses of Spanish or only minimal and obscure uses. Banks should ensure that their choice of language targets the Latino community to encourage Latinos to learn about their services. On the other side of the equation, payday lenders that want to reassure the public that they are not targeting African Americans or Latinos should reduce the number of advertisements featuring people in those groups to reflect either the general population or, at the very least, their customer pool.

At a more general level, banks should insist that their outside advertising firms or their internal advertising teams have diverse racial backgrounds. In recent history, advertising agencies have often hired members of racial minority groups to focus on expanding services to minority markets.<sup>131</sup> These hiring decisions have “contributed significantly to improvements in the manner of portrayals of ethnic minorities in advertising.”<sup>132</sup>

Banks should welcome these sorts of changes because they align with current consumer expectations. In the wake of racial injustices and calls for social change in 2020, companies have become more amenable to taking action to combat racial inequalities.<sup>133</sup> Major companies like Citigroup, Nike, and Nordstrom took public stances against George Floyd’s treatment and racial injustice generally.<sup>134</sup> The reason, one marketing professor explained, is that companies wanted to align their messaging with consumers’ values.<sup>135</sup>

Banks should also welcome these suggested changes to stave off more aggressive regulations. Implementing a long-term audit program that considers the race of models featured in advertisements is a good business practice because regulators conducting bank examinations already evaluate whether companies seek to prevent discriminatory actions or effects.<sup>136</sup> As the Biden Administration takes over, companies should anticipate a more aggressive CFPB and proactively implement policies that make unwelcome regulations less likely. Moreover, companies focused on confronting racism in advertising are more likely to comply with other anti-discrimination norms.<sup>137</sup>

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<sup>131</sup> Foster Davis, *supra* note 18, at 155.

<sup>132</sup> *Id.*

<sup>133</sup> Hsu, *supra* note 112 (noting that while businesses usually avoid controversial issues, “after Mr. Floyd died on Monday in Minneapolis, a wide range of companies began to take much more public stances on racial injustice and police violence”).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (quoting Wharton School of the University of Pennsylvania marketing professor Americus Reed).

<sup>136</sup> See FED. FIN. INSTS. EXAMINATION COUNCIL, INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES 11–12 (2009), <https://www.ffiec.gov/PDF/fairlend.pdf>.

<sup>137</sup> Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187, 1229–30 (2017) (“My discussion in this Part supports

But some companies will lag behind or purposefully fail to market credit to historically disenfranchised communities. Understanding this, the next sections suggest how policymakers can immediately change the advertising landscape for fringe and mainstream banks.

### *B. Legislative/Regulatory Action Under the Equal Credit Opportunity Act*

The primary law that regulates discrimination by fringe and mainstream creditors is the Equal Credit Opportunity Act (ECOA).<sup>138</sup> It applies to any creditor,<sup>139</sup> any applicant,<sup>140</sup> and any credit transaction.<sup>141</sup> There are some disputes on the margins about these definitions' applicability,<sup>142</sup> but in this case, it is plain that the ECOA applies to credit cards, bank loans, payday loans, and auto title loans.

As currently written, the ECOA's text is very sparse. Its main limitation on lender behavior is found in 15 U.S.C. § 1691(a)(1): "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)."<sup>143</sup>

The CFPB administers the ECOA through Regulation B. This regulation gives more specificity to what the ECOA prohibits regarding advertising: "A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application."<sup>144</sup>

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the idea that a more frank discussion about racial difference and discrimination—both implicit and explicit—can lead to more effective compliance. Acknowledging that the overwhelming majority of the firms that engaged in predatory lending were 'white' firms (i.e., explicitly racializing them), and acknowledging that the firms' victims were people of color are important steps toward accomplishing this." (citation omitted).

<sup>138</sup> 15 U.S.C. § 1691.

<sup>139</sup> *Id.* § 1691a(e) ("The term 'creditor' means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.").

<sup>140</sup> *Id.* § 1691a(b) ("The term 'applicant' means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.").

<sup>141</sup> *Id.* § 1691a(d) ("The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.").

<sup>142</sup> *Compare* *Salvagne v. Fairfield Ford, Inc.*, 794 F. Supp. 2d 826, 836 (S.D. Ohio 2010) (holding a car dealer was "not a 'creditor' for notification purposes under the [ECOA]"), *with* *Barnette v. Brook Rd., Inc.*, 457 F. Supp. 2d 647, 655 (E.D. Va. 2006) (holding a car dealer was a creditor under the ECOA).

<sup>143</sup> 15 U.S.C. § 1691(a)(1).

<sup>144</sup> 12 C.F.R. § 1002.4(b) (2020).

The academic literature largely argues that current laws are failing to close the gap between minority borrowers and white borrowers.<sup>145</sup> In the context of the ECOA, very few litigants appear to use the ECOA to address discrimination related to advertising. Searching for ECOA cases relating to advertising yielded almost no results.<sup>146</sup> And, the only three cases found concerning the ECOA and advertising did not involve discrimination because of pictures in advertising.<sup>147</sup>

Policymakers and the regulators that enforce the ECOA can change this. First, Congress could amend the ECOA to prohibit discriminatory advertising by creditors. Currently, the ECOA only has a general prohibition on discrimination in the statute,<sup>148</sup> but Congress could apply the FHA's model to the ECOA and explicitly outlaw discriminatory advertisements.<sup>149</sup> The FHA is

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<sup>145</sup> Jordan Bartley Mack, Comment, *Born in the Red: How Affirmative Action Could Cure the Race-Credit Divide*, 55 HOUS. L. REV. 1157, 1160 (2018) (“Existing academic literature has not directly addressed a solution for the race-credit disparity. Local, state, and federal government agencies, along with private organizations, have implemented various types of credit education programs. These programs have been largely unsuccessful.”). Additionally, the racial disparity in access to mainstream banking services likely exacerbates savings and investment inequality. See, e.g., Hye Jin Yoon & Carrie La Ferle, *Saving Behavior Messaging: Gain/Loss Framing, Self/Family Orientations, and Individual Differences in Collectivism*, 47 J. ADVERT. 146, 147 (2018) (citation omitted); see also Tanzina Vega, *The Retirement Crisis Facing Hispanics*, CNN (Mar. 2, 2016, 6:01 PM), <http://money.cnn.com/2016/03/02/news/economy/retirement-saving-hispanics/> (explaining that 65% of white families had savings in a retirement plan, as compared to only 58% of Asian families, 41% of African American families, and 26% of Latino families).

<sup>146</sup> On November 28, 2020, Hawkins searched all cases for “advertis! /50 ECOA.” There were twenty-eight cases, but only three related to discrimination because of advertisements. See *Canatella v. Reverse Mortg. Sols. Inc.*, No. 13-CV-05937-HSG, 2016 WL 6070508, at \*5 (N.D. Cal. Oct. 17, 2016) (dismissing as conclusory a plaintiff’s allegation that the defendant’s advertising “‘target[s] elderly homeowners like plaintiff’ to apply for reverse mortgage loans”); *Korea Week, Inc. v. Got Capital, LLC*, No. CV 15-6351, 2016 WL 3049490, at \*2 (E.D. Pa. May 27, 2016) (noting the plaintiffs’ allegation that “[d]efendants target the Korean-American and Asian-American business communities through marketing, advertising, and soliciting of” small business financing); *Jackson v. Novastar Mortg., Inc.*, 645 F. Supp. 2d 636, 647 (W.D. Tenn. 2007) (holding that a plaintiff’s pleadings were sufficient to allege discriminatory conduct under the ECOA because she alleged that the defendant “targeted minority sub-prime borrowers via advertisements, engaged in interest-rate steering and yield-spread premium incentives that disparately affected minority borrowers over non-minority borrowers, and extended credit to minority borrowers on terms higher than similarly situated non-minority subprime borrowers”). In addition to these cases, the Fair Housing Council of Greater Washington also filed a complaint alleging an ECOA advertising violation in conjunction with another violation because the lender “specifically targeted its advertising towards African Americans in Washington, D.C., concentrating its business in predominately African American census tracts.” Deborah Goldstein, *Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions*, 35 HARV. C.R.-C.L. L. REV. 225, 243–44 (2000) (citing Complaint, Fair Hous. Council of Greater Wash., Inc. v. Cap. City Mortg. Corp., (D.D.C. 1998)).

<sup>147</sup> *Id.*

<sup>148</sup> 15 U.S.C. § 1691(a)(1).

<sup>149</sup> 42 U.S.C. § 3604(c) (making it illegal to “make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination”); see also Stephanie



not a perfect statute, but it has been effective in curbing racial discrimination in housing markets.<sup>150</sup> In contrast to the 3 advertising cases found relating to the ECOA, a quick search revealed 262 cases involving the FHA and advertising.<sup>151</sup>

Second, the CFPB should make Regulation B's prohibition on discriminatory advertising explicitly applicable to pictures in advertisements. Right now, Regulation B only forbids discrimination in advertising through "any oral or written statement."<sup>152</sup> In contrast, the FHA's prohibition on discriminatory advertisements is worded more broadly, allowing for an expansive application to a wide variety of situations.<sup>153</sup> The FHA's more expansive wording permits suits against advertising that targets racial minorities through pictures.<sup>154</sup> If the CFPB made Regulation B's advertising language match the FHA's language, ECOA plaintiffs could use the precedent from the

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M. Stern, *supra* note 117, at 471–72 (attributing the FHA's discriminatory advertising prohibition with creating a social norm of disdain for expressing prejudice—at least explicitly—and arguing that the resultant social norm was instrumental in reducing housing discrimination). There is also empirical data that the FHA has helped reduce housing segregation. *See id.* at 472 ("There is evidence that residential segregation has decreased significantly since the passage of the FHA." (citing EDWARD GLAESER & JACOB L. VIGDOR, MANHATTAN INST. FOR POL'Y RSCH., *THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA'S NEIGHBORHOODS, 1890-2010* (2012), [https://media4.manhattan-institute.org/pdf/cr\\_66.pdf](https://media4.manhattan-institute.org/pdf/cr_66.pdf)).

<sup>150</sup> *See* Peter Engel, *Fairer Housing: Proposals for Improving the Fair Housing Act*, J. AFFORDABLE HOUS. & CMTY. DEV. L. 114, 114 (1996) (noting that "Section 3604(c) of the FHA, which prohibits discrimination in advertising, is an area in which some success has been achieved").

<sup>151</sup> On November 28, 2020, Hawkins searched all cases for "advertis! /50 fha" to find 262 cases.

<sup>152</sup> 12 C.F.R. § 1002.4(b) (2020). The CFPB's "Official Interpretation" of this provision takes a broader stance on what actions could be discriminatory: "use of words, symbols, *models* or other forms of communication in advertising that express, imply, or suggest a discriminatory preference or a policy of exclusion in violation of the Act." 12 C.F.R. pt. 1002, Supp. I, at § 1002.4, para. 4(b)(ii) (emphasis added). Section 706(e) of the ECOA states that conformance with "any official . . . interpretation" of Regulation B shields creditors from liability under the Act. Still, it is not clear how much weight courts would give to the CFPB's interpretations in the regulatory supplement. *See* *Fridman v. NYCB Mortg. Co., LLC*, 780 F.3d 773, 776–77 (7th Cir. 2015) (indicating that "CFPB Official Interpretations [that are] adopted pursuant to notice-and-comment rulemaking" may "merit deference under the framework set forth in *Chevron*" (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); 12 C.F.R. pt. 1002, Supp. I, at Introduction ("[CFPB] [i]nterpretations will be . . . incorporated in this commentary following publication for comment in the Federal Register."). *But see* *AT&T Corp. v. FCC*, 967 F.3d 840, 847 (D.C. Cir. 2020) ("Publication in the Federal Register does not suggest that the matter published was meant to be a regulation, since the APA requires general statements of policy to be published as well."). Some lower courts have applied the CFPB's Official Interpretation without questioning the level of deference the interpretations are owed. *See, e.g.,* *Pedro v. Equifax, Inc.*, 186 F. Supp. 3d 1364 (N.D. Ga. 2016).

<sup>153</sup> Stearns, *supra* note 79, at 1212 ("The language of this section of the Act is extremely broad, covering a wide range of potentially liable parties and potentially discriminatory practices. In addition, the terms 'indicates' and 'preference' are not terms that lend themselves to objective analysis or bright-line rules; to the contrary, they require subjective interpretation and, consequently, open the Advertising Preference Section to potentially extensive and varied application.").

<sup>154</sup> *See supra* Part I.A.

FHA to pursue cases outside of the real estate context, like credit cards and payday loans.

Finally, the regulators charged with enforcing the ECOA could take a more aggressive approach to advertising, including looking specifically at the pictorial content of advertisements. In the past, federal administrative bodies have used the ECOA to stop discriminatory marketing practices. One famous example is from the 1990s when the Department of Justice used the ECOA, among other laws, to bring a case against Chevy Chase Federal Savings Bank.<sup>155</sup> Among other accusations, the Justice Department claimed that Chevy Chase had failed to adequately market its credit products to African Americans.<sup>156</sup> More recently, the Department of Justice sued Union Savings Bank under the ECOA for failing to adequately market its credit to minorities.<sup>157</sup> Similarly, the CFPB has also filed complaints against banks for discouraging minorities from seeking credit because of a failure to market credit to them.<sup>158</sup>

While these examples are promising, the focus has not been on the content of advertising.<sup>159</sup> Indeed, federal examination procedures for financial institutions instruct regulators to consider advertising, but the focus is on *where* the lender is marketing its credit and not *what* the advertisement is communicating. To assess disparate treatment, the current examination procedures direct examiners to consider things like the lender marketing “only in media serving non-minority areas of the market,” the lender working “through brokers or other agents that . . . would serve only one racial or ethnic group in the market,” and the lender not marketing to ZIP codes with higher minority populations.<sup>160</sup>

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<sup>155</sup> Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 835 n.247 (1995).

<sup>156</sup> Craig E. Marcus, Note, *Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low- and Moderate-Income Lending*, 96 COLUM. L. REV. 710, 737–39 (1996).

<sup>157</sup> Martha J. Svoboda, *The Evolution of Redlining Post-Financial Crisis and Best Practices for Financial Institutions*, 22 N.C. BANKING INST. 67, 86 (2018) (citation omitted).

<sup>158</sup> Richard J. Andreano, Jr., Christopher J. Willis, John L. Culhane, Jr. & Wendy Tran Novotne, *DOJ Enters into Consent Order with Union Savings Bank and Guardian Savings Bank*, 70 CONSUMER FIN. L.Q. REP. 88 (2016) (first citing C.F.P.B. & U.S. v. Hudson City Savings Bank, F.S.B., No. 2:15-cv-07056-CCC-JBC (D.N.J. Sept. 24, 2015); then citing U.S. & C.F.P.B. v. Bancorpsouth Bank, No. 1:16-cv-00118-GHD-DAS (N.D. Miss. June 29, 2016)).

<sup>159</sup> E.g., Marcus, *supra* note 150 (describing the Justice Department’s concerns about Chevy Chase’s failure to open branches in African American communities).

<sup>160</sup> FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 130.

The CFPB and other regulators could use advertising more effectively and aggressively in ECOA and Regulation B suits by focusing on the content of advertisements along the lines suggested in this Essay. Also, increasing the frequency of these suits would deter discrimination by bringing diverse advertising to the attention of companies seeking to comply with federal regulations.

### C. *Regulatory Action Under the Community Reinvestment Act*

While less intuitive than the ECOA,<sup>161</sup> the Community Reinvestment Act (CRA) offers another way for regulators to curb advertising discrimination by banks.<sup>162</sup> Congress passed the CRA to incentivize banks to “help meet the credit needs of the communities in which they operate.”<sup>163</sup> Congress delegated regulatory authority for the CRA to three agencies: (1) the Federal Reserve Board (Federal Reserve), (2) the Federal Deposit Insurance Corporation (FDIC), and (3) the Office of the Comptroller of the Currency (Comptroller).<sup>164</sup> The Comptroller regulates banks with national charters, while the Federal Reserve and the FDIC regulate state-chartered banks.<sup>165</sup>

The CRA’s enforcement mechanism, text, purpose, and recent focus on online banking make it a feasible tool for regulators to encourage banks to increase minority representation in website advertisements for at least three reasons. First, the CRA offers a politically appealing regulatory mechanism to curb discriminatory advertising. The CRA’s unique rewards-based enforcement mechanism can encourage banks to increase diversity on their websites without imposing harsh penalties. Regulators do not enforce the CRA through lawsuits or fines; instead, the CRA’s grading system motivates banks to perform

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<sup>161</sup> Unlike the ECOA, which explicitly prohibits racial discrimination, the CRA requires banks to serve the interests of “low- and moderate-income communities.” 12 C.F.R. § 25.04(a)(1) (2020); *see also id.* § 25.04 (using the phrase “low- or moderate-income” to describe the community for a qualifying activity eighteen times).

<sup>162</sup> Congress should also consider revising the CRA to add an explicit incentive for advertising that adequately represents minority consumers. However, because the CRA as it is written can feasibly be interpreted to authorize the implementing agencies to make this adjustment, a Congressional call to action is not the focus of this Section.

<sup>163</sup> *Community Reinvestment Act*, FED. FIN. INSTS. EXAMINATION COUNCIL, <https://www.ffiec.gov/cra/history.htm> (last visited Jan. 30, 2021); 12 U.S.C. § 2901(a)(1) (“[R]egulated financial institutions are required by law to demonstrate their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business.”); *id.* § 2901(a)(3) (“[Banks] have continuing and *affirmative obligation* to help meet the credit needs of the local communities in which they are chartered.” (emphasis added)).

<sup>164</sup> *See* 12 U.S.C. § 2905; *see also Federal Banking Regulators for the CRA*, FED. RSRV., [https://www.federalreserve.gov/consumerscommunities/cra\\_regulators.htm](https://www.federalreserve.gov/consumerscommunities/cra_regulators.htm) (last visited Apr. 10, 2021).

<sup>165</sup> *See* 12 U.S.C. § 2905; *see also* FED. RSRV., *supra* note 158.

“qualifying activities.”<sup>166</sup> Regulators use a bank’s CRA “grade” when considering that bank’s application for certain activities, such as mergers.<sup>167</sup> The grading system also encourages banks to perform well under the CRA to avoid costly public challenges to mergers and to preserve a good public image.<sup>168</sup> Criticism of this rewards-based enforcement mechanism may be justified in the context of community investments or loans.<sup>169</sup> But in the context of advertising, where the purpose is subjective—focused primarily on how images make people feel—a pliable standard makes sense. Moreover, the flexible performance metrics can reduce discriminatory advertising without creating representation “quotas.”

Second, the CRA’s purpose and broad text indicate that implementing agencies possess the statutory authority to modify CRA regulations to incentivize more diverse representation in advertising. The FDIC, Federal Reserve, and Comptroller each assess banks’ performance under the CRA differently.<sup>170</sup> To illustrate, the Comptroller’s regulations include twelve non-exclusive categories of “qualifying activities” that describe community development investments, loans, or (non-financial) “acts of service.”<sup>171</sup> Admittedly, none of the existing twelve categories provides an obvious fit for a

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<sup>166</sup> *CRA Rating Search Frequently Asked Questions (FAQs)*, FED. FIN. INSTS. EXAMINATION COUNCIL, [https://www.ffiec.gov/craratings/ratings\\_faqs.htm#:~:text=Upon%20completion%20of%20a%20CRA,to%20improve%2C%20and%20Substantial%20Noncompliance](https://www.ffiec.gov/craratings/ratings_faqs.htm#:~:text=Upon%20completion%20of%20a%20CRA,to%20improve%2C%20and%20Substantial%20Noncompliance) (last visited Apr. 10, 2021) (explaining the banks’ available grades as ranging from “Standing” to “Substantial Noncompliance”).

<sup>167</sup> See Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617, 629 (2009); see also Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. REGUL. 435, 489 (2020) (describing the four-part rating system). Although disapproval of a merger request on CRA grounds is uncommon, subsequent legislation established that merger approval requires at least a “Satisfactory” rating. 12 U.S.C. § 2903(c); Camden C. Betz, *Recent Changes to the Community Reinvestment Act and Their Impact on Community Banks and Rural Economies*, 10 N.C. BANKING INST. 157, 163–65 (2006) (discussing the 1999 Gramm-Leach Bliley Act).

<sup>168</sup> See Brescia, *supra* note 161, at 636 (citing RICHARD D. MARSICO, *DEMOCRATIZING CAPITAL: THE HISTORY, LAW, AND REFORM OF THE COMMUNITY REINVESTMENT ACT* 134 (2005)).

<sup>169</sup> Many scholars have criticized the CRA’s enforcement mechanism as too weak to achieve significant financial investment or loans by the banks to low- or moderate-income communities. See, e.g., Raymond H. Brescia, *The Community Reinvestment Act: Guilty, but Not as Charged*, 88 ST. JOHN’S L. REV. 1, 14–17 (2014).

<sup>170</sup> See 12 C.F.R. § 25.05 (2020) (listing the OCC’s qualifying activities); *id.* §§ 345.21–29 (describing the FDIC’s mechanisms for measuring performance); *id.* §§ 228.21–29 (explaining the Federal Reserve’s method of assessing performance).

<sup>171</sup> *Id.* § 25.04 (“[A] community development service that helps to meet the credit needs of a bank’s entire community, including low- and moderate-income communities, is a qualifying activity if it meets the criteria in this section at the time the activity is originated.”); see also *CRA Illustrative List of Qualifying Activities*, U.S. DEP’T TREASURY, OFF. COMPTROLLER CURRENCY, <https://www.occ.gov/topics/consumers-and-communities/cra/cra-illustrative-list-of-qualifying-activities.pdf> (last visited Feb. 4, 2021) (enumerating a non-exhaustive list of specific examples of qualifying activities under 12 C.F.R. § 25.04).

new subcategory encouraging minority representation in advertising.<sup>172</sup> But the Comptroller could reasonably interpret the CRA to include diverse advertising initiatives as an independent qualifying activity for two reasons. First, part of the CRA's purpose is to combat racial discrimination. While the CRA is "conspicuously color-blind,"<sup>173</sup> primarily directed at the needs of "low- and moderate-income" communities, many scholars agree that the legislative history and context indicate that Congress intended for the CRA to curb racial discrimination in lending.<sup>174</sup> Additionally, the CRA text specifically states that banks should receive CRA credit for assisting minority-owned banks in "predominantly minority neighborhoods."<sup>175</sup> This specific carve-out for minority neighborhoods and institutions is an important hint of Congressional intent because the Act otherwise leaves the agencies free to determine how banks receive CRA credit.<sup>176</sup> Second, the Comptroller already interprets the CRA text to encompass activities that indirectly meet the credit needs of minority communities.<sup>177</sup> The social proof heuristic and distinctiveness theory strongly suggest that advertisements featuring minority models appeal to minority consumers.<sup>178</sup> Thus, diverse advertising indirectly serves the credit needs of minority communities by steering them toward mainstream credit sources.

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<sup>172</sup> See 12 C.F.R. § 25.04(1)–(12) (2020). This reality makes it unlikely that a bank that makes anti-discriminatory adjustments to its advertising would be able to receive credit from the OCC under the scope of an existing qualifying activity. See *CRA Qualifying Activities Confirmation Request*, U.S. DEP'T TREASURY, OFF. COMPTROLLER CURRENCY, <https://www.occ.treas.gov/topics/consumers-and-communities/cra/qualifying-activity-confirmation-request/index-cra-qualifying-activities-confirmation-request.html> (illustrating the process for banks or interested parties to apply for recognition of a novel activity as "qualifying" under the CRA).

<sup>173</sup> Baradaran, *supra* note 13, at 935 (quotation marks omitted).

<sup>174</sup> *Id.* ("[The CRA's] justification was to remedy a history of discriminatory redlining, and its mission was to require mainstream banks to lend a fair portion of their loans to the ghetto. Although redlining had been based on explicit racial discrimination, policymakers designed the CRA to be color-blind."); Brescia, *supra* note 161, at 628 (explaining that the CRA was passed in response to "redlining—the decision by banking institutions to exclude certain communities" and is part of the same historical context as the ECOA and the FHA); Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 516–17 (2005) (framing the CRA as "an important part of a broader regulatory strategy to overcome the legacy of [racial] discrimination in order to expand access to credit to minority households" (emphasis added)).

<sup>175</sup> See 12 U.S.C. § 2907; see also *id.* § 2903 (authorizing consideration of "capital investment, loan participation, and other ventures undertaken" in partnership with a minority-owned financial institution).

<sup>176</sup> See *id.* § 2905.

<sup>177</sup> See *id.* § 2901 (declining to prescribe particular actions that could "serve the convenience" or "help meet the credit needs" to any particular list of actions). That broad language left it to the agencies to shape the qualifying activities, and they have shaped them broadly. See, e.g., 12 C.F.R. § 25.04(1)–(12) (2020) (clarifying that "activities that indirectly help meet community credit needs" qualify under subsection (12) (emphasis added)).

<sup>178</sup> See *supra* Part II.A. Importantly, attracting minority consumers is not a zero-sum equation for banks, which may fear losing some of an existing predominantly white consumer base. The distinctiveness theory indicates that banks can increase minority models to attract minority consumers without deterring white consumers (who are less likely to note the race of a model in an ad). See *id.*

Finally, a new “qualifying activity” for diverse advertising aligns with new CRA regulations that expand the Act’s definition of “community” to capture online banking customers. Until recently, the CRA’s “community” focus seemed to require that bank’s direct qualifying activities only at individuals residing near a bank’s deposit facility.<sup>179</sup> But the agencies responsible for implementing the CRA are reimagining “community” in the context of online banking. Updated Comptroller regulations, effective since October 2020, significantly expanded the meaning of “community” under the statute.<sup>180</sup> The new Comptroller rule provides that banks receiving more than 50% of deposits from online customers must report qualifying activities under both a deposit-based and facility-based community.<sup>181</sup> Additionally, the new rule allows banks that predominantly interact with their customers through physical deposit facilities to receive credit for qualifying “outside-of-assessment area activities,” such as online initiatives.<sup>182</sup> The Federal Reserve published a notice of proposed rulemaking in October 2020 that considers similar updates to the “community” for state-chartered banks operating online.<sup>183</sup> Under these updated conceptualizations of “community,” all banks with a website could receive CRA credit under a new category for increasing minority representation on their websites. Thus, the proposal to add anti-discriminatory advertising efforts, perhaps embodied in a qualifying activity that encourages banks to reflect the racial composition of its online “community,” aligns with the CRA’s evolving notion of “community.”

In sum, the CRA’s flexible enforcement mechanism, text, purpose, and evolving notion of “community” make the CRA a feasible and desirable regulatory mechanism to address advertising discrimination.

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<sup>179</sup> See 12 U.S.C. § 2901 (placing an obligation on banks to invest in the “local communities” where they are chartered); see also Brescia, *supra* note 161, at 633 (explaining that the “assessment area” is defined by “(1) the geographic location of [a bank’s] main office, branches, and deposit-taking ATMs and (2) where a substantial portion of [the bank’s] loans are purchased or originated”); Giselle R. Finne, *Strengthening Mortgage Lending Discrimination Safeguards: The Requisite Need for Modernizing the Community Reinvestment Act*, 7 SCHOLAR 229, 254 (2005) (“The predominant challenge [in modernizing the CRA to align with the reality of online banking] lies in determining what comprises the internet’s community.”).

<sup>180</sup> Community Reinvestment Act Regulations, 85 Fed. Reg. 34,734, 34,757 (June 5, 2020) (to be codified at 12 C.F.R. § 25,195) (recognizing that “[t]he [CRA’s] current regulatory framework’s reliance on branch footprint as the sole basis for delineating a bank’s CRA assessment areas . . . no longer aligns adequately with where a given bank does business”); see also *id.* (describing the deposit-based assessment area option and a state-wide assessment area options that align with the expansion of online banking).

<sup>181</sup> *Id.* at 34,759.

<sup>182</sup> *Id.*

<sup>183</sup> See Community Reinvestment Act, 85 Fed. Reg. 66,410, 66,415–18 (proposed Oct. 19, 2020) (to be codified at 12 C.F.R. 228).

#### *D. Too Little to Matter?*

Some commentary is critical of piecemeal approaches to correcting inequality through improving consumer law or consumer credit products. In an important article, Abbye Atkinson opposes focusing on credit as a solution to social and economic inequality because it distracts policymakers from addressing the deeper causes of economic inequality.<sup>184</sup> In another recent article, Mehrsa Baradaran similarly challenges solutions that seek to address racial inequality through increasing access to mainstream banks, contending that eliminating unequal levels of wealth is central to any workable solution.<sup>185</sup>

It is certainly true that this Essay's proposal is limited in scope and therefore subject to Atkinson's and Baradaran's criticisms. But its limited scope is also part of what makes it an attractive solution to minority groups' oversubscription to fringe lending.

Mainstream and fringe lenders can make an immediate positive impact by making a small, almost costless change: being sensitive to the racial composition of models on their websites. And to the extent that the current discriminatory advertising practices are inadvertent, these financial institutions should willingly implement changes.

Policymakers should find laws against discrimination in advertising very palatable in comparison to more radical economic reconfigurations like those other academics suggest. The FHA has been on the books for fifty years, so legislators can hardly object to including FHA provisions in the ECOA to make the ECOA more effective at combatting discrimination. Case law has already accepted the importance of the racial makeup of groups of models, so policymakers should have little objection to changing the ECOA to reflect this reality. Because the CRA regulates by encouraging good action instead of punishing bad action, it is an even more palatable way for regulators to incentivize banks to be mindful of who their ads are excluding.

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<sup>184</sup> Atkinson, *supra* note 7, at 1161–62; *see also id.* at 1105 (“Credit, as currently conceived, cannot work for everyone, and as broader economic circumstances remain in decline, the range of individuals for whom it can function as productive social provision will shrink. Thus, it is time to redirect our energies toward the more important issues of worsening economic instability and inequality that plague not only low-income families but middle-class families as well.”).

<sup>185</sup> Baradaran, *supra* note 13, at 888, 916 (“The only way to adequately counter credit disparity was to eliminate the wealth inequality between the ghetto and the suburbs which would eliminate the Jim Crow credit market.”).

In short, recalcitrant advertisers or policymakers have not shot down the reforms we are suggesting. These reform ideas have simply been overlooked until now.

Also, while the reforms in this Essay will not eliminate wealth inequality in America, they will have wider effects than merely providing racial minority groups with access to lower cost credit. As described in Part II.D, advertising has consequences beyond the goods and services advertised. Advertising shapes societal perceptions of the value and role of different racial groups. Thus, reforming how financial institutions include or exclude minorities in advertising matters for social and racial justice. In this case, a small policy change can have ripple effects beyond who goes to a payday lender to get cash.

### CONCLUSION

A Houstonian looking for a loan online might go to three websites. The first one—a mainstream bank—has two white women pictured as customers.<sup>186</sup> The next bank's website has five white men and one white woman.<sup>187</sup> The final bank's website pictures a white female customer.<sup>188</sup> If the Houstonian is white, she knows exactly where to go for a loan.

If she is Latina or African American, however, she may wonder if those banks are a good fit.<sup>189</sup> If she clicks on a payday lender's website, however, there is a much higher chance she will see advertising in a language she speaks or that she will see people who look like her.<sup>190</sup> If she is anything like the rest of us, this "social proof" will be a subtle but powerful draw to visit the payday lender.

It does not have to be that way. The Fair Housing Act already provides the language policymakers could use to protect minorities from discriminatory treatment in advertising by amending the Equal Credit Opportunity Act. The Consumer Financial Protection Bureau, among other federal regulators, could use evidence from the pictures on lenders' websites to detect whether mainstream banks are failing to market their credit to African Americans and Latinos. The case law also supports sanctions if payday lenders are using pictures to target racial minority groups with high-cost credit. Regulators could also update the qualifying activities under the Community Reinvestment Act to

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<sup>186</sup> 2014 Mainstream Bank Study Observation 19.

<sup>187</sup> 2014 Mainstream Bank Study Observation 23.

<sup>188</sup> 2014 Mainstream Bank Study Observation 24.

<sup>189</sup> See *supra* Part II.A.

<sup>190</sup> See *supra* Part II.C.



encourage more diverse representation on bank websites. Even more simply, banks and payday lenders themselves could review their own websites for discriminatory treatment to stave off unfavorable legislation, litigation, or negative public opinion. These simple changes could mean more affordable credit for minorities. More importantly, they could usher in advertising that combats racial injustice rather than embodies it.