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RACISM AS A THREAT TO FINANCIAL STABILITY

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ABSTRACT—This Article draws from several theoretical frameworks such as critical race theory, law and economics, and rule of law conceptions to argue that the Financial Stability Oversight Council (FSOC) should formally recognize racism as a threat to financial stability due to its interconnectedness with recent and projected systemic disruptions. This Article begins by first introducing a novel model created by the author through which to dissect this claim. This "Systemic Disruption Model" provides a theoretical depiction of how racism drives every phase along the life-cycle continuum of a systemic disruption.

First, with respect to the Model's "Introduction" phase, this Article contends that racist practices and policies incentivize systemic disruptions. These practices and policies transform Black communities (and other vulnerable areas) into ideal dumping grounds for negative externalities produced by the private sector. For example, redlining and restrictive racial covenants made Black communities ideal targets for subprime mortgages during the initial stages of the financial crisis of 2007–2009. Racism then leads to "blind spots" where market participants magnify the economic benefits flowing from such negative externalities while underestimating its resulting costs.

Second, during its "Growth" phase, these blind spots cause the systemic disruption to expand exponentially since market participants create additional avenues for exclusive commodification. During the financial crisis of 2007–2009, for instance, subprime mortgages were repackaged into financial instruments and sold to elite counterparties across the globe. Relying on the quintessential free market to resolve these harms has therefore proven inadequate.

Third, when the systemic disruption reaches its "Maturity" phase, the disparate harms experienced by Black people and other vulnerable communities spill over into the masses. The excessive leverage pumped into the market during the financial crisis led to the cascading failures and losses that spread to every corner of the market.

Based on this novel Systemic Disruption Model, this Article therefore argues that Professor Derrick Bell's interest-convergence theory firmly takes root within this Maturity phase since this spillover effect is a necessary

condition for meaningful regulatory intervention. Racism, however, can extend the depth and duration of this Maturity phase given the tendency of lawmakers to grant selective relief for elite classes. As the systemic disruption goes into its fourth and last phase of "Decline," racism causes lawmakers to underestimate the long-term costs accruing to vulnerable communities, which creates a fertile breeding ground for future systemic disruptions. This Article applies this same analytical framework in assessing how the systemic disruption generated by climate change is similarly connected to racism.

A formal recognition by FSOC that recognizes racism as a threat to financial stability could significantly disrupt this deeply troubling cycle. Such a designation would first concede the limitations of preexisting protections that arise under federal and state law, as well as privately ordered responses, which could increase the likelihood for more inclusive rulemaking going forward. It could further serve as a framework for formalizing data collection mechanisms, coordination across regulatory agencies, and expertise building within every corner of the financial markets. Finally, an FSOC designation could spur investors, asset managers, stakeholders, and nongovernmental organizations to advocate for meaningful reform, while stimulating integral rulemaking from applicable regulatory agencies. For example, this could be a vital step in prompting the U.S. Securities and Exchange Commission (SEC) to promulgate rules within the context of its ongoing commitment to streamline the environmental, social, and governance (ESG) metrics utilized by its registrants. Mandatory racial-equity disclosures implemented by the SEC could assist in weeding out systemically racist practices that compromise investor protection, while increasing competition and accountability.

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INTRODUCTION

The term "systemic risk" automatically elicits images of corporate elites experiencing grave financial losses that rapidly spread to the masses like a virus. This term became popularized during the financial crisis of 2007–2009 (the Great Recession), when the failure of multiple financial institutions nearly toppled the global economy. Images of hundreds of employees departing the building that once housed Lehman Brothers while holding cardboard boxes containing their scant office belongings proliferated across the major news channels at the outset of the crisis.[1] Reports subsequently emerged from numerous sources that corporate executives from New York

[1] *See, e.g.*, David Teather, James Orr & Kathryn Hopkins, *Wall Street Crisis: Lehman Staff Tell Their Stories*, GUARDIAN (Sept. 15, 2008, 11:54 AM), https://www.theguardian.com/business/2008/sep/15/lehmanbrothers.creditcrunch1 [https://perma.cc/4D43-C926] (depicting employees carrying boxes outside the Lehman offices).

City to London were shedding actual tears at the mere thought of such a prominent financial institution shuttering its doors.[2] Their tears incited a level of collective fear amongst the broader populace, as this country had not experienced a failure of this magnitude since the Great Depression. Excessive leverage, or taking on debt levels that threaten macroeconomic stability, seemed to be the primary culprit of such a disastrous event.[3] Once Lehman failed, several other financial institutions faced imminent collapse.[4] This led to a credit freeze of epic proportions that paralyzed seemingly unrelated corners of the market.[5] Companies from an array of industries struggled to meet ongoing business expenses given the difficulties in accessing short-term liquidity.[6] Unemployment skyrocketed as millions of Americans were laid off.[7] Stock markets experienced dire losses that affected the retirement plans of countless Americans.[8]

Yet, as one digs deeper in exploring the origins of this crisis, a different picture emerges that is unmistakably connected with race and racism. Subprime mortgages with higher fees and interest rates were disproportionately sold to Black people and members of other underrepresented communities, which initially incentivized the speculative housing bubble that introduced excessive leverage into the financial system. Prior racist practices such as redlining, restrictive racial covenants, and other forms of housing discrimination made these communities an easy target for unscrupulous lenders looking to sell the American dream of home ownership on highly unfavorable terms. Even worse, mortgage lenders would frequently engage in predatory lending practices by selling subprime mortgages to Black people who were eligible for more favorable prime loan counterparts. Such homeowners faced higher default rates, and countless

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2 *Id.*

3 CONG. OVERSIGHT PANEL, 111TH CONG., SPECIAL REPORT ON REGULATORY REFORM: MODERNIZING THE AMERICAN FINANCIAL REGULATORY SYSTEM: RECOMMENDATIONS FOR IMPROVING OVERSIGHT, PROTECTING CONSUMERS, AND ENSURING STABILITY 37 (2009), https://www.govinfo.gov/content/pkg/CPRT-111JPRT47018/html/CPRT-111JPRT47018.htm [https://perma.cc/ZA42-PSRA].

4 *Id.*

5 Donald L. Kohn, Vice Chairman, Bd. of Governors of the Fed. Rsrv. Sys., The Federal Reserve's Policy Actions During the Financial Crisis and Lessons for the Future at Carleton University, Ottawa, Canada (May 13, 2010) (transcript available at https://www.federalreserve.gov/newsevents/speech/kohn20100513a.htm [https://perma.cc/2RT5-5JJL]).

6 *Id.*

7 Evan Cunningham, *Great Recession, Great Recovery? Trends from the Current Population Survey*, BUREAU OF LABOR STAT. (Apr. 2018), https://www.bls.gov/opub/mlr/2018/article/great-recession-great-recovery.htm [https://perma.cc/ACL7-T5VT].

8 Robert Rich, *The Great Recession: December 2007–June 2009*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-of-200709 [https://perma.cc/C5SA-DGFR] (highlighting how "the S&P 500 index fell 57 percent from its October 2007 peak to its trough in March 2009").

ended up foreclosing on their homes across the duration of the financial crisis. Even as the systemic risk associated with the crisis started to decline, Black communities suffered the most in terms of unemployment rates and poverty levels. Regulatory relief did little to rectify these disproportionate and long-term harms.

Climate change is yet another systemic disruption that initially seems unrelated to racism. One generally associates climate change with heartbreaking images of melting glaciers and shifting weather patterns that contribute to rising sea levels.[9] The resulting damage that such disruptions cause to all forms of life is almost unfathomable. Entire species of animals have already purportedly been lost to the vortex of climate change.[10] Certain regions of the world face increased levels of risk associated with global warming which could result in devastating losses to infrastructure, property, and human life.[11] Any such losses will further lead to profound market disruptions given how they would affect industries on a global scale.[12] Available evidence demonstrates that private enterprises have played a primary role in facilitating this magnitude of climate change given their massive contributions to the record levels of greenhouse gas emissions.[13]

In addition to these global risks, many Americans have already lived in seemingly dystopian realities where they endure daily challenges in accessing clean drinking water and breathable air. Private enterprises have a sordid history of targeting vulnerable communities as dumping grounds for toxic waste of multiple forms. Studies have overwhelmingly shown that Black communities have been disproportionately exposed to climate change contributors, such as the pollution arising from fossil fuels, long before climate change was recognized as a systemic threat to the financial industry. As a result, Black people have disproportionately suffered from asthma, cancer, lead poisoning, and several additional health issues. This inequitable exposure has also contributed to the racial wealth gap since property values within such neighborhoods are likely to be lower due to these higher levels of toxins. Advocates within the robust environmental justice movement have

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9 *Global Climate Change: Vital Changes of the Planet*, NAT'L AERONAUTICS & SPACE ADMIN. (June 22, 2023), https://climate.nasa.gov/vital-signs/sea-level [https://perma.cc/CL6T-4GDD].

10 Li Cohen, *Animal Populations Have Plummeted by Nearly 70% in Last 50 Years, New Report Says*, CBS NEWS (Oct. 14, 2022, 11:38 AM), https://www.cbsnews.com/news/animal-populations-plummeted-by-nearly-70-percent-last-50-years-new-report [https://perma.cc/9RJ7-GCBJ].

11 *Id.*

12 *See id.*; *see also* FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON CLIMATE-RELATED FINANCIAL RISK 12 (2021), https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf [https://perma.cc/K9YA-YE65] (explaining the multifaceted justifications for declaring that climate risk does in fact affect financial stability).

13 NAT'L AERONAUTICS & SPACE ADMIN., *supra* note 9.

gallantly fought for both the recognition and eradication of such disparate harms over the course of decades.[14] While significant gains have flowed from this movement, lawmakers as well as private sector participants have failed to eliminate these harms.

This Article seeks to more clearly "connect the dots" between racism and financial stability by using the two categories of systemic disruptions briefly discussed above as analytical frameworks for predicting how racism might affect future systemic disruptions. In doing so, it draws from several theoretical lenses such as critical race theory (CRT), law and economics, and rule of law conceptions to argue that the Financial Stability Oversight Council (FSOC) should formally recognize racism as a threat to financial stability due to its interconnectedness with recent and projected systemic disruptions.

The primary means through which this Article makes these underlying claims is through a novel model created by the author. This "Systemic Disruption Model" provides a theoretical depiction of how racism drives every phase along the life-cycle continuum of a systemic disruption.[15] This Model pinpoints four distinct phases of systemic disruptions: (1) the Introduction phase, (2) the Growth phase, (3) the Maturity phase, and (4) the Decline phase. This theoretical account of the relationship between racism and systemic risk appears in the Appendix. Scrutinizing the racism and systemic risk relationship in this manner reveals that racism is a virus that continues to threaten financial stability on a global scale in a vicious cycle that is seemingly repeated into perpetuity.

The continuum reflected in the Systemic Disruption Model begins with the Introduction phase, when negative externalities are first introduced into the financial system by the private sector.[16] This Article explains how Black communities and other vulnerable areas serve as ideal dumping grounds for negative externalities produced by the private sector during this timeframe.[17] This claim is supported by historical accounts of preexisting legal and economic vulnerabilities that invite exploitation of this magnitude and by data explaining the depth and scale of disparate impacts resulting from such

[14] ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 1, 5 (3d ed. 2018).

[15] *See infra* Appendix.

[16] *See infra* Appendix.

[17] For the sake of clarity, this Article tends to focus on the disproportionate harms suffered by Black communities in examining possible connections to financial stability. This is not designed to dismiss the unique harms experienced by other underrepresented groups, but it simply provides a prototypical example of such harms. This author urges other scholars to more narrowly focus on unique harms experienced by other vulnerable groups to expand upon the novel concepts and arguments introduced in this Article.

underlying markets. It then dissects the limited legal protections in preventing such harms from occurring ex ante that may further incentivize the dumping of negative externalities of this nature. In thinking about climate change, for example, the private sector has a sordid history of dumping pollutants that contribute to climate change into communities where they perhaps face limited legal repercussions for doing so. Fossil fuel combustion remains a primary contributor to climate change as it accounts for the bulk of harmful emissions released into the atmosphere.[18] Preexisting vulnerabilities invite environmental exploitation. Historically, racist practices such as redlining and restrictive racial covenants constrained Black people to segregated communities with lower quality schools, inferior infrastructure development, and limited public transportation options, all of which have led to progressively lower property values and dilapidated living conditions.[19] These vulnerabilities increase the appeal of underrepresented communities as ideal sites for fossil fuel production facilities from an economic perspective.

Law and economics models have infiltrated the ways judges make decisions.[20] Accordingly, if any inequitable harms are difficult to measure, particularly under the weight of the perceived economic benefits of allowing such harms to continue, then it can be challenging to justify legal interventions when utilizing these deeply entrenched lenses.[21] Neoliberal

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[18] *Energy and the Environment Explained: Where Greenhouse Gases Come From*, U.S. ENERGY INFO. ADMIN. (June 24, 2022), https://www.eia.gov/energyexplained/energy-and-the-environment/where-greenhouse-gases-come-from.php#:~:text=Fossil%20fuel%20combustion%20(burning)%20for,of%20total%20CO2%20emission [https://perma.cc/RBM7-2FSU].

[19] *See generally* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 27 (2019); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 64 (2017).

[20] *See generally* Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29788, 2022), https://www.nber.org/papers/w29788 [https://perma.cc/JY8E-97WU] (providing a quantitative analysis of the law-and-economics movement's effect on the judiciary).

[21] *See* Exec. Order No. 12291, 3 C.F.R. § 127 (1981) (mandating for the first time under the Reagan Administration that "regulatory action shall not be undertaken unless the potential benefits to society [from] the regulation outweigh the potential costs to society"); ANTHONY E. BOARDMAN, DAVID H. GREENBERG, AIDAN R. VINING & DAVID L. WEIMER, COST–BENEFIT ANALYSIS: CONCEPTS AND PRACTICE 52 (4th ed. 2018) (illuminating the ways in which basic tenets of microeconomic theory provide the foundational rubric for generating cost–benefit analyses); *Guidelines for Preparing Economic Analyses*, EPA (June 12, 2023), https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses [https://perma.cc/8KGW-XRWV] (outlining the procedures underlying cost–benefit calculations that the EPA must implement in adopting any new regulations under its broad authority to protect the environment and human health); Yoon-Ho Alex Lee, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881, 887–88 (2013) (acknowledging the challenges that administrative agencies face in adopting "controversial" rules that may yield massive benefits to society, while proposing

ideologies, which emphasize the value of free trade in unencumbered markets, have further constrained the extent to which lawmakers have directed public resources towards eradicating preexisting vulnerabilities related to unaffordable housing, inadequate health care, inferior education, and derelict infrastructure.[22]

The combined effect of these various strands of economic theory can lead to "zones of inaction" with respect to multiple layers of disparate harms experienced by vulnerable communities. Even when gains are acquired after long-fought battles, shifting political regimes can further complicate the extent to which these harms can be resolved on a long-term basis.[23] Some have even attributed disparate harms to inherent or cultural deficiencies within underrepresented groups as opposed to systemic inequities.[24]

Since the disparate harms created in the Introduction phase are frequently left unattended to or even further cemented by lawmakers, the systemic disruption then moves along its life-cycle continuum through its Growth phase.[25] The "blind spots" resulting from racism cause market participants to magnify the economic benefits flowing from such negative

an "options" based solution that would "allow the agency to formally incorporate the value of *ex post* learning into its [cost–benefit analysis]"); FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 8–9 (2004) (generally asserting that incorporating economic analysis into policymaking decisions such as environmental protection initiatives severely discounts immeasurable costs to human life and health). *But see* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1493 (2002) (advocating for a deeper commitment to more robust cost–benefit analyses as a means to "increase the likelihood that regulation will actually produce human goods" as "better allocations of health expenditures could save, each year, 60,200 additional lives at no additional cost—and such allocations could maintain the current level of lives saved with $31.1 billion in annual savings").

22 David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 35, 38 (2007).

23 *See, e.g.*, Laura Meckler & Devlin Barrett, *Trump Administration Considers Rollback of Anti-Discrimination Rules*, WASH. POST (Jan. 3, 2019, 7:00 AM), https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html [https://perma.cc/6UQ9-3ZJE] (summarizing the multilevel attacks emanating from the Trump Administration on disparate impact protections that are integrated within federal civil rights protections).

24 *See* John J. Donahue, *The Law and Economics of Antidiscrimination Law* (Yale L. Sch., Pub. L. & Legal Theory Rsch. Paper Series, Rsch. Paper No. 101; Ctr. for L., Econ., & Pub. Pol'y, Rsch. Paper No. 318, 2005), https://www.nber.org/system/files/working_papers/w11631/w11631.pdf [https://perma.cc/UF2J-SHBB] (illustrating the various ways that disparities can exist in the absence of discrimination, due to lower rates of productivity and education, among other inferior traits that certain groups may possess); Amy L. Wax, *The Dead End of "Disparate Impact*,*"* 12 NAT'L AFFS. 53, 54 (2012), https://www.nationalaffairs.com/publications/detail/the-dead-end-of-disparate-impact [https://perma.cc/FF9C-F3R] (arguing in part that "if members of one racial group are more qualified for particular positions than others, they will be hired in disproportionately greater numbers; persons from a less qualified group will be under-represented in those jobs").

25 *See infra* Appendix.

externalities while underestimating their resulting costs. In supporting this fundamental claim, this portion of the Model documents the exponential growth of these markets despite the disparate harms revealed in the previous phase.[26] It then exposes the ways in which this growth remains exclusive under the operation of the law. With respect to fossil fuels, ownership and control of these industries rely on shareholder primacy models as opposed to community-based paradigms, which would give more input to surrounding areas that have been historically denigrated under these preexisting frameworks. The disparate impacts suffered by vulnerable communities during the Introduction phase are therefore largely ignored and dismissed during this Growth phase.

The life cycle of a systemic disruption peaks at its Maturity phase, when the masses experience the negative externalities that were initially disproportionately borne by vulnerable communities.[27] This component of the Model utilizes Professor Derrick Bell's interest-convergence theory as a prism for examining the ways in which this spillover effect is a necessary condition for meaningful regulatory intervention.[28] As background, this framework for assessing Black liberation efforts effectively theorizes that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[29] Professor Bell has further analyzed how interest-convergence drove movements undergirding the Emancipation Proclamation and the Civil War Amendments to the Constitution, as well as the seminal *Brown v. Board of Education* decision.[30]

In thinking about climate change, the systemic disruption matures when the masses collectively experience the physical, psychological, emotional, and economic harms flowing from a climate-related disruption. It is precisely at this juncture where the markets, as well as lawmakers, officially recognize such harms as being systemic in nature. This Article recognizes the inherent injustices of this delayed recognition, which is the primary basis for the proposals discussed herein. Moreover, this convergence period is fleeting in nature, as this Model further analyzes the ways in which racism enables

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26 *See* Nicola Gennaioli, Andrei Shleifer & Robert Vishny, *Neglected Risks, Financial Innovation, and Financial Fragility*, 104 J. FIN. ECON. 452, 452 (2012) (presenting a model to demonstrate the ways in which investors and intermediaries neglect excessive risks in pursuing innovative financial products that are perceived to secure safe cash flows).

27 *See infra* Appendix.

28 DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 49 (2004) (generally arguing that establishing interest-convergence factors between Black and white communities is essential in achieving racial justice initiatives).

29 Derrick A. Bell Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

30 BELL, *supra* note 28, at 49.

selective emergency relief in response to the short-term harms of any such systemic disruptions. Lawmakers institute such relief through institutional bailouts, enhanced regulatory protections, and several other forms of interventions. With respect to climate change, lawmakers have historically provided relief that is tilted in favor of elite groups in responding to climate-related calamities.

The continuum reflected in the Systemic Disruption Model officially ends with its Decline phase when the prior emergency interventions begin to root out the systemic risk from the financial system. This Model asserts that racism elongates this phase, since it distorts the long-term costs borne by vulnerable communities in bearing the brunt of systemic harms. Scholars within the realm of energy justice, for example, have extensively studied the ways in which initiatives to reverse climate change create additional harms by continuing to select vulnerable communities for siting locations for new technologies and by excluding such groups as economic beneficiaries, among other categories of harms.[31] As a result, the failure to implement tailored interventions increases the vulnerabilities of underrepresented communities. This enhances their allure as fertile dumping grounds for negative externalities, thereby increasing the likelihood of future systemic disruptions. This insidious cycle can theoretically continue into perpetuity without significantly reconfiguring how we collectively process the relationship between racism and systemic risk.

This Article builds upon a rich body of scholarship that has increasingly sought to hold the private sector accountable for the harms generated by its

[31] *See Section 1–Defining Energy Justice: Connections to Environmental Justice, Climate Justice, and the Just Transition*, INITIATIVE FOR ENERGY JUST., https://iejusa.org/section-1-defining-energy-justice [https://perma.cc/4AKD-4MUN] (defining energy justice as "the goal of achieving equity in both the social and economic participation in the energy system, while also remediating social, economic, and health burdens on those historically harmed by the energy system" and noting that it further "aims to make energy more accessible, affordable, clean, and democratically managed for all communities"); Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 6 (2019) (advocating for an ethos of "anti-resilience" with respect to energy justice initiatives which generally entails "resisting the obfuscation of systemic violence enacted upon communities of color and the poor in the name of energy"); BENJAMIN K. SOVACOOL, ENERGY AND ETHICS: JUSTICE AND THE GLOBAL ENERGY CHALLENGE 218 (2013) (discussing how "our energy decisions erode the intrinsic worth or vitality of other human beings, ecosystems, and future generations" and the importance of "making energy decisions that promote availability, affordability, due process, good governance, prudence, intergenerational equity, intragenerational equity, and responsibility"); Kirsten Jenkins, Darren McCauley, Raphael Heffron, Hannes Stephan & Robert Rehner, *Energy Justice: A Conceptual Review*, 11 ENERGY RES. & SOC. SCI. 174, 179 (2016) (advocating for energy policy to combine the "social science account of energy (policy) with its natural science counterpart (systems)" to "provide[] a more nuanced understanding of justice concerns" as "energy policy often deals with only one section of the energy system to the detriment of its overall effectiveness").

systemically racist activities.[32] In particular, this Article extends existing scholarship by arguing that such racism remains a perpetual threat to financial stability. It therefore urges FSOC to make an official recognition in this regard. As background, FSOC was created under the Dodd–Frank Act of 2010 as a "super regulator" comprised of the heads of major financial regulators that is charged with overseeing emerging threats in the financial system.[33] More specifically, it is "charged . . . with identifying risks to the financial stability of the United States; promoting market discipline; and responding to emerging threats to the stability of the U.S. financial system."[34] FSOC fulfills its statutory mandate by identifying threats to financial stability. For instance, it recently released a lengthy *Report on Climate Change* which detailed the various ways in which climate change could trigger financial crises of epic proportions.[35] Specific recommendations for its member agencies include building expertise, gathering data, and enhancing transparency related to climate change to assist investors and other market participants in protecting themselves against such risks.[36]

This Article uses the *Report on Climate Change* as a blueprint for identifying the ways in which FSOC can potentially disrupt the vicious cycles of systemic disruptions that are incentivized by racism. Several benefits could flow from a comparable designation of racism as a threat to financial stability. First, it would concede limitations of preexisting protections that arise under federal and state law, as well as privately ordered responses, which could incentivize more inclusive rulemaking processes going forward. Second, a comparable FSOC designation of racism as a threat to financial stability could provide a rubric for formalizing data collection mechanisms and coordination among regulators, while building expertise across every corner of the financial markets. Such a framework inherently recognizes that additional data collection and expertise is essential in ensuring that any proposed rules are closely tailored to the harms discussed

32 *See, e.g.*, Audra L. Savage, *Aunt Jemima's Resignation Letter*, 121 COLUM. L REV. F. 186, 192–93 (2021) (describing a foundational prism for holding companies accountable for profiting from systemic racism); Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869, 869 (2021) (explaining how the market can better address corporate discrimination and racism); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 329 (2003) (coining the term "Critical Race Corporate Law Theory" as a framework for assessing the intersection of racism and corporate conduct).

33 12 U.S.C. §§ 5321–22 (2022); Miriam F. Weismann, *Achieving the Goal of "Credible" Regulatory Oversight*, 15 J. LEGAL, ETHICAL & REGUL. ISSUES 1, 2 (2012).

34 *Financial Stability Oversight Council*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc [https://perma.cc/F5MW-2VEQ].

35 FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 12, at 3–4.

36 *Id.* at 118–23.

herein. Finally, a comparable FSOC designation could provide investors, asset managers, stakeholders, and nongovernmental organizations (NGOs) with essential tools in advocating for meaningful reforms, while stimulating integral rulemaking from applicable administrative agencies. For example, an FSOC recognition of this scale could be a vital step in prompting the SEC to promulgate rules within the context of its ongoing commitment to streamline the environmental, social, and governance (ESG) metrics utilized by its registrants.

In summary, Part I begins by providing foundational definitions of racism and systemic risk and introducing the Systemic Disruption Model. Part II then applies the various components of this Model to the Great Recession, which is a paradigmatic case study in highlighting how racism threatens financial stability. Part III applies this same analytical framework to the systemic disruption by climate change, which is the second integral case study selected by this Article given its timeliness and scale. Part IV examines how FSOC recognizing racism as a threat to financial stability can begin the process of disrupting this vicious cycle. Such a designation would concede the limitations of existing protections at the federal and state level, as well as privately developed solutions. Officially recognizing racism as a threat to financial stability could likewise facilitate the necessary process of data collection and coordination across the vast spectrum of regulatory agencies. This Article concludes with a brief synopsis of additional categories of systemic disruptions that seem to be following comparable patterns, as a final call to action for the regulatory interventions discussed herein.

I. THE INTERCONNECTEDNESS OF RACISM AND THE GREAT RECESSION

This Part proceeds in five Sections. First, it provides foundational information on how racism and systemic risk is defined by leading scholars and regulators, while briefly explaining the unique role that FSOC is intended to serve in protecting the financial system from emerging threats. It then introduces the novel Systemic Disruption Model, which demonstrates the interconnectedness of systemic risk and racism. It divides systemic disruptions into four distinct phases which establish how such risk moves through the financial system: (1) its initial Introduction phase, followed by (2) the exponential Growth phase, (3) the apex Maturity phase, and (4) the Decline phase, where it finally dissipates to preexisting levels. This analytical framework is then applied to the Great Recession as a prototypical case study.

A. Background: Defining Racism and Systemic Risk

Defining racism remains a highly contested endeavor that is tarnished by political ploys for power and subordination. This affects the ways in which the masses perceive the magnitude of racism as it currently exists. Many have sought to restrict the definition to direct and clear forms of prejudice that arise from a subjective intent to cause harm based on one's racial or ethnic background.[37] This would include overt communications and actions that are brazenly laced with prejudices and hatred against certain racial groups. The use of racial epithets against underrepresented groups,[38] and intentionally denying housing, employment, and other opportunities to individuals solely due to their race or national origin, would clearly fall within this definition. Such limited conceptions of racism have presumably been outlawed by the landmark civil rights statutes sprouting from the Civil Rights Movement, which have minimized the need for additional interventions.[39]

In contrast, a primary tenet of CRT acknowledges that racism is ordinary in that it encompasses systemic inequities that are intricately interwoven within legal and institutional structures that exist in daily life.[40] This Article adopts this more expansive CRT conception of racism. Racism persists due to the historical ways in which institutions have been tainted by racist policies and actors. Prominent financial institutions, for example, still deploy internal practices that have a disparate impact on Black people within every level of their operations. This includes the limited diversity of their

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[37] *See, e.g.*, Yelena Dzhanova, *Sen. Lindsey Graham Says Systemic Racism Doesn't Exist in the United States*, BUS. INSIDER (Apr. 25, 2021, 10:17 AM), https://www.businessinsider.com/lindsey-graham-systemic-racism-doesnt-exist-in-us-2021-4 [https://perma.cc/43SH-6HB5] (detailing remarks by Senator Lindsey Graham wherein he explains that racism is limited to bad actors and the elections of President Barrack Obama and Vice President Kamala Harris rebut the premise of systemic racism in the United States); Steven Ross Johnson, *U.S. News–Harris Poll Survey: As America Aims for Equity, Many Believe Systemic Racism Doesn't Exist*, U.S. NEWS & WORLD REP. (Nov. 16, 2022, 8:00 AM), https://www.usnews.com/news/health-news/articles/2022-11-16/poll-many-americans-dont-believe-systemic-racism-exists [https://perma.cc/D8C5-EGPX] (detailing findings that over 40% of Americans believe systemic racism does not exist in the United States).

[38] *See, e.g.*, Elisha Fieldstadt, *Alabama Lawmaker Uses Racist Slur in Recorded Council Meeting, Faces Calls to Resign*, NBC NEWS (July 21, 2021, 11:05 AM), https://www.nbcnews.com/news/us-news/alabama-lawmaker-uses-racist-slur-recorded-council-meeting-faces-calls-n1274603 [https://perma.cc/S8DM-GWCJ].

[39] *See, e.g.*, 42 U.S.C. § 2000a (1964) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."); 52 U.S.C. § 10101 (1965) ("Race, color, or previous condition not to affect right to vote."); Fair Housing Act of 1968, 42 U.S.C. §§ 3601–19 (1968) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

[40] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8 (3d ed. 2017).

managers, employees, and suppliers,[41] and the ways in which their consumers from underrepresented groups are exploited for financial gain.[42] While the Black Lives Matter movement has played a pivotal role in fighting for the acknowledgement and eradication of such systemic forms of racism, many such institutional failures have persisted due in part to the continued lack of representation of Black people within the legal and operational underpinnings of these structures.[43]

The extent to which leaders in the public and private sphere have acknowledged these more expansive definitions of racism is currently in flux. A multitude of states have banned CRT from being taught in public education altogether, which seems to flow with Professor Bell's theory of retrenchment which he has historically argued naturally follows momentous periods of racial reckoning.[44] Such leaders have targeted CRT as being anti-American despite the movement's underlying goal of optimizing Black liberation, which would presumably bolster every aspect of American life for all of its citizens.[45] Other political leaders and commentators have in

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41 Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105, 1105 (2005) (highlighting that "people of color appear to have experienced more significant barriers [to accessing board of director positions] than women, while women of color appear to be experiencing the most formidable of such barriers"); Matt Gonzales, *The Damaging Effects of Workplace Racism: How to Protect Workers of Color From Racial Trauma*, SHRM (Dec. 14, 2022), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/the-damaging-effects-of-workplace-racism.aspx [https://perma.cc/Z97Y-ZD48] (stating that "more than 2 in 5 Black workers (42 percent) feel they faced race- or ethnicity-based unfair treatment at work in the past five years"); *Social Investment Sector Still Plagued by Lack of Diversity*, PIONEERS POST (Jan. 9, 2019), https://www.pioneerspost.com/news-views/20190109/social-investment-sector-still-plagued-lack-of-diversity [https://perma.cc/7B94-SAW4].

42 Joe Hernandez, *Johnson & Johnson Targeted Black Women with Products Linked to Cancer, Lawsuit Says*, NPR (July 29, 2021, 3:28 PM), https://www.npr.org/2021/07/29/1022355144/johnson-johnson-targeted-black-women-powder-products-cancer-lawsuit [https://perma.cc/UAH5-E4JX]; Alexandra Sifferlin, *Beauty Products Marketed to Black Women May Contain More Hazardous Chemicals: Report*, TIME (Dec. 6, 2016, 1:32 PM), https://time.com/4591079/beauty-products-marketed-to-black-women-may-contain-more-hazardous-chemicals-report [https://perma.cc/G28A-B4XU].

43 Bryan Hancock, Monne Williams, James Manyika, Lareina Yee & Jackie Wong, *Race in the Workplace: The Black Experience in the US Private Sector*, MCKINSEY & CO. (Feb. 21, 2021), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/race-in-the-workplace-the-black-experience-in-the-us-private-sector [https://perma.cc/4UDL-2HHG] (revealing, in part, "that Black workers are underrepresented in the highest-growth geographies and the highest-paying industries").

44 Cathryn Stout & Thomas Wilburn, *CRT Map: Efforts to Restrict Teaching Racism and Bias have Multiplied Across the U.S.*, CHALKBEAT (Feb. 1, 2022, 6:20 PM), https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism [https://perma.cc/3YU8-5PM6].

45 Laura E. Gómez, *Trump's White House Says Critical Race Theory Is Anti-American. Here's the Truth*, NBC NEWS (Sept. 11, 2020, 12:29 PM), https://www.nbcnews.com/think/opinion/trump-s-white-house-says-critical-race-theory-anti-american-ncna1239825 [https://perma.cc/8HYG-PS9Q] (highlighting a memo from the Office of Management and Budget Director which stated in relation to

contrast acknowledged the existence of systemic racism and have even adopted proclamations and programs that seek to eradicate it.[46] For example, President Joseph Biden's "Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" acknowledged the following with respect to the persistence of systemic racism:

> Our country faces converging economic, health, and climate crises that have exposed and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism. Our Nation deserves an ambitious whole-of-government equity agenda that matches the scale of the opportunities and challenges that we face.[47]

The private sector's acknowledgement of systemic racism is similarly in flux. Following the brutal murder of George Floyd in 2020, a slew of corporations made commitments of varying degrees calling for the eradication of systemic racism.[48] Shareholder groups have increasingly pressured their underlying corporations to conduct racial equity audits and to increase board diversity in the ever-increasing investor demand for sustainable company practices.[49] Several commentators have of course called into question whether these commitments are simply marketing ploys that are designed to capitalize on the global movement emanating from the inhumane murder of George Floyd.[50] Many would similarly argue that such

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CRT that "[i]t has come to the President's attention that Executive Branch agencies have spent millions of taxpayer dollars to date 'training' government workers to believe divisive, anti-American propaganda").

46 The following component of Merriam-Webster's definition of "racism" also includes a reference to systemic racism: "2a: the systemic oppression of a racial group to the social, economic, and political advantage of another." *Racism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/racism [https://perma.cc/49ST-4U6U].

47 Exec. Order No. 13985, 86 C.F.R. § 7009 (Jan. 20, 2021).

48 PepsiCo's CEO, for example, publicly proclaimed that "the next step in PepsiCo's journey for racial equality [is] a more than $400 million set of initiatives over five years to lift up Black communities and increase Black representation at PepsiCo." He likewise asserted that "[t]hese initiatives make up a holistic effort for PepsiCo to walk the talk of a leading corporation and help address the need for systemic change." Ramon Laguarta, *PepsiCo CEO: 'Black Lives Matter, to Our Company and to Me.' What the Food and Beverage Giant Will Do Next*, FORTUNE (June 16, 2020, 2:00 PM), https://fortune.com/2020/06/16/pepsi-ceo-ramon-laguarta-black-lives-matter-diversity-and-inclusion-systemic-racism-in-business [https://perma.cc/9TM2-759L].

49 Leslie P. Norton, *Activists Pressure Corporate Boards to Address Racial Justice, Voting Laws*, BARRON'S (Apr. 20, 2021, 3:46 PM), https://www.barrons.com/articles/activists-pressure-corporate-boards-to-address-racial-justice-voting-laws-51618947999 [https://perma.cc/QAJ6-SSTZ].

50 Nicole Regalado, *McDonald's Is Hiding Policies That Perpetuate Systemic Racism Behind Woke-Washing*, ACLU (July 20, 2020), https://www.aclu.org/news/racial-justice/mcdonalds-is-hiding-policies-that-perpetuate-systemic-racism-behind-woke-washing [https://perma.cc/26GS-X6DY]; Terry Nguyen, *Consumers Don't Care About Corporate Solidarity. They Want Donations*, VOX (June 3, 2020, 1:00 PM),

companies have decided to act within this specific moment in time because it was mutually beneficial to do so from an economic standpoint, which is in line with Professor Bell's interest-convergence theory. The number of companies making public pledges to racial justice causes has likewise declined in recent years.[51]

Irrespective of this ongoing debate, such commitments to racial justice issues made by private and public sector actors acknowledge that racism within the financial system has incurred significant macroeconomic costs that have negatively impacted America as a whole. Costs of this nature generally focus on the negative impact to this country's GDP arising from the collective loss of opportunities, life, liberty, and health resulting from all forms of racism. This Article takes this analysis a step further by contending that modern forms of racism, both direct and systemic, have played a considerable role in incentivizing or exacerbating numerous systemic disruptions across history. Racism also distorts the benefits and harms flowing from negative externalities that have both contributed to and resulted from such systemic disruptions.

Systemic risk (not to be confused with systemic racism) has yet to be concretely defined by regulators. As described by Commodity Futures Trading Commission (CFTC) Commissioner Kristin N. Johnson, "[S]ystemic risk is not a term of art with a simple, precise, user-friendly definition. Interpretations differ regarding the types of threats that constitute systemic risk."[52] Many would, however, agree that it broadly refers to "the risk of threats to financial stability that impair the functioning of a large part of the financial system with significant adverse effects on the broader economy."[53] Scholars have found that bank failures, excessive leverage, financial innovation, and lax regulatory environments, for example, are major sources of systemic risk.[54] This Article is likewise advocating that

https://www.vox.com/the-goods/2020/6/3/21279292/blackouttuesday-brands-solidarity-donations [https://perma.cc/P5FY-2BEA]. *But see* Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 COLUM. BUS. L. REV. 118, 124 (utilizing "an original empirical survey to demonstrate that, on the first anniversary of these [antiracist] corporate statements, many corporations that issued such statements began to follow through on their commitments, at least with respect to increasing the presence of Blacks and other people of color on their boards").

51 Megan Armstrong, Eathyn Edwards & Duwain Pinder, *Corporate Commitments to Racial Justice: An Update*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (Feb. 21, 2023), https://www.mckinsey.com/bem/our-insights/corporate-commitments-to-racial-justice-an-update [https://perma.cc/W42Y-X4QP].

52 Kristin N. Johnson, *Managing Cyber Risks*, 50 GA. L. REV. 547, 559 (2016).

53 XAVIER FREIXAS, LUC LAEVEN & JOSÉ-LUIS PEYDRÓ, SYSTEMIC RISK, CRISES, AND MACROPRUDENTIAL REGULATION 13 (2015).

54 Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657, 665 (2012).

racism be categorized as a source of systemic risk that warrants government intervention given its relationship to recent and projected systemic disruptions. This Article further defines a "systemic disruption" as the process through which multiple sources of systemic risk spur debilitating shocks to major sectors of the economy. The Great Recession is one such disruption that has previously run its course in terms of its devastating effect on the collective welfare of the global economy. This Article categorizes climate change as another systemic disruption that seems to be ongoing with respect to its Maturity and Decline phases as further discussed in Part II.

The Great Recession popularized the term "systemic risk," as numerous sources such as excessive leverage in the form of risky financial instruments, caused a systemic disruption of epic proportions by nearly toppling economies across the globe. The failures of major financial institutions rippled throughout the markets as their enhanced interconnectedness (yet an additional source of systemic risk) triggered a domino effect of calamities.[55] Congress passed the Dodd–Frank Act to prevent comparable crises of this scale from occurring in the future.[56] Banks and insurance companies were among the categories of financial institutions targeted by the Dodd–Frank Act for enhanced prudential regulation, increased transparency, and other forms of regulatory protections.[57] The Dodd–Frank Act also authorized the creation of FSOC, which is "[c]harged . . . with identifying risks to the financial stability of the United States; promoting market discipline; and responding to emerging risks to the stability of the U.S. financial system."[58]

Scholars have comprehensively critiqued the effectiveness of the extensive legislation provided under the Dodd–Frank Act, which necessarily entails dissecting the multifaceted causes of the crisis through a multitude of theoretical lenses.[59] However, the ways in which racism played a role in facilitating and extending the Great Recession (among other systemic

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[55] Kristin N. Johnson, *Things Fall Apart: Regulating the Credit Default Swap Commons*, 82 U. COLO. L. REV. 167, 213 (2011) ("The concentration within the market and the interconnectedness of contractual arrangements increases the risk that one market participant, such as AIG, might become insolvent and trigger a domino effect of losses [among market participants].").

[56] U.S. DEP'T OF THE TREASURY, *supra* note 34.

[57] *Id.*

[58] *Id.*

[59] *See, e.g.*, Christina Parajon Skinner, *Regulating Nonbanks: A Plan for SIFI Lite*, 105 GEO. L.J. 1379 (2017) (evaluating FSOC's binary framework for identifying systemic risk in nonbank financial companies); Arthur E. Wilmarth Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-To-Fail Problem*, 89 OR. L. REV. 951 (2011) (arguing that Dodd–Frank will not prevent future taxpayer-financed bailouts of large banks); Frank Partnoy, *What's (Still) Wrong with Credit Ratings*, 92 WASH. L. REV. 1407 (2017) ("[Dodd–Frank's provisions] have had little or no impact [on the credit rating system], and that therefore the same . . . dangers, market distortions, and inefficient allocations of capital that led to the 2007–08 global financial crisis potentially remain today.").

disruptions) warrants additional analysis particularly as additional sources of systemic risk have proliferated to comparable levels. For the sake of clarity, this Article does not mean to suggest that racism is the single driver of financial crises. The root causes are multifaceted and highly complex.[60] It does however provide an alternative lens through which to view the integral ways in which racism has driven recent systemic disruptions. The Systemic Disruption Model provided below documents the ways in which racism interacts with every phase of a systemic disruption.

B. *Introduction Phase: Disparate Exposure to Subprime Mortgages*

With respect to the first Introduction phase, where risk is first introduced into the financial system, this Article posits that racism can incentivize systemic disruptions as racist policies and practices transform communities of color into ideal dumping grounds for negative externalities generated by the private sector. Available evidence demonstrates that racism played a central role in triggering the Great Recession, since financial intermediaries disproportionately targeted communities of color in selling subprime mortgages.[61] Such low-grade mortgages obligate borrowers to pay higher interest rates and fees due to the higher risks that lenders must undertake to extend loans to individuals with lower credit ratings.[62] The U.S. Department of Housing and Urban Development (HUD) additionally found that during the period leading up to this crisis, subprime mortgages accounted for over 50% of total home loans within predominantly Black neighborhoods while accounting for a mere 9% within white communities.[63] In 2006, the Joint Center for Political and Economic Studies estimated that "the rate of subprime mortgages for home purchase for Hispanics and African Americans was approximately double the white rate . . . . [where] [t]wenty-six percent of mortgages for home purchase by whites were

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60 *See, e.g.*, STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME MORTGAGE CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW 156 (2013).

61 Jacob S. Rugh, Len Albright & Douglas S. Massey, *Race, Space, and Cumulative Disadvantage: A Case Study of the Subprime Lending Collapse*, 62 SOC. PROBS. 186 (2015) ("Using an integrated theoretical model specified at multiple levels and reliable empirical estimates, we document a clear and consistent pattern of racial disparities that suggest significant racial discrimination occurs across successive phases of mortgage lending carried out by a major financial institution in a major American city."); Gillian B. White, *The Recession's Racial Slant*, ATLANTIC (June 24, 2015), https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725 [https://perma.cc/3AFE-AX4J].

62 Rugh et al., *supra* note 61, at 204.

63 U.S. DEP'T OF HOUS. & URB. DEV., UNEQUAL BURDEN: INCOME & RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000), https://archives.hud.gov/reports/subprime/subprime.cfm [https://perma.cc/FU32-LCWL].

subprime . . . . [and for] Hispanics, it was 47% and for African Americans, 53%."[64]

Moreover, several studies found that direct racism through predatory lending was occurring en masse. Financial intermediaries would often steer Black consumers into subprime mortgages despite them having met the qualifications for more favorable prime counterparts, which possess lower interest rates and fees. One report concluded that "[b]orrowers in upper-income black neighborhoods were twice as likely as homeowners in low-income white neighborhoods to refinance with a sub-prime loan."[65] A study administered by the *Wall Street Journal* found that "[a]t the height of the lending frenzy, 61 percent of subprime borrowers qualified for prime loans."[66] Professors Cheryl Wade and Janis Sarra further dissect the contours of such predatory practices through extensive research, which includes firsthand narratives, within their trailblazing book, *Predatory Lending and the Destruction of the African-American Dream*.[67] They additionally surmised that these insidious forms of economic exploitation have increased the racial wealth gap, while the perpetrators of these harms have not been held sufficiently accountable.[68]

Preexisting vulnerabilities experienced by Black communities make them the perfect target for such unjust practices that have generated massive negative externalities, spilling over into surrounding areas. Government sanctioned practices like "redlining" disqualified entire Black communities from receiving key services related to homeownership, such as credit, homeowner's insurance, and even grocery stores.[69] Restrictive racial covenants adopted by local governments and home ownership associations specifically forbade Black people from moving into predominantly white

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[64] Algernon Austin, *Subprime Mortgages are Nearly Double for Hispanics and African Americans*, ECON. POL'Y INST. (June 10, 2008), https://www.epi.org/publication/webfeatures_snapshots_20080611 [https://perma.cc/5QQ8-H95X].

[65] Sam Thielman, *Black Americans Unfairly Targeted by Banks Before Housing Crisis, Says ACLU*, GUARDIAN (June 23, 2015, 1:17 PM), https://www.theguardian.com/business/2015/jun/23/black-americans-housing-crisis-sub-prime-loan [https://perma.cc/K62U-P89H] (quoting SARAH BURD-SHARPS & REBECCA RASCH, SOC. SCI. RSCH. COUNCIL, IMPACT OF THE US HOUSING CRISIS ON THE RACIAL WEALTH GAP ACROSS GENERATIONS 9 (2015), https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf [https://perma.cc/PV63-LHLG]).

[66] RAMIREZ, *supra* note 60, at 78.

[67] *See generally* JANIS SARRA & CHERYL L. WADE, PREDATORY LENDING AND THE DESTRUCTION OF THE AFRICAN-AMERICAN DREAM (2020).

[68] *Id*.

[69] ROTHSTEIN, *supra* note 19, at 64.

neighborhoods.[70] Practices of this nature relegated Black homeowners to segregated areas with lower real estate values, which served to deepen the racial wealth gap.[71] Rampant reports of discrimination by bankers and lenders against Black applicants seeking prime mortgages have presented additional hurdles for Black homeownership.[72] For these reasons, subprime mortgages likely presented a seemingly golden opportunity for securing the American dream of homeownership for countless Black families who were ultimately preyed upon by predatory lending practices.

The limited accountability mechanisms baked into the law further enable the private sector to target Black communities as dumping grounds for negative externalities that generate immense and exclusive profit opportunities for elite classes. Several financial institutions, such as Wells Fargo, have entered into settlement agreements arising from subprime mortgage litigation.[73] These settlement agreements, however, absolved parties of having to admit to any wrongdoing.[74] In terms of criminal prosecution, senior executives of these institutions universally evaded culpability here in the United States.[75] Professor Brandon L. Garrett has described this phenomenon as "too big to jail."[76] As corporations have grown increasingly complex, with intersecting layers of directors, officers, and employees each playing an integral role in managing the affairs of a company, it becomes even more difficult for prosecutors to charge specific individuals within a corporation with criminal conduct given the requisite levels of intent that must be ascribed to wrongdoers.[77]

In contrast, others would argue that there was no intentional racism in targeting communities of color for subprime mortgages, as market forces were simply responding to the demand to create tailored loans for high-risk

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[70] Julian Agyeman, *The Ugly Truth About How Food Deserts Came to Be*, MIC (Mar. 9, 2021), https://www.mic.com/p/racism-created-the-food-deserts-that-still-plague-too-many-cities-65411672 [https://perma.cc/RG67-EMV2].

[71] *See id.*

[72] Susan M. Wachter & Isaac F. Megbolugbe, *Racial and Ethnic Disparities in Homeownership*, 3 HOUS. POL'Y DEBATE 333, 333–34 (1992).

[73] SARRA & WADE, *supra* note 67, at 151–207 (describing the multiple settlement agreements entered into by financial institutions that were implicated in the subprime mortgage debacle).

[74] *Id.* at 207.

[75] Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html [https://perma.cc/FY9X-G94Q]; Laura Noonan, Cale Tilford, Richard Milne, Ian Mount & Peter Wise, *Who Went to Jail for Their Role in the Financial Crisis*, FIN. TIMES (Sept. 20, 2018), https://ig.ft.com/jailed-bankers/ [https://perma.cc/22P6-GYT6] ("The US, ground zero for the financial crisis, has jailed just one banker for issues relating to the crisis.").

[76] BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 1 (2014).

[77] *Id.* at 13.

borrowers, which would necessarily require higher fees.[78] Certain law and economic models would likewise call on lawmakers to simply ignore disparate harms of this nature if they cannot be attributed to a specific actor operating with intent, and if they likewise fall outside of the bounds of reliable empirical measurement.[79] While protecting against disparate impacts is a central component of several landmark civil rights laws, many such provisions have endured repeated attacks in recent years.[80] For example, simply proving statistical disparities is insufficient for purposes of bringing a disparate impact claim of discrimination under the Fair Housing Act.[81] Plaintiffs must prove an actual causal link between the disparate impact and the challenged policy or program.[82] To make matters worse, influential neoliberal ideologies that are vehemently opposed to government funding for social welfare programs have profoundly constrained the extent to which public resources are directed towards affordable housing in the United States.[83] Lawmakers have instead increasingly delegated the provision of social welfare services related to education, housing, and healthcare to the private sector, where accountability and access is even more limited in comparison to government controlled programs.[84]

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[78] *See, e.g.*, Todd J. Zywicki & Joseph D. Adamson, *The Law & Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 20 (2009) (highlighting the benefits of the subprime mortgage market as "[i]t brought into the market many new homeowners who previously were excluded and allowed others to access accumulated home equity to consolidate high-interest consumer debt, start small businesses, pay for educational expenses, and invest in home improvements").

[79] *See supra* notes 21–22.

[80] Meckler & Barrett, *supra* note 23.

[81] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 521 (2015).

[82] *Id.*

[83] Harvey, *supra* note 22; *see also* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 76 (2005) ("As the [neoliberal] state withdraws from welfare provision and diminishes its role in arenas such as health care, public education, and social services . . . it leaves larger . . . segments of the population exposed to impoverishment [and] [t]he social safety net is reduced to a bare minimum in favour of a system that emphasizes personal responsibility."); Jonathan Weisman, *Bush Plans Sharp Cuts in HUD Unit*, NBC NEWS (Jan. 14, 2005, 3:58 AM), https://www.nbcnews.com/id/wbna6824033 [https://perma.cc/DNN7-XNHY] ("The White House [under the George W. Bush Administration] will seek to drastically shrink the Department of Housing and Urban Development's $8 billion community branch, purging dozens of economic development projects, scrapping a rural housing program . . . ."); Marian Moser Jones, *Creating a Science of Homelessness During the Reagan Era*, 93 MILBANK Q. 139 (2015) (summarizing President Ronald Reagan's plan to "simultaneously halt construction of new federally subsidized low-income housing while raising the rents on such housing and introducing a much less costly program of housing vouchers"); Fred McGhee, *The Most Important Housing Law Passed in 1968 Wasn't the Fair Housing Act*, SHELTERFORCE (Sept. 5, 2018), https://shelterforce.org/2018/09/05/the-most-important-housing-law-passed-in-1968-wasnt-the-fair-housing-act/ [https://perma.cc/JG7X-DQSM] ("President Richard Nixon declared a moratorium on the entire federal housing effort in 1971, and the liberal era of American housing policy started during the New Deal in the 1930s came to an end.").

[84] *See generally* TAYLOR, *supra* note 19, at 27.

The collective effect of these frameworks for evaluating and responding to racism creates zones of inaction from a public policy standpoint, given how such models have shaped the law's overall unresponsiveness to its harms. Myopic conceptions that seek to dismiss disparate impacts ignore how the preexisting vulnerabilities arising from state-sanctioned racism via redlining and restrictive racial covenants have shaped the need for such mortgages by underrepresented communities.[85] Taking these historical practices and disparate impacts into account in crafting policies would implicate the more expansive definition of racism advanced by CRT, which encompasses systemic and structural inequities. In contrast, these zones of inaction further ignore how disparate impacts can adversely affect the broader populace given their propensity to spur the growth of systemic risk, which is further discussed below. Disparate suffering in one corner of the world will invariably spill into other corners if left unresolved.

Such zones of inaction further contribute to the public perception that Black people are responsible for their own pain flowing from racism.[86] Political power within certain groups is often achieved through safeguarding white supremacy by blaming communities of color for the plethora of individual and collective harms that continue to result from racism.[87] This public discourse is then used as leverage in securing support for programs and policies that ignore, dismiss, and create more Black pain.

C. *Growth Phase: Exclusive Access to Complex Financial Instruments*

As presented in the Growth phase of the Systemic Disruption Model, this Article posits that racism can lead to blind spots that distort the economic benefits and costs that flow from negative externalities. This leads to additional layers of commodification that catapult the growth of a systemic disruption as it moves towards its Maturity phase.

During the periods leading up to the Great Recession, financial institutions that targeted Black people for subprime mortgages immediately repackaged those loans into securitized financial instruments and resold

[85] ROTHSTEIN, *supra* note 19, at 64.

[86] IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 30–31 (2013) ("Conservative dog whistling made minorities, not concentrated wealth, the pressing enemy of the white middle class. It didn't seem to matter that the actual monetary transfers to nonwhites were trivial. If all of the anti-poverty and social welfare dollars paid to blacks during the Kennedy and Johnson administrations had instead been given to low- and middle-income whites, it would have added less than three-eighths of 1 percent to their actual disposable income. What mattered was the sense that blacks were getting more than they deserved, at the expense of white taxpayers.").

[87] *Id.*

them to parties across the globe.[88] This effectively created a highly robust and speculative secondary market for risky loans which initially proved to be highly lucrative for elite investors.[89] Trillions of dollars were earned at the expense of innumerable Black people and other vulnerable communities who were lured into subprime mortgages. Since counterparties to these instruments were isolated from their underlying racist practices, they likely failed to appreciate the true risks of default associated with these predatory subprime mortgages. Banks disproportionately foreclosing on Black homeowners' properties (for example, due to excessive fees and interest rates) would presumably have no bearing on financial instruments being traded in separate markets that enjoyed a highly favorable rating from credit rating agencies.

Credit default swaps (CDSs), which enabled investors to insure their investments in these mortgages against potential losses, likewise provided a perceived shield of protection from the risks associated with potential defaults.[90] Reliance on credit default swaps to protect these investments ignored that, due to the pervasive interconnectedness of financial institutions, the insurance companies and other intermediaries who issued the CDSs would likely fail if the underlying mortgage holders simultaneously defaulted on a massive scale. Even if counterparties and investors did in fact foresee the massive costs resulting from the inevitable bursting of these speculative bubbles, they perhaps rightly predicted that they faced a higher likelihood of receiving government subsidies and bailouts within the Maturity phase of a systemic disruption given how such cycles had previously unfolded.[91] The resulting crisis was thus facilitated and magnified by practices inseparable from the racism that permeated a myriad of institutions and every layer of the financial sector.

At this level of commodification, Black people and other vulnerable groups were not able to profit from their own pain because they were mostly excluded as investors under federal securities laws. The risky complex derivatives comprising these markets were generally considered private and

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[88] Johnson, *supra* note 55, at 206 (scrutinizing the ways in which "credit default swap market participants extracted and internalized the benefits of their activities in credit default swap markets, while transferring credit, operational, and systemic risks to the national economy").

[89] *Id.* at 212–13; MARTIN NEIL BAILY, ROBERT E. LITAN & MATTHEW S. JOHNSON, BROOKINGS, THE ORIGINS OF THE FINANCIAL CRISIS 8 (2008), https://www.brookings.edu/wp-content/uploads/2016/06/11_origins_crisis_baily_litan.pdf [https://perma.cc/WRS9-CZ4W].

[90] Johnson, *supra* note 55, at 207.

[91] GEORGE C. NURISSO & EDWARD SIMPSON PRESCOTT, FED. RSRV. BANK OF CLEVELAND, THE 1970S ORIGINS OF TOO BIG TO FAIL (2017), https://www.clevelandfed.org/publications/economic-commentary/2017/ec-201717-origins-of-too-big-to-fail [https://perma.cc/3E68-7X7Y].

therefore restricted to high-net worth individuals and institutional investors.[92] The theoretical justification for such exclusion is that more sophisticated investors can protect themselves against such risks without the need for federal intervention.[93] Yet, the practical effect of how the public-private divide operated in this context presented interesting conundrums. Black people and other communities of color could access highly risky loans that form the basis of such instruments, but they could not access the further commodification of those loans which would have presented higher wealth generation opportunities within the Growth phase of this systemic disruption.[94]

The elite investors that could in fact access these instruments were not experiencing the same degree of disparate harms arising from the subprime mortgage market, which further facilitated this Growth phase due to their limited abilities to understand such harms through lived experiences. Since these instruments mostly operated in the private realm, this limited the level of transparency available within the public sphere. Black communities were likewise unaware of the scale of these markets during the time leading up to their maturity. Opacity surrounding these troubling layers of commodification prevented any significant organizing or advocacy efforts in response to markets disproportionately compromising the abilities of vulnerable communities to generate wealth.

D. Maturity Phase: Spillover Effect of Excessive Leverage

Once a systemic disruption reaches its Maturity phase, these underrecognized harms spread to the masses while crumbling overall financial stability on a global scale.[95] One could argue that perhaps the systemic disruption could have been prevented in prior phases of its life cycle, as its harms were already wreaking havoc on communities of color through widespread foreclosures. Yet, consistent with Professor Bell's

[92] Elite investors are legally defined as "accredited investors" and "qualified Purchasers" under the Securities Act and 1940 Act, respectively. Definitions and Terms Used in Regulation D, 17 C.F.R. § 230.501(a) (2021); Investment Company Act of 1940, 15 U.S.C. §§ 80a-2(a)(51)(a), 80a-3(c)(7); Johnson, *supra* note 55, at 213; *see also* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 445 (2017) ("[T]he new public-private divide [is] centered on its information effects . . . . [though] private companies are thriving in part by freeriding on the information contained in public company stock prices and disclosure.").

[93] *See generally* SEC v. Ralston Purina Co., 346 U.S. 119, 124–27 (1953).

[94] Jennifer J. Schulp, *This SEC Rule Makes It Harder to Invest–Unless You're Already Rich*, CATO INST. (Apr. 26, 2023), https://www.cato.org/commentary/sec-rule-makes-it-harder-invest-unless-youre-already-rich#:~:text=Due%20to%20existing%20wealth%20divides,know%20best%20for%20business%20funding [https://perma.cc/KX3F-LJMA].

[95] *See infra* Appendix.

interest-convergence theory, we do not recognize a crisis as reaching Maturity until the harms spread to the global marketplace.

During this phase of the Great Recession, the subprime mortgage bubble, along with its interconnected derivatives markets, collapsed under the weight of excess and greed; default rates spiked and many of the mortgage-backed securities that had fueled the bubble became worthless overnight.[96] This triggered a chain of colossal failures, such as the bankruptcy of Lehman Brothers, which led to thousands of employees losing their jobs. Seemingly unrelated corners of the market also suffered as it became increasingly difficult to assess the creditworthiness of counterparties due to the opaqueness of their total debt exposure. Companies struggled in paying short-term obligations such as payroll expenses due to the resulting credit freeze that destabilized the markets.[97]

Government relief was swift and immediate, but it was tilted in favor of the elite classes of institutions that facilitated the financial crisis. This Article argues that selective relief of this nature extends the depth and duration of systemic disruptions. During the Great Recession, the government deployed hundreds of billions of dollars to bail out central financial institutions such as Bear Stearns, Fannie Mae, and Freddie Mac.[98] These bailouts occurred "at a great cost to taxpayers (up to $685 billion) and great benefit to banks that held the great weight of securities issued by the government-sponsored entities."[99] The U.S. Treasury likewise created the Troubled Asset Relief Program (TARP) which used hundreds of billions of taxpayer dollars to purchase the troubled assets of major financial institutions.[100]

While such relief could have been necessary and effective in terms of stabilizing such large financial institutions, it was not sufficiently supplemented with direct relief to Black communities whose pain was commodified during the Introduction and Growth phases of the systemic disruption. When the securitized debt markets invariably collapsed, leading to one of the worst financial crises in recent memory, the Black community suffered disproportionate harms. As Gillian White of the *Atlantic* noted, "[b]etween 2007 and 2009, home equity for white Americans decreased by

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[96] BAILY ET AL., *supra* note 89, at 1.

[97] David Goldman, *Credit 2008: Year of the Freeze*, CNN MONEY (Dec. 31, 2008, 3:34 PM), https://money.cnn.com/2008/12/31/markets/bondcenter/credit_market/index.htm [https://perma.cc/4ALN-CAZ4].

[98] RAMIREZ, *supra* note 60, at 173.

[99] *Id.*

[100] *Id.* at 174.

about 9 percent; for black Americans the decrease was 12 percent."[101] Others have found that "[b]etween 2005 and 2009, the median net worth of black households dropped by 53 percent, while white household net worth dropped by 17 percent."[102] In March 2010, the unemployment rate for Black Americans was a staggering 16.8%, which was almost double the rate for whites.[103]

The Dodd–Frank Act did admittedly include relief that extended to the general public. It authorized the creation of the Consumer Financial Protection Bureau, which "implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive."[104] Congress similarly approved a range of home assistance programs such as the Home Affordable Modification Program (HAMP), which was a voluntary program for mortgage servicers that incentivized them to assist financially distressed homeowners by modifying underlying mortgage contract terms to avoid foreclosing on their homes.[105] The Home Affordable Refinance Program (HARP) likewise reached millions of Americans in assisting them with refinancing their homes to include more favorable payment obligations.[106]

Troubles, however, immediately abounded with respect to the optimal implementation of these programs. The operational systems of mortgage service providers could not logistically support the overwhelming demand for such programs by distressed homeowners.[107] Many endured foreclosures on their homes who otherwise would have benefited from such modifications.[108] Even worse, financial institutions that did in fact receive

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101 White, *supra* note 61.

102 Christopher Famighetti & Darrick Hamilton, *The Great Recession, Education, Race, and Homeownership*, ECON. POL'Y INST. (May 15, 2019, 2:04 PM), https://www.epi.org/blog/the-great-recession-education-race-and-homeownership [https://perma.cc/WDY4-59MX].

103 Patrick Gillespie, *Black Unemployment Finally Falls Below 10%*, CNN BUS. (May 8, 2015, 1:06 PM), https://money.cnn.com/2015/05/08/news/economy/black-unemployment-below-10-percent/index.html [https://perma.cc/7DT7-9WYN].

104 *About Us*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/ [https://perma.cc/2J7Y-4VR8].

105 *Home Affordable Modification Program (HAMP)*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/data/troubled-assets-relief-program/housing/mha/hamp [https://perma.cc/FU6Q-R4AY].

106 Sarah Brady, *HARP Replacement Programs*, FORBES ADVISOR (June 9, 2023, 2:20 PM), https://www.forbes.com/advisor/mortgages/harp-replacement-programs/#:~:te [https://perma.cc/DY8T-CRBH].

107 Michael Calhoun, *Lessons from the Financial Crisis: The Central Importance of a Sustainable, Affordable and Inclusive Housing Market*, BROOKINGS (Sept. 5, 2018), https://www.brookings.edu/research/lessons-from-the-financial-crisis-the-central-importance-of-a-sustainable-affordable-and-inclusive-housing-market [https://perma.cc/K64U-2RK4].

108 *Id.*

government aid under TARP were not obligated to utilize these mortgage assistance programs in exchange for receiving such relief.[109] Distressed asset sales overseen by the Federal Housing Administration auctioned off foreclosed loans within large pools as opposed to individually.[110] This meant that hedge funds became the largest buyers of these pools of homes, rather than individual buyers.[111] These homes were then quickly converted into rental properties, further squeezing out lower-priced homes from the marketplace.[112] As aptly summarized by Professor Carolina Reid,

> Rather than stepping in boldly with direct aid to homeowners, the policy response was shaped by racialized narratives of who was "deserving" of aid and the unwavering belief that private actors—such as mortgage servicers and investors—were the best placed to provide aid to hard-hit borrowers and communities. These failures of government led to a deeply uneven recovery for Black homeowners and communities, widening not only the racial wealth and homeownership gap, but also fueling gentrification and displacement pressures in some Black communities.[113]

Borrowers were also precluded from restructuring their distressed mortgages through bankruptcy under emergency relief programs.[114]

In terms of how the social safety net was deployed by the federal government to provide immediate relief to vulnerable communities, scholars have concluded that core aspects such as unemployment insurance and the Supplemental Nutrition Assistance Program (SNAP) were particularly helpful in reducing the ill-effects of the crisis relative to prior calamities.[115] Yet, immigrants were completely excluded from receiving any such benefits, which accelerated and worsened the losses that this crisis inflicted upon these underrepresented groups.[116] Although the federal government extended $5 billion to bolster funds for cash assistance provided under the Temporary Assistance to Needy Families (TANF) program, administering states

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109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 CAROLINA K. REID, TERNER CTR. FOR HOUS. INNOVATION, UNIV. OF CAL. BERKELEY, CRISIS, RESPONSE, AND RECOVERY: THE FEDERAL GOVERNMENT AND THE BLACK/WHITE HOMEOWNERSHIP GAP 3 (2021), https://ternercenter.berkeley.edu/wp-content/uploads/2021/03/Crisis-Response-Recovery-March-2021-Final.pdf [https://perma.cc/DFJ9-PWQF].

114 *Id.* at 11.

115 LISA MCCORKELL & SARA HINKLEY, INST. FOR RSCH. ON LAB. & EMP., UNIV. OF CAL. BERKELEY, THE GREAT RECESSION, FAMILIES, AND THE SAFETY NET (2018), https://irle.berkeley.edu/files/2018/12/IRLE-The-Great-Recession-Families-and-the-Safety-Net.pdf [https://perma.cc/4WV7-G6VC].

116 *Id.* at 3.

frequently imposed draconian restrictions for receiving such benefits, leading to an overall reduction in payouts flowing from this initiative.[117] Since the receipt of TANF benefits are tied to work requirements, families who struggled to find employment for extensive periods of time due to the long-lasting effects of the crisis were precluded from seeking such benefits.[118] In addition, irrespective of such increases to the social safety net,

> children whose head of household is single and children with Black or Hispanic household heads experienced larger increases in poverty . . . than their married and white household heads counterparts did . . . . This is because racial and ethnic minorities and single-headed households have a higher poverty rate baseline and are more likely to be affected by economic downturns.[119]

Social benefits that are not closely tailored to these categories of vulnerable communities are not as effective in mitigating harms flowing from financial crises for these particular groups.

E. Decline Phase: Limited Effect of Regulatory Interventions

In the last Decline phase of the Systemic Disruption Model, this Article asserts that racism distorted the long-term costs flowing from the systemic disruption. During the first couple of years following the crisis, "white wealth levels, excluding home equity, began to show signs of recovery: median white household wealth exhibited zero loss. During that same time period, however, black households continued to experience severe declines, with the typical black household losing 40 percent of non-home-equity wealth."[120] It could take several decades for Black families to close the massive increases to the racial wealth gap caused by this financial crisis.[121] One even estimated that "[f]or a typical black family, median wealth in 2031 will be almost $98,000 lower than it would have been without the Great Recession."[122] The resulting housing crisis fueled gentrification and displacement within Black communities leading to immeasurable harms that lawmakers have failed to rectify.[123]

Regulatory interventions that aggressively increase the affordable housing stock available to vulnerable communities, or that drastically retool

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117 *Id.* at 2.

118 *See* Marianne Bitler, *Responsiveness of the Safety Net During Downturns: Lessons from the Great Recession*, ECONOFACT (Oct. 28, 2019), https://econofact.org/responsiveness-of-the-safety-net-during-downturns-lessons-from-the-great-recession [https://perma.cc/TN6U-WJAS].

119 MCCORKELL & HINKLEY, *supra* note 115, at 3–4.

120 BURD-SHARPS & RASCH, *supra* note 65, at 2.

121 *Id.* at 4.

122 *Id.* at 3.

123 REID, *supra* note 113.

social safety net eligibility requirements to better accommodate communities that have been repeatedly brutalized by racist practices and policies, could perhaps better address these long-term harms. Creating more accountability measures which seek to weed out systemically racist practices and policies implemented by the private sector would further assist in rectifying these lingering costs. In a similar vein, Professor Steven Ramirez has advocated for an expansion of civil rights protections under federal law as well as "a broader and deeper embrace of our culturally diverse human resources."[124]

In a regulatory environment where federal agencies have started to recognize climate change as being systemically harmful, they are curiously silent on the deep interconnectedness of racism to systemic risk. Regulatory interventions of this magnitude rarely move forward in a meaningful way. This is perhaps due to the ways in which the interests of the masses no longer converge with vulnerable communities during this phase of the systemic disruption life cycle. This could habitually affect the costs and benefits that policy makers assign to such regulatory interventions. Moreover, a sociopolitical climate has emerged where government interventions of this scale are widely viewed as enabling the inherent laziness and other cultural defects of the Black community instead of rectifying past harms implemented by both the public and private sector.[125] As alluded to in this Article, dismissing systemic and structural racism creates a convenient pathway for victim blaming through alternative forms of racism.

This Article posits that continually underestimating such long-term costs increases the likelihood of additional systemic disruptions occurring in the future. Increasing the vulnerability of underrepresented communities enhances their appeal as dumping grounds for future negative externalities produced by the private sector. This causes the cycle presented in the Systemic Disruption Model to repeat itself into perpetuity. As further discussed in Part III, FSOC recognizing racism as a threat to financial stability may be a vital first step in disrupting these vicious cycles.

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[124] RAMIREZ, *supra* note 60, at 156.

[125] *See, e.g.*, Jared Mitovich, *Penn Law's Amy Wax Doubles Down on Racist Comments, Says She Will Not Resign 'Without a Fight,'* DAILY PENNSYLVANIAN (Jan. 27, 2022, 1:18 AM), https://www.thedp.com/article/2022/01/penn-law-amy-wax-will-not-resign-despite-university-sanctions-anti-asian-racism [https://perma.cc/85DG-M8NM] (summarizing remarks by Professor Amy Wax who stated that "[g]iven the realities of different rates of crime, different average IQs, people have to accept without apology that Blacks are not going to be evenly distributed throughout all occupations. They're just not, and that's not a problem. That's not due to racism," and that "[g]roups have different levels of ability, demonstrated ability, different competencies").

II. THE INTERCONNECTEDNESS OF RACISM AND CLIMATE CHANGE

This Part illuminates the ways in which climate change as a systemic disruption is eerily similar to the Great Recession in terms of its interconnectedness with race and racism. It is certainly possible that one cycle has fed into the other as the unresolved damage to vulnerable communities arising from the Great Recession has made it easier for the private sector to disproportionately dump toxins into these areas. In either case, this Part begins by outlining how climate change has expanded beyond the bounds of being viewed as a social justice issue, as it is increasingly being recognized as a systemic threat to financial stability by the private and public sector in a multitude of ways.

Part II continues by applying the analytical frame provided in the Systemic Disruption Model to climate change, which is the second archetypical case study provided herein. Vulnerable communities have long served as literal dumping grounds for fossil fuels and other climate change contributors, which has spurred the growth of these industries. As we grapple with the Maturity phase of climate change, such communities are not likely to receive tailored relief in rectifying these past and ongoing harms. The battle to bring us into the Decline phase of this cycle has been wrought with initiatives that serve to replicate the harms generated by prior industries. For example, implementing renewable energy solutions that continually exclude vulnerable communities as participants and economic beneficiaries serves to perpetuate these problematic cycles.

A. Background: Climate Change as a Systemic Disruption

Since the passage of the Dodd–Frank Act, additional sources of systemic risk, such as cyber security threats and cryptocurrency markets, have been highlighted by scholars, regulators, and commentators as having the potential to cause staggering damage to the global economy.[126] Climate change is another possible source which generally encompasses severe changes in global weather and temperature patterns, and largely results from human actions such as the "burning of fossil fuels like coal, oil and gas."[127] Multiple sectors, such as "[e]nergy, industry, transport, buildings, agriculture and land use," have accelerated the production of greenhouse gas emissions

[126] *See* Johnson, *supra* note 52; Andrew Ackerman & Paul Kiernan, *Crypto Could Threaten Financial System, Federal Risk Panel Warns*, WALL ST. J. (Oct. 3, 2022, 5:41 PM), https://www.wsj.com/articles/crypto-could-threaten-financial-system-federal-risk-panel-warns-11664826496 [https://perma.cc/29E5-S3JY].

[127] *What Is Climate Change?*, U.N., https://www.un.org/en/climatechange/what-is-climate-change [https://perma.cc/YY95-AC48].

to record levels.[128] Such emissions can cause respiratory illnesses and other diseases.[129] Other ill-effects of climate change include rising sea levels, severe weather patterns, intense droughts, and other related calamities.[130]

Due to these harms, climate change is now being increasingly acknowledged by the public and private sector as a source of systemic risk given its potential to severely disrupt multiple levels of private enterprise that impacts overall financial stability.[131] Industries on an international scale are already showing signs of suffering.[132] As one source noted, "The Central Valley of California, for instance, already experienced a $1.7 billion loss on this year's drought."[133] In assessing future harms, "[h]abitat loss for [fisheries] could be as high as 17 percent by 2030 and 34 percent by 2060 if emissions of heat-trapping pollutants are not reduced."[134] Other industries such as travel are also expected to face inordinate losses as increasing temperatures and weather calamities threaten the core aspects of their underlying business functions.[135] It is next to impossible to measure the sheer gravity of the total economic, psychological, emotional, and physical costs that will holistically result from climate change.

On May 20, 2021, President Biden issued the "Executive Order on Climate-Related Financial Risk" which directly recognized how "the intensifying impacts of climate change present physical risk to assets, publicly traded securities, private investments, and companies—such as

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128 *Id.*

129 *Human Health Impacts of Climate Change*, NAT'L INST. OF ENV'T HEALTH SCIS., https://www.niehs.nih.gov/research/programs/climatechange/health_impacts/index.cfm [https://perma.cc/7MZZ-EUPJ].

130 *Id.*

131 *See, e.g.*, Jacqueline Peel, Anita Foerster, Brett McDonnell & Hari M. Osofsky, *Governing the Energy Transition: The Role of Corporate Law Tools*, 36 ENV'T & PLANNING L.J. 459, 460 (2019) ("As understanding has grown in the private sector post-Paris that climate change may pose material financial risks to businesses, there has been increasing attention given by companies, as well as regulators and civil society, to how these legal obligations may be enlivened and applied to corporate decision-making relating to climate change.").

132 *See, e.g.*, Javier Barbuzano, *Climate Change Will Reduce Spanish Olive Oil Production*, EOS (Mar. 19, 2020), https://eos.org/articles/climate-change-will-reduce-spanish-olive-oil-production [https://perma.cc/N83K-6H4E] (observing that warmer weather patterns will likely lead to a 30% reduction in olive oil production over the next several decades).

133 Nicholas Duva, *7 Industries at Greatest Risk from Climate Change*, CNBC (Oct. 22, 2014, 6:01 AM), https://www.cnbc.com/2014/10/22/7-industries-at-greatest-risk-from-climate-change.html [https://perma.cc/YQ2T-NHPS].

134 *Id.*

135 Renee Cho, *Climate Change Is Making Travel That Much Harder*, COLUM. CLIMATE SCH. (July 11, 2023), https://news.climate.columbia.edu/2023/07/11/climate-change-is-making-travel-that-much-harder [https://perma.cc/Z59W-7UVV].

increased extreme weather risk leading to supply chain disruptions."[136] In response to this executive order, FSOC has identified that "[c]limate change is an emerging threat to the financial stability of the United States."[137] It then issued its *Report on Climate-Related Financial Risk*, which detailed the various ways in which climate change could trigger economic disruptions of epic proportions.[138] Specific recommendations for its member agencies include building expertise, gathering data, and enhancing transparency related to climate change to assist investors and other market participants in protecting themselves against such risks.[139] The SEC has recently followed suit by adopting a proposal on March 21, 2022, to mandate standardized climate risk disclosures for its registrants.[140]

This Article posits that climate change has risen to the level of a systemic disruption given the ways in which it has negatively impacted entire industries. In thinking about the life cycle of climate change as a systemic disruption, it seems to have followed a comparable path in terms of its inseparable relationship to racism as outlined in the attached Model. Again, this Article does not argue that racism is the sole and primary source of all categories of climate change. Multiple sources exist, such as natural solar cycle variations and everyday activities such as driving cars, filling landfills, heating buildings, and even cooking. Categorizing a weather calamity as an event attributable to climate change can therefore be especially challenging.[141] Even still, this Article posits that racism has impacted every stage of climate change as a systemic disruption in ways that are difficult to dismiss from a public policy standpoint.

B. Introduction Phase: Disparate Exposure to Fossil Fuels

To begin with, in assessing the Introduction phase of the Systemic Disruption Model, racist policies and practices have transformed Black communities and other vulnerable areas into ideal dumping grounds for a range of pollutants that have escalated climate change to record levels. The

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136 Exec. Order No. 14030, 86 C.F.R. § 27967 (May 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk [https://perma.cc/AK4B-8XXN].

137 FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 12, at 2.

138 *Id.*

139 *Id.* at 5–9.

140 Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [https://perma.cc/DX4V-HPBU].

141 Leo Hickman, *Is It Now Possible to Blame Extreme Weather on Global Warming?*, WMO (2012), https://public.wmo.int/en/resources/bulletin/it-now-possible-blame-extreme-weather-global-warming [https://perma.cc/AD8A-JDWE].

fossil fuel industry provides a prime example of this claim in action since it remains a primary contributor to climate change. The U.S. Energy Information Administration has specifically found that "[f]ossil fuel combustion (burning) for energy accounted for 73% of total U.S. GHG emissions and for 92% of total U.S. anthropogenic CO_2 emissions" while "CO_2 emissions from other anthropogenic sources and activities were about 6% of total GHG emissions and 8% of total CO_2 emissions."[142] As such, activists often focus on reducing fossil fuel production as a primary means for decreasing and preventing climate change.[143]

Black communities and other vulnerable areas have historically suffered disparate harms from the fossil fuel industry long before climate change became globally recognized by regulators as a source of systemic risk. A joint report published in April 2021 by the Movement for Black Lives, Gulf Coast Center for Law and Policy, and Greenpeace, Inc. synthesized an extensive record of existing research to further scrutinize this claim across the life cycle of fossil fuel production, which includes its extraction, processing, transport, and combustion.[144] In terms of fossil fuel extraction, this report found that "[a]lthough findings vary by region, oil and gas extraction is also found to have disproportionate impacts on people of color, especially Black/African-American people."[145] With respect to the combustion of fossil fuels, it further surmised that "oil refineries and petrochemical facilities (which provide key inputs for plastics production) are among the worst polluting sectors of the economy, and that the toxic burden of those sectors falls disproportionately on Black, Brown, Indigenous, and poor communities."[146] A study published jointly with the NAACP and Clean Air Task Force similarly concluded that Black people "are 75 percent more likely to live in fence-line communities than the average American."[147] Fence-line communities are defined as areas "that are next to a company, industrial, or service facility and are directly affected in

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[142] U.S. ENERGY INFO. ADMIN., *supra* note 18.

[143] *See, e.g.*, *Renewable Energy–Powering a Safer Future*, U.N., https://www.un.org/en/climatechange/raising-ambition/renewable-energy [https://perma.cc/W4V8-UN6A] (arguing in part that ending climate change requires that we "end our reliance on fossil fuels and invest in alternative sources of energy that are clean, accessible, affordable, sustainable, and reliable").

[144] TIM DONAGHY & CHARLIE JIANG, GREENPEACE, FOSSIL FUEL RACISM: HOW PHASING OUT OIL, GAS, AND COAL CAN PROTECT COMMUNITIES 2 (2021), https://www.greenpeace.org/usa/wp-content/uploads/2021/04/Fossil-Fuel-Racism.pdf [https://perma.cc/QR5F-PCQH].

[145] *Id.*

[146] *Id.*

[147] LESLEY FLEISCHMAN & MARCUS FRANKLIN, NAACP & CLEAN AIR TASK FORCE, FUMES ACROSS THE FENCE-LINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES 6 (2017), http://www.catf.us/wp-content/uploads/2017/11/CATF_Pub_FumesAcrossTheFenceLine.pdf [https://perma.cc/ZB34-YZDE].

some way by the facility's operation (e.g. noise, odor, traffic, and chemical emissions)."[148] The health effects of such disparate exposure to fossil fuel pollution are devastating. Black people are more likely to suffer from asthma, develop various categories of cancer, and suffer from a range of additional health issues due, in part, to this disparate exposure to pollution.[149]

Preexisting vulnerabilities incentivize these disparate harms. As explained in the previous section, racist practices such as redlining and restrictive racial covenants constrained Black people to segregated communities with lower quality schools, inferior infrastructure development, and limited public transportation options, all of which has led to progressively lower property values and dilapidated living conditions.[150] These communities then become ideal dumping grounds for corporations to offload negative externalities, since market forces frequently drive private sector decisions to place hazardous facilities where it is less costly to do so.[151] Vulnerable communities often provide cheaper land for building toxic facilities, while perhaps possessing more lenient zoning rules, tax incentives, and other lucrative benefits.[152] These communities also possess less political power and fewer resources to resist such efforts flowing from the private sector. As detailed in a report prepared by a waste-incinerator consultant in 1984, "[a]ll socioeconomic groupings tend to resent the nearby siting of major facilities, but the middle and upper-socioeconomic strata possess better resources to effectuate their opposition."[153]

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148 *Id.*

149 A comprehensive study published in 2021, for example, concluded that "[r]acial-ethnic minorities in the United States are exposed to disproportionately high levels of ambient fine particulate air pollution (PM2.5), the largest environmental cause of human mortality." Christopher W. Tessum, David A. Paolella, Sarah E. Chambliss, Joshua S. Apte, Jason D. Hill & Julian D. Marshall, *PM2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES, Apr. 28, 2021, at 1, 1. More specifically, in "[q]uantifying the PM2.5 exposure caused by each emitter type, [they] show that nearly all major emission categories—consistently across states, urban and rural areas, income levels, and exposure levels—contribute to the systemic PM2.5 exposure disparity experienced by people of color." *Id.* Such emission categories include construction sites, agricultural endeavors, pollutants flowing from vehicles, as well as residential and restaurant activities. Hiroko Tabuchi & Nadja Popovich, *People of Color Breathe More Hazardous Air. The Sources Are Everywhere*, N.Y TIMES (Sept. 7, 2021), https://www.nytimes.com/2021/04/28/climate/air-pollution-minorities.html [https://perma.cc/J9A9-8HYN].

150 U.S. ENERGY INFO. ADMIN., *supra* note 18.

151 DORCETA E. TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY 70 (2014); Gabi Velasco & Oriya Cohen, *Three Ways Zoning Can Advance Housing and Climate Justice*, URB. INST. (Mar. 2, 2022), https://housingmatters.urban.org/articles/three-ways-zoning-can-advance-housing-and-climate-justice [https://perma.cc/GX8X-956D].

152 *Id.*

153 CERRELL ASSOCS., INC. & J. STEPHEN POWELL, POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING 26 (1984), http://www.ejnet.org/ej/cerrell.pdf [https://perma.cc/MBL9-2Y6Q].

Influential law and economic models would likewise call policymakers to simply ignore any resulting disparate harms since many such private actors did not create the racist policies and practices that transformed communities into ideal locations for toxic facilities.[154] They simply took advantage of these policies from an economic standpoint. If resulting disparate harms fall outside the bounds of reliable empirical measurement and cannot be attributed to racist practices and policies by the fossil fuel industry, then applicable law and economic models urge that lawmakers remain unresponsive.[155] The limited participation of Black people in rule promulgation processes further taints the extent to which relevant actors can effectively examine whether the costs of regulatory intervention exceed the benefits.[156] Neoliberal ideologies, which are profoundly ingrained into the lawmaking process, have also constrained the extent to which government resources are deployed to fight against these harms.[157] As Martin Lukacs of the *Guardian* noted, "[neoliberalism's] trademark policies of privatization, deregulation, tax cuts and free trade deals . . . have liberated corporations to accumulate enormous profits and treat the atmosphere like a sewage dump, and hamstrung our ability, through the instrument of the state, to plan for our collective welfare."[158]

These deeply embedded philosophies lead to zones of inaction from a regulatory perspective. These zones of inaction further contribute to the public perception that Black people are responsible for their own pain flowing from the disparate harms of fossil fuel pollution. With respect to the disparate mortality rate that Black people endured during the COVID-19 pandemic, Professor Ibram X. Kendi observed that "Americans are blaming black people."[159] He additionally highlighted that "[t]o explain the disparities in the mortality rate, too many politicians and commentators are noting that black people have more underlying medical conditions but, crucially, they're not explaining why. Or they blame the choices made by black people, or

154 *See generally supra* notes 21–22.

155 *See generally supra* notes 21–22.

156 *See infra* Section IV.A.

157 *See generally* Harvey, *supra* note 22, at 34–39 (describing the effects of neoliberal ideologies as "devastating for the dignity and social well-being of vulnerable populations and territories").

158 Martin Lukacs, *Neoliberalism Has Conned Us into Fighting Climate Change as Individuals*, GUARDIAN (July 17, 2017, 10:56 AM), https://www.theguardian.com/environment/true-north/2017/jul/17/neoliberalism-has-conned-us-into-fighting-climate-change-as-individuals [https://perma.cc/WA3U-3PS8].

159 Ibram X. Kendi, *Stop Blaming Black People for Dying of the Coronavirus: New Data from 29 States Confirm the Extent of the Racial Disparities*, ATLANTIC (Apr. 14, 2020), https://www.theatlantic.com/ideas/archive/2020/04/race-and-blame/609946 [https://perma.cc/HS9N-GXWM].

poverty, or obesity—but not racism."[160] In reality, this high mortality rate was in part connected to the health issues that Black people have historically experienced due to the disparate exposure to fossil fuel pollution discussed herein.[161] This misplaced blame arguably led to zones of inaction from a public policy perspective given the politicized nature of how States chose to mitigate the harmful effects of the pandemic. One study found that "[t]hroughout the pandemic, people living in states won by Hillary Clinton have been far more likely to live under mask mandates for workers or individuals, stay-at-home-orders, or limitations on social gatherings."[162] Political leaders may have been influenced by their constituents in deciding how to respond to this public health crisis.

The Environmental Justice Movement has been birthed by leading advocates following the Civil Rights Movement to fight against the racist practices and policies undergirding climate change.[163] Dr. Robert Bullard—"an award-winning author of eighteen books that address sustainable

[160] *Id.* (emphasis omitted).

[161] Tanujit Dey & Francesca Dominici, *COVID-19, Air Pollution, and Racial Inequity: Connecting the Dots*, 34 CHEM. RSCH. TOXICOLOGY 669, 669 (2021) (noting that Black Americans breathe more pollutants and that breathing more pollutants increases risk of COVID-19 death); Xiao Wu, Rachel C. Nethery, M. Benjamin Sabath, Danielle Braun & Francesca Dominici, Exposure to Air Pollution and COVID-19 Mortality in the United States: A Nationwide Cross-Sectional Study 12 (Apr. 27, 2020) (unpublished manuscript), https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2.full.pdf [https://perma.cc/4RED-U3DE] (finding that long-term exposure to air pollution is correlated with increased COVID-19 fatality); Ranjani Chakraborty, *One Reason Why Coronavirus Is Hitting Black Americans the Hardest*, VOX (May 22, 2020, 12:10 PM), https://www.vox.com/videos/2020/5/22/21267365/coronavirus-black-americans-pollution-deaths [https://perma.cc/8DGU-V4CW].

[162] Jonathan Rothwell & Christos Makridis, *Politics Is Wrecking America's Pandemic Response*, BROOKINGS (Sept. 17, 2020), https://www.brookings.edu/blog/up-front/2020/09/17/politics-is-wrecking-americas-pandemic-response [https://perma.cc/G3C2-VK3A].

[163] *See, e.g.*, ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY, at xv (3d ed. 2000) (identifying "the major economic, social, and psychological impacts associated with the siting of noxious facilities (municipal landfills, hazardous-waste facilities, lead smelters, chemical plants) and their significance in mobilizing the African American community"); CATHERINE COLEMAN FLOWERS, WASTE: ONE WOMAN'S FIGHT AGAINST AMERICA'S DIRTY SECRET 11, 13 (2020) (revealing the ways in which Black communities and other vulnerable areas within the United States live within "third-world conditions" due to lacking safe and affordable waste disposal systems). *See generally* TAYLOR, *supra* note 51 (examining the ways in which discriminatory zoning and segregation policies have incentivized the disproportionate exposure to environmental hazardous facilities); *Beverly Wright, Ph.D.*, DEEP S. CTR. FOR ENV'T JUST., https://www.dscej.org/our-story/our-team/beverly-l-wright-phd [https://perma.cc/2ACH-W62X] (summarizing Dr. Beverly Wright's extensive contributions as an "environmental justice scholar, advocate, author, civic leader, professor of Sociology, and the Founder and Executive Director of the Deep South Center for Environmental Justice"); Ayana Elizabeth Johnson, *We Can't Solve the Climate Crisis Unless Black Lives Matter*, TIME (July 9, 2020, 6:28 AM), https://time.com/5864705/climate-change-black-lives-matter [https://perma.cc/4U4H-QTHM] ("If climate organizations fail to prioritize welcoming people of color, the movement will never grow large enough to succeed . . . [as] people of color are significantly more concerned about climate change than white people are (49% of whites, 57% of Blacks, 69% of Latinx).").

development, environmental racism, urban land use, industrial facility siting, community reinvestment, housing, transportation, climate justice, disasters, emergency response, and community resilience, smart growth, and regional equity"—is the purported father of this movement.[164] Countless other leaders, scholars, and organizations have followed his lead in advocating for "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[165] Impactful achievements have flowed from this movement as environmental justice groups have successfully prevented the construction of numerous polluting facilities within disadvantaged communities while forcing buyouts and even relocation for several others.[166] Advocates have likewise fought for initiatives that increase "green" spaces within a range of facilities while supporting renewable energy sources.[167]

Even against the backdrop of this monumental movement, existing legal frameworks have been woefully inadequate to hold private actors accountable for creating the harms that have disparately affected vulnerable communities. In terms of enforcement for clear legal violations, a 1992 study "found that, in general, penalties against violators of environmental laws in minority communities were lower than those imposed for violations in largely white areas."[168] A later study equally concluded that facilities located in underrepresented communities receive lower penalties and other punitive measures than facilities located in more affluent communities.[169] Professor Dorceta Taylor has more recently observed that "[r]esearch has shown that if you have a corporation who has violated environmental laws, the corporation is going to be fined. The fines tend to be lower in communities of color, especially Black communities and poor communities."[170]

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164 *Biography*, DR. ROBERT BULLARD, https://drrobertbullard.com/biography [https://perma.cc/T5M2-JWKH].

165 *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice [https://perma.cc/43DK-UYMP].

166 ROBERT D. BULLARD, GLENN S. JOHNSON, DENAE W. KING & ANGEL O. TORRES, TEX. S. UNIV., ENVIRONMENTAL JUSTICE TIMELINE AND MILESTONES: 1964–2014, at 7 (2014), https://www.researchgate.net/publication/260338988 [https://perma.cc/TT4K-368Z].

167 *Id.*

168 Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN'S J. LEGAL COMMENT. 625, 628–30 (1994) (noting, however, that the study's categorization of minority and white areas has been criticized).

169 Jeremy L. Mennis, *The Distribution and Enforcement of Air Polluting Facilities in New Jersey*, 57 PROF. GEOGRAPHER 411, 411–22 (2005).

170 Ivana Ramirez, *10 Examples of Environmental Racism and How It Works*, YES! SOLS. JOURNALISM (Apr. 22, 2021), https://www.yesmagazine.org/environment/2021/04/22/environmental-

Moreover, the underlying legal framework for directly addressing the environmental justice issues discussed herein is currently in flux.[171] While executive orders issued by the Biden Administration have prioritized environmental justice in several respects,[172] there is still no explicit federal mandate to integrate its underlying principles into rulemaking and enforcement efforts. Pursuant to President Biden's executive orders, the EPA has recently prioritized environmental justice as detailed in its lengthy report, *EPA Legal Tools to Advance Environmental Justice*, which was published in May 2022.[173] Even still, any such efforts remain subject to scrutiny by the federal courts. Some courts have embraced environmental justice principles by scrutinizing the extent to which agencies are incorporating disparate impacts into decision making processes.[174] Others have rejected proof of disparate harms to underrepresented groups and have instead reiterated the

racism-examples [https://perma.cc/MJ39-GZKW]; *see also* Shea Diaz, *Getting to the Root of Environmental Injustice*, N.Y.U. ENV'T L.J. SYNDICATE (Jan. 30, 2016), https://www.nyuelj.org/2016/01/getting-to-the-root-of-environmental-injustice/ [https://perma.cc/R86W-PHJB] (concluding that "because empirical research shows that discriminatory siting, unequal regulatory enforcement, and unequal political power are the major culprits for environmental injustice, policymakers should work to level the playing field and allow for meaningful stakeholder participation in siting decisions and increase enforcement efforts in minority and impoverished communities"). *But see* David M. Konisky & Christopher Reenock, *Compliance Bias and Environmental (In)Justice*, 75 J. POL. 506, 514, 517 (2013) (using data from 2001–2004 to conclude that "firms located in Hispanic communities and lower socioeconomic status communities are more likely to be noncompliant with the [Clean Air Act] [while] firms located in African American communities, however, are not more likely to be major violators—a finding that cuts against our expectations and claims made by many environmental justice advocates").

171 Anthony B. Cavender & Anne Idsal Austin, *Environmental Justice: The Evolution of a New Federal Regulatory Program*, FED. LAW., Sept./Oct. 2022, at 29, 32.

172 Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021); Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021); Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 60201, 136 Stat. 1818, 2078–79 (2022) (codified at 42 U.S.C. § 7438) (authorizing the EPA to distribute block grants to disadvantaged communities to mitigate climate-related risks).

173 *EPA Legal Tools to Advance Environmental Justice*, EPA, https://www.epa.gov/ogc/epa-legal-tools-advance-environmental-justice [https://perma.cc/LYU3-KTSU] (stating that the report provides an "updated and expanded compilation of legal authorities available to EPA for identifying and addressing the disproportionate impact of pollution on underserved and overburdened communities, including communities of color, Indigenous people, and low-income communities").

174 *See, e.g.*, Vecinos Para El Bienestar de la Comunidad Costera v. Fed. Energy Reg. Comm'n, 6 F.4th 1321, 1325 (D.C. Cir. 2021) (holding in part that "the Commission's analyses of the projects' impacts on climate change and environmental justice communities were deficient under NEPA and the APA, and that the Commission failed to justify its determinations of public interest and convenience under Sections 3 and 7 of the NGA").

need to prove intentional discrimination with respect to environmentally hazardous activities.[175]

C. Growth Phase: Exclusive Access to Economic Benefits

If disparate impacts related to fossil fuel pollution are not sufficiently addressed by lawmakers during the Introduction phase described above, then they will continue to proliferate within the Growth phase of a systemic disruption as further reflected in the Systemic Disruption Model. The global economy has already experienced this phase given the exponential growth of the fossil fuel industry since its inception. Market participants mirror the lawmakers in the prior phase by continuing to ignore the disparate impacts experienced by vulnerable communities despite the potential of such harms spreading to the masses. Moreover, these market participants fail to fully appreciate that the harms they inflict on these vulnerable communities create risks that may spill over into the broader economy during the Maturity phase of climate change. The continued dismissal of these harms is perhaps comparable to a blind spot where participants magnify the economic benefits flowing from such negative externalities while underestimating resulting costs. These deeply problematic blind spots have likely resulted from the false assumption that affluent areas will continue to experience seemingly utopian realities devoid of the harms caused by climate change contributors. The consequences have already crippled Black communities and other vulnerable groups.

The ways in which climate change disproportionately harms underrepresented communities further muddles the risk-reward calculation within this Growth phase. For instance, Black communities that were historically redlined by racist policies and practices are currently experiencing higher temperatures than non-redlined areas. A study published in 2020 specifically revealed that "94% of studied areas display consistent city-scale patterns of elevated land surface temperatures in formerly redlined areas relative to their non-redlined neighbors by as much as 7°C."[176] It further found that on a national level, land surface temperatures were 2.6°C higher on average in redlined areas than in non-redlined areas.[177] These higher temperatures have in part resulted from the government targeting such areas

[175] *See, e.g.*, Rollerson v. Brazos River Harbor Navigation Dist., 6 F.4th 633, 641 (5th Cir. 2021) (holding in part that "[b]ecause Rollerson made no allegations that tend to exclude these benign purposes, he failed to sufficiently allege that the Port is acting with discriminatory intent").

[176] Jeremy S. Hoffman, Vivek Shandas & Nicholas Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, 8 CLIMATE 12, 12 (2020).

[177] *Id.* at 17.

for infrastructure projects including roads, highways, and high-rise buildings. The concrete and asphalt used to construct these projects serve to trap additional heat, thereby raising the collective temperature of surrounding communities.[178] In a similar vein, these areas are less likely to have allocated green space from a city planning perspective, tree canopies, or bodies of water, each of which could provide a counteracting cooling effect.[179] Climate change, therefore, has a disparate effect on vulnerable areas.

Available evidence suggests that the disproportionately high temperatures in Black communities will lead to higher rates of economic damages, illness, and death. Going forward, an additional study has predicted that in 2050, areas where the population is over 20% Black will experience an increase in flood risk related to climate change at double the rate experienced by areas where the population is less than 1% Black.[180] Since affluent areas are not experiencing the harms flowing from climate change such as higher temperatures and flooding risks to the same degree within this "growth" period, market participants (that are mostly comprised of such affluent groups) are perhaps incentivized to accelerate the growth of underlying markets despite the negative externalities that they consistently produce.

Moreover, Black people and other underrepresented groups are not participating in these markets as consumers, owners, or managers to the same extent as affluent groups. Scholars have frequently focused on participation gaps within the realm of consumption activities that generate carbon emissions. Some have estimated that the wealthiest 10% of the global population produce close to half of all carbon emissions worldwide.[181] In the United States, wealthier Americans are responsible for about 25% more carbon emissions than lower-income Americans, which can be explained

[178] *Id.* at 22.

[179] *Id.* at 15; Alejandra Borunda, *How 'Nature Deprived' Neighborhoods Impact the Health of People of Color*, NAT'L GEOGRAPHIC (July 29, 2020), https://www.nationalgeographic.com/science/article/how-nature-deprived-neighborhoods-impact-health-people-of-color?loggedin=true&rnd=1687346770258 [https://perma.cc/3JFB-4KT5].

[180] Oliver E.J. Wing, William Lehman, Paul D. Bates, Christopher C. Sampson, Niall Quinn, Andrew M. Smith, Jeffrey C. Neal, Jeremy R. Porter & Carolyn Kousky, *Inequitable Patterns of US Flood Risk in the Anthropocene*, 12 NATURE CLIMATE CHANGE 156, 158–59 (2022).

[181] Lucas Chancel, *The Richest 10% Produce About Half of Greenhouse Gas Emissions. They Should Pay to Fix the Climate*, GUARDIAN (Dec. 7, 2021, 6:30 AM), https://www.theguardian.com/commentisfree/2021/dec/07/we-cant-address-the-climate-crisis-unless-we-also-take-on-global-inequality [https://perma.cc/P8XD-QYVN]; LUCAS CHANCEL, THOMAS PIKETTY, EMMANUEL SAEZ & GABRIEL ZUCMAN, WORLD INEQ. LAB, WORLD INEQUALITY REPORT 23 (2022), https://wir2022.wid.world [https://perma.cc/B4MH-F2EE].

primarily by their larger homes.[182] Another source found that "[i]n the United States, the richest 10 percent pollute 16 times as much as the poorest 10 percent."[183] This exorbitant gap partly arises from the exuberant lifestyle of the ultra wealthy. For example, "[t]he single-most polluting asset, a superyacht, saw a 77% surge in sales last year. An 11-minute ride to space, such as the one taken by Amazon founder Jeff Bezos, is responsible for more carbon per passenger than the lifetime emissions of any one of the world's poorest billion people."[184] For these reasons, preventative measures such as imposing mandatory carbon taxes could unfairly burden the least likely offenders by regressively raising prices for basic living expenses.[185]

While data related to inequities in emission producing activities is essential in considering appropriate preventive measures, it is equally important to identify primary economic beneficiaries in scrutinizing how growth is incentivized during this phase of the systemic disruption. As to be expected, Black people and other underrepresented groups are not profiting from these markets to the same degree due to limited representation as owners and managers of the large corporations that control these industries.[186] This is consistent with the historical development of these industries, which is rooted in imperialism and colonialism. Dominant classes continued to subjugate people of color in the development of these industries by destructively extracting coal and oil from indigenous lands, while relegating lower classes to the least advantageous jobs in terms of coal mining and assembly lines.[187] As further concluded by Professor Myles Lennon, "the transition to fossil fuels institutionalized racial hierarchies in ways that intersected with regimes of capitalist exploitation."[188]

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182 Benjamin Goldstein, Dimitrios Gounaridis & Joshua P. Newell, *The Carbon Footprint of Household Energy Use in the United States*, 117 PNAS 19,122, 19,124 (2020).

183 Somini Sengupta, *The American Exception*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/28/climate/climate-change-carbon-footprint-america.html [https://perma.cc/Z5DH-WDXR].

184 Eric Roston, Leslie Kaufman & Hayley Warren, *How the World's Richest People Are Driving Global Warming*, BLOOMBERG (Mar. 24, 2022), https://www.bloomberg.com/graphics/2022-wealth-carbon-emissions-inequality-powers-world-climate [https://perma.cc/VK8B-Q6UT].

185 Roumeen Islam, *What Are the Advantages and Challenges of a Carbon Tax?*, WORLD ECON. F. (Feb. 4, 2022), https://www.weforum.org/agenda/2022/02/what-a-carbon-tax-can-do-and-why-it-cannot-do-it-all [https://perma.cc/D2X9-7MLV].

186 *See* DARIO KENNER, CARBON INEQUALITY: THE ROLE OF THE RICHEST IN CLIMATE CHANGE 1 (2019) ("Wealthy shareholders who are also decision-makers at large multi-national oil, gas and coal companies form part of the *polluter elite* [and] . . . [b]ased on the size of their investment emissions . . . these decision-makers, such as the executive team and directors, hold greater historical responsibility for climate change.").

187 Myles Lennon, *Decolonizing Energy: Black Lives Matter and Technoscientific Expertise Amid Solar Transitions*, 30 ENERGY RSCH. & SOC. SCI. 18, 25 (2017).

188 *Id.*

In modern times, ownership and control of these industries continues to be rooted in shareholder primacy models as opposed to community-based paradigms, where surrounding areas that have been historically denigrated under these preexisting frameworks would have more input.[189] As further elucidated by leading advocate Michelle Mascarenhas-Swan, "[s]ince the purpose of corporations is to maximize profit and most corporate decision makers do not live in the places they are impacting, corporate decisions rarely take into account the consequences of their actions on ecosystems, including human communities."[190] The communities that suffered the greatest harms from these industries have therefore been stifled from advocating for better practices via share ownership or control. Companies that are primarily facilitating and profiting from these climate change contributors have further engaged in lobbying campaigns and other efforts to prevent meaningful action in reducing climate change.[191] Residing within areas that suffer the least levels of harms resulting from environmental calamities likely encourages company actors to spur the rapid growth of underlying industries. This invariably leads to the Maturity phase of the systemic disruption described below.

D. Maturity and Decline Phases: Spillover Effect and Energy Justice Initiatives

We are likely entering the Maturity phase of climate change as a systemic disruption, although it is difficult to know with certainty given the multitude of industries that could be affected by climate change. It is equally challenging to delineate neatly defined time frames in assessing the scale of damage resulting from fossil fuels and other climate change contributors. As highlighted by Professor Andreas Malm, even if we immediately reduce emissions to zero,

> the sea might continue to rise for many hundreds of years, the waters slowly expanding as the heat makes its way deeper and deeper into the oceans. A rising and warming sea could then unhinge ice sheets, thaw permafrost, destabilise methane hydrates or trigger other feedback mechanisms centuries after a complete cessation of emissions.[192]

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[189] Fergus Green & Noel Healy, *How Inequality Fuels Climate Change: The Climate Case for a Green New Deal*, 5 ONE EARTH 635, 638 (2022).

[190] Michelle Mascarenhas-Swan, *The Case for a Just Transition*, *in* ENERGY DEMOCRACY: ADVANCING EQUITY IN CLEAN ENERGY SOLUTIONS 44 (Denise Fairchild & Al Weinrub eds., 2017).

[191] *ExxonMobil's Funding of Climate Science Denial*, DESMOG, https://www.desmog.com/exxonmobil-funding-climate-science-denial [https://perma.cc/ZFV9-NAV6].

[192] ANDREAS MALM, FOSSIL CAPITAL: THE RISE OF STEAM POWER AND THE ROOTS OF GLOBAL WARMING 8 (2016).

Despite these temporal difficulties in assessing climate change, the negative externalities that were previously restricted to vulnerable communities are currently spilling over into the masses. Professor Bell's interest-convergence theory is beginning to firmly take root. Climate change is now threatening the collective air and water quality for all, while endangering the existence of entire industries. As previously discussed, sectors across the globe such as fishing, travel, and agriculture have already experienced grave losses due to the calamities brought about by climate change.

The extent to which racism will elongate the Maturity phase by enabling emergency relief that is tilted in favor of elite classes is unfortunately extremely high given how events of a smaller scale have historically unfolded within areas throughout the United States. In an affluent area in Los Angeles, for example, lawmakers responded swiftly and forcefully to a methane gas leak which occurred from October 2015 to February 2016.[193] The city of Los Angeles responded by declaring a state of emergency while evacuating over 4,000 homes within the surrounding area.[194] Luckily for these residents, this evacuation order was accompanied by a mandate for the offending gas company to supply temporary housing for each of these units.[195] Lawmakers responded quite differently to a comparable crisis that occurred in a predominantly Black and Latinx community located in south Los Angeles.[196] Between 2010 and 2013 for instance, 251 complaints were filed against a drilling site that was causing its surrounding residents to experience a range of debilitating ailments.[197] However, it was not until 2013, "after EPA officials became sick after investigating the site," that this site was finally closed.[198]

Even still, regulators as well as private sector participants have gradually started to implement longer term reforms in an attempt to reverse the harms resulting from climate change. Successful endeavors on this front would hopefully bring us within the Decline phase of the systemic disruption, although it will undoubtedly take centuries for this to meaningfully occur given the long-term effects of climate change discussed in the preceding paragraphs. Against the backdrop of such dire

193 Aneesh Patnaik, Jiahn Son, Alice Feng & Crystal Ade, *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change [https://perma.cc/JS9E-TMJ8].

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*; *see also* Olga Grigoryants, *Los Angeles Moves Two Steps Closer to Phasing Out Oil Drilling*, L.A. DAILY NEWS (Sept. 27, 2022, 8:53 AM), https://www.dailynews.com/2022/09/27/los-angeles-moves-one-step-closer-to-phasing-out-oil-drilling [https://perma.cc/DNC6-NZ9S].

198 Patnaik et al., *supra* note 193.

circumstances, companies such as Alphabet (the parent company of Google) have pledged to rely exclusively on carbon-free energy by 2030.[199] Government bodies have likewise launched various initiatives to increase investments into renewable energy over the last decades, which encompass fossil fuel alternatives such as solar, wind, and hydroelectric power.[200]

However, tailored relief for the vulnerable communities that were disproportionately targeted by the fossil fuel industry is all too often missing from these reforms. Professor Shalanda Baker, who is also serving as the Director of the Office of Economic Impact and Diversity at the U.S. Department of Energy, has documented several failures in this regard through her extensive scholarship within the realm of energy justice.[201] The California Global Solutions Act of 2006 included lofty goals to reduce greenhouse gas emissions by 30% through a "cap-and-trade" approach which would allow emitters to purchase emission credits if they exceeded predetermined levels provided under this law.[202] Yet, environmental justice advocates argued that this law would cause additional harms to vulnerable communities, since surrounding polluting facilities might find it more economically advantageous to simply purchase additional "emission credits" as opposed to reducing their overall emissions.[203] Studies found that these fears did in fact come to fruition during the periods following the passage of this law.[204]

In critiquing Hawaii's recent legislative commitment for the state to rely on 100% clean energy sources, Professor Baker similarly found that

> [w]ithout a clear equity lodestar embedded in the legislation for 100 percent clean energy, the state's most vulnerable populations will consistently lose. Low-income communities and communities of color will lose in terms of scale. Developers and utilities will favor large-scale energy projects that offer no opportunities for meaningful economic participation. Communities will also lose with respect to siting. Developers and utilities will continue to see vulnerable communities as sacrifice zones where large footprint renewable energy projects are located without the need to distribute economic benefits to

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199 *We Must Help Build a More Sustainable Future for Everyone*, GOOGLE, https://sustainability.google/commitments [https://perma.cc/F578-7ZAF].

200 *See, e.g.*, SHALANDA H. BAKER, REVOLUTIONARY POWER: AN ACTIVIST'S GUIDE TO THE ENERGY TRANSITION 74–75 (2021).

201 *See generally supra* note 31 (defining energy justice and providing list of prevalent scholars).

202 BAKER, *supra* note 200.

203 *Id.* at 76.

204 *Id.*

> the local community. Finally, communities will lose out on the tremendous opportunity to generate real wealth as a result of clean energy development.[205]

By and large, policies of this nature embody carbon fundamentalism, which refers to the "narrow focus on 'carbon reduction' [that] only serves to exacerbate the root causes of inequity."[206] Such policies cause vulnerabilities to intensify within underrepresented communities, which increases their appeal as ideal dumping grounds for negative externalities produced by the private sector. As a consequence, failing to adequately address the complaints of environmental justice advocates will make it impossible for regulators to fully alleviate the harms associated with climate change.

III. RECOGNIZING RACISM AS A THREAT TO FINANCIAL STABILITY

This Part provides initial thoughts on why an FSOC recognition of racism as a threat to financial stability could incentivize preliminary and long-term solutions for the problems discussed herein. FSOC is "charged by statute with identifying risks to the financial stability of the United States; promoting market discipline; and responding to emerging risks to the stability of the U.S. financial system."[207] Such member agencies within this super regulator organization include the SEC, the CFTC, the Federal Reserve, and the Federal Housing Finance Agency, among several others. Prior to the Great Recession, no single regulator possessed authority or membership of this magnitude.[208]

The regulatory framework here in the United States is notoriously divided based on individual institutions and markets which created blind spots in terms of properly identifying risks that could simultaneously arise from multiple categories of firms and markets.[209] FSOC can implement its authority in identifying emerging threats by identifying nonbank financial institutions (such as insurance companies) as being systemically important,

205 *Id.* at 82.

206 Gopal Dayaneni, *Carbon Fundamentalism vs. Climate Justice*, 16 RACE, POVERTY & ENV'T 7, 9 (2009). In contrast, the Justice40 Initiative seeks to "deliver at least 40 percent of the overall benefits from Federal investments in climate and clean energy to disadvantaged communities." Shalanda Young, Brenda Mallory & Gina McCarthy, *The Path to Achieving Justice40*, WHITE HOUSE (July 20, 2021), https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40 [https://perma.cc/Z3YD-FTXT].

207 U.S. DEP'T OF THE TREASURY, *supra* note 34.

208 *About FSOC*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/about-fsoc [https://perma.cc/M34R-8SSH].

209 *Id.*

such that their failure would be harmful to U.S. financial stability.[210] Doing so would subject these firms to a range of stringent regulations in an effort to mitigate any such systemic threats emanating from the firm's activities.[211] FSOC can likewise draw from the expertise and resources of the Office of Financial Research in gathering requisite data and analyses in effectuating its mission.[212] FSOC is directly accountable to Congress, and it seeks to provide transparency in its decision-making processes by publishing periodic reports on its underlying activities.[213]

This Article utilizes FSOC's recent *Report on Climate Change* as a prototype for developing a similar report on how racism threatens financial stability. This Part begins by examining how such a designation by FSOC would assist in identifying the limitations of existing protections at the federal and state level, as well as solutions developed by the private sector. This Part continues by explaining how FSOC's recognition of racism as a threat to financial stability could likewise facilitate the necessary process of data collection and coordination across the vast spectrum of regulatory agencies. It could therefore equip investors, stakeholders, NGOs, and other relevant groups with crucial advocacy tools while incentivizing regulatory agencies to deploy applicable rulemaking authority. Overall, FSOC's recognition of racism as a threat to financial stability could affect important change on several fronts, and ultimately mitigate the harm and likelihood of future crises.

A. Concede Limitations of Preexisting Protections

FSOC recognizing racism as a threat to financial stability would first implicitly concede the limitations of preexisting protections under federal and state law. Scrutinizing these limitations could lead to more inclusive rulemaking processes by FSOC's member agencies going forward.

1. Rule of Law Conceptions

FSOC explicitly described shortcomings of preexisting protections under federal and state law in terms of data collection and expertise within its historic *Report on Climate Change*.[214] A comparable report on racism

[210] Andy Winkler, *Primer: FSOC's SIFI Designation Process for Nonbank Financial Companies*, AM. ACTION F. (Sept. 3, 2014), https://www.americanactionforum.org/research/primer-fsocs-sifi-designation-process-for-nonbank-financial-companies [https://perma.cc/G4VA-25W5].

[211] *Id.*

[212] *Council Work*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/financial-stability-oversight-council/council-work [https://perma.cc/DT6N-DMMC].

[213] U.S. DEP'T OF THE TREASURY, *supra* note 208.

[214] FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 12, at 10.

could presumably do the same. Even if it does not, the mere act of making an official designation of racism as a threat to financial stability would immediately call into question the abilities of existing rules and regulations to protect against these harms. As a threshold matter, these defects likely stem from the severe underrepresentation of Black people and other marginalized groups from the historical and modern development of the rule of law undergirding the financial sector. This has probably played a role in the limited abilities of preexisting laws to protect financial markets against racism as a source of systemic risk.

Professor Veronica Root Martinez, for instance, authored a landmark essay which identified how the development of corporate purpose theory was likely "influenced by the discriminatory practices of the time."[215] Corporate purpose theory explores the extent to which the primary purpose of a corporation is to maximize shareholder wealth or to serve outside stakeholder interests. The development of various tenets of this theory would have perhaps been fundamentally different if it more strongly incorporated the interests of underrepresented groups over the course of its development as stakeholders, investors, and owners. Professor Christopher Brummer has assessed this issue from a different angle in providing novel empirical research on the severe lack of representation of Black people serving as financial regulators.[216] He found that only 3% of all financial regulators have been Black, which shuts Black Americans out from representation in financial regulatory bodies.[217] This leads to profoundly disturbing implications, considering "that African Americans have had little, and usually no direct say in the very shape and operation of finance, the lifeblood of capitalism and the U.S. economy."[218]

Another possible angle in assessing the contours of this problem arises from theoretical constructs developed by leading rule of law scholar Professor Paul Gowder.[219] He has examined the extensive ways in which Black liberation movements have played a vital and perhaps

[215] Veronica Root Martinez, *A More Equitable Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 56 (E. Pollman & R. Thompson eds., 2021); *see also* Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 573 (2022) (providing an historical account of how the predominance of women as shareholders during the first half of the twentieth century likely influenced the extent to which shareholders were categorized as "passive" in preeminent corporate governance theories).

[216] Chris Brummer, *What Do the Data Reveal About (the Absence of Black) Financial Regulators?* 4 (Brookings Econ. Stud., Working Paper, 2020), https://www.brookings.edu/wp-content/uploads/2020/09/ES-09.02.20-Brummer.pdf [https://perma.cc/TW5K-ERHY].

[217] *Id.* at 11.

[218] *Id.* at 28.

[219] PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION (2021).

underrecognized role in developing constitutional protections that are essential in preserving the tenets of democracy.[220] Such movements have arguably not had the same force in advocating for equity and access within the regulatory underpinnings of the financial sector due to the acute exclusion of underrepresented groups both as participants and as regulators in all aspects of the financial markets. Racial capitalism scholars would argue that this exclusion is perhaps intentional from a public policy perspective, given that racism is arguably essential in preserving the primary tenets of capitalism as it exists today.[221]

2. SEC Mission and Rules

Irrespective of how one views the underlying intent of such pervasive exclusion, this lack of representation has led to possible blind spots on the extent to which the rules and regulations undergirding the financial sector are tailored to protect against racism's systemic harms. The SEC's mission, for example, "is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[222] The SEC further "strives to promote a market environment that is worthy of the public's trust."[223] Yet, during the time in which the federal securities laws were adopted in the 1930s, "Black people had widely different abilities to access credit, capital, and the monetary resources necessary for becoming shareholders."[224] This historical exclusion has likely detracted from the SEC's mission to protect all investors, which now includes a myriad of Black market participants who face a greater likelihood of enduring direct and systemic racism emanating from the private sector, creating the need for tailored regulatory relief.

In assessing the second component of the SEC's mission to maintain fair, orderly, and efficient markets, it is currently unclear as to the specific ways in which this extends to underrepresented groups. The SEC has recently released its first strategic plan to incorporate diversity, equity, inclusion, and access considerations within its mission (among other goals). But the specific ways in which the SEC will utilize its authority to mitigate harms such as the racial wealth gap, or the systemic threats arising from racism, remains uncertain.[225] In the SEC's ongoing quest to facilitate capital

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220 *Id.*

221 CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 9 (2000).

222 *About the SEC*, SEC, https://www.sec.gov/about.shtml [https://perma.cc/5MEC-6VLJ].

223 *Id.*

224 Martinez, *supra* note 215, at 12–13.

225 SEC, DIVERSITY, EQUITY, INCLUSION, AND ACCESSIBILITY STRATEGIC PLAN FISCAL YEARS 2023–2026 (2023), https://www.sec.gov/files/sec-deia-strategic-plan-2023-2026.pdf [https://perma.cc/

formation and to promote competition, the ways in which its rules compromise access to capital while reducing competition for Black communities and other underrepresented groups is highly debatable.

The SEC may have already concluded in certain respects that it has limited power to promulgate rules related to racial justice disclosures that focus on disparate racial harms, although these initiatives could fall within their overall mission to protect markets against the systemic risk that such harms can generate. An FSOC designation of racism as a threat to financial stability would perhaps incentivize the SEC to delve into these seemingly missing aspects of its mission.

As we move into an era where theoretical notions of corporate purpose are shifting to accommodate a larger range of stakeholder interests, and where ESG metrics have taken center stage in assessing the financial health and impact of private enterprises, regulators have not paid sufficient attention to racial justice issues. The SEC should prioritize the "S" component of ESG metrics in the same ways that it has with respect to climate change. More specifically, in addition to protecting against systemic risks related to climate change and excessive leverage, a standardized disclosure framework could similarly assist with preventing the systemic risks that arise from racism.

The human capital disclosure requirements adopted by the SEC in 2020 have admittedly led some registrants to disclose diversity and inclusion initiatives related to its hiring practices. As background, the SEC adopted amendments to its Regulation S-K disclosure requirements which mandate that registrants provide "a description of [their] human capital resources to the extent such disclosures would be material to an understanding of the registrant's business."[226] These principle-based disclosure rules have nonetheless been subject to significant criticisms given the complete lack of guidance in terms of how to define and measure human capital.[227] Some registrants have provided pages of disclosures including information related

527B-R239]; Jon McGowan, *SEC Could Be Moving Towards Regulation of DEI in the Financial Industry*, FORBES (Oct. 13, 2023), https://www.forbes.com/sites/jonmcgowan/2023/10/13/sec-could-be-moving-towards-regulation-of-dei-in-the-financial-industry/?sh=40dc7bd45b5a [https://perma.cc/N9A7-FKKV] (acknowledging that the precise method in which "the SEC is intending on utilizing its regulatory authority to push the financial markets towards the implementation of DEI policies" remains unclear).

[226] Press Release, SEC, SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 26, 2020), https://www.sec.gov/news/press-release/2020-192 [https://perma.cc/3M4X-BVJZ].

[227] *See* Jessica Mach, *Will New SEC Disclosure Rules on 'Human Capital' Further Befuddle Companies?*, CORP. COUNS. (Mar. 15, 2022), https://www.law.com/corpcounsel/2022/03/15/will-new-sec-disclosure-rules-on-human-capital-further-befuddle-companies/?slreturn=20220325171133 [https://perma.cc/A4V8-WNGD].

to employee diversity as well as retention and turnover rates.[228] Others have simply disclosed a paragraph providing a baseline description of their existing employee base.[229]

In considering how such disclosures would assist in mitigating the specific harms discussed herein, prioritizing transparency related to diversity could be a tool for mitigating the harms that generate systemic risk ex ante.[230] However, diversity related efforts that are implemented at the state or federal level represent a small sliver of the much larger problems arising from the disparate harms that private enterprises inflict upon communities of color, and the ways in which these harms affect the broader populace. These activities would encompass a larger range of stakeholders that are not necessarily directly connected to the company as shareholders, directors, managers, employees, creditors, or suppliers.

This Article does not mean to suggest that diversity related efforts are unnecessary or unimportant, but it does argue that regulators must further increase their efforts to directly address the multilayered harms flowing from the negative externalities arising from racism. An FSOC designation of racism as a threat to financial stability could perhaps spur regulators such as the SEC to address these issues head-on through its primary regulatory power of mandating material disclosures for its registrants.

3. *Privately Ordered Responses*

FSOC identifying racism as a threat to financial stability could further establish that solutions developed by the private sector have been insufficient in this regard. Within its *Report on Climate Change*, for example, FSOC provided a detailed account of the limitations of relying on privately ordered solutions.[231] With respect to issues pertaining to racial justice, companies have increasingly responded to investor demands to provide more transparency on how their activities impact such issues through conducting racial equity audits and other voluntary mechanisms. Racial equity audits "generally seek an independent, objective and holistic analysis of a company's policies, practices, products, services and efforts to combat

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[228] *Id.*

[229] *Id.*

[230] *See, e.g.*, Modernization of Regulation S-K Items 101, 103, and 105, 17 C.F.R. §§ 229, 239, 240 (2020) (highlighting the value of increased efficiency and readability in human capital disclosures). By and large, other state and federal efforts to increase diversity likewise have a limited impact on preventing the disparate harms discussed herein.

[231] FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 12, at 80 ("Although the growth in voluntary frameworks and standards has been an important development in the climate-related disclosure space, the lack of common standards is a significant problem. There remains a great deal of variance in the quality, coverage, and comparability of the disclosed information, due in large part to the voluntary nature of the disclosure and lack of mechanisms to assure consistency, comparability, and decision usefulness.").

systemic racism in order to end discrimination within or exhibited by the company with respect to its customers, suppliers or other stakeholders."[232] Shareholder activism has been used as an avenue to urge companies to conduct such audits while making their reports available to investors, particularly in the wake of worldwide protests that occurred in response to George Floyd's brutal murder by police officers.[233] Large institutional investors can be especially impactful in advocating for change of this magnitude in urging companies to address systemic racism through a multitude of initiatives.

Yet, several notable companies have pushed back on shareholder proposals that have requested that their underlying companies conduct such audits, despite having made prior commitments to become antiracist institutions when it was perhaps trendy to do so.[234] Racial equity audits and other comparable initiatives are still completely voluntary from a regulatory perspective, which leaves significant gaps in terms of assessing how the private sector is collectively contributing to the harms discussed herein.[235] Potential conflicts of interest between companies and purported independent auditors could compromise the accuracy of their final assessments. The lack of standardization for companies that do, in fact, make such audits publicly available further compromises the extent to which investors can make optimal decisions about companies that are combating systemic racism.

This limited transparency constrains the extent to which outside stakeholders can hold companies accountable through advocacy efforts. For these reasons, many affected parties view racial equity audits as marketing ploys designed to recruit socially conscious investors, as opposed to impactful solutions to systemic racism that are backed with meaningful levels of company resources and commitments.[236] An FSOC designation of racism as a threat to financial stability could incentivize financial regulators

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232 Ron S. Berenblat & Elizabeth R. Gonzalez-Sussman, *Racial Equity Audits: A New ESG Initiative*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 30, 2021), https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative [https://perma.cc/74UN-6SPF].

233 John M. Bryson II, *Shareholder Proposals Gaining Traction with Racial Equity Audits*, BLOOMBERG L. (Jan. 2023), https://www.bloomberglaw.com/external/document/X2N1MD3C000000/esg-professional-perspective-shareholder-proposals-gaining-tract [https://perma.cc/3RG9-5ECK].

234 *Id.*

235 *See* Johnjerica Hodge & Ally Jordan, *How Proactive Racial Equity Audits Can Increase Company Profits*, BLOOMBERG L. (Nov. 30, 2022, 7:30 AM), https://news.bloomberglaw.com/us-law-week/how-proactive-racial-equity-audits-can-increase-company-profits [https://perma.cc/W7PW-QLJ9].

236 Kiernan Dunlop, *Worcester Racial Equity Audit Leaves Some Wondering if Real Change Will Happen or if "It's More of a PR Strategy,"* MASSLIVE (Sept. 19, 2022), https://www.masslive.com/worcester/2022/09/worcester-racial-equity-audit-leaves-some-wondering-if-real-change-will-happen-or-if-its-more-of-a-pr-strategy.html [https://perma.cc/SX9C-YWFQ].

to close these remaining loopholes left by private sector solutions through concrete regulatory action.

B. *Mechanisms for Data Collection, Coordination, and Building Expertise*

FSOC's *Report on Climate Change* acknowledged the limited expertise that its member regulators possessed in enhancing protections against the systemic risk arising from climate change. The *Report on Climate Change* specifically acknowledges that "FSOC and its members are at different stages in enhancing their ability to address climate-related financial risks, and all members plan to invest further to build capacity and expertise."[237] The report also encourages regulators to build expertise through coordination efforts with the private sector, developing of committees to improve coordination across agencies, utilizing other external experts, and relying on international communities.

In a similar vein, FSOC's recognition of racism as a threat to financial stability could presumably call on its member regulators to build expertise in terms of understanding the multitude of ways that private sector activities could generate negative externalities that are disproportionately borne by vulnerable communities. The various ways in which these negative externalities are further commodified by private actors, who are presumably underestimating how such harms will have a spillover effect on other communities, warrants further analysis and study. This would require working with experts from a range of racial justice fields that fall outside the scope of commonly understood conceptions of finance, economics, and banking disciplines. Building knowledge within these multifaceted disciplines would also entail consulting with individuals who have lived experiences in navigating any such racially disparate harms. While some member agencies may already be involved in building expertise within the broader racial justice landscape, a formal recognition and mandate from FSOC could rapidly increase these commitments.

FSOC's *Report on Climate Change* further recognized the need for data collection by specifically recognizing that "[w]hile significant data related to climate change already exists, there remain gaps in connecting the science of climate change to financial risk assessments and real-world economic impacts."[238] It further concedes that "the ability of regulators and supervisors to build this expertise will be important to quantifying and assessing climate-related financial risk."[239] In terms of a comparable report that would

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[237] FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 12, at 24.

[238] *Id.* at 23.

[239] *Id.* at 32.

recognize racism as a source of systemic risk, it would presumably include additional calls for data collection. More empirical data is clearly needed in terms of further understanding and perhaps quantifying, when possible, the many ways in which racism can be interconnected with the four phases of a systemic disruption.

Determining how to disclose racially disparate harms emanating from the private sector for purposes of enhancing investor protection and public accountability would require additional streams of data from the kinds of experts briefly discussed above. Privately developed solutions such as racial equity audits can certainly provide a useful starting point in structuring these frameworks. Regulators should immediately examine the lack of participation of Black people and other underrepresented groups in the development of the rule of law as it relates to the financial sector. The potential impact of such lack of participation on underrepresented communities could be more dire than originally anticipated.

FSOC also has a statutory duty to coordinate its initiatives with all of its member agencies, which is essential in efficiently integrating its calls for action across all corners of the financial system. More specifically, "[t]he Council is responsible for facilitating information sharing and coordination among the Council member agencies and other federal and state agencies regarding domestic financial services policy development, rulemaking, examinations, reporting requirements, and enforcement actions."[240] FSOC's list of member agencies is extensive. It includes ten voting members from regulators such as the Secretary of the Treasury, the Federal Reserve System, the Comptroller of the Currency, the SEC, the Federal Deposit Insurance Corporation, the CFTC, the Director of the Federal Housing Finance Agency, and several others.[241] It also includes five nonvoting members, such as the Federal Insurance Office, and representatives from state banking, insurance, and securities commissioners.[242] FSOC's *Report on Climate Change* repeatedly summarized the ways in which climate change mitigation efforts would be coordinated across this wide network of agencies.[243] A recognition by FSOC that racism compromises financial stability could likewise be accompanied by comparable duties for coordination. This is crucial in ensuring that there are no gaps in terms of how the systemic harms arising from racism are mitigated across every sector of the economy.

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240 U.S. DEP'T OF THE TREASURY, *supra* note 212.

241 *Council Members*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/financial-stability-oversight-council/about-fsoc/council-members [https://perma.cc/YX52-V93H].

242 *Id.*

243 FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 12, at 6.

C. *Incentivize Regulatory Action*

FSOC's recognition of racism as a threat to financial stability could equip investors, stakeholders, and NGOs with a range of advocacy tools in eradicating the harms discussed herein while simultaneously incentivizing regulators to engage in meaningful and tailored rulemaking endeavors. Prominent institutional investors such as asset managers, for example, could utilize an FSOC designation as a tool in pressuring regulators to develop tailored regulatory responses to the harms of systemic racism. In contrast, regulators may implement reforms in direct response to such an FSOC designation without the need for additional pressure from applicable constituents. While predicting the precise ways in which market participants and regulators will respond to an FSOC designation is an impossible task, it still provides an invaluable roadmap for mitigating systemic racism within every corner of the financial markets on a national scale. A designation of this magnitude is also consistent with FSOC's broader mission of identifying and assessing emerging threats to U.S. financial stability. This Article therefore seeks to hold FSOC accountable to this vital mission as it relates to the persistent threat that racism poses to the national economy.

FSOC's *Report on Climate Change* likewise includes various recommendations for its member agencies. For instance, it further recognizes that "[i]nvestors, financial markets, and financial entities can manage risk more effectively if information on such risks is provided in a consistent, comparable, and decision-useful manner."[244] While the specific mechanics of such a disclosure system are outside the scope of this Article, the SEC could take the lead in developing a mandatory transparency framework via federal securities laws in weeding out racially disproportionate impacts. A series of federal laws admittedly mandate various categories of race related disclosures for public companies. The Equal Employment Opportunity Commission requires that companies submit disclosures related to demographic workforce data, including "data by race/ethnicity, sex and job categories."[245] The Environmental Protection Agency requires disclosures of civil violations of environmental law and other issues pertaining to environmental impact.[246]

However, these agencies do not require the disclosure of racially disparate impacts with respect to its consumers, investors, managers, employees, and other possible stakeholders. In addition, interested parties

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[244] *Id.* at 24.

[245] *EEO-1 Data Collection*, EEOC, https://www.eeoc.gov/employers/eeo-1-data-collection [https://perma.cc/8EEY-TBVU].

[246] *EPA's eDisclosure*, EPA, https://www.epa.gov/compliance/epas-edisclosure [https://perma.cc/E6P4-TCMW].

might struggle in accessing such piecemeal information as they may have to submit multiple FOIA requests in order to do so. As described by Professor Ann Lipton in her seminal work, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, the federal securities laws are the only legislation that provide a holistic view of the entire company. She further explains:

> [B]ecause the securities laws are the only source for holistic disclosures about corporate operations, securities disclosures are consumed by other corporate stakeholders. Examples abound: Regulators may rely on securities disclosures to identify red flags of lawbreaking, to gain a general understanding of business activity in their sphere of influence, and to make critical policy decisions. Employees rely on reported profit margins to strike for higher wages. Competitors use securities filings to benchmark their own financial decisions to others in their industry. Lenders use securities filings to judge the creditworthiness of potential borrowers.[247]

As implied in her above statement, disclosures that are mandated under federal securities laws are generally available for public consumption by outside stakeholders irrespective of whether such disclosure obligations are triggered under an investor protection mandate.

Transparency is also an underexplored tool in simultaneously enhancing investor protection while rooting out activities that generate systemic risk. Enhancing race-related disclosures, for example, can empower investors to better protect themselves against the systemic risks flowing from racially disparate harms generated by the private sector.[248] This could effectually weed out such systemically harmful activities from the marketplace. Mandating standardized race disclosures could likewise assist investors in optimizing their investment choices with respect to companies that are generating harms of this magnitude.[249] Receiving standardized disclosures about the extent to which companies are in contrast promoting racial justice initiatives can be equally helpful in bolstering such activities. The mere act of disclosing information of this nature could also have positive effects on issuer behaviors as it may encourage best practices with respect to their overall impacts on communities of color. Increasing transparency in this regard could further encourage a form of public accountability as racial

[247] Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 509–10 (2020).

[248] Cary Martin Shelby, *Closing the Hedge Fund Loophole: The SEC as the Primary Regulator of Systemic Risk*, 58 B.C. L. REV. 639, 647 (2017) (making comparable arguments regarding the relationship between transparency and systemic risk in the context of hedge funds).

[249] *See* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 296–97 (highlighting how disclosure "blind spots" related to climate change can generate systemic risk in the financial system).

justice groups and other stakeholders would then have access to meaningful information about the extent to which various companies and industries are engaged in systemically harmful activities related to race. Moreover, such a disclosure system could provide a reliable source of data for conducting ongoing empirical research on these issues.

This Article fully acknowledges that a mandatory disclosure framework may be insufficient in terms of eliminating the vast range of disparate impacts experienced by vulnerable groups, but it would nonetheless provide a necessary minimum. Even still, standardized disclosures could be used as a reference tool in creating government responses that are more closely tailored to the multifaceted harms arising from racism.

Many would argue that making any such racial impact disclosures would be inconsistent with the SEC's mission to "protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[250] However, as discussed in the previous paragraph, disentangling systemic risk from investor protection is difficult to do. Investors may refrain from allocating their limited capital into a systemically harmful company that could incur excessive losses in the long run. Investors are also increasingly demanding ESG disclosures about prospective investments that extend beyond the financial characteristics of a company.[251] Some studies have even concluded that considering ESG characteristics in decision making processes can serve to increase investor returns.[252] Irrespective of this ongoing debate, the SEC's mission of maintaining fair, orderly, and efficient markets seems to necessarily entail weeding out systemically harmful investment activities from the public capital marketplace.

In terms of the SEC's mission to facilitate capital formation, mandating standardized racial impact disclosures could assist a larger range of investors in optimizing their investment decisions. While the particulars of how such a disclosure framework would be structured is largely outside the scope of this Article, there are ways that the SEC could minimize costs in mandating such a system. It could use a privately developed model (a racial equity audit, for example) as a starting point in implementing its obligation to facilitate capital formation. It could also build on information that companies are already disclosing to regulators.

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[250] SEC, *supra* note 222.

[251] Olwyn Alexander & Kevin O'Connell, *The Race to Keep Pace with Investor Expectations on ESG*, STRATEGY+BUSINESS (Oct. 26, 2022), https://www.strategy-business.com/article/The-race-to-keep-pace-with-investor-expectations-on-ESG [https://perma.cc/BAW7-JA3B].

[252] Cole Horton & Simon Jessop, *Positive ESG Performance Improves Returns Globally, Research Shows*, REUTERS (July 28, 2022), https://www.reuters.com/business/sustainable-business/positive-esg-performance-improves-returns-globally-research-shows-2022-07-28 [https://perma.cc/7QU9-85W2].

CONCLUSION

Additional categories of systemic disruptions are potentially interconnected with racism in ways that warrant further attention. Pandemics, for example, are yet an additional category of systemic disruptions that have crippled global economies in recent years. COVID-19 wreaked havoc on the global financial system by decimating small business owners, drying up supply chains, and propelling inflation, among other harms. While the virus itself did not originate within the financial system, racist practices and policies certainly exacerbated and perhaps prolonged the disruption.

With respect to the Coronavirus Aid, Relief, and Economic Security Act, also known as the CARES Act, an embarrassingly low percentage of Black business owners were able to secure necessary relief. The CARES Act included the Paycheck Protection Program, which was a loan for small businesses to assist with paying their employees.[253] However, "[j]ust 12% of black and Latino business owners who applied for PPP (Paycheck Protection Program) loans reported receiving what they asked for, according to a survey by Global Strategy Group, and nearly half of these individuals say they anticipate being forced to close permanently in the near future."[254] In contrast, just over 38% of all U.S. small businesses were able to secure PPP loans around this same time frame.[255] Preexisting vulnerabilities arising from systemic and structural racism likely led to these harms as Black business owners faced disparities in terms of accessing the necessary credit relationships with financial intermediaries in order to secure such PPP relief.[256]

Many also faced prior discrimination in securing favorable financing arrangements, making them far more susceptible to closure during the

[253] *Paycheck Protection Program: An SBA-backed loan that helps businesses keep their workforce employed during the COVID-19 crisis*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program [https://perma.cc/4ALQ-Y5FH].

[254] Tommy Beer, *Minority-Owned Small Businesses Struggle to Gain Equal Access to PPP Loan Money*, FORBES (May 18, 2020), https://www.forbes.com/sites/tommybeer/2020/05/18/minority-owned-small-businesses-struggle-to-gain-equal-access-to-ppp-loan-money/#54e083685de3 [https://perma.cc/U3DB-TCJM].

[255] *Id.*

[256] Sifan Liu & Joseph Parilla, *New Data Shows Small Businesses in Communities of Color Had Unequal Access to Federal COVID-19 Relief*, BROOKINGS (Sept. 17, 2020), https://www.brookings.edu/articles/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief [https://perma.cc/C6ZS-LBQP].

pandemic.[257] In April 2020, "[t]he number of African-American business owners fell from 1.1 million in February to 640,000 . . ., a 41% decline. By comparison, the overall number of small business owners dropped by 35%."[258] As new pandemics continue to unfold, it is essential for regulators to begin the arduous process of collecting data on how to best reduce the depth and duration of its resulting economic shocks that are often exacerbated by racism.

Scholars have also assessed how the lack of diversity in all aspects of the financial sector is a potential source of systemic risk, as homogeneous groups face inherent challenges in managing multiple layers of risk. Such groups face comparable challenges in optimizing complex decision-making processes due to the tendency of like-minded people to maintain the status quo in governing enterprises. In summary, "groupthink, herd behavior, and affinity bias challenge group decision-making [and] [s]imilarly, humans naturally fall prey to confirmation bias, overconfidence, and structural bias."[259]

Laws at the state and federal level have sought to increase diversity through mandates or nudges, but the lack of representation within every aspect of the financial sector remains deeply troubling. Increasing diversity, particularly within the upper echelons of corporate management, could perhaps prevent the scale and depth of systemic disruptions. Claims of this nature warrant additional analysis and study as the financial markets grow increasingly complex and interconnected on a global scale.

Assessing the ways in which private sector actors have broadly contributed to direct and systemic racism with respect to its employees, managers, suppliers, and consumers has led to macroeconomic costs that are difficult to fully quantify.[260] In 2020, Citigroup published a study which estimated the full impact of these costs since 2000.[261] It concluded that "[i]f racial gaps for Blacks had been closed 20 years ago, U.S. GDP could have

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[257] Karen Ho, *Covid-19 Has Destroyed 41% of Black Small Businesses*, QUARTZ (June 18, 2020), https://qz.com/1870103/covid-19-has-destroyed-41-percent-of-black-small-businesses [https://perma.cc/ES2R-TMF3].

[258] *Id.*

[259] Kristin Johnson, Steven A. Ramirez & Cary Martin Shelby, *Diversifying to Mitigate Risk: Can Dodd–Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH. & LEE L. REV. 1795, 1807 (2016).

[260] Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 371–72 (2004).

[261] DANA M. PETERSON & CATHERINE L. MANN, CITIGROUP, CLOSING THE RACIAL INEQUALITY GAPS: THE ECONOMIC COST OF BLACK INEQUALITY IN THE U.S. 3 (2020), https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D [https://perma.cc/7JS7-TMYJ].

benefitted by an estimated $16 trillion."[262] In particular, closing the racial wage gap would have potentially "provided an additional $2.7 trillion in income available for consumption and investment . . . [and] improving access to housing credit might have added an additional 770,000 Black homeowners over the last 20 years."[263] Other categories of harms are exceedingly difficult to quantify such as the loss of life, health, and liberty that can result from racist laws and practices. This Article demonstrates that such macroeconomic costs have become a source of systemic risk in the financial sector in ways that have been unrecognized by financial regulators.

By and large, an FSOC recognition of racism as a threat to financial stability could enable data collection and expertise building within every corner of the financial sector. It could further assist in mitigating the harms emanating from these additional systemic disruptions described above. Increasing data collection and transparency throughout the regulatory sector on issues related to race and racism could undoubtedly assist in preventing the occurrence of future systemic disruptions that remain unforeseen. Without such efforts, the cycle documented in the attached Systemic Disruption Model will continue to propel into unmitigable heights. Haphazard efforts to repair the harms resulting from future systemic disruptions, without addressing the underlying contributor of racism, will extend this "cycle of cycles" into a never-ending dystopia of calamities. After all, continuing to deny the interconnectedness of any such harms against humanity is the ultimate form of self-destruction. Reversing this vicious path charted by racism is imperative for the vitality of future generations.

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[262] *Id.* at 7.

[263] *Id.*

APPENDIX

FIGURE 1: SYSTEMIC DISRUPTION MODEL