RELOCATING THE COMMUNITY REINVESTMENT ACT*

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The Community Reinvestment Act was enacted in 1977 to address the failure of financial institutions to provide credit and financial services in low-income communities, especially Black neighborhoods. The Act is part of a family of legal regimes, including the Home Mortgage Disclosure Act and the Equal Credit Opportunity Act. Congress transferred authority and responsibility for those regimes and other consumer financial laws to the Consumer Financial Protection Bureau in the Dodd-Frank Act of 2010, but it did not transfer the CRA. The reasons for this are, thus far, lost to history. It turns out that early versions of what became Dodd-Frank would have transferred the CRA to the Bureau. And a number of consumer and community advocates argued in favor of transferring the CRA at the time. This Essay excavates that legislative history and revisits the question, proposing that U.S. policymakers should seriously consider transferring authority for the CRA to the Bureau. It argues that the Bureau would likely be a better steward of the CRA than the financial regulators; that authority and responsibility for the CRA, the Home Mortgage Disclosure Act, and the Equal Credit Opportunity Act should not be divided among different regulators; and that implementing and enforcing the CRA would beneficially expand the scope of the Bureau's mission and function.

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INTRODUCTION

In October 2023, financial regulators in the United States issued a set of rules to amend the framework for implementing the Community Reinvestment Act ("CRA").[1] These changes, described below,[2] represent significant reforms to the Act. Yet, as others have argued, there are good reasons to believe that these reforms alone will not sufficiently improve the regulators' implementation and enforcement of the Act.[3]

If policymakers want to more substantially improve the operation and functioning of the CRA, they should seriously consider transferring authority for the Act to the Consumer Financial Protection Bureau ("Bureau"), which has responsibility for implementing and enforcing federal consumer financial laws.[4] The CRA was enacted in 1977 as part of a family of consumer financial laws also adopted around that time,[5] including the Truth in Lending Act (1968),[6] the Fair Housing Act (1968),[7] the Equal Credit Opportunity Act (1974),[8] and the Home Mortgage Disclosure Act (1975).[9] The particular aim of the CRA was to address "redlining"—the failure of financial institutions to provide credit and financial services in low-income communities, especially Black neighborhoods—with the more general aim "to rebuild and revitalize inner-city and other struggling areas."[10] The Act charges the relevant financial

1. Community Reinvestment Act, 89 Fed. Reg. 6574 (Feb. 1, 2024) (to be codified at 12 C.F.R. pts. 25, 228, 345).

2. *See infra* Part I.

3. Peter Conti-Brown & Brian D. Feinstein, *Banking on a Curve: How To Restore the Community Reinvestment Act*, 13 HARV. BUS. L. REV. 335, 338 (2023) (arguing that "grade inflation" by bank regulators will not be corrected by the proposed rules).

4. *The CFPB*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau [https://perma.cc/VT8N-9UTD] (last updated Nov. 21, 2023).

5. *See* DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 135–39, 143–47 (2004).

6. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 U.S.C.).

7. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 18, 25, 28 & 42 U.S.C.).

8. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f).

9. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, §§ 301–310, 89 Stat. 1124, 1125–28 (codified as amended at 12 U.S.C. §§ 2801–2810).

10. IMMERGLUCK, *supra* note 5, at 148 (citing Warren L. Dennis, *The Community Re-investment Act of 1977: Its Legislative History and Its Impact on Application for Changes in Structure Made by Depository Institutions to the Four Federal Financial Supervisory Agencies* (Credit Rsch. Ctr., Working Paper No. 24, 1978)).

regulators—the Office of the Comptroller of the Currency, the Federal Reserve, and the Federal Deposit Insurance Corporation—with ensuring that banks provide adequate resources and services in these communities.[11] Its core requirement is that each federal banking regulator "use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions."[12]

More specifically, the CRA requires regulators to "assess [an] institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods" and to "take such record into account in its evaluation of an application for a deposit facility by such institution."[13] "Applications" for this purpose include those to charter a bank, obtain deposit insurance for new banks, open branches, or merge or consolidate with another financial institution.[14] Furthermore, all banks owned by financial holding companies must have at least satisfactory ratings under the CRA for the holding company to enjoy the expanded powers to engage in a broad array of financial activities authorized under the Gramm-Leach-Bliley Act of 1999.[15]

The CRA has had many critics. Some writers have argued, for example, that the government should not interfere with banks' private market-based decision-making, that the Act imposes onerous compliance costs, and that it unjustifiably gives consumer and community advocates leverage to obtain payoffs when banks seek to merge.[16] Another group has generally defended the Act and emphasized its accomplishments yet argued that the banking regulators have been insufficiently aggressive in supervising and enforcing the Act.[17] Still another group has criticized the Act as entrenching a market-based approach to community development that has failed to address the underlying causes of inequality—especially racial inequality—while itself contributing to unsustainable consumer indebtedness.[18]

Empirical study of the CRA has confirmed that it has at least modestly increased banking resources and services for low-income and minority

11. *See infra* Part I.

12. Community Reinvestment Act of 1977, Pub. L. No. 95-128, § 802(b), 91 Stat. 1111, 1147 (codified at 12 U.S.C. § 2901(b)).

13. *Id.* § 804, 91 Stat. at 1148.

14. *Id.* § 803(3), 91 Stat. at 1147–48.

15. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, sec. 103, § 4(l)(2), 113 Stat. 1338, 1346–47 (1999) (codified as amended at 12 U.S.C. § 1843(l)(2)). The Gramm-Leach-Bliley Act provided that "financial holding companies" with a bank subsidiary can engage in a much broader range of activities, including certain types of securities insurance underwriting, than bank holding companies. *See* LISSA L. BROOME, JERRY W. MARKHAM & JOSÉ M. GABILONDO, REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES: CASES AND MATERIALS 189–91 (6th ed. 2022).

16. *See infra* notes 86–94 and accompanying text.

17. *See infra* notes 95–99 and accompanying text.

18. *See infra* notes 100–34 and accompanying text.

communities.[19] Yet it is at least equally clear that the underlying problems that motivated its enactment persist. The communities it was designed to help continue to be underserved by financial markets compared to other communities and are disproportionately subject to extractive and abusive products and practices.[20]

In the wake of the 2008–09 global financial crisis, which was driven in large part by failures in regulating consumer financial markets in the United States,[21] the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[22] transferred responsibility and authority for "consumer financial laws" from federal banking regulators to a new Consumer Financial Protection Bureau.[23] The transferred laws included the Truth in Lending Act,[24] the Fair Housing Act,[25] the Home Mortgage Disclosure Act,[26] the Equal Credit Opportunity Act,[27] the Fair Credit Reporting Act,[28] the Fair Debt Collection Practices Act,[29] and the Home Ownership and Equity Protection Act.[30] The CRA was not among the laws transferred to the Bureau.

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19. *See infra* note 99 and accompanying text.

20. *See infra* notes 179–80 and accompanying text.

21. THE FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, at xxiii (2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [https://perma.cc/693N-7N7L] ("As irresponsible lending, including predatory and fraudulent practices, became more prevalent, the Federal Reserve and other regulators and authorities heard warnings from many quarters. Yet the Federal Reserve neglected its mission 'to ensure the safety and soundness of the nation's banking and financial system and to protect the credit rights of consumers.'"); *see* U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 55–56 (2009) [hereinafter DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM], https://fraser.stlouisfed.org/files/docs/historical/fct/treasury_finregreform_20090617.pdf [https://perma.cc/EN22-CH9E]; *cf.* Emma Coleman Jordan, *The Hidden Structures of Inequality: The Federal Reserve and a Cascade of Failures*, 2 U. PA. J.L. & PUB. AFFS. 107, 110–11 (2017) (describing the impact of the financial crisis on racial minority communities in particular).

22. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 7, 12, 15, 31 & 42 U.S.C.).

23. *See infra* notes 151–52 and accompanying text.

24. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 U.S.C.).

25. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 18, 25, 28 & 42 U.S.C.).

26. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, §§ 301–310, 89 Stat. 1124, 1125–28 (codified as amended at 12 U.S.C. §§ 2801–2810).

27. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f).

28. Fair Credit Reporting Act, Pub. L. No. 91-508, §§ 601–622, 84 Stat. 1114, 1128–36 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681t).

29. Fair Debt Collection Practices Act, Pub. L. No. 95-109, §§ 801–818, 91 Stat. 874, 874–83 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p).

30. Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, §§ 151–158, 108 Stat. 2160, 2190–98 (codified as amended in scattered sections of 15 U.S.C.) (amending the Truth in Lending Act).

In the voluminous post-crisis academic literature on financial regulatory reform, one can find no discussion of the decision to have banking regulators retain responsibility and authority for the CRA.[31] That silence could be due to the fact that the question is unremarkable—that the CRA is categorically different from the consumer financial laws that were transferred to the Bureau, making it unquestionably more suited to the authority of the banking regulators. As the title of the regime itself reflects, the CRA is directed at community investment, which is broader in scope than the other consumer finance laws and notably includes the financial needs of small businesses and other community institutions.

But the legislative history of the CRA reveals that it was far from obvious at the time that the natural institutional home of the CRA was with the banking regulators. Policymakers seriously considered and debated whether to transfer the CRA to the Bureau in the process of drafting, debating, and enacting Dodd-Frank.[32] The Obama administration's initial blueprint for regulatory reform that began the process leading up to the enactment of Dodd-Frank expressly proposed transferring the CRA to a consumer financial protection agency that eventually became the Bureau.[33] Although this dropped out of the bills passed by both the Senate and the House leading to enactment of Dodd-Frank, many organizations and individuals, including leading consumer and community advocates, tried to persuade policymakers to include the CRA in the responsibilities of the new Bureau.[34]

This Essay excavates the lost debate over relocating the CRA to the Bureau, reconsiders the merits of the shift, and argues in favor of giving the Bureau responsibility and authority for the regime. It argues first, as a formal definitional matter, that the CRA is properly understood as a federal consumer financial law, notwithstanding its operational focus on communities rather than consumers. More important, as has been true for the regimes transferred to the Bureau's authority, giving responsibility and authority for the CRA to the Bureau would likely improve the Act's operation and impact. Many of the potential arguments for not transferring the CRA were made against transferring the regimes that are currently under the Bureau's authority. And those objections have not stood the test of time. In particular, the Bureau has been able to conduct its regulatory activities with due regard for the safety and soundness of the banking system. There is no reason to doubt that it can do the same with regard to the CRA. And transferring the CRA to the Bureau need

31. Broome and Markham mention in passing that the reason may be because the CRA only applies to depository institutions, unlike the regimes transferred to the Bureau. *See* BROOME ET AL., *supra* note 15, at 900.

32. *See infra* Part II.

33. *See infra* notes 144–49 and accompanying text.

34. *See infra* notes 149–67 and accompanying text.

not undermine or unduly complicate the Act's role in bank-merger analysis or the leverage it provides consumer and community advocates in that process.

There are also reasons to believe that transferring the CRA to the Bureau would enable the Bureau to pursue its mission more effectively and would reduce existing overlap in regulatory functions between the Bureau and other financial regulators. The CRA is part of an interrelated family of consumer financial regulations and is a missing piece of the framework inherited by the Bureau. The CRA was, most significantly, designed to reinforce the functions of the Home Mortgage Disclosure Act[35] and the Equal Credit Opportunity Act,[36] and vice versa. Information generated by each of these regimes is supposed to inform and enhance the operation of the others. Consigning these regimes to separate institutional settings likely undermines their combined potential.

The Bureau's role and authority was designed by policymakers to extend beyond simply enforcing a family of consumer laws—they clearly intended that it would more generally support the development of productive and fair consumer financial markets. For example, the Bureau is charged under Dodd-Frank with "researching, analyzing, and reporting on topics relating to the Bureau's mission including consumer behavior, consumer awareness, and developments in markets for consumer financial products and services."[37] In recent years, the Bureau has been more active in pursuing this mandate, especially through its *Making Ends Meet* surveys, which examine financial challenges for consumers and households and their access to credit.[38] The Bureau has also become increasingly, if slowly, focused on markets for small business credit in recent years.[39] Among other things, it is charged under Dodd-Frank with gathering information about applications for "credit for women-owned, minority-owned, or small businesses"[40] to enable it to more effectively implement the Equal Credit Opportunity Act.[41] It promulgated rules pursuant to this responsibility for the first time in March of 2023.[42]

35. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, §§ 301–310, 89 Stat. 1124, 1125–28 (codified as amended at 12 U.S.C. §§ 2801–2809).

36. Equal Credit Opportunity Act, Pub. L. No. 93-495, §§ 503, 701–707, 88 Stat. 1500, 1521–25 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f).

37. Agency Information Collection Activities: Comment Request, 88 Fed. Reg. 31251, 31251 (proposed May 16, 2023).

38. *See infra* notes 208–15 and accompanying text.

39. *See infra* notes 212–20 and accompanying text.

40. DARRYL E. GETTER, CONG. RSCH. SERV., R45878, SMALL BUSINESS CREDIT MARKETS AND SELECTED POLICY ISSUES, at Summary (2019) ("[Dodd-Frank] required the Bureau of Consumer Financial Protection (CFPB) to collect data from small business lenders concerning credit applications made by women-owned, minority-owned, and small businesses with the goal of better understanding their financing needs. The CFPB has not yet implemented this requirement.").

41. Equal Credit Opportunity Act §§ 701–707.

42. *See infra* notes 219–20 and accompanying text.

Thus, transferring the CRA to the Bureau would expand the scope of the latter's mission and augment the more affirmative aspects of its work—improving access and fair allocation of credit for productive purposes and reducing extractive behavior. This could help the Bureau connect its regulation of consumer financial markets more directly and more broadly to its efforts to promote equitable distribution of financial resources and financially sustainable development in low- and moderate-income communities.

At the very least, seriously considering transfer of the CRA to the Bureau conceptually resituates the Act. Doing so provides a reminder that the CRA was initially designed as one piece of a framework of interrelated and complimentary financial regulatory regimes. And it should prompt a reexamination of the scope of the Bureau's mission.

This Essay begins, in Part I, by briefly summarizing the design and operation of the CRA and describing the various strands of criticism of the Act. Part II excavates and describes the debate over the CRA in the legislative history of Dodd-Frank, summarizing the arguments made by advocates at the time for and against transferring the CRA to the Bureau. Part III revisits this debate and sets out a case for giving responsibility and authority for the CRA to the Bureau.

I. THE CRA AND ITS CRITICS

This part explains the historical context of the enactment of the Community Reinvestment Act and summarizes its institutional design and operation. It also describes some of the prominent commentary on the Act by both supporters and skeptics.

A. *Development of the Legal Framework*

In writing about the development of racially "separate and unequal credit market[s]" in the United States in the twentieth century, Mehrsa Baradaran observes that "[o]rganized protest against this racialized inequality was an essential but forgotten part of the civil rights movement."[43] The CRA in particular had its genesis in a growing appreciation in the 1960s of the dire economic challenges of lower-income urban neighborhoods, which were commonly home to racial and ethnic minorities.[44] It became increasingly clear to policymakers at the time that these challenges were caused or exacerbated by a relative lack of financial resources and services in those communities, due in part to discriminatory "redlining" by financial institutions, especially with

43. Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 887 (2019) [hereinafter Baradaran, *Jim Crow Credit*]; *see also id.* at 901–07.

44. IMMERGLUCK, *supra* note 5, at 67.

regard to home mortgage lending and extending credit to small businesses.[45] In the wake of rioting in major U.S. cities after the assassination of Martin Luther King, Jr., it was widely understood by policymakers that the effects of discriminatory and abusive consumer financial markets were a significant factor in fueling unrest and required meaningful policy responses.[46]

Congress enacted the Equal Credit Opportunity Act[47] in 1974 to address discrimination in the granting of credit,[48] but that law was primarily focused on discrimination at the individual level.[49] In 1975, Congress enacted the Home Mortgage Disclosure Act as a modest step toward addressing the broader problem of the redlining of low-income urban communities.[50] As initially enacted, that regime required financial institutions to disclose data about their home mortgage lending in metropolitan areas by census tract.[51] Currently, data collected pursuant to that Act include information about loan applications; loan types and amounts; actions taken and reasons for denials; the race, ethnicity, age, and sex of borrowers; borrowers' incomes; and total loan costs.[52] The law

45. *Id.* at 67–68; Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1431 (2020) [hereinafter Atkinson, *Borrowing Equality*] (noting the connection between the goals of the CRA and the Equal Credit Opportunity Act); Mehrsa Baradaran, *Banking on Democracy*, 98 WASH. U. L. REV. 353, 359, 375 (2020) [hereinafter Baradaran, *Banking on Democracy*]; Josh Silver, *The Purpose and Design of the Community Reinvestment Act (CRA): An Examination of the 1977 Hearings and Passage of the CRA*, 72 CONSUMER FIN. L.Q. REP. 408, 408–09 (2018); *see also* Jordan, *supra* note 21, at 115–19 (describing the history of racial discrimination in allocation of credit).

46. *See, e.g.*, Duncan Kennedy, *The Bitter Ironies of* Williams v. Walker-Thomas Furniture Co. *in the First Year Law School Curriculum*, 71 BUFF. L. REV. 225, 235 n.23, 250 n.65 (2023) (citing NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 91–141 (1968)); *see also* Baradaran, *Jim Crow Credit*, *supra* note 43, at 887 ("After protests and riots drew attention to the reality that the poor were paying more for essential consumer products than the wealthy, the nation's policymakers began to pay attention.").

47. Equal Credit Opportunity Act, Pub. L. No. 93-495, §§ 501–503, 88 Stat. 1500, 1521–25 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f).

48. Baradaran, *Banking on Democracy*, *supra* note 45, at 359 ("The Equal Credit Opportunity Act (ECOA) aims to censure banks that deny access to credit to individuals due to discrimination based on a protected class status." (emphasis omitted)); Atkinson, *Borrowing Equality*, *supra* note 45, at 1425, 1427–28.

49. When the Equal Credit Opportunity Act was initially adopted in 1974, it only prohibited discrimination on the basis of gender and marital status. *See* Brian Kreiswirth & Anna-Marie Tabor, *What You Need To Know About the Equal Credit Opportunity Act and How It Can Help You*, CONSUMER FIN. PROT. BUREAU (Oct. 31, 2016), https://www.consumerfinance.gov/about-us/blog/what-you-need-know-about-equal-credit-opportunity-act-and-how-it-can-help-you-why-it-was-passed-and-what-it [https://perma.cc/CG7G-N8RM]. The Act was amended in 1976 to also prohibit discrimination on the basis of race, color, religion, national origin, age, the receipt of public assistance income, or exercising one's rights under certain consumer protection laws. *See id.*; IMMERGLUCK, *supra* note 5, at 138.

50. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, §§ 301–310, 89 Stat. 1124, 1125–28 (codified as amended at 12 U.S.C. §§ 2801–2810).

51. IMMERGLUCK, *supra* note 5, at 143–44.

52. *See generally* CONSUMER FIN. PROT. BUREAU, REPORTABLE HMDA DATA: A REGULATORY AND REPORTING OVERVIEW REFERENCE CHART FOR HMDA DATA COLLECTED

as originally proposed had envisioned loan-level reporting of data, but that was scaled back.[53]

Efforts to enact the CRA built upon the success in adopting these prior Acts, especially upon the effective political pressure brought to bear by community activists.[54] In fact, initial data generated by the Home Mortgage Disclosure Act were employed by sponsors of the CRA to establish the need for imposing a community reinvestment obligation on financial institutions.[55] These three regimes—the CRA, the Equal Credit Opportunity Act, and the Home Mortgage Disclosure Act—have been described as a "trilogy."[56]

Though it was more conservative than its proponents would have preferred, the CRA was certainly a more interventionist regime than the others in the trilogy.[57] As noted above, it required financial regulators to ensure that financial institutions were not discriminating against lower-income communities and that they affirmatively served the credit needs of their communities.[58] In particular, it directed the regulators to evaluate institutions' performance of this obligation in considering, among other things, applications for mergers or new branches.[59] The financial regulators had generally opposed the new law, asserting that they already had the power to impose and enforce its requirements.[60] As Dan Immergluck observed, the Act was in this regard a "rebuke" of the regulators, who were perceived by many policymakers as having failed to use the powers they already had to address the problem of redlining and to ensure the equitable allocation of financial resources.[61]

The initial regulations implementing the CRA allowed financial institutions to define their own relevant community areas and, among other things, required that they prepare public CRA statements and create public

IN 2023 (2023), https://files.consumerfinance.gov/f/documents/cfpb_reportable-hmda-data_regulatory-and-reporting-overview-reference-chart_2023-02.pdf [https://perma.cc/8HGZ-CN73] (summarizing the data required to be collected and reported under the Act).

53. IMMERGLUCK, *supra* note 5, at 143–44.

54. The success in advancing the HMDA has been largely attributed to prompting by community activists. *Id.* at 143. National public interest groups were subsequently more involved in advancing the CRA. *Id.* at 145.

55. *See* Silver, *supra* note 45, at 413 ("Senator Proxmire and witnesses at the hearing had access to new data required by the Home Mortgage Disclosure Act (HMDA) passed in 1975 that effectively documented stark racial disparities in lending compelling policy responses and action.").

56. SUSAN WACHTER, PENN INST. FOR URB. RSCH., MODERNIZING THE CRA (WHILE PRESERVING ITS SPIRIT) 2 (2019), https://penniur.upenn.edu/uploads/media/Modernizing_the_CRA.pdf [https://perma.cc/K62Y-H2YX].

57. *See* IMMERGLUCK, *supra* note 5, at 145–49.

58. *Id.* at 148–49.

59. Community Reinvestment Act of 1977, Pub. L. No. 95-128, § 804, 91 Stat. 1111, 1148 (codified as amended at 12 U.S.C. § 2903).

60. IMMERGLUCK, *supra* note 5, at 146.

61. *Id.* at 146–47.

comment files.[62] Those initial regulations identified twelve factors that defined an institution's obligations under the CRA. These included activities that banks conducted to determine the credit needs of their relevant communities; their marketing of services within the community; the geographic distribution of credit they provided to customers; any evidence of discrimination in the provision of credit; patterns of their branch openings and closings; their participation and investment in community development activities; their extension of credit to households and small businesses within their communities; and their general ability to serve the credit and financial needs of their communities.[63]

The CRA did not seem to have much of an impact for a decade or so.[64] A series of policy changes by regulators and Congress enhanced the Act's practical function and impact. In the late 1980s, in response to growing political pressure to address lending disparities, the financial regulators announced that they would focus more on banks' actual performance of CRA obligations than their stated commitments about future performance.[65] More significantly, in that year, in the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA"),[66] Congress required that a good deal of information in regulators' CRA exams of banks be made public.[67] FIRREA also made important improvements to the Home Mortgage Disclosure Act, requiring that lenders report on all loan applications "the race, income, and gender of the applicant, the loan amount, the purpose of the loan, [and] whether the loan was approved, denied, or withdrawn."[68] As Jonathan Macey and Geoffrey Miller observe, underscoring the relationship between the CRA and the Home Mortgage Disclosure Act, these aspects of FIRREA "greatly enhanced the CRA's impact."[69]

Perhaps most significantly, these reforms enabled community activists to leverage the CRA with increasing effectiveness. Beginning in the 1980s, individuals and organizations had begun to carefully follow banks' performance of their obligations under the CRA and to put pressure on them to improve in

62. *Id.* at 155; *see also* Kevin O'Connor, *The DOJ's Reliance on the Community Reinvestment Act To Support Discrimination Allegations Has Negative Consequences for Community Banks*, 44 VT. L. REV. 399, 403–04 (2019).

63. IMMERGLUCK, *supra* note 5, at 156.

64. Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 292 (1993) ("For many years after its adoption in 1977, the CRA was little more than a vague statement of principle without much real-world effect.").

65. IMMERGLUCK, *supra* note 5, at 170.

66. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12, 18 & 31 U.S.C.).

67. IMMERGLUCK, *supra* note 5, at 172.

68. *Id.* at 172–73.

69. Macey & Miller, *supra* note 64, at 292.

relevant categories.[70] They did so especially by highlighting banks' shortcomings in satisfying their CRA obligations when the banks sought to consolidate through mergers.[71] This quickly became a successful strategy and gave these activists further leverage to negotiate CRA agreements with banks.[72]

In 1995, the financial regulators overhauled their approach to the CRA and formally adopted an outcome-based regime that entailed tests regarding banks' lending, investment, and service.[73] The lending test addresses a bank's lending record within its assessment area, within low- and moderate-income areas, and to low- and moderate-income borrowers.[74] The investment test evaluates a bank's "qualified community development investments."[75] And the service test considers a bank's retail services within its assessment areas.[76] Over the years, the banking regulators have developed guidelines on what activities, products, and services count favorably for these tests.[77] The reforms in 1995 also enabled banks to propose individualized strategic plans and relaxed some

70. IMMERGLUCK, *supra* note 5, at 165–67.

71. Macey & Miller, *supra* note 64, at 292 ("Consequently, CRA-based challenges to bank mergers and other transactions subject to CRA scrutiny are now routine, even when the institution in question has received high marks for CRA compliance in recent examinations."); Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 517 (2005) ("Banks have an incentive to seek high ratings because regulators consider a bank's or thrift's CRA record in determining whether to approve that institution's application for a 'deposit facility,' which includes mergers with or acquisitions of other depository institutions. CRA also plays a role in the approval process for more mundane events, such as the opening or closing of a bank branch. Such applications also provide the public with an opportunity to comment, including by commenting on the CRA performance of the institution.").

72. IMMERGLUCK, *supra* note 5, at 165–67 (reporting the increase in number and size of such agreements in the decade between the early 1980s and the early 1990s and noting that the estimated value of commitments under such agreements was around $30 billion by the early 1990s). The National Community Reinvestment Coalition reports that it has, since 2016, "facilitated the creation of CBAs with 21 bank groups worth a combined $580 billion for mortgage, small business and community development lending, investments and philanthropy in [low- to moderate-income] and under-resourced communities." *Community Benefits Agreements: How Banks Ensure They Meet Local Needs*, NAT'L CMTY. REINVESTMENT COAL., https://ncrc.org/cba/ [https://perma.cc/4GZ4-6PDJ] (last updated Jan. 2024).

73. Barr, *supra* note 71, at 520 ("In part, the 1995 reforms to CRA promulgated by the bank regulators responded to earlier criticisms in positive ways."); IMMERGLUCK, *supra* note 5, at 176–77; Silver, *supra* note 45, at 421.

74. John Mullin, *Revisiting the Community Reinvestment Act*, ECON FOCUS, First Quarter 2022, at 18, 19.

75. *Id.*

76. *Id.* at 19–20.

77. Silver, *supra* note 45, at 421 ("Over the years, banks and community groups would ask the federal agencies questions about what activities would count under CRA. The agencies responded by developing an interagency question and answer (Q&A) document describing various activities and types of financing that would qualify in CRA exams. For example, the Q&As have specified that environmental clean-ups, foreclosure prevention, international remittance payments, and Individual Development Accounts helping to finance education or homeownership are activities that would receive favorable consideration on CRA exams.").

requirements under the CRA for smaller institutions.[78] As noted above,[79] the Gramm-Leach-Bliley Act of 1999 gave additional potential import to the CRA and the leverage it affords by requiring that all banks within a bank holding company have satisfactory CRA ratings for the company to become a financial holding company.[80] Currently, banks are evaluated for their CRA performance roughly every three years.[81]

Beginning in the late 1990s, CRA grade inflation led to a significant reduction in the number of CRA agreements and banks' CRA-relevant pledges.[82] The agreements and pledges made during that time involved some very large institutions, however, so the overall value of banks' commitments under CRA agreements or unilateral pledges increased dramatically.[83]

The new rules recently adopted by the financial regulators represent significant reforms to how the CRA is implemented and enforced. They include expanding the definition of community development activities, delineated in eleven categories; clarifying the content and scope of performance tests and standards and tailoring those to different types and sizes of institutions; providing that "relevant activities" of banks' subsidiaries are included in their performance evaluations; applying new retail lending assessment areas for large banks; revamping assessments of products and services; and replacing the satisfactory rating under most performance tests with two new categories, high satisfactory and low satisfactory.[84]

B. *Critics, Right and Left*

As Baradaran aptly notes, the CRA "finds itself between a group of people who believe it does not achieve nearly enough and another group that believe it requires too much."[85] Since its inception, the CRA has been variously criticized by the latter group as imposing significant compliance costs, giving nonbank

78. IMMERGLUCK, *supra* note 5, at 176–77.

79. *See supra* note 15 and accompanying text.

80. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, sec. 103, § 4(l)(2), 113 Stat. 1338, 1346–47 (1999) (codified as amended at 12 U.S.C. § 1843(1)(2)).

81. Mullin, *supra* note 74, at 19.

82. IMMERGLUCK, *supra* note 5, at 178.

83. *Id.* at 187–89.

84. *See* Community Reinvestment Act, 89 Fed. Reg. 6574, 6575–76 (Feb. 1, 2024) (to be codified at 12 C.F.R. pts. 25, 228, 345).

85. Baradaran, *Jim Crow Credit*, *supra* note 43, at 936. "[T]he act has been one of the most vilified banking laws, even as it was criticized by civil rights groups as 'toothless' in counteracting the legacy of past injustices." *Id.* at 935. For some prominent critiques, see Macey & Miller, *supra* note 64, at 295–97; Lawrence J. White, *The Community Reinvestment Act: Good Intentions Headed in the Wrong Direction*, 20 FORDHAM URB. L.J. 281, 283–87 (1993); Keith N. Hylton & Vincent D. Rougeau, *The Community Reinvestment Act: Questionable Premises and Perverse Incentives*, 18 ANN. REV. BANKING L. 163, 196 (1999). For a good summary of these critiques, see Barr, *supra* note 71, at 518–19.

institutions an unfair competitive advantage,[86] effectively taxing mergers and other actions,[87] distorting private market forces and forcing banks to make unprofitable loans,[88] and creating an inefficient subsidy to its beneficiaries.[89]

Macey and Miller leveled one of the earliest systematic critiques along these lines. In addition to most of the claims noted above, they argued that the CRA also "impairs the safety and soundness of an already overstrained banking industry [by] promot[ing] the concentration of assets in geographically nondiversified locations."[90] Further,

> [i]ts requirements are vague and self-contradictory, and its enforcement often appears arbitrary. . . . Tragically, the CRA poorly furthers the purposes for which it was designed. It penalizes institutions that actually serve low-income and moderate-income neighborhoods, while rewarding those that do not. It drives capital away from poor neighborhoods by imposing a tax on those depository institutions foolhardy enough to do business in such communities.[91]

Finally, they argued that a complex political economy has entrenched the CRA.[92] This line of criticism of the CRA remerged in the wake of the financial crisis of 2008–09, as some commentators argued that the CRA played a significant role in precipitating the crisis by causing banks to make risky mortgage loans.[93] This view is now largely discredited. The Financial Crisis Inquiry Commission, created by Congress in 2009, for example, concluded that "the CRA was not a significant factor in subprime lending or the crisis."[94]

Scholars who are more supportive of the CRA have responded to these critiques with a much more sanguine view of its function and impact. In separate works, Immergluck and Barr have offered some of the most thorough defenses of the Act and surveyed emerging empirical evidence of its impact.[95]

86. Macey & Miller, *supra* note 64, at 293.

87. *Id.* at 295.

88. *Id.*

89. *Id.* at 295–96 ("Regardless of the social benefits of affirmative action or charitable giving, these were not the goals of the CRA and its use to further these goals represents a distortion of its original purpose. The CRA has become a potent political tool in the hands of activist political pressure groups. Some of these groups use the statute to magnify their political importance and to gain special favors for themselves and their leaders, either by way of obtaining funding for pet projects or garnering direct logistical or financial support for their operations.").

90. *Id.* at 295.

91. *Id.* at 295–96.

92. *See id.*

93. Sumit Agarwal, Efraim Benmelech, Nittai Bergman & Amit Seru, *Did the Community Reinvestment Act (CRA) Lead to Risky Lending?* 24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 18609, 2012) (finding that the CRA led to riskier lending by banks during the period before the financial crisis of 2008–09).

94. THE FIN. CRISIS INQUIRY COMM'N, *supra* note 21, at xxvii; *see also* WACHTER, *supra* note 56, at 3.

95. *See* IMMERGLUCK, *supra* note 5, at 237–46; Barr, *supra* note 71, at 515–22.

Immergluck noted the difficulty in isolating the Act's impact, since relevant outcomes are inevitably affected by other legal regimes as well as macroeconomic factors such as interest rate fluctuations.[96] That said, both writers observed that the emerging evidence strongly indicated that the CRA had, in Immergluck's words, "a significant impact on lending flows to lower-income and minority communities," especially mortgage lending.[97] Furthermore, both writers surveyed evidence indicating that the costs imposed by the Act on banks were not as substantial as critics claimed and that the profitability of banks' CRA lending compared favorably to their conventional lending.[98] More recent work generally confirms that the CRA has had some, if modest, beneficial ongoing impact.[99]

96. IMMERGLUCK, *supra* note 5, at 237.

97. *Id.*; *see also* Barr, *supra* note 71, at 520 ("Recent evidence shows that over the last decade CRA appears to have created far greater benefits than previous legal scholarship had predicted. Lending to low- and moderate-income and minority households increased dramatically during the 1990s. Through econometric controls, studies suggest that CRA has had an independent effect on increased lending to low- and moderate-income and minority communities.").

98. IMMERGLUCK, *supra* note 5, at 238–41; Barr, *supra* note 71, at 520.

99. *See generally* BRAD BLOWER, JOSH SILVER, JASON RICHARDSON, GLENN SCHLACTUS & SACHA MARKANO-STARK, NAT'L CMTY. REINVESTMENT COAL., ADDING ROBUST CONSIDERATION OF RACE TO COMMUNITY REINVESTMENT ACT REGULATIONS: AN ESSENTIAL AND CONSTITUTIONAL PROPOSAL (2021) ("The statute and its regulations have produced positive information externalities that allow all lenders, whether or not covered by CRA, to better assess and price for risk. . . . Because of CRA, banks . . . have taken numerous steps, including establishing loan products geared to LMI borrowers; entering loan pooling arrangements; undertaking lending consortiums; and partnering with local groups, community development corporations and community development financial institutions ('CDFIs') to break down barriers that impede the efficient flow of capital into LMI communities."); Hyojung Lee & Raphael W. Bostic, *Bank Adaptation to Neighborhood Change: Mortgage Lending and the Community Reinvestment Act*, 116 J. URB. ECON. art. no. 103211 (2020) (finding an increase in loan approvals in CRA-eligible neighborhoods that are already rapidly improving, with distributional consequences within CRA target areas); Neil Bhutta, *The Community Reinvestment Act and Mortgage Lending To Lower Income Borrowers and Neighborhoods*, 54 J.L. & ECON. 953 (2011) (finding significant effect on lending in large metropolitan areas in the late 1990s and early 2000s); Robert B. Avery, Raphael W. Bostic & Glenn B. Canner, *Assessing the Necessity and Efficiency of the Community Reinvestment Act*, 16 HOUS. POL'Y DEBATE 143 (2005) (finding that the CRA caused banks to engage in at least some additional lending activities and that most but not all of this lending was profitable); Stuart A. Gabriel & Stuart S. Rosenthal, *Government-Sponsored Enterprises, the Community Reinvestment Act, and Home Ownership in Targeted Underserved Neighborhoods*, *in* HOUSING MARKETS AND THE ECONOMY: RISK, REGULATION, AND POLICY 202 (Edward L. Glaeser & John M. Quigley eds., 2009) (finding evidence of a positive impact by the CRA on nonconforming mortgage lending); Lei Ding & Leonard Nakamura, *"Don't Know What You Got Till It's Gone"—The Effects of the Community Reinvestment Act (CRA) on Mortgage Lending in the Philadelphia Market* (Fed. Rsrv. Bank of Phila., Working Paper No. 17-15, 2017) (on file with the North Carolina Law Review) (finding a significant decrease in purchase originations by CRA-covered lenders in neighborhoods that lose their CRA coverage); Lei Ding, Hyojung Lee & Raphael W. Bostic, *Effects of the Community Reinvestment Act (CRA) on Small Business Lending* (Fed. Rsrv. Bank of Phila., Discussion Paper, 2018) (on file with the North Carolina Law Review) (finding that "that the CRA promotes small business lending, especially in terms of number of loan originations, in lower-income neighborhoods"); Indraneel

Most scholars who generally agree with this assessment have nonetheless criticized the CRA as falling short of its full potential and promise and have argued that it should be strengthened and expanded.[100] As Immergluck put it, "[n]otwithstanding the significant impacts of CRA, the law has suffered from persistent problems of weak implementation and enforcement."[101] Anthony Taibi describes this as the "liberal critique" of the CRA.[102] Commentators and scholars in this school have proposed various reforms to improve the CRA's function. These include expanding the scope of the CRA to nonbank financial institutions;[103] changing how assessment areas are determined;[104] clarifying further what activities and investments count towards CRA compliance;[105] increasing the importance of providing financial services within an assessment area under the CRA;[106] focusing more narrowly on low-income borrowers than low-income areas;[107] increasing the frequency of CRA exams for smaller banks;[108] and focusing more and more specifically on race as a factor of evaluation and as a causal factor in credit allocation.[109] In recent years, as in

Chakraborty, Vidhi Chhaochharia, Rong Hai & Prithu Vatsa, *Returns to Community Lending* (Univ. of Mia. Bus. Sch., Research Paper No. 3353786, 2021) (on file with the North Carolina Law Review) (finding that the CRA directs significant resources toward low- and middle-income communities).

100. *See* IMMERGLUCK, *supra* note 5, at 145–48; BLOWER ET AL., *supra* note 99, at 3–5; WACHTER, *supra* note 56, at 2–5; Roberto Quercia, Janneke Ratcliffe & Michael A. Stegman, *The Community Reinvestment Act: Outstanding, and Needs To Improve*, *in* FED. RSRV. BANKS OF BOS. & S.F., REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 47, 47 (Prabal Chakrabarti et al. eds., 2009) [hereinafter, REVISITING THE CRA]; *see also* John Taylor & Josh Silver, *The Community Reinvestment Act: 30 Years of Wealth Building and What We Must Do To Finish the Job*, *in* REVISITING THE CRA, *supra*, at 148, 148–53; Liz Cohen & Rosalia Agresti, *Expanding the CRA to All Financial Institutions*, *in* REVISITING THE CRA, *supra*, at 134; Baradaran, *Jim Crow Credit*, *supra* note 43, at 936 ("At the other end of the spectrum, community groups have expressed concern that the CRA is more geared towards process than real reform. Banks, for example, receive a rating based on how often they meet with a community group rather than on the actual results of those meetings. In addition, loans are measured quantitatively, not qualitatively.").

101. IMMERGLUCK, *supra* note 5, at 246.

102. Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1490–94 (1994).

103. Quercia et al., *supra* note 100, at 56; Eugene A. Ludwig, James Kamihachi & Laura Toh, *The Community Reinvestment Act: Past Successes and Future Opportunities*, *in* REVISITING THE CRA, *supra* note 100, at 84, 100–01; Silver, *supra* note 45, at 422–24.

104. *See* WACHTER, *supra* note 56, at 4–5; Quercia et al., *supra* note 100, at 56; Silver, *supra* note 45, at 423.

105. *See* WACHTER, *supra* note 56, at 5–6.

106. Quercia et al., *supra* note 100, at 53–54.

107. *See, e.g.*, Laurie Goodman, Jun Zhu & John Walsh, *The Community Reinvestment Act: What Do We Know, and What Do We Need To Know?*, 30 HOUS. POL'Y DEBATE 83, 90–98 (2020).

108. Taylor & Silver, *supra* note 100, at 157.

109. *See* BLOWER ET AL., *supra* note 99; Stella J. Adams, *Putting Race Explicitly into the CRA*, *in* REVISITING THE CRA, *supra* note 100, at 167; *see also* IMMERGLUCK, *supra* note 5, at 247–65.

previous episodes,[110] the financial regulators have not been consistently coordinated in their enforcement of the Act. In 2020, for example, the Office of the Comptroller of the Currency issued a rule updating CRA regulations that was not joined by the other financial regulators.[111] The new rules noted above include some of the changes proposed by scholars and advocates and appear to reflect at least a new commitment to inter-agency cooperation and consistency.[112]

Still other writers have leveled more fundamental critiques against the CRA. Taibi made perhaps the earliest contribution along these lines,[113] characterizing and criticizing the CRA as a type of affirmative action regime.[114] Of affirmative action in general, Taibi wrote:

> To the extent that it accepts as given the institutional structures of American life (but for racial disparity), affirmative action reinforces the legitimacy of the very institutions that effectively disempower African-American and other nonelite communities. Thus, affirmative action turns the aspirations of disempowered groups into mere special interest pleadings, and demands for justice into supplications for charity. It divides the disempowered along the lines of who does and does not benefit from "special treatment" instead of uniting them in a common struggle.[115]

Taibi proposed instead a "community empowerment paradigm"[116] influenced by the emergence of community development financial institutions ("CDFIs").[117] These "mission driven" institutions—currently including banks, credit unions, loan funds, and venture capital funds—direct their activities and products to "create economic opportunity for individuals and small businesses"

110. In 2004, for example, the OTS and the Federal Deposit Insurance Corporation decided to scale back CRA examinations for institutions with less than $1 billion in assets, which the Federal Reserve and the Office of the Comptroller of the Currency declined to do. Barr, *supra* note 71, at 517–18.

111. Community Reinvestment Act Final Rule, 85 Fed. Reg. 34734 (June 5, 2020) (codified as amended at 12 C.F.R. pts. 25, 195).

112. *See* Macey & Miller, *supra* note 64, at 326–29; *see also* Mullin, *supra* note 74, at 21 (noting that "[t]he Fed, OCC, and FDIC are currently working toward creating a CRA framework that is consistent across the agencies").

113. *See* Taibi, *supra* note 102, at 1484–514.

114. *See id.* at 1484–89, 1511–14.

115. *Id.* at 1468.

116. *See id.* at 1514–40.

117. *See id.* at 1520–36. Taibi describes and discusses the various types of existing community development financial institutions, including banks, credit unions, loan funds, and micro-loan funds. *See id.* at 1520–28.

in underserved communities.[118] Taibi acknowledged that such institutions received support from banks' CRA activity, but emphasized their roots in "visionary grassroots activism."[119] At the time, the Clinton administration was in the process of creating a CDFI fund to enhance the role of these types of institutions.[120] That fund was created in 1994 and, among other things, formally certifies CDFIs.[121] Immergluck argues that CRA-driven support for CDFIs is part of the underappreciated success of the CRA,[122] but Taibi anticipated some concerns about CDFI's and criticisms of the CDFI fund—especially that regulators and policymakers should steer more banking resources to minority-owned financial institutions—and the subsequent observations that CDFIs have failed to achieve their full potential.[123]

Baradaran and Atkinson have both recently built upon and expanded this critique of the CRA, especially the concern that by expanding access to credit in low-income and minority communities, the CRA reinforces existing market-based social and economic institutions.[124] Both argue that the operation of the CRA and other related regimes have not significantly resolved—and may exacerbate—racial inequality in America.[125] Atkinson focuses on the underlying nature of credit relationships, especially the destructive impact of indebtedness, and the insufficiency of tools to address extractive practices and unsustainable debt.[126] As she observes, the CRA, the Equal Credit Opportunity Act, and other consumer financial regulations "are steeped in the notion that borrowing money is a social good, capable of addressing, at least in part, deeply embedded social

118. *Community Development Financial Institution (CDFI) and Community Development (CD) Bank Resource Directory*, OFF. COMPTROLLER CURRENCY, https://www.occ.gov/topics/consumers-and-communities/community-affairs/resource-directories/cdfi-and-cd-bank/index-cdfi-and-cd-bank-resource-directory.html [https://perma.cc/C4DF-TN4Y].

119. *See* Taibi, *supra* note 102, at 1520–21.

120. *See id.* at 1525–30 (discussing the proposed CDFI Fund).

121. U.S. DEP'T TREASURY, CDFI FUND, https://www.cdfifund.gov/sites/cdfi/files/documents/cdfi_infographic_v08a.pdf [https://perma.cc/J3WG-R5X5].

122. IMMERGLUCK, *supra* note 5, at 237–38.

123. *See* Taibi, *supra* note 102, at 1528–36 (discussing the proposed CDFI Fund and criticizing aspects of its design); *see also infra* notes 134–35 and accompanying text.

124. *See* Baradaran, *Banking on Democracy*, *supra* note 45, at 398 ("Even well-meaning financial inclusion programs, including robust anti-redlining measures like the CRA, remain firmly rooted in neoliberal logic that centers the private banking market in remedying the historic exclusion of Black communities."); Baradaran, *Jim Crow Credit*, *supra* note 43, at 938–43; Atkinson, *Borrowing Equality*, *supra* note 45, at 1431–32; Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1157–56 (2019) [hereinafter Atkinson, *Rethinking Credit*]. *See generally* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (discussing the persistence of racial segregation and housing insecurity for low-income individuals and households).

125. Atkinson, *Borrowing Equality*, *supra* note 45, at 1434–43; Baradaran, *Banking on Democracy*, *supra* note 45, at 374–75.

126. Atkinson, *Borrowing Equality*, *supra* note 45, at 1408, 1431–32; Atkinson, *Rethinking Credit*, *supra* note 124, at 1157–62.

pathologies like racialized and gendered socioeconomic exclusion and, more broadly, entrenched social subordination."[127] As she notes, however, "increased access to conventional mortgages has neither resulted in consistent overall increases in homeownership nor wealth gains among African Americans."[128] She argues, among other things, that expanding access to credit must be coupled with effective means of addressing the impact of debt on communities that are intended beneficiaries of the CRA and other related regimes.[129]

Baradaran focuses generally on the need for an alternative framework to promote equity and community development—one that creates "a more egalitarian credit and financial system."[130] In various works, she has described how lower-income and minority communities are very disproportionately "unbanked or underbanked" and dramatically underserved by the banking and financial industries.[131] She has advocated for a more comprehensive approach to providing financial services to these communities—one that does not depend as much on private financial firms as do existing approaches—and has argued for policies that more effectively empower these communities to chart their own financial and economic progress.[132] Among other things, she has been a prominent advocate for providing broad access to financial services through the U.S. postal system.[133]

Like Taibi, Baradaran points to the early history of community development financial institutions as having been a promising path toward the alternative framework she envisions.[134] Writing over twenty years after Taibi, however, she reports on the disappointing role of CDFIs in this regard as they evolved over time. As she writes, "CDFIs have struggled to remain profitable despite help from the tax code. CDFI's routinely show weaker financial

127. Atkinson, *Borrowing Equality*, *supra* note 45, at 1408.

128. *Id.* at 1442.

129. "[A]ny policy that invokes market-based borrowing as a social good must account for the embeddedness of credit and debt in the broader social context—a context that Congress's current borrowing-as-equality policy seems to ignore." *Id.* at 1412. "[T]o the extent that Congress intends the existing borrowing-as-equality statutes to promote both the economic and noneconomic welfare of marginalized groups, Congress should amend its procredit statutes to expressly account for the countervailing force of debt on the communities for whom the benefits of those statutes are intended. For example, Congress might add intrastatutory modification or discharge of violative loans rather than subjecting distressed borrowers to the collateral damage of a global bankruptcy filing." *Id.*

130. Baradaran, *Banking on Democracy*, *supra* note 45, at 418.

131. *See, e.g.*, Baradaran, *Jim Crow Credit*, *supra* note 43, at 938–39.

132. *See, e.g.*, *id.* at 887–88. ("[T]hese laws are rooted in neoliberal and libertarian concepts of banking market even as they have been championed by progressive reformers and community activists. For most policymakers, activists, and scholars, the buzzword is 'community empowerment' and they have legislated accordingly. In doing so, they have avoided addressing the root causes of the problem and have shifted the responsibility of a solution to the disenfranchised communities themselves instead of devising comprehensive federal policy solutions.").

133. Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165, 165–66 (2014); *see* Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 544–47 (2013).

134. Baradaran, *Jim Crow Credit*, *supra* note 43, at 934–35; Taibi, *supra* note 102, at 1528–36.

performance across the board compared with their more conventional peers. Remarkably, minority banks have been essentially shut out of the CDFI fund."[135]

In sum, the CRA has been an important and impactful component of the U.S. financial regulatory landscape since its inception. It remains a controversial regime from various perspectives. Significantly for present purposes, most commentators who favor government intervention to advance the goals of the CRA seem to agree that the CRA is not being employed aggressively enough, is poorly designed for its function, or both.

II. THE PATH NOT TAKEN

As is well known, the financial crisis of 2008–09 had its roots in the residential housing sector in the United States and the magnification of risks stemming from that sector caused by aggressive financial innovation.[136] Among other things, the crisis dramatically underscored the potential for consumer financial markets to generate systemic instability.[137] It also underscored the concrete risks that dysfunctional consumer financial markets and poorly regulated products create for individuals, households, and communities.

Before and during the crisis, the federal banking regulators had authority and responsibility for regulating consumer financial transactions and markets.[138] This institutional design had been premised on confidence, first, that these agencies were in a good position to supervise and enforce compliance of consumer financial laws by the banks they regulated and, second, that they could uniquely balance the goal of protecting consumers with that of ensuring the

135. Baradaran, *Jim Crow Credit*, *supra* note 43, at 934–35 ("Since its inception, only between 2% and 6% of these funds [from the CDFI Fund] have been awarded to minority banks. The issue stems from the Treasury consistently choosing projects that promised more profits and had less risk due to its institutional concern of maintaining the fund's profitability. This practice has only exacerbated the profit leakage from segregated minority neighborhoods.").

136. *See generally* THE FIN. CRISIS INQUIRY COMM'N, *supra* note 21, at xvi ("While the vulnerabilities that created the potential for crisis were years in the making, it was the collapse of the housing bubble—fueled by low interest rates, easy and available credit, scant regulation, and toxic mortgages—that was the spark that ignited a string of events, which led to a full-blown crisis in the fall of 2008. Trillions of dollars in risky mortgages had become embedded throughout the financial system, as mortgage-related securities were packaged, repackaged, and sold to investors around the world. When the bubble burst, hundreds of billions of dollars in losses in mortgages and mortgage-related securities shook markets as well as financial institutions that had significant exposures to those mortgages and had borrowed heavily against them.").

137. Edward J. Balleisen & Melissa B. Jacoby, *Consumer Protection After the Global Financial Crisis*, 107 GEO. L.J. 813, 816 (2019) ("In the aftermath of the [global financial crisis], policymakers identified deceptive and unfair practices as significant contributors to the eventual instability in the American mortgage market and wider financial markets."); DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM, *supra* note 21, at 2.

138. DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM, *supra* note 21, at 55–56.

safety and soundness of banks and the financial system.[139] There was widespread acknowledgment in the wake of the crisis that this existing regulatory framework affecting consumer financial markets had not been up to the task,[140] and debates over regulatory reforms at that time generally envisioned some changes to that framework.[141]

Largely due to the work and advocacy of Senator Elizabeth Warren (then a professor of law),[142] these discussions ultimately centered around the creation of a new agency that would have authority and responsibility for implementing and enforcing all federal consumer financial regulations. Warren and Oren Bar-Gill had analogized the risks posed by consumer financial products to those posed by physical products and proposed "a single regulatory body that will be responsible for evaluating the safety of consumer credit products and policing any features that are designed to trick, trap, or otherwise fool the consumers who use them."[143]

The Obama administration's initial proposal for broad financial reform in the wake of the global financial crisis included a consumer financial protection agency.[144] As proposed, it was to be an independent agency with a reliable funding source.[145] Its jurisdiction would include "consumer financial services and products such as credit, savings and payment products and related services, as well as the institutions that issue, provide, or service these products and provide services to the entities that provide the financial products."[146] The agency was also designed to have robust supervisory authority.[147]

The Obama administration's initial blueprint would have transferred the CRA to the new agency as part of a broad and comprehensive grant of authority:

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139. *Id.* at 7.

140. *Id.* at 7–8.

141. *See, e.g.*, Balleisen & Jacoby, *supra* note 137, at 828–29; DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM, *supra* note 21, at 7; Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 87 TEMP. L. REV. 807, 808 (2015) (observing that, before the financial crisis of 2007–09, "[t]here was so little consumer protection taking place, particularly regarding financial products, that an unsustainable level of consumer debt became a major contributor to the recent financial crisis"). "The prudential regulators who previously had jurisdiction over consumer financial protection law were not committed to consumer protection and in some instances were hostile towards it. The CFPB's design reflects an understanding of why the prudential-regulator model of consumer protection failed and a goal of reversing course." Braucher & Littwin, *supra*, at 810.

142. *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 8, 14, https://democracyjournal.org/magazine/5/unsafe-at-any-rate [https://perma.cc/J7XP-SU82]; Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 100–01 (2008).

143. Bar-Gill & Warren, *supra* note 142, at 3–6.

144. DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM, *supra* note 21, at 55–63.

145. *Id.* at 14.

146. *Id.* at 57.

147. *See, e.g.*, Braucher & Littwin, *supra* note 141, at 808–09 ("[F]or the first time in U.S. history, a federal regulator with a commitment to consumer protection has access to real-time company compliance information as well as the tools to remedy any deficits it finds.").

> The [agency] should have sole authority to promulgate and interpret regulations under existing consumer financial services and fair lending statutes, [such as the Truth in Lending Act, Home Ownership and Equity Protection Act, Real Estate Settlement and Procedures Act, Community Reinvestment Act, Equal Credit Opportunity Act, and Home Mortgage Disclosure Act, and the Fair Debt Collection Practices Act]. . . . The [agency] should be given similar rulemaking authority under any future consumer protection laws addressing the consumer credit, savings, collection, or payment markets.[148]

An early version of the law proposed by Senator Christopher Dodd would also have included the CRA in the laws transferred from federal financial regulators to the new agency.[149] But the House bill, authored by Representative Barney Frank, did not; and neither of the bills passed by the Senate or the House transferred the CRA to the new agency.[150] The Dodd-Frank Act transferred to the new Consumer Financial Protection Bureau authority and responsibility for "federal consumer financial laws."[151] There was no categorical definition of such laws; rather, the definition referred to a list of nearly twenty laws enumerated under the Dodd-Frank Act.[152] The CRA was not among them.

The decision not to include the CRA among those regimes transferred to the new Bureau is not explained in the legislative history of Dodd-Frank or in reporting or academic discussion from the time. And it has not subsequently been addressed or debated in the literature on Dodd-Frank and financial regulatory reform.[153] At the time, however, this question generated some debate, which is reflected in the legislative history of the Dodd-Frank Act.[154] While the history of this debate has been lost in the huge sweep of reforms considered and adopted in Dodd-Frank, it is clear that many—perhaps most—proponents of

148. DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM, *supra* note 21, at 58.

149. For a copy of the discussion draft released by Senator Dodd, see generally SENATOR CHRISTOPHER DODD, 111TH CONG., DISCUSSION DRAFT: THE RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2009 (Nov. 10, 2009), https://www.llsdc.org/assets/DoddFrankdocs/bill-111th-s3217-discussion-draft.pdf [https://perma.cc/L6E8-6QWT] (including the CRA as an enumerate law to be transferred to the new Bureau). *See generally* Rick McKinney, *Dodd-Frank Wall Street Reform and Consumer Financial Protection Act: A Brief Legislative History with Links, Reports, and Summaries*, LAW LIBRS.' SOC'Y OF WASH., D.C., https://www.llsdc.org/dodd-frank-legislative-history [https://perma.cc/L9WU-MNJX] (last updated Oct. 13, 2017) (describing a discussion draft).

150. DAVIS POLK, SIDE-BY-SIDE COMPARISON CHART–KEY SENATE AND HOUSE BILL ISSUES 143 (2010), https://www.davispolk.com/sites/default/files/files/Publication/d243b01a-324f-4ccd-85a5-e9bb42d70920/Preview/PublicationAttachment/c56258f4-0e4e-479e-8632-ea9b08fc2b82/060210_SenateHouseComparisonChart.pdf [https://perma.cc/E2xJ-TKLQ].

151. 12 U.S.C. § 5491(a) ("There is established in the Federal Reserve System, an independent bureau to be known as the 'Bureau of Consumer Financial Protection', which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."); *see also id.* § 5481(14).

152. *Id.* § 5481(12), (14).

153. *See infra* note 177 and accompanying text.

154. *See* McKinney, *supra* note 149.

the new Bureau felt strongly that the CRA should be among the enumerated laws transferred to the Bureau.[155] As John Taylor of the National Community Reinvestment Coalition ("NCRC") put it, "[s]ince CRA is a central component of consumer protection and [the new agency] will be the central agency to protect consumers, [it] must be charged with enforcing CRA."[156]

This view was grounded, first, in a deeply critical view of the performance of financial regulators in conducting regulation of consumer financial products and markets.[157] As James Carr, also of the NCRC, argued,

> for more than a decade, the Federal Reserve has increasingly limited the effectiveness of CRA. As with all other consumer protections under its jurisdiction, CRA has been the neglected "stepchild" of the quarterly earnings reports from financial firms. Retaining CRA at the Federal Reserve would greatly limit its effectiveness to channel much-needed dollars into communities with mounting foreclosures and rising job loss.[158]

Similarly, from Taylor:

> The current institutional structure has inhibited a fervent commitment to CRA and fair lending enforcement on the part of the agencies. Charter shopping, interagency conflict, competing regulatory priorities, and other institutional constraints have resulted in a CRA rulemaking and

155. *See, e.g.*, *Mortgage Lending Reform: A Comprehensive Review of the American Mortgage System: Hearing Before the H. Subcomm. on Fin. Insts. & Consumer Credit*, 111th Cong. 34 (2009) [hereinafter *Mortgage Lending Reform*] (testimony of David Berenbaum, Exec. Vice President, Nat'l Cmty. Reinvestment Coal.); *Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve: Hearing Before the Subcomm. of the Domestic Monetary Pol'y & Tech. of the H. Comm. of Fin. Servs.*, 111th Cong. 32–33 (2009) [hereinafter *Regulatory Restructuring*] (statement of James H. Carr, Chief Operating Officer, Nat'l Cmty. Reinvestment Coal.); *Regulatory Restructuring*, *supra*, at 37–38 (testimony of Patricia A. McCoy, Dir., Ins. L. Ctr.); *Community and Consumer Advocates' Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Comm. of Fin. Servs.*, 111th Cong. 16–17 (2009) [hereinafter *Community and Consumer Advocates' Perspectives*] (statement of John Taylor, President & CEO, Nat'l Cmty. Reinvestment Coal.); Letter from Executive Committee Organizations, Ams. for Fin. Reform, to U.S. House of Representatives (Dec. 8, 2009), https://www.politico.com/pdf/PPM136_dec_8_afr_sign_on_letter_in_support_of_support_h._r_4173.pdf [https://perma.cc/7L95-KAZY].

156. *Community and Consumer Advocates' Perspectives*, *supra* note 155, at 145 (statement of John Taylor, President & CEO, Nat'l Cmty. Reinvestment Coal.).

157. *Regulatory Restructuring*, *supra* note 155, at 56 (statement of James H. Carr, Chief Operating Officer, Nat'l Cmty. Reinvestment Coal.); *see also* Letter from Executive Committee Organizations, Ams. for Fin. Reform, to U.S. House of Representatives, *supra* note 155 ("The proposed [agency] needs to have jurisdiction over the Community Reinvestment Act (CRA). . . . [T]he CRA is vital to fighting discriminatory, deceptive, and unsustainable lending practices in minority communities. But as is the case with other consumer protection and civil rights laws, CRA enforcement in recent years has been extremely weak, allowing a wide range of under-regulated, non-bank—and often predatory—lenders to fill the void.").

158. *Regulatory Restructuring*, *supra* note 155, at 56–57 (statement of James H. Carr, Chief Operating Officer, Nat'l Cmty. Reinvestment Coal.).

> enforcement record that ranges from lackluster to negligent. An objective analysis of the record does not produce compelling arguments for retaining CRA and fair lending enforcement with the current bank agencies.[159]

Broadening this assessment, Taylor argued that

> the same rationale for moving the enforcement and rulemaking for the other consumer protection and fair lending laws applies with the same vigor to placing CRA under the jurisdiction of the [new agency]. The time is now to have an agency whose core mission is the protection of consumers and communities to oversee all of the consumer and fair lending laws.[160]

According to Carr, the new agency would also be better suited to employing the CRA to promote financial inclusion[161] and, especially, to enhance minority communities' access to financial resources.[162]

Perhaps equally important, advocates for transferring authority for the CRA to the Bureau argued that doing so would be essential, or at least very helpful, to the Bureau in advancing its mission.[163] Transferring the full range of "fair lending, and consumer protection oversight to [the agency] would provide [it] with the necessary examination tools to conduct similar analyses and ensure that CRA activities are conducted in a safe and sound manner."[164] As Taylor of the NCRC elaborated:

> If different regulatory agencies enforce these laws, opportunities will continue to be missed for effective enforcement since different regulatory agencies have not regularly or routinely reported violation of

159. *Community and Consumer Advocates' Perspectives*, *supra* note 155, at 157–58 (statement of John Taylor, President & CEO, Nat'l Cmty. Reinvestment Coal.).

160. *Id.* at 16; *see also Regulatory Restructuring*, *supra* note 155, at 37–38 (testimony of Patricia A. McCoy, Dir., Ins. L. Ctr.) ("I think it makes sense for the Community Reinvestment Act to be part of the new agency because the agency is so concerned with access to credit and credit quality. And those two things are at the core of CRA."); *Regulatory Restructuring*, *supra* note 155, at 57 (statement of James H. Carr, Chief Operating Officer, Nat'l Cmty. Reinvestment Coal.) ("Therefore, NCRC recommends that bank agencies be coordinated by CFPA to ensure that their fair lending reviews allow for the development of a full understanding of the lending practices and patterns of the banks they are examining. The best way to ensure adequate consultation and collaboration across banking agencies is to consolidate enforcement authority for both fair lending and CRA examination authority within CFPA's jurisdiction.").

161. *Regulatory Restructuring*, *supra* note 155, at 57 (statement of James H. Carr, Chief Operating Officer, Nat'l Cmty. Reinvestment Coal.) ("As such, NCRC believes that CRA is the best tool to adequately address these concerns [about financial inclusion] and put the US economy on the road to recovery.").

162. "Community Reinvestment Act is the only real act that really promotes and holds banks . . . accountable for proactively lending in communities and not ignoring the legitimate credit needs. So if it is not in that agency, we have left a major piece of support for minority communities out." *Id.* at 38.

163. *Id.*

164. *Id.* at 58.

> laws to each other and thus have not jointly prosecuted practices that violate two or more laws . . . The best way to avoid the possibility of inadequate consultation among agencies is to simply place both CRA and fair lending examination authority with the [new agency].[165]

These advocates also generally argued that the benefits of transferring the CRA to the Bureau in turn depended to some extent on reforms to the CRA generally in line with the liberal critique described above.[166] These included extending the CRA to nonbank financial institutions, expanding data disclosures related to the Act to include more small business lending data, and sharpening the focus of the CRA on racial inequality in the extension of credit.[167]

To be sure, there were also vocal opponents to shifting authority for the CRA to a new consumer financial protection agency.[168] James MacPhee, testifying on behalf of the Independent Community Bankers of America, for example, argued that all fair lending laws, including the CRA, the Equal Credit Opportunity Act, and the Home Mortgage Disclosure Act, should remain with

165. *Community and Consumer Advocates' Perspectives*, *supra* note 155, at 158–59 (statement of John Taylor, President & CEO, Nat'l Cmty. Reinvestment Coal.) ("If the bank agencies do not consult with the CFPA or conduct their own fair lending reviews, they will not develop a full understanding of the lending practices and patterns of the banks they are examining and thus will award ratings that will not fully reflect the banks' record of serving credit needs of all communities."); *see also Public Hearing on the Community Reinvestment Act Regulations: Hearing Before the Bd. of Governors of the Fed. Rsrv. Sys.*, N.Y.C. Dep't of Consumer Affs. 2–3 (2010) [hereinafter *Community Reinvestment Act Regulations*] (testimony of Jonathan Mintz, Comm'r, N.Y.C. Dep't of Consumer Affs.); *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 263 (2009) [hereinafter *Enhancing Consumer Financial Products Regulation*] (testimony of Jonathan Mintz, Comm'r, N.Y.C. Dep't of Consumer Affs.) ("[T]he Consumer Financial Protection Agency could hold financial institutions accountable using tools such as the Community Reinvestment Act examination process for their product-rating mix, and the actual number of safe products and services sold in low- and moderate-income communities.").

166. *Mortgage Lending Reform*, *supra* note 155, at 147–48 (testimony of David Berenbaum, Exec. Vice President, Nat'l Cmty. Reinvestment Coal.).

167. *Regulatory Restructuring*, *supra* note 155, at 59–60 (statement of James H. Carr, Chief Operating Officer, Nat'l Cmty. Reinvestment Coal.) ("[The] CFPA's effectiveness would be further increased with a modernized CRA. Modernizing CRA and strengthening how it applies to banks and nonbank financial institutions would allow CFPA to better leverage increases in responsible loans and investments in low- to moderate-income areas. Enhanced CRA data disclosure on lending, investing, and services would also support CFPA's overall mission and goals."); *Community and Consumer Advocates' Perspectives*, *supra* note 155, at 163–67 (statement of John Taylor, President & CEO, Nat'l Cmty. Reinvestment Coal.). "If [the CRA] had been applied broadly throughout the financial services industry, the U.S. economy would not be increasingly unhinged as a result of mounting foreclosures, widespread job loss, and a potentially steep and protracted recession." *Community and Consumer Advocates' Perspectives*, *supra* note 155, at 145 (statement of John Taylor, President & CEO, Nat'l Cmty. Reinvestment Coal.).

168. *See, e.g.*, *Regulatory Restructuring*, *supra* note 155, at 7–8 (testimony of Elizabeth A. Duke, Governor, Bd. of Governors of the Fed. Rsrv. Sys.) (defending the Federal Reserve's role in consumer protection viz prudential regulation); *Community and Consumer Advocates' Perspectives*, *supra* note 155, at 9 (statement of Joseph L. Flatley, President & CEO, Mass. Hous. Inv. Corp.).

the banking regulators so that they could appropriately balance those regimes with bank safety and soundness concerns.[169] Similarly, from the Independent Community Bankers of America:

> [T]he regulatory and enforcement powers shifted to the [new agency] would unwisely separate consumer protection from safety and soundness enforcement, when both types of enforcement must co-exist under one agency for efficient financial services regulation. . . . Separating enforcement of CRA from safety and soundness regulation, as the Administration has proposed, could easily result in conflicts between the CRA requirements of the [new agency] and the safety and soundness requirements of banking agencies, leaving banks in the middle. It would be far better to leave with the banking agencies jurisdiction over statutes, such as the CRA, that directly govern bank operations.[170]

Ellen Seidman, who had previously served as director of the Office of Thrift Supervision, argued in favor of a new consumer financial protection agency but against transferring the CRA to it for the same reason. She argued that the "CRA explicitly and appropriately states that the affirmative obligation to serve is to be exercised 'consistent with safe and sound operation.' This will be harder to accomplish if CRA evaluation is separated from the entity responsible for evaluating safe and sound operation."[171]

Seidman and others argued that banking regulators had in fact effectively enforced the CRA in recent years[172] and that "requiring [the new agency] to . . . address broad-based community reinvestment and serving populations as

169. *Full Comm. Hearing on the Impact of Financial Regulatory Restructuring on Small Business: Hearing Before the H. Comm. on Small Bus.*, 111th Cong. 130 (2009) (testimony of James D. MacPhee, CEO, Kalamazoo Cnty. State Bank) ("We appreciate that Chairman Frank's legislation establishing the Consumer Financial Protection Agency (CFPA), H.R. 3126, does not transfer enforcement authority over the Community Reinvestment Act (CRA) to the new agency. This is a common-sense step that allows current prudential regulators to maintain their authority over this law. CRA is intended to ensure that banks are providing services to all segments of the community. Similarly, other fair lending statutes, such as the Equal Credit Opportunity Act (ECOA) and Home Mortgage Disclosure Act, should also remain with the current financial regulatory agencies that will be conducting safety and soundness examinations. Of course, fair lending is good lending and good business. But regulators must consider safety and soundness considerations when they impose specific requirements to achieve these goals.").

170. Letter from Camden R. Fine, President & CEO, Indep. Cmty. Bankers of Am. to Barney Frank, Chairman, House Fin. Servs. Comm. & Spencer Bachus, Ranking Member, House Fin. Servs. Comm. (June 24, 2009), *reprinted in Enhancing Consumer Financial Products Regulation*, *supra* note 165, at 248, 249.

171. *Id.* at 188 (statement of Ellen Seidman, Senior Fellow, New Am. Found.).

172. *See, e.g.*, *Regulatory Restructuring*, *supra* note 155, at 7–8 (testimony of Elizabeth A. Duke, Governor, Bd. of Governors of the Fed. Rsrv. Sys.); *Community and Consumer Advocates' Perspectives*, *supra* note 155, at 40 (statement of Joseph L. Flatley, President & CEO, Mass. Hous. Inv. Corp.); *see also Community and Consumer Advocates' Perspectives*, *supra* note 155, at 161–62 (statement of John Taylor, President & CEO, Nat'l Cmty. Reinvestment Coal.) (addressing the arguments of opponents to moving the CRA to the new agency).

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borrower groups rather than solely as individuals will dilute the agency's mission."[173] According to Seidman:

> [P]ossibly the most consistently effective part of CRA over the past thirty years has been its support for community economic development—affordable multifamily housing; community facilities such as clinics, schools and community centers; shopping centers and other economic anchors; pre-bankable small business lending; support of Community Development Financial Institutions. These are not consumer protection functions, although there certainly is a correlation between communities in need of economic development and consumers most in need of consumer protection. But they are different concepts, using different tools, for different purposes.[174]

Finally, Seidman argued that enforcement and authority for the CRA should not be separated from the regulatory authority over bank mergers and similar actions for which CRA ratings are formally relevant factors.[175] Taylor responded to this particular concern, observing:

> Contrary to the Administration's proposal, Seidman suggests that since the existing agencies would decide merger applications, they should also conduct CRA exams. In contrast, NCRC recommends that bank agencies must be required to obtain the consent of [the new agency] before deciding the outcome of a merger application. . . . NCRC recommends that [the new agency] issue a written opinion regarding the CRA and fair lending performance of banks as part of the merger application process, and that [it] and the bank agencies hold public hearings and meetings with banks and those who have offered written comments on the merger application.[176]

In sum, there was serious consideration of and debate over transferring authority and responsibility for the CRA to the new Consumer Financial Protection Bureau when the Bureau was created. The initial plans for the Bureau assumed that the CRA would be transferred, and consumer and community development advocates lobbied for that result. These advocates argued, among other things, that the logic for transferring other consumer financial laws to the new agency applied with equal force to the CRA and that the regime was intricately and deeply connected to regimes like the Home

173. *Regulatory Restructuring*, *supra* note 155, at 56 (statement of James H. Carr, Chief Operating Officer, Nat'l Cmty. Reinvestment Coal.).

174. *Enhancing Consumer Financial Products Regulation*, *supra* note 165, at 188 (statement of Ellen Seidman, Senior Fellow, New Am. Found.).

175. *Id.*

176. *Community and Consumer Advocates' Perspectives*, *supra* note 155, at 162 (statement of John Taylor, President & CEO, Nat'l Cmty. Reinvestment Coal.).

Mortgage Disclosure Act and the Equal Opportunity Act that were transferred to the Bureau.

III. REVISITING THE DEBATE

It remains unclear why policymakers ultimately decided not to transfer the CRA to the Bureau. It is possible, for example, that policymakers were influenced by practical questions of institutional design. In perhaps the only reference to the topic in the literature on financial regulation, Broome et al. suggest that the reason for retaining the status quo was that, unlike the other regimes transferred to the Bureau, the CRA only applied to depository institutions.[177] It is also possible that the factors of political economy identified by Macey and Miller determined the outcome.[178] The banking industry may have effectively objected to a move that would likely have expanded the scope and operation of the CRA, or the financial regulators may have exerted influence to retain their regulatory turf. Some important supporters of the CRA may have decided that moving it to the Bureau would dilute the leverage it afforded to activists.

Without the benefit of that historical account, this part revisits the debate over transferring the CRA to the Bureau and argues, at least tentatively, in favor of doing so. The argument here largely tracks the case made by advocates in 2009–10 with the benefit of significant hindsight about the Bureau's record of activity since its inception. It first makes an affirmative case for relocating the CRA based on continued concerns about the banking regulators' performance in implementing and enforcing the CRA; the broadly successful record of the Bureau to date in taking over the other legal regimes it inherited from the banking regulators; the deep connections between the CRA and the Bureau's existing authorities and responsibilities; and the likelihood that taking over the CRA would beneficially expand the scope of the Bureau's activities. It then addresses concerns about and possible objections to transferring the CRA related to institutional logistics, complications for the bank merger reviews, a potential loss of leverage for CRA activists, and the political and legal vulnerability of the Bureau.

A. *Revisiting the Case for Transfer*

While the available data appear to confirm that the CRA has generally had a beneficial impact on low-income communities, there remain many reasons to believe that the banking regulators are not fully advancing the promise or goals of the regime. This concern is supported by various observable circumstances,

177. BROOME ET AL., *supra* note 15, at 900.
178. *See* Macey & Miller, *supra* note 64, at 296–97.

including CRA grade inflation[179] and continuing disparities in bank lending across communities, especially, racial disparities in community development finance.[180]

The new CRA rules arguably reflect and acknowledge shortcomings in the regulators' performance in their CRA activities in recent years. And those new rules, while failing to incorporate some far-reaching proposals by informed commenters,[181] should yield at least some improvements. But this Essay follows Conti-Brown and Feinstein and other critics in concluding that the causes of these shortcomings run deeper and argues that the banking regulators are simply not well positioned to more fully advance the particular goals of the CRA.

This is true for the same reasons that the regulators were not well positioned to implement the other consumer financial laws that were transferred to the Bureau when it was created.[182] Enforcing and implementing the CRA is only tenuously related to their primary goals of ensuring the safety and soundness of the banks they regulate and of the banking system as a whole. There are reasons to believe that the regulators are constrained in the adverse actions they can take against the banks they regulate, due in part to regulatory competition and, perhaps, to capture as well.

Meanwhile, the Bureau has proven to be an effective and assertive steward and regulator of the consumer financial laws that were transferred to it, at least compared to the *status quo ante*. It has promulgated important and innovative rules and regulations pursuant to the various regimes under its authority, including those related to mortgage servicing,[183] credit cards,[184] and predatory

179. *See* Conti-Brown & Feinstein, *supra* note 3, at 26–43; *see also* Quercia et al., *supra* note 100, at 55; Taylor & Silver, *supra* note 100, at 154–55.

180. *See* Quercia et al., *supra* note 100, at 52–53; *see also* BRETT THEODOS, STEVEN BROWN, MICHAEL NEAL, ELLEN SEIDMAN & SHENA ASHLEY, URB. INST., A NEW ERA OF RACIAL EQUITY IN COMMUNITY DEVELOPMENT FINANCE: LEVERAGING PRIVATE AND PHILANTHROPIC COMMITMENTS IN THE POST-GEORGE FLOYD PERIOD 14 (2021), https://www.urban.org/sites/default/files/publication/105256/a-new-era-of-racial-equity-in-community-development-finance_0_0.pdf [https://perma.cc/FR67-86KF].

181. For a representative sample of comment letters on the proposed rule, see *Comment Letters About 2022 CRA Joint Notice of Proposed Rulemaking*, NOVOGRADAC, https://www.novoco.com/resource-centers/community-reinvestment-act/comment-letters-about-2022-joint-notice-proposed-rulemaking-cra [https://perma.cc/WDP5-89CQ (staff-uploaded archive)].

182. *See* Braucher & Littwin, *supra* note 141, at 810.

183. *See, e.g.*, Real Estate Settlement Procedures Act (Regulation X), 12 C.F.R. § 1024 (2023) (mortgage servicing rules).

184. *See, e.g.*, Truth in Lending (Regulation Z), 12 C.F.R. § 1026 (2022) (requiring credit card issuers to consider a borrower's ability to repay amounts borrowed under the account before opening a credit card account or increasing a line of credit).

lending.[185] As required by Dodd-Frank, it created a user-friendly system for consumer complaints,[186] which it actively monitors and compiles in a searchable database[187] to identify potential violations of law and to help it conduct effective regulation, supervision, and enforcement. Perhaps most importantly, it has conducted hundreds of enforcement actions and obtained many billions of dollars in recoveries for consumer victims.[188]

Although there has not been much study or commentary on the topic, it appears that the Bureau has been a more assertive and impactful supervisor of banks' consumer financial activity than the other regulators had been before Dodd-Frank.[189] For one recent example, the Bureau has employed its authority under Dodd-Frank to expand the scope of its supervisory role to new financial

185. *See, e.g.*, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. § 1041 (2022) (regulating the ability of financial institutions to withdraw funds from consumers' accounts under such products). *But see infra* text accompanying note 228 (discussing the withdrawal of the underwriting standards for these products in 2020).

186. *See* 12 U.S.C. § 5534(a)–(b) (establishing the Bureau's responsibilities for obtaining and responding to consumer complaints and companies' obligations to respond to such complaints); CHRISTOPHER L. PETERSON, CONSUMER FED'N OF AM., DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE 7 (2019) [hereinafter PETERSON, DORMANT], https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf [https://perma.cc/P89E-RQE7]; *Submit a Complaint About a Financial Product or Service*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/complaint/ [https://perma.cc/3UN6-R36X].

187. *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/consumer-complaints/ [https://perma.cc/3NCM-SLFT].

188. ANDREAS FUSTER, MATTHEW PLOSSER & JAMES VICKERY, FED. RSRV. BANK OF N.Y., DOES CFPB OVERSIGHT CRIMP CREDIT? 1–3 (2023) (Staff Rep. No. 857), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr857.pdf [https://perma.cc/84RX-YEWK] ("Our results speak to an active policy debate about the costs and benefits of consumer financial protection and more specifically the CFPB. Critics argue that the CFPB's activities increase costs and legal risk, thereby reducing the supply of credit to consumers. Supporters argue that CFPB oversight has been effective in deterring and punishing deceptive and abusive practices. Our estimates provide some support for both these perspectives—we find evidence suggesting that CFPB oversight leads to an improvement in servicing practices which may reduce inefficient foreclosures, but also that it induces a contraction in lending to risky borrowers during a period where some have argued mortgage lending is too 'tight.'" (citations omitted)); PETERSON, DORMANT, *supra* note 186, at 2 ("The CFPB returned about $43 million in restitution to consumers for each week of the Bureau's first Director's term in office.").

189. Braucher & Littwin, *supra* note 141, at 808–09; O'Connor, *supra* note 62, at 405–06 (describing the banking regulators' supervision pursuant to the CRA); Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 394–95 (2019) ("[T]he creation of the CFPB in 2011 represented a break with the traditional absence of visitorial authority for regulators focused on protecting against economic harms to individuals."); *id.* at 414 ("In a recent six-month period, CFPB examinations prompted financial institutions to refund $44 million to consumers, while the enforcement group secured $82 million."). It appears that the Bureau was initially even more assertive in its supervision and recalibrated in its early history to be somewhat less so. *See, e.g.*, Rachel Witkowski, *CFPB Pulls Enforcement Attorneys from Its Exams*, AM. BANKER (Oct. 9, 2013, 8:33 PM), https://www.americanbanker.com/news/cfpb-pulls-enforcement-attorneys-from-its-exams [https://perma.cc/N6K5-ZR5F (staff-uploaded, dark archive)].

technology firms.[190] More generally, the Bureau regularly publishes a summary of its supervisory activities, *Supervisory Highlights*, that addresses issues and practices it has observed in the course of its supervision, including enforcement actions that derived from its supervision.[191]

While more assertive, this stewardship appears to have been well-calibrated. There is no indication, for example, that concerns about the Bureau's supervision or other regulatory activities conflicting with the safety and soundness of the banking system were well founded.[192] In fact, there is substantial evidence to the contrary. Fuster et al. found in 2018 that the Bureau's activities did not have an effect on overall mortgage lending but did "induce[] a contraction in lending to risky borrowers" and lead "to an improvement in servicing practices which may reduce inefficient foreclosures."[193] In sum, the Bureau now has a track record of exercising its authority and responsibilities, including its broad supervision powers, to better effect than the financial regulators did before Dodd-Frank. And it appears to have done so with due regard for safety and soundness of financial institutions and the financial system.

In addition to being a better steward of the CRA than the banking regulators, the Bureau would also benefit from the multiplier effect of combining the CRA with other laws that were transferred to it under Dodd-Frank. From the vantage of nearly fifteen years later, it seems all the clearer that the CRA was logically within the intended scope of the Bureau's domain and that the CRA's function is better served in concert with those other regimes.

As noted above, the CRA was adopted as part of a family of laws along with the Home Mortgage Disclosure Act and the Equal Credit Opportunity Act to promote equal and nondiscriminatory allocation of credit.[194] These laws do not merely have a common purpose; they were designed to operate as distinct tools in a common enterprise. Information generated by the Home Mortgage Disclosure Act and the Equal Credit Opportunity Act should directly and regularly inform the operation of the CRA and vice versa. In the course of implementing the Home Mortgage Disclosure Act, the Bureau generates and,

190. Evan Weinberger, *Fintechs Face Expanded CFPB Supervision with Little-Used Tool*, BLOOMBERG L. (July 20, 2023, 11:18 AM), https://news.bloomberglaw.com/banking-law/fintechs-face-expanded-cfpb-supervision-with-little-used-tool [https://perma.cc/5DVX-ZQFX (staff-uploaded, dark archive)].

191. *CFPB Exams Find Unfair, Deceptive, and Abusive Practices Across a Wide Array of Consumer Financial Product Lines*, CONSUMER FIN. PROT. BUREAU (July 26, 2023), https://www.consumerfinance.gov/about-us/newsroom/unfair-deceptive-abusive-practices-across-wide-array-consumer-financial-product-lines/ [https://perma.cc/MUX2-BGGT].

192. *See supra* note 170 and accompanying text.

193. *See* FUSTER ET AL., *supra* note 188, at 3, 14.

194. *See supra* notes 5–9, 47–56 and accompanying text.

especially through its Office of Research, carefully and constantly evaluates data that are essential for operation and implementation of the CRA.[195] At a minimum, under the current arrangement, this requires a high level of coordination, communication, and common purpose among all of the financial regulators and the Bureau. These agencies do participate together in various programs and tasks forces,[196] but the degree of cooperation, coordination, and information sharing is not readily observable. The complementary and inter-connected aspects of these Acts is surely undermined to some extent by distributing the institutional responsibility for them between the Bureau and the banking regulators. This fragmentation of consumer financial regulation functions was exactly what Dodd-Frank aimed to avoid in creating the Bureau in the first place.

That may be related—as cause or consequence—to the fact that the observable work of the Bureau has underemphasized addressing lending discrimination and fair credit allocation. This has created something of a vacuum in the regulatory attention given to these issues. As John Taylor and Josh Silver have observed, "there is little evidence that the fair lending reviews of CRA exams are rigorously testing for discriminatory lending."[197] Fair lending

195. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, INTRODUCING NEW AND REVISED DATA POINTS IN HMDA: INITIAL OBSERVATIONS FROM NEW AND REVISED DATA POINTS IN 2018 HMDA 4 (2019), https://www.consumerfinance.gov/data-research/research-reports/introducing-new-revised-data-points-hmda/ [https://perma.cc/RFQ8-56MY]; CONSUMER FIN. PROT. BUREAU, DATA POINT: 2020 MORTGAGE MARKET ACTIVITY AND TRENDS 4–9 (2021), https://files.consumerfinance.gov/f/documents/cfpb_2020-mortgage-market-activity-trends_report_2021-08.pdf [https://perma.cc/763M-ZB2F].

196. CONSUMER FIN. PROT. BUREAU, FAIR LENDING REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 24 (2023) [hereinafter FAIR LENDING REPORT], https://files.consumerfinance.gov/f/documents/cfpb_fair-lending-report_2023-06.pdf [https://perma.cc/58LX-7W8T] ("For example, throughout the reporting period, the CFPB has chaired the HMDA/Community Reinvestment Act (CRA) Data Collection Subcommittee, a subcommittee of the FFIEC Task Force on Consumer Compliance. This subcommittee oversees FFIEC projects and programs involving HMDA data collection and dissemination, the preparation of the annual FFIEC budget for processing services, and the development and implementation of other related HMDA processing projects as directed by this Task Force."); CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 65 (2022) [hereinafter FALL SEMI-ANNUAL REPORT], https://files.consumerfinance.gov/f/documents/cfpb_fall-2022-semi-annual-report_2023-06.pdf [https://perma.cc/VR9C-7TXT] ("The CFPB, along with the FTC, U.S. Department of Housing and Urban Development (HUD), Federal Deposit Insurance Corporation (FDIC), FRB, National Credit Union Administration (NCUA), Office of the Comptroller of the Currency (OCC), the Department of Justice, and Federal Housing Finance Agency (FHFA), constitute the Interagency Task Force on Fair Lending. This Task Force meets regularly to discuss fair lending enforcement efforts, share current methods of conducting supervisory and enforcement fair lending activities, and coordinate fair lending policies.").

197. Taylor & Silver, *supra* note 100, at 156 ("Evidence of discriminatory and illegal lending can result in downgrades of CRA ratings for banks if discrimination and illegal lending were widespread and the lender did not take action to end the practices. . . . In most cases, even for the largest banks,

reviews by banking regulators are relevant for CRA supervision,[198] yet the regulators generally refer violations to the Department of Justice for enforcement.[199]

Congress clearly intended the Bureau to play a primary role in addressing fair lending and discrimination in credit markets and made this a significant part of the Bureau's institutional design. The Dodd-Frank Act created an Office of Fair Lending and Equal Opportunity within the Bureau as well as a division of Supervision, Enforcement, and Fair Lending.[200] To be clear, the Bureau is active in this area, to some effect, as is summarized in a regular *Fair Lending Report*.[201] Fair lending is, for example, an important object of its supervision activities. As a recent *Fair Lending Report* notes:

> [I]n 2022 the CFPB focused much of its fair lending supervision efforts on mortgage origination and pricing, small business lending (including agricultural lending), policies and procedures regarding geographic and other exclusions in underwriting, and on the use of automated systems and models, sometimes marketed as artificial intelligence and machine learning models.[202]

The Bureau does conduct some enforcement of fair lending laws. Along with the Department of Justice and the Office of Comptroller of the Currency, for example, the Bureau obtained a settlement with Jackson, Mississippi–based Trustmark in 2021 "to resolve allegations that it previously violated the Fair Housing Act, the Equal Credit Opportunity Act and the Consumer Financial Protection Act within the Memphis metropolitan statistical area."[203] In 2022,

the fair-lending section of the CRA exam reports in one to three sentences that the regulatory agency tested for evidence of illegal and discriminatory lending and that no such lending was found. Yet there is no discussion of what precisely had been done to reach its conclusion.").

198. *See supra* notes 63, 163–65 and accompanying text; *see also* O'Connor, *supra* note 62, at 407 n.54 (citing Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1944)).

199. O'Connor, *supra* note 62, at 408 ("While CRA examinations focus on the income levels of consumers and communities, fair lending examinations focus on the race and ethnicity, among other prohibited bases, of consumers and communities."); *id.* at 410 ("Federal bank regulators refer potential redlining matters to the DOJ when they have reason to believe banks are engaging in or have engaged in a pattern or practice of discrimination."); *id.* at 419 ("[T]he DOJ essentially strips community banks of their discretion to define communities that they can reasonably serve according to the practical and financial constraints imposed by their business models and strategies. Thus, the DOJ is effectively rewriting the CRA rules.").

200. *See* Christopher L. Peterson, *Choosing Corporations over Consumers: The Financial Choice Act of 2017 and the CFPB*, CONSUMER FIN. L.Q. REP., Nov. 2017, at 1, 6 [hereinafter Peterson, *Choosing Corporations*].

201. FAIR LENDING REPORT, *supra* note 196, at 2–3.

202. *Id.* at 2.

203. *Trustmark National Bank Announces Settlement of Claims Made by Federal Regulators*, TRUSTMARK (Oct. 22, 2021, 1:00 PM), https://investorrelations.trustmark.com/news-events/press-releases/news-details/2021/Trustmark-National-Bank-Announces-Settlement-of-Claims-Made-by-

the Bureau and the DOJ obtained a settlement with Trident Mortgage Company, the "first federal government resolution involving illegal lending discrimination by a nonbank mortgage lender."[204] The Trident settlement was based on claims that Trident had

> engaged in unlawful discrimination on the basis of race, color, and national origin against applicants and prospective applicants, including by redlining majority-minority neighborhoods in the [Philadelphia metropolitan area] and engaged in acts and practices directed at prospective applicants that would discourage prospective applicants from applying for credit in violation of [the Equal Credit Opportunity Act and the Fair Housing Act].[205]

But these actions are somewhat exceptional. According to Christopher Peterson, writing in 2017, "[I]n the history of the [Bureau], over 93 percent of all consumer relief was awarded in cases where the business deceived its customers about a material fact. . . . Indeed, these data suggest that above all else, the [Bureau's] enforcement program has focused on promoting truthfulness in consumer finance."[206]

Federal-Regulators/default.aspx [https://perma.cc/3MD6-F2M5]; *see also* CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 20 (2022) [hereinafter SPRING SEMI-ANNUAL REPORT], https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2022.pdf [https://perma.cc/V8P3-J4RZ] ("The order, as entered by the court on October 27, 2021, requires Trustmark to invest $3.85 million in a loan subsidy program that will offer qualified applicants for credit secured by properties in majority Black and Hispanic neighborhoods in Memphis loans on a more affordable basis than otherwise available from Trustmark; open a new loan production office in a majority Black and Hispanic neighborhood in the Memphis MSA; fund targeted advertising to generate applications for credit from qualified consumers in majority Black and Hispanic neighborhoods in Memphis; and take other remedial steps to improve its fair lending compliance and serve the credit needs of majority Black and Hispanic neighborhoods in the Memphis MSA. The order also requires Trustmark to pay a civil money penalty of $5 million, $4 million of which would be remitted as a penalty paid to the Office of the Comptroller of the Currency (OCC) for FHA violations arising from the same conduct alleged in the complaint.").

204. FAIR LENDING REPORT, *supra* note 196, at 4.

205. *Id.* The order required Trident to take various actions in majority-minority neighborhoods in Philadelphia. *Id.* These include investing $18.4 million in a loan subsidy program, making loans under the loan subsidy fund; maintaining at least four licensed branch locations; funding targeted advertising to generate applications for credit from qualified consumers; and taking other steps to serve the credit needs of those neighborhoods. *Id.* It also required Trident to pay a civil money penalty of $4 million. *Id.*

206. Peterson, *Choosing Corporations*, *supra* note 200, at 17; *see also* Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1091 (2016) ("Much of the CFPB's enforcement work has focused on stopping unfair, deceptive, or abusive financial acts and practices."); *id.* ("Deception was by far the most common legal violation asserted in CFPB public enforcement actions to date."); *id.* at 1090–91 ("Although fair lending cases in the auto finance market have generated considerable controversy, these cases represent only 2.5% of the Bureau's public docket. While the Bureau's 8 ECOA cases accounted for about 6.6% of the Bureau's publicly announced matters, the $493 million in consumer relief generated in these cases amounted to 4.4% of

While the CRA may seem to be distinct from other consumer financial laws because it is primarily directed at the financial needs of communities, these community needs are largely derivative of the financial needs and circumstances of individuals and households. Reflecting this, the scope of the Bureau's remit already includes the broader and general financial landscape for households and individuals. Thus, for example, Dodd-Frank charged the Bureau with "researching, analyzing, and reporting on topics relating to the Bureau's mission including consumer behavior, consumer awareness, and developments in markets for consumer financial products and services."[207]

Perhaps the most important of recent activities pursuant to this charge is the Bureau's ongoing *Making Ends Meet Survey* ("Survey").[208] It uses data from the Bureau's Consumer Credit Information Panel and conducts a recurring survey of individuals "about their experiences in consumer credit markets."[209] The Survey examines the financial circumstances of households and assesses factors and threats affecting them—like inflation, danger of recession, and pandemics.[210] As a recent report on the Survey explains, it

> compare[s] consumers' financial status along several dimensions, including financial well-being, difficulty paying bills and expenses, and ability to cover expenses following income loss, to previous Making Ends Meet surveys and credit bureau data to understand changes over time. We also compare these changes across race and ethnicity, age, military experience, student loan status, and other dimensions where consumers

all consumer relief. No defendant has contested a CFPB discrimination case after announcement. And in every case in which the Bureau pleaded a violation of ECOA, it proceeded in collaboration with another law enforcement or regulatory agency.").

207. Agency Information Collection Activities: Comment Request, 88 Fed. Reg. 31251, 31251 (May 16, 2023).

208. *See, e.g.*, SCOTT FULFORD, SAMYAK JAIN, GRETA LI, ELIZABETH SAUNDERS & ERIC WILSON, CONSUMER FIN. PROT. BUREAU, MAKING ENDS MEET IN 2022: INSIGHTS FROM THE CFPB MAKING ENDS MEET SURVEY 7 (2022) [hereinafter MAKING ENDS MEET], https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-in-2022_report_2022-12.pdf [https://perma.cc/MSK6-UD5J]; CORTNIE SHUPE, GRETA LI & SCOTT FULFORD, CONSUMER FIN. PROT. BUREAU, CONSUMER USE OF BUY NOW, PAY LATER: INSIGHTS FROM THE CFPB MAKING ENDS MEET SURVEY 5 (2023) [hereinafter CONSUMER USE OF BUY NOW], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4399626 [https://perma.cc/6VC9-3J79 (staff-uploaded archive)]; SCOTT FULFORD, MARIE RUSH & ERIC WILSON, CONSUMER FIN. PROT. BUREAU, CHANGES IN CONSUMER FINANCIAL STATUS DURING THE EARLY MONTHS OF THE PANDEMIC: EVIDENCE FROM THE SECOND WAVE OF THE MAKING ENDS MEET SURVEY 5–6 (2021) [hereinafter CHANGES IN CONSUMER FINANCIAL STATUS], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911437 [https://perma.cc/M3LG-Y52Q (staff-uploaded archive)].

209. Agency Information Collection Activities: Comment Request, 88 Fed. Reg. 31251 (May 16, 2023); *see also Know the Process*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/owning-a-home/sources/ [https://perma.cc/J6M7-6VK2] (noting that these data include: "a 1-in-48 longitudinal sample of de-identified credit records purchased from one of the national credit reporting agencies. The sample is statistically representative of the population of consumers with credit records"); MAKING ENDS MEET, *supra* note 208, at 7–8.

210. MAKING ENDS MEET, *supra* note 208, at 4.

> may be underserved. By digging below the average to understand the financial status of underserved consumers and communities and to track emerging risks, the CFPB can be better prepared with policy solutions to mitigate such risks.[211]

The Survey also examines households' access to credit and how that differs among groups. In 2022, for example, it reported that "[w]hile racial and ethnic groups applied for credit at similar rates, Black and Hispanic consumers were more likely to be turned down or to receive less credit than they requested, and were much more likely to avoid applying for credit because they thought they might be turned down."[212] It also found that "[t]here were similar disparities in how many consumers held or revolved debt on a credit card. Meanwhile, use of high-cost credit products, including payday, pawn, auto title, and overdraft, appears to have increased again after falling early in the pandemic."[213] In examining consumers' access to credit,[214] the Survey found that "Black consumers were 10 percentage points more likely to be turned down than white consumers and 13 percentage points more likely to not apply in the first place."[215]

Like the CRA, the Bureau's authority already extends to small businesses pursuant to the fair lending regimes within its existing authority. In fact, Dodd-Frank envisioned a fairly robust role for the Bureau in this regard and provided that the Bureau gather information about "credit applications made by women-owned, minority-owned, or small businesses."[216] The stated purpose of this requirement was "to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses."[217]

Yet the Bureau only adopted the necessary rules for this information gathering this year, over a decade after Dodd-Frank was enacted. The process leading to this rule was initiated in 2017, when the Bureau sought comments on how to implement the requirement.[218] After substantial subsequent delay, the

211. *Id.* at 3.

212. *Id.* at 5.

213. *Id.*

214. *Id.* at 32–40.

215. *Id.* at 34 ("Hispanic consumers were similarly more likely to be turned down and more likely to not apply in the first place.").

216. GETTER, *supra* note 40, at 20 (emphasis omitted); SPRING SEMI-ANNUAL REPORT, *supra* note 203, at 12–13.

217. 15 U.S.C. § 1691c-2(a).

218. GETTER, *supra* note 40, at 20.

agency agreed pursuant to a federal court order to complete rulemaking under the provision by March of this year,[219] which it did.[220]

In sum, there are good reasons to believe that the Bureau would be more effective in exercising its authority and responsibility for the CRA than the financial regulators have been. Moreover, (re-)combining authority for the CRA with other regimes in its family, like the Home Mortgage Disclosure Act and the Equal Credit Opportunity Act, would enable the Bureau to realize important synergies between these regimes that were intended as part of their original design. And finally, by giving the Bureau authority and responsibility for the CRA, it would inevitably be in a better position to play the broader role in promoting community development and consumer financial markets that Congress clearly intended for it when enacting Dodd-Frank.

B. *Objections/Concerns*

Notwithstanding the reasons to favor transferring the CRA to the Bureau, there are a number of potential practical objections and concerns about doing so. These are briefly noted below. Upon examination, none of them seem likely to cause problems significant enough to outweigh the benefits of transferring the CRA.

1. Logistics, Especially Personnel

Transferring the CRA to the Bureau would certainly entail some significant logistical hurdles and costs, presumably including the need to transfer some staff from the financial regulators to the Bureau. The cost and difficulty of transferring staff would likely in turn be dependent on how specialized they currently are within their respective institutions. If the current CRA bureaucracy is composed entirely of individuals who perform no other functions within their institutions, it should be relatively easy to reassemble that team elsewhere. If, on the other hand, this group is engaged in other non-CRA work within their institutions, then their professional work would presumably need to become more focused on the CRA within the Bureau. And their current non-CRA functions would need to be replaced in their current

219. Kate Berry, *Why the CFPB Is Still Writing Its Small-Business Data Rule a Decade Later*, AM. BANKER (July 12, 2022, 1:49 PM), https://www.americanbanker.com/news/why-the-cfpbs-small-business-data-rule-took-12-years-to-write [https://perma.cc/87X9-7P68 (staff-uploaded, dark archive)] ("One of the Consumer Financial Protection Bureau's most important rules—requiring that lenders collect data on small-business loans—has proven to be so difficult to write that the agency had to agree under a court order to finish the rule by early next year. A federal judge on Monday signed a court order in which the CFPB agreed to issue its small-business data collection rule by March 31, 2023.").

220. *See* Small Business Lending Under the Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 1002 (2023).

home institutions. That would entail at least some transition costs of sorting out the functions of staff at the relevant institutions post transfer.

Without knowing the precise nature of these costs, the history of the creation of the Bureau provides compelling evidence that these reallocations of expertise and personnel are feasible. And, hopefully, that experience provides useful institutional capacity at the Bureau for absorbing functions and personnel from other regulators.

2. Bank Merger Analysis and Advocate Leverage

It is possible that transferring the CRA to the Bureau would unduly complicate bank merger analysis and other financial regulatory actions or decisions that require a satisfactory CRA rating.[221] If the CRA were transferred to the Bureau, an important input for that analysis would be moved out of the banking regulators' domain.

And it is theoretically possible that it could also reduce the leverage that the Act currently provides for consumer and community advocates. As discussed above, organizations and individuals who advocate for community investment and reinvestment have long been effective in using potential bank mergers as a pressure point for leaning on banking regulators and negotiating community reinvestment agreements with banks seeking to merge.[222]

As a practical matter, however, it will be entirely possible for the Bureau to conduct the relevant supervision, enforcement, and analysis under the CRA, assign a rating, and make that information available to the banking regulators (and the public). The merger standards and analysis would presumably remain the same—the CRA rating would simply be provided by a different entity. This was what John Taylor of the NCRC proposed in congressional testimony leading to the enactment of Dodd-Frank.[223] And activists could continue to raise the same objections they currently do and interpose themselves in the financial regulators' reviews if CRA ratings were provided by the Bureau as inputs to those processes.

Furthermore, if it is true that the Bureau would be a more assertive and effective steward of the CRA in general, then the information it provides may be better and more useful for this purpose than what the banking regulators currently obtain and generate in-house. It would also presumably increase the leverage that advocates currently have with regard to banking institutions when they seek to merge or do other activities that require minimum CRA ratings.

221. *See supra* notes 13–15 and accompanying text.
222. *See supra* notes 70–72 and accompanying text.
223. *See supra* note 165 and accompanying text.

3. Vulnerability of the Bureau

Perhaps the most potentially significant reason to be concerned about transferring the CRA is the Bureau's vulnerability to political and legal developments. As an initial matter, it is always possible that Congress could act to reform and dramatically redesign the Bureau. Various legislators have aimed to do so, perhaps most notably with the Choice Act of 2017, which among other dramatic proposed changes, would have eliminated the Bureau's supervisory authority.[224] But thus far, these attempts have not come very close to success.

Short of threats to the Bureau's foundational statutory authority and responsibilities, however, the Bureau is still subject to significant political and legal challenges and course changes. The Bureau was designed to have a strong, highly independent executive.[225] This independence and concentrated authority was intended by the drafters of Dodd-Frank to enable the Bureau to act decisively and aggressively in pursuit of its mandate.[226] One underappreciated consequence of that design is its amenability to reversal or dramatic adjustment when new administrations with different policy orientations take over. Thus, when the Trump administration took over the executive branch, it rather quickly halted and redirected many of the Bureau's activities.[227] During that period, for example, the Bureau withdrew relatively new underwriting standards for predatory lending.[228] And it began more systematically curtailing its supervision activities.[229] There was an extended moment during that administration when it appeared that the Bureau's function and operation were going to be radically altered.

Notably, however, that initial period of retrenchment at the Bureau slowed during the Trump administration itself and has largely been reversed.[230] This may reflect that the basic functioning and operation of the Bureau are more

224. *See, e.g.*, Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2569–72 (2019); Peterson, *Choosing Corporations*, *supra* note 200, at 2–11 (describing changes to the Bureau under the proposed Financial Choice Act of 2017, which was not enacted).

225. JACOB D. SHELLY, CONG. RSCH. SERV., LSB10507, SUPREME COURT RULES CFPB STRUCTURE UNCONSTITUTIONAL: IMPLICATIONS FOR CONGRESS 1 (2020).

226. *Id.*

227. *See* McCoy, *supra* note 224, at 2579–98.

228. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. § 1041 (2020).

229. McCoy, *supra* note 224, at 2574–79; Keith Bradley, *Is CFPB Curtailing Its Own Supervisory Authority?*, SQUIRE PATTON BOGGS LLP (Oct. 11, 2018, 5:37 PM), https://www.squirepattonboggs.com/-/media/files/insights/publications/2018/10/is-cfpb-curtailing-its-own-supervisory-authority/is-cfpb-curtailing-its-own-supervisory-authority.pdf [https://perma.cc/VNK9-BCVD].

230. Evan Weinberger, *Kraninger Leaves CFPB Diminished yet Ready for Biden Ramp-Up*, BLOOMBERG L. (Jan. 20, 2021, 1:09 PM), https://news.bloomberglaw.com/banking-law/kraninger-leaves-cfpb-diminished-yet-ready-for-biden-ramp-up [https://perma.cc/5WKK-XC6L (staff-uploaded, dark archive)].

stable and resistant to political upheavals than it seemed in the early period of the Trump administration. And, even if the Bureau is subject to changes in mission and institutional policy, this has to be measured against the same vulnerability or dynamic among the banking regulators, which are also subject to agenda changes under different executive administrations.

The Bureau's design has also turned out to be vulnerable to legal challenge.[231] In *Seila Law LLC v. Consumer Financial Protection Bureau*,[232] the Supreme Court held that the protection afforded to the Bureau's director from removal by the executive was unconstitutional.[233] As a result, the Bureau's director is now removable by the president at will. While the current organizational structure, with the director removable at will, passes constitutional muster, there is significant appetite among Republican lawmakers to change the structure from a unitary director to a commission-style structure like the National Labor Relations Board.[234]

Furthermore, the Fifth Circuit, in *Community Financial Services Ass'n of America v. Consumer Financial Protection Bureau*,[235] held that the Bureau's funding arrangement was also unconstitutional.[236] The Bureau is funded by transfers from the Federal Reserve, not through regular congressional appropriations.[237] The Supreme Court has granted certiorari to review that decision.[238]

It is unclear whether and how these challenges and threats to the Bureau's status quo and its original design have impacted its operation and its pursuit of its mission. It is likely that they have caused the Bureau's staff and leadership to be somewhat more modest and strategic than they would otherwise be. And it is possible that being subject to congressional appropriations or a commission-

231. *See* McCoy, *supra* note 224, at 2572–74. For an early critique of the structure and funding of the Bureau, see Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 872–917 (2013).

232. 140 S. Ct. 2183 (2020).

233. *Id.* at 2192.

234. McCoy, *supra* note 224, at 2569–72; Ethan G. Ostroff & Chris Willis, *House Republicans Consider Proposals To Reform CFPB; Criticize Agency's War on Fees*, TROUTMAN PEPPER (Mar. 13, 2023), https://www.consumerfinancialserviceslawmonitor.com/2023/03/house-republicans-consider-proposals-to-reform-cfpb-criticize-agencys-war-on-fees/ [https://perma.cc/ZGG2-74YF]; Memorandum from the Members of the Comm. on Fin. Servs. to FSC Majority Staff on Mar. 9, 2023 Subcomm. Hearing: "Consumer Financial Protection Bureau: Ripe for Reform" (Mar. 6, 2023), https://democrats-financialservices.house.gov/uploadedfiles/hhrg-118-ba20-20230309-sd002.pdf [https://perma.cc/4E5Z-V7XS].

235. 51 F.4th 616 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023).

236. *Id.* at 641–44; *see also* SEAN M. STIFF & DAVID H. CARPENTER, CONG. RSCH. SERV., LSB10891, FIFTH CIRCUIT: CFPB'S FUNDING AUTHORITY IS UNCONSTITUTIONAL 1 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10891 [https://perma.cc/CM9C-3M89].

237. Peterson, *Choosing Corporations*, *supra* note 200, at 3.

238. Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 143 S. Ct. 978 (2023); *see also* STIFF & CARPENTER, *supra* note 236, at 4.

style leadership could have a significant impact on the Bureau's activities and mission. But there are reasons to believe that the Bureau would still enforce the CRA more robustly than the financial regulators currently do even under a different funding or leadership arrangement. In any event, these potential changes in the Bureau's independence and leadership structure should be taken into account in assessing its capacity for being a more assertive steward of the CRA.

CONCLUSION

The Community Reinvestment Act was enacted in 1977 to address the failure of financial institutions to provide credit and financial services in low-income communities, especially Black neighborhoods. It is properly understood as one of a trilogy of regimes, along with the Home Mortgage Disclosure Act and the Equal Credit Opportunity Act, that are designed to address discrimination in the provision of credit and to promote fair lending. It is also complimentary to a broader array of federal legal regimes that regulate consumer financial transactions and promote development of fair, stable, and productive consumer financial markets.

The financial crisis of 2008–09 revealed systematic failures in the operation and enforcement of these various regimes. In response, in the Dodd-Frank Act of 2010, Congress created the Consumer Financial Protection Bureau and transferred to it authority and responsibility for all "consumer financial laws." But Dodd-Frank did not transfer the CRA to the Bureau. The reasons for this are, thus far, lost to history. It turns out that early versions of what became Dodd-Frank would have transferred the CRA to the Bureau. And a number of consumer and community advocates argued in favor of transferring the CRA at the time. This Essay excavates that legislative history and finds that those early arguments for transferring authority and responsibility for the CRA to the Bureau still have force.

Based on the Bureau's record of implementing and enforcing the other regimes transferred to it, there are good reasons to believe that it would a better steward of the CRA than the financial regulators. Furthermore, Congress originally intended that institutional authority and responsibility for the CRA not be separated from authority and responsibility for the Home Mortgage Disclosure Act and the Equal Credit Opportunity Act. Among other things, this is because this trilogy of regimes was designed to operate in coordination, especially through the systematic sharing of information generated pursuant to each of them.

It should not be logistically difficult to transfer authority for the CRA to the Bureau—the Bureau and financial regulators have a good deal of experience transferring personnel and functions pursuant to Dodd-Frank. Transferring the CRA to the Bureau need not disrupt the financial regulators' merger analysis or

other regulatory determinations that are impacted CRA ratings, and it should not undermine advocates' leverage provided by the CRA. There remain significant questions about the Bureau's vulnerability to political or legal efforts to scale back its activities. Even if its mission is clipped, however, it would likely still be a better steward of the CRA than the financial regulators.

Finally, and perhaps most importantly, implementing and enforcing the CRA would beneficially expand the scope of the Bureau's mission and function. Although the Bureau's primary function is regulating consumer financial transactions, Congress intended that it also have responsibility for promoting consumer financial markets more generally to ensure the productive and fair allocation of financial resources throughout the country.