

Essay

Erasing Racial Harms in *CFPB v. Community Financial Services Association*

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INTRODUCTION

Professor Allan Freeman’s “perpetrator perspective” explains the normative American legal framework that casts racism as an intentional deviation from an otherwise neutral system.¹ Freeman describes the perpetrator perspective as a negative, remedial dimension casting discrimination as an isolated action by a perpetrator onto a victim.² By conflating the concept of equality with race neutrality, race neutrality becomes synonymous with legal credibility.³ The victim, then, must prove fault and causation against a blameworthy individual who may still evade liability by demonstrating his action was taken for good reason (or sometimes for no reason at all).⁴ Freeman conceives of an alternate reality told from the “victim perspective” in which racial discrimination is construed as part and parcel of the systemic conditions of a member of a “perpetual

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1. Allan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29, 29 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., New Press 1995).

2. *Id.*

3. *See, e.g., id.* at 30 (describing the perpetrator perspective as “the only formal conception of a violation in antidiscrimination law”).

4. *Id.*

underclass.”⁵ Told from the victim perspective, the law holds the potential to right systemic wrongs.⁶

We see the perpetrator perspective at work today in the persistence of economic inequality. The racial wealth gap is “large and shows no signs of closing.”⁷ Nonetheless, the American myth of economic mobility achievable via hard work, homeownership, and a loving, perfect family remains and feeds negative stereotypes about Black Americans.⁸ The endurance of these racialized myths sets a stage for facially “colorblind” challenges to progressive policies that hold the potential to facilitate racial justice.⁹

One such challenge is in the 2023 United States Supreme Court case *CFPB v. Community Financial Services Association* (“*Community Financial*”).¹⁰ Despite the traceable and widely discussed racial implications of a case that could render unconstitutionally void an agency expressly tasked with preventing economic racial discrimination, race plays no part in the case’s merit arguments.¹¹ Because the victim perspective is sidelined, the Black and brown low-income borrowers who stand to lose most from *Community Financial* are erased from the narrative. Racial justice is pushed out of the courtroom and into the margins of the discourse surrounding the potential defunding of the Consumer Financial Protection Bureau (“CFPB”) because the law renders racial injuries invisible outside of the perpetrator perspective.

This analysis proceeds in three parts. Part I explains the racialized history of economic discrimination, the racial wealth gap, and the founding of and progress made by the CFPB. Part II explains the current challenge to the CFPB’s funding structure in *Community Financial*, the past challenge to the CFPB’s

5. *Id.* at 29.

6. *Id.* (describing both “the objective conditions of life” and “consciousnesses associated with those objective conditions” as constituting discrimination).

7. William Darity, Jr. et al., *What We Get Wrong About Closing the Racial Wealth Gap*, SAMUEL DUBOIS COOK CENT. ON SOCIAL EQUITY & INSIGHT CENT. FOR COMM. ECON. DEV. 2 (April 2018), <https://socialequity.duke.edu/wp-content/uploads/2019/10/what-we-get-wrong.pdf> [<https://perma.cc/7WGF-VSPU>].

8. *Id.* (outlining the top ten myths about the racial wealth gap).

9. See *infra* Part III.A.

10. No. 22-448 (U.S. argued Oct. 3, 2023).

11. See *infra* Part I.B.2.

administrative structure in *CFPB v. Seila Law* (“*Seila Law*”),¹² and the racial politics of restricting the administrative state. Part III uses critical race theory methods to demonstrate that the law in its current state does not recognize racial harm as a legitimate claim or defense and allows colorblind challenges with negative racial consequences, such as *Community Financial*, to thrive via the perpetrator perspective. Thus, regardless of whether the Supreme Court invalidates the CFPB in the present case, the racial consequences of economic harms in this and future challenges are rendered invisible inside the courtroom unless and until the law acknowledges prospective racial injuries.

I. THE RACIALIZED HISTORY OF THE CFPB

A. AMERICANS OF COLOR, SPECIFICALLY BLACK AMERICANS, FACE HISTORIC AND ONGOING WEALTH INEQUALITY, FINANCIAL EXPLOITATION, AND BARRIERS TO WEALTH ACCRUAL

Starting with chattel slavery, enslaved Black people could not accrue wealth because the law classified enslaved Black people themselves as transactable property.¹³ Following the Civil War and the abolition of slavery, in part due to the Freedmen’s Bureau¹⁴ and the passage of the Reconstruction Amendments,¹⁵ Black Americans found ways to operate within the system to

12. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

13. Cheryl I. Harris, *Whiteness as Property*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 276, 278 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., New Press 1995) (“The hyper-exploitation of Black labor was accomplished by treating Black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race: only Blacks were subjugated as slaves and treated as property.”).

14. See, e.g., W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–80* 229 (Henry Louis Gates, Jr. ed., Oxford Univ. Press 2007) (1935) (describing the Bureau as “an extraordinary piece of work but . . . a small and imperfect part of what it might have done if it had been made a permanent institution . . .”).

15. See, e.g., Eric Foner, *The Supreme Court and the History of Reconstruction – And Vice-Versa*, 112 *COLUM. L. REV.* 1585, 1587 (2012) (describing how the Reconstruction Amendments and enfranchisement of Black Americans “created for the first time an interracial democracy in which rights attached to persons not in their capacity as members of racially defined groups but as members of the American people”).

gain power.¹⁶ These systemic advances were short lived.¹⁷ Through the rapid onset of Black codes and Supreme Court decisions that diminished the Reconstruction Amendments and endorsed the “separate but equal” regime, white leaders reinstated violent and destructive *de jure* barriers to racial equity.¹⁸ Jim Crow became the law of the land.¹⁹ At the same time, redlining in American communities proliferated with the influx of Black Americans into northern and western cities during The Great Migration.²⁰ These segregated communities and discriminatory housing patterns still pervade most cities.²¹

This pattern is replicated across other marginalized racial and ethnic groups. For example, the institutional and economic systems known as “Juan Crow” restrain economic progress of Latine communities, especially noncitizen immigrants.²²

16. See DU BOIS, *supra* note 14, at 350, 390 (detailing Reconstruction-era “Black Proletariats” in South Carolina, Mississippi, and Louisiana).

17. *Id.* at 66 (“The slave went free; stood a brief moment in the sun; then moved back again toward slavery.”).

18. See, e.g., CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 17–19 (2018) (describing how Jim Crow laws, Court decisions like *Plessy v. Ferguson*, and Black Codes meant that “real change [from Reconstruction] was infinitesimal at best”).

19. *Id.* at 28 (“Jim Crow dominated the lives of black people in America from 1890 well into the twentieth century. From conception to coffin, there was no nook or cranny of a black person’s life that it did not touch.”).

20. See ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* 10 (2010) (“[The Great Migration’s] imprint is everywhere in urban life. The configuration of the cities as we know them, the social geography of black and white neighborhoods, the spread of the housing projects.”); RICHARD ROTHSTEIN, *THE COLOR OF THE LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 64 (2017) (“The [Home Owners’ Loan Corporation] created color-coded maps of every metropolitan area in the nation, with the safest neighborhoods colored green and the riskiest colored red. A neighborhood earned a red color if African Americans lived in it, even if it was a solid middle-class neighborhood of single-family homes.”).

21. ROTHSTEIN, *supra* note 20, at 175 (“Racial policy in which government was inextricably involved created income disparities that ensure residential segregation, continuing to this day.”).

22. Roberto Lovato, *Juan Crow in Georgia*, *NATION* (May 8, 2008), <https://www.thenation.com/article/archive/juan-crow-georgia> [<https://perma.cc/7LFP-M9RB>] (“[L]atinos’ subordinate status . . . bears more than a passing resemblance to that of African-Americans who were living under Jim Crow. Call it Juan Crow: the matrix of laws, social customs, economic institutions and symbolic systems enabling the physical and psychic isolation needed to control and exploit undocumented immigrants.”).

Japanese internment during World War II removed Japanese Americans from their families and communities, turning them into a “monolithic, fearsome, inhuman enemy” to assuage white fear of Japanese American competition on the west coast.²³ The late-nineteenth and twentieth century thus systematized racialized economic barriers to nonwhite Americans.²⁴

Even after the outlaw of overt racial covenants, redlining, and Jim Crow, invidious barriers to the acquisition of wealth and material resources for racial minorities persist.²⁵ As Carol Anderson describes, the Civil Rights Movement was the “latest round of African American advances [that] set the gears of white opposition in motion.”²⁶ And this opposition did not end with the Civil Rights Movement. Home ownership, which contributes to overall wealth by extension, remains elusive for Black Americans due to subprime loans²⁷ and discriminatory appraisals.²⁸ The wage gap between Black and white workers was higher in 2019 than in 1979, and ongoing discrimination plays a statistically significant factor in this growth over time.²⁹ Even

23. Mari J. Matsuda, *McCarthyism, the Internment and the Contradictions of Power*, 40 B.C. L. REV. 18 (1998) (“Military necessity masked the real impetus of lust for Japanese-American land holdings and fear of Japanese-American competition in the highly profitable West Coast farming industry.”).

24. This paper will focus on the relationship between Black Americans, the wealth gap, and the current threat to the Consumer Financial Protection Bureau because Black people in the United States have faced unique *de jure* segregation that remains unremedied. See ROTHSTEIN, *supra* note 20, at 235 (“Although our history includes government-organized discrimination and even segregation of other groups . . . it was of a lesser degree, and is in the more distant past, than the *de jure* segregation experienced by African Americans.”).

25. ROTHSTEIN, *supra* note 20, at 108–09 (describing how the Federal Home Loan Bank Board did not oppose the denial of mortgages to Black Americans until 1961, and even after mortgages became available, reverse redlining (disproportionate marketing of loans in Black communities) and the proffering of subprime loans was “tolerated, sometimes winked at, by bank regulators” into the 2000s).

26. ANDERSON, *supra* note 18, at 47.

27. See *supra* text accompanying note 25.

28. Heather R. Abraham, *Appraisal Discrimination: Five Lessons for Litigators*, 76 SMU L. REV. 205, 214 (2023) (describing how though appraisal requirements are facially race-neutral, “they nevertheless allow for, or even encourage, the consideration of racial demographics in a manner that leads to a quantifiable discriminatory effect”).

29. Valerie Wilson & William Darity, Jr., *Understanding Black-White Disparities in Labor Market Outcomes Requires Models that Account for Persistent Discrimination and Unequal Bargaining Power*, ECON. POL. INST. (Mar. 25,

government-sponsored programs designed to help low-income Americans continue to have negative effects on marginalized racial minorities.³⁰ These practices from the twentieth century through today contribute to the growing racial wealth gap.³¹

Indeed, the current racial wealth gap is predicated by this history of economic inequality and racism.³² Scholars agree that society must reckon with the legacies of slavery, Jim Crow, and ongoing racism and discrimination in order to close the wealth gap.³³ However, in a follow-up to his seminal article “The Case for Reparations,” Ta-Nehisi Coates noted that in 2014, seventy-eight percent of white Americans felt that the legacy of slavery was a “minor factor” or “no factor at all” in the American racial wealth gap.³⁴ The disconnect between white society’s perception of the wealth gap and the history that underlies it is not a coincidence, but rather a product of historical distortion that maintains racial power.³⁵

2022), <https://www.epi.org/unequalpower/publications/understanding-black-white-disparities-in-labor-market-outcomes> [<https://perma.cc/AP3J-JLT3>] (stating that Black workers earn 24.4% less per hour than the typical white worker in 2019, compared to 16.4% in 1979, and noting that “compelling empirical evidence and a solid historical record [] points to discrimination as a significant factor in the persistence of racial disparities in the labor market”).

30. ROTHSTEIN, *supra* note 20, at 190 (describing how even the Low-Income Housing Tax Credit and “Section 8,” two federal programs designed to address the housing crisis affecting low-income communities of color, “ha[ve] been implemented in a manner that deepens racial segregation”).

31. California Newsreel, *Race – The Power of an Illusion: How the Racial Wealth Gap Was Created*, YOUTUBE (Jul. 30, 2020), <https://www.youtube.com/watch?v=YvY3Ok6YpbU>.

32. Ricardo Mimbela & Katie Duarte, *Visualizing the Racial Wealth Gap*, ACLU (Aug. 10, 2023), <https://www.aclu.org/news/racial-justice/visualizing-the-racial-wealth-gap> [<https://perma.cc/QHP7-SRKL>] (demonstrating that as of 2022 45% of Black families and 75% of white families own a home, as of 2019 Black applicants were 1.8 times more likely to be denied for a mortgage than white applicants, and as of 2018 the median income for a Black family of three was \$51,600 compared to \$84,600 for a white family).

33. Darity, Jr. et al., *supra* note 7, at 4.

34. Ta-Nehisi Coates, *The Case for Considering Reparations*, ATLANTIC (Jan. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/01/tanehisi-coates-reparations/427041> [<https://perma.cc/DZ7H-7RM4>].

35. Cf. Olatunde C. Johnson, *AFFH and the Challenge of Reparations in the Administrative State*, REGUL. REV. (Oct. 26, 2020), <https://www.theregreview.org/2020/10/26/johnson-affh-challenge-reparations-administrative-state> [<https://perma.cc/H9UV-KGPC>] (detailing white America’s dependence on obscuring history to cast the law and policies as race-neutral).

B. THE CFPB WAS DESIGNED TO REDRESS THE ECONOMIC IMPACT OF THE 2008 RECESSION

1. The 2008 Recession Most Drastically Impacted Low-Income People of Color

The worst financial crisis since the Great Depression, the 2008 recession caused Americans to lose \$9.8 trillion in wealth.³⁶ Although the Lehman Brothers and Wall Street are the recession's most infamous icons, the housing market "was ground zero of the crisis."³⁷ Reverse redlining and predatory loans, both of which disproportionately affect Black communities, led to the recession by promising illusory deals that were "bound to go into default."³⁸ Because financial lenders disproportionately targeted Black communities with these doomed loans, the "financial trauma" of the recession hit Black families harder.³⁹ Black borrowers stuck in financial turmoil burned through savings, took on debt, and faced unemployment at higher rates than whites.⁴⁰ For these reasons, both the cause and the effect of the recession were "especially disastrous" for Black Americans.⁴¹

2. The Dodd-Frank Act Has a Broad Remedial Nature and Designed the CFPB to Actualize Its Goals

After financial collapse, Congress quickly passed the Dodd-Frank Act to respond to the recession and to hold predatory and

36. Renae Merle, *A Guide to the Financial Crisis – 10 Years Later*, WASH. POST (Sept. 10, 2018), https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis--10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666_story.html [https://perma.cc/E8DH-HBH8].

37. *Id.* Ultimately, Millions of Americans lost their homes in the crisis due to subprime loans and debt. And, Americans have mostly financially recovered, though the lowest-income borrowers have been "left behind." Meanwhile, banks are bigger than ever. *Id.*

38. ROTHSTEIN, *supra* note 20, at 109.

39. 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/E5AT-BD85].

40. *Id.* For instance, Black borrowers in upper-income neighborhoods before the recession were two times more likely than white households in lower-income neighborhoods to have received a subprime loan. This disparity has lasting effects: by 2031, estimates measure that the recession will have lessened the median wealth of Black households by almost \$100,000. *Id.*

41. *Id.*

exploitative financial institutions accountable going forward.⁴² The Dodd-Frank Act established the Consumer Financial Protection Bureau to bring consumer protection to the forefront of a federal agency rather than relying on the disparate spread of agencies previously responsible for the task.⁴³ Martha Coakley and Alicia Daniel note that part of the CFPB's mission, as stated by now-Senator Elizabeth Warren and then-President Barack Obama, is to "level[] the playing field" between consumers and lenders.⁴⁴ The CFPB successfully regulates and investigates companies on behalf of consumers, recovering over twelve billion dollars from violations in its first eight years.⁴⁵ The CFPB serves to protect consumers from the type of exploitation that led to the 2008 recession.

3. The CFPB Fills a Gap Between Barriers to Economic Equality and Antidiscrimination Law

In addition to its remedial goals in the interest of all consumers, an integral goal of the CFPB is to "protect consumers from unfair, deceptive, or abusive acts or practices."⁴⁶ The CFPB's watchdog features give it the potential to be "an effective advocate for racial justice, promoting both credit access and antidiscrimination principles."⁴⁷ This is no surprise given the inextricable connections between predatory lending, redlining,

42. See Martha Coakley & Alicia Daniel, *Improving Consumer Protection: Lessons from the 2008 Recession*, 103 MINN. L. REV. 2477, 2477 (2019) (discussing the Dodd-Frank Act as one measure enacted to regulate the corporations "whose recklessness had, in large part, caused the foreclosure crisis and the resulting recession"); Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. § 5301.

43. Elizabeth Warren, *Testimony of Elizabeth Warren Before the Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs*, CFPB (May 24, 2011), <https://www.consumerfinance.gov/about-us/newsroom/testimony-of-elizabeth-warren-before-the-subcommittee-on-tarp-financial-services-and-bailouts-of-public-and-private-programs> [https://perma.cc/C9WD-ZX7C] (describing how the prior seven agencies overseeing consumer protection resulted in a "system without effective rules or consistent enforcement").

44. Coakley & Daniel, *supra* note 42, at 2487.

45. *Id.*

46. Warren, *supra* note 43.

47. Hosea H. Harvey, *Constitutionalizing Consumer Financial Protection: The Case for the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2429, 2431 (2019).

wealth accrual, and race.⁴⁸ Since its inception, the CFPB has actualized this potential by holding banks accountable for redlining majority-minority neighborhoods,⁴⁹ charging people of color higher interest rates for auto loans,⁵⁰ and denying Black consumers fair and equal access to mortgages.⁵¹ These results are made possible through the CFPB’s enforcement powers, often via the Equal Credit Opportunity Act (“ECOA”).⁵²

4. The Equal Credit Opportunity Act, Enforced by the CFPB, Allows for Race-Based Claims of Discriminatory Lending

The Equal Credit Opportunity Act, originally passed in 1974, prohibits discrimination in any aspect of a credit transaction.⁵³ Via “Regulation B” of ECOA, Congress entrusted to the

48. See *supra* Part I.A.

49. *CFPB, DOJ Order Trident Mortgage Company to Pay More Than \$22 Million for Deliberate Discrimination Against Minority Families*, CFPB (Jul. 27, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-doj-order-trident-mortgage-company-to-pay-more-than-22-million-for-deliberate-discrimination-against-minority-families> [https://perma.cc/7B93-U4TM] (announcing settlement between the CFPB and Trident Mortgage Company after allegations that Trident “redlined majority-minority neighborhoods through its marketing, sales, and hiring actions”); *CFPB and DOJ Order Hudson City Savings Bank to Pay \$27 Million to Increase Mortgage Credit Access in Communities Illegally Redlined*, CFPB (Sept. 24, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined> [https://perma.cc/Y5C3-Y4WF] (alleging that Hudson Bank owes \$27 million for “discriminatory redlining practices that denied residents in majority-Black-and-Hispanic neighborhoods fair access to mortgage loans”).

50. *CFPB and DOJ Order Ally to Pay \$80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing*, CFPB (Dec. 20, 2013), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing> [https://perma.cc/V8DJ-FTDP] (detailing civil penalties for company that harmed 235,000 minority borrowers through discriminatory auto loan pricing).

51. *Consumer Financial Protection Bureau And Department Of Justice Action Requires Bancorpsouth To Pay \$10.6 Million To Address Discriminatory Mortgage Lending Practices*, CFPB (Jun. 29, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-department-justice-action-requires-bancorpsouth-pay-106-million-address-discriminatory-mortgage-lending-practices> [https://perma.cc/4ZMF-LEN8] (announcing lawsuit against company that specifically harmed Black Americans via illegal redlining in Memphis).

52. 15 U.S.C. § 1691.

53. *Id.*

CFPB the role of enforcing ECOA.⁵⁴ ECOA violations can be proven either through a disparate treatment or disparate impact strategy, meaning that lenders can be liable for purposeful discrimination or facially neutral practices that have a discriminatory impact or effect.⁵⁵ ECOA's history is part of the lineage of civil rights legislation, such as the Fair Housing Act.⁵⁶ Winnie F. Taylor details the legislative history of ECOA, including one House Report in which the chairman of the U.S. Committee on Civil Rights acknowledged that "the availability of credit has a profound impact on an individual's ability to exercise the substantive civil rights guaranteed by the Constitution."⁵⁷ Although not often recognized as part of the canon of civil rights law, the history of the racial wealth gap and the antidiscrimination laws enforced by the CFPB like ECOA make the agency a powerful tool for racial equity.

5. The CFPB's Powers Change with Presidential Administration

As great as the potential is for the CFPB to be a racial justice watchdog, the efficacy of the CFPB in achieving this goal has fluctuated during its short history. Created during the Obama Administration, the CFPB not only used its robust enforcement powers to recover on behalf of consumers financially,⁵⁸ but also took an identity-conscious approach to the breadth of its enforcement.⁵⁹ The Trump administration changed course, rolling back several Obama-era rules, decreasing oversight of lenders, and "constrain[ing] the agency from within."⁶⁰ Then-Commissioner Mick Mulvaney fired the entire twenty-five person Consumer

54. 12 CFR Part § 1002.1 ("Reg. B").

55. Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J.L. POL'Y 575, 596 (2018). Although the Supreme Court has never directly answered the question of whether disparate impact claims are available under ECOA, every other federal court that has addressed such a claim has allowed it to proceed. *Id.*

56. *Id.* at 631.

57. *Id.*

58. See *supra* discussion accompanying notes 35–37.

59. Cyrus Mostaghim, *Constructing the Yellow Brick Road: Preventing Discrimination in Financial Services Against the LGBTQ+ Community*, 11 MICH. BUS. & ENTREPRENEURIAL L. REV. 63, 78 (2021) (noting the CFPB's 2016 affirmation that ECOA applies to sexual orientation and gender identity discrimination).

60. Coakley & Daniel, *supra* note 42, at 2488 n.87.

Advisory Board in a move to “regularly identif[y] and address[] outdated, unnecessary, or unduly burdensome regulations.”⁶¹ A Republican Congress facilitated this regression, passing legislation that narrowed or eliminated Dodd-Frank Act requirements.⁶² In 2018, Senator Elizabeth Warren remarked that “[o]n the 10th anniversary of an enormous financial crash, Congress should not be passing laws to roll back regulations on Wall Street Banks.”⁶³ President Biden has attempted to restore the CFPB, especially its “promises to address systemic racial inequality.”⁶⁴ Certainly, the CFPB is designed to fluctuate with executive goals to some extent; however, Congress did not likely foresee extensive judicial challenges to its constitutionality.⁶⁵

II. THE CHALLENGE: CFPB V. COMMUNITY FINANCIAL SERVICES ASSOCIATION

A. *SEILA LAW*: A PRECURSOR FOR RESTRICTING CONGRESS’S VISION FOR THE CFPB ON PROCEDURAL GROUNDS

Amidst political and ideological debate about the CFPB, constitutional challenges to its structure emerged in the courts.⁶⁶ The jurisprudence reached a head at the Supreme Court in the 2020 case *Seila Law LLC v. CFPB*.⁶⁷ In a five-four decision, the Court ruled that the agency’s leadership structure, which put one Director at its head with a provision that the Director could only be terminated “for cause,” violated the Constitution.⁶⁸ While this provision was intended to isolate the Director from removal

61. *Id.* at 2489.

62. *Id.*

63. *Id.* at 2488–89.

64. Adam Edelman, ‘A Cop on the Beat Again’: Biden Looks to Reassert Consumer Watchdog Agency Sidelined by Trump, NBC NEWS (Mar. 23, 2021), <https://www.nbcnews.com/politics/white-house/cop-beat-again-biden-looks-reassert-consumer-watchdog-agency-sidelined-n1261586> [https://perma.cc/6XNL-57J9].

65. *Cf.* Harvey, *supra* note 47, at 2431 (noting that legal challenges to the CFPB may have arisen *because* “the Bureau was remarkably effective at its inception and engaged in regulatory practices that threatened entrenched bureaucratic interests and industry stakeholders”).

66. *Id.* at 2432 (analyzing the “many” cases raising the constitutional question).

67. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

68. *Id.* The Director previously could only be terminated for “inefficiency, neglect of duty or malfeasance in office.” 12 U.S.C. § 5491(c)(1), (3).

at the President's whim, the Court found this reasoning unpersuasive and held that the scheme violated the Constitution's separation-of-powers mandates.⁶⁹ The Court emphasized that the Constitution "scrupulously avoids concentrating power in the hands of any single individual."⁷⁰ However, the Court acknowledged that the unconstitutional removal provision could be severed from the rest of the CFPB's implementing statutes, so the CFPB lived to regulate another day.⁷¹

B. WHILE *SEILA LAW* IMPEDED THE CFPB'S EXECUTIVE STRUCTURE, *COMMUNITY FINANCIAL* THREATENS TO ERADICATE IT COMPLETELY

Following the *Seila Law* decision, Senator Warren tweeted "[l]et's not lose sight of the bigger picture: after years of industry attacks and GOP opposition, a conservative Supreme Court recognized what we all knew: the CFPB itself and the law that created it is constitutional. The CFPB is here to stay."⁷² Unfortunately, the Senator's optimistic affirmation did not last long as another constitutional challenge to the CFPB processed through the courts and landed in the Fifth Circuit. The payday lending interest group Community Financial Services Association of America challenged a 2017 CFPB rule prohibiting lenders from attempting to withdraw payments from borrowers' accounts after two failed attempts due to lack of funds, alleging that it was an unconstitutional exercise of power.⁷³ The Fifth Circuit latched onto the argument that the CFPB's funding scheme itself was unconstitutional and struck down the rule.⁷⁴ The court reasoned that the funding structure impedes Congress's "power of the purse" because the agency is funded outside of Congress's appropriations process, instead receiving funds from the Federal

69. Jason W. McElroy & A.J. S. Dhaliwal, *The Supreme Court's Ruling in Seila Law LLC v. CFPB: The End of Constitutionality Litigation?*, 76 BUS. L. 635, 636 (2021).

70. *Seila Law*, 140 S. Ct. at 2202.

71. *Id.* at 2209.

72. Elizabeth Warren (@SenWarren), X (formerly TWITTER) (Jun. 29, 2020, 10:05 AM), <https://twitter.com/SenWarren/status/1277619172042846208> [<https://perma.cc/D7ML-GCK6>].

73. Amy Howe, *Court Will Review Constitutionality of Consumer-Watchdog Agency's Funding*, SCOTUSBLOG (Feb. 27, 2023), <https://www.scotusblog.com/2023/02/supreme-court-will-review-constitutionality-of-consumer-watchdog-agencys-funding-cfpb> [<https://perma.cc/6HYS-XL5R>].

74. *Id.*

Reserve.⁷⁵ The Fifth Circuit used the Appropriations Clause to find unconstitutional an Act of Congress that specifically designed the agency's funding structure.⁷⁶

CFPB Director Rohit Chopra called this interpretation of the Constitution's Appropriations clause "unprecedented and erroneous."⁷⁷ Unlike the possibility of severability of the removal clause at issue in *Seila Law*, finding the entire funding structure unconstitutional "calls into question virtually every action the CFPB has taken in the 12 years since it was created."⁷⁸ The Court granted certiorari in February.⁷⁹ Based on an assessment of the Justices' ideologies and questioning, the outcome will likely depend on one vote.⁸⁰

Many commentators recognize that this case is part of a bigger siege on the administrative state by conservative entities and interest groups.⁸¹ Certainly, the administrative state can itself perpetuate racial harms.⁸² But for as much as the administrative state can itself create racial power, attacks on agencies designed to protect consumers and mitigate discrimination will

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Amy Howe, *Court Divided over Funding Mechanism for Consumer Watchdog*, SCOTUSBLOG (Oct. 3, 2023), <https://www.scotusblog.com/2023/10/court-divided-over-funding-mechanism-for-consumer-watchdog> [<https://perma.cc/SWX8-5T8F>].

81. See, e.g., Mekela Panditharatne, *How a Supreme Court Case Could Upend the Consumer Financial Protection Bureau*, TIME (Oct. 3, 2023), <https://time.com/6320149/supreme-court-consumer-financial-protection-bureau> [<https://perma.cc/JV9U-J7Q6>] (describing downstream threats to the Federal Deposit Insurance Corporation, the Federal Reserve itself, the U.S. Postal Service, and programs such as Medicare and Medicaid); *Strict Scrutiny: Not Especially Judicious*, CROOKED MEDIA (Oct. 9, 2023), <https://crooked.com/podcast/not-especially-judicious> [<https://perma.cc/2CCS-7ZDB>] (arguing that this case was brought by interest groups seeking to persuade a conservative Court to destruct the administrative state when such goals will not be achieved via a divided Congress).

82. Brian N. Williams & Carmen Williams, *The Past and Present of Racism in the Administrative State*, REGUL. REV. (Oct. 29, 2020), <https://www.theregreview.org/2020/10/29/williams-williams-past-present-racism-administrative-state> [<https://perma.cc/WUX9-TAVG>] (noting how administrative racism "emerges from socially constructed beliefs and norms that are reinforced by political constructions or policies and [] impact[s] bureaucratic practices and behaviors").

ultimately put more money and power in the hands of corporations.⁸³ And, judicial review of administrative action that is overly sympathetic to anti-federal-regulation sentiments depends on a “colorblind” approach that serves to doubly create racial power: first, by applying facially neutral legal analyses and erasing the presence of any racial animus, and again by reinforcing the idea of law as a non-discriminatory baseline.⁸⁴

C. ALTHOUGH CONSTITUTIONAL QUESTIONS GOVERN THE CASE, SERIOUS RACIAL CONSEQUENCES ARE AT STAKE

1. Race Is Not Discussed as Part of the Merits of the Case, but Its Racialized Implications Are Leveraged by Non-Party Advocates

As demonstrated in Part A, the CFPB has a racialized history, and it is likely that the agency’s efficacy in furthering racial justice and holding financial institutions accountable encouraged legal challenges to the agency.⁸⁵ Nonetheless, the briefings in *Community Financial* contain no mention of race.⁸⁶ When the Court heard oral arguments on October 3rd, neither parties’ argument acknowledged race.⁸⁷ The merit arguments in the case suggest that the constitutional challenge successfully eradicated any racial appeal or defense from the courtroom.

However, racial implications are widely discussed outside the courtroom. For example, three Amici Curiae briefs supporting the CFPB explicitly discuss race and the negative

83. Bernard Bell, *Race and Administrative Law*, YALE J. REG.: NOTICE & COMMENT (Aug. 10, 2020), <https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell> [<https://perma.cc/S7LQ-VLPK>] (describing how regulation and the administrative state limits private power and protect victims of discrimination).

84. *Cf.* Johnson, *supra* note 35 (describing how attempts to frame progressive policy “on a non-discriminatory baseline” depends on obscuring history).

85. *See supra* Part A; Harvey, *supra* note 47 (describing the CFPB as “an effective advocate for racial justice” and arguing that this efficacy may have sparked legal challenges).

86. Petition for Writ of Certiorari, CFPB v. Cmty. Fin. Servs. Ass’n, 143 S. Ct. 978 (2022) (No. 22-448), 2022 WL 16951308; Respondents’ Brief in Opposition, CFPB v. Cmty. Fin. Servs. Ass’n, 143 S. Ct. 978 (2023) (No. 22-448), 2023 WL 317680.

87. Oral Argument, CFPB v. Cmty. Fin. Servs. Ass’n, 143 S. Ct. 978 (2023) (No. 22-448), https://www.supremecourt.gov/oral_arguments/audio/2023/22-448 [<https://perma.cc/CSVU-TWF6>].

consequences that defunding the CFPB would have on minority communities.⁸⁸ One journalist summarized the case as one “about the rights of loan sharks” who “target poor people and people of color.”⁸⁹ By contrast, supporters of Community Financial use the anti-discrimination powers of the CFPB as a dog whistle calling for invalidation. One Amicus for Community Financial, for instance, called the disparate impact theory “supposed discrimination without any evidence of discriminatory intent,” and argued that CFPB’s recognition of it was a “dangerous new authority” creating “significant uncertainty for regulated industries.”⁹⁰ Whether demonizing the CFPB as a threat to the racial hierarchy or warning of the real consequences that minorities would face in the CFPB’s absence, interested parties on both sides understand the role of race.

2. The Payday Lending Industry—Which Has Historically and Continues to Prey on Low-Income Communities of Color—Is Leading This Charge

It is worth unpacking that the plaintiff in the case is an association of payday lenders. Payday lenders are a main target of CFPB enforcement.⁹¹ As of 2023, the CFPB received more than

88. Brief for Lawyers’ Committee for Civil Rights et al. as Amici Curiae Supporting Petitioners at 20–26, *CFPB v. Cmty. Fin. Servs. Ass’n*, 143 S. Ct. 978 (2022) (No. 22-448) (discussing the CFPB’s ability to address race discrimination); Brief for Mortgage Bankers Ass’n et al. as Amici Curiae Supporting Petitioners at 14–15, *CFPB v. Cmty. Fin. Servs. Ass’n*, 143 S. Ct. 978 (2022) (No. 22-448); Brief for AARP & AARP Foundation as Amici Curiae Supporting Petitioners at 20, *CFPB v. Cmty. Fin. Servs. Ass’n*, 143 S. Ct. 978 (2022) (No. 22-448) (noting how the CFPB “expands on [the] promise” of ECOA “to ensure that financial institutions and firms dealing with credit make it equally available to all creditworthy customers”).

89. Madiba K. Dennie, *Supreme Court Set to Hear Important Case About Rights of Loan Sharks*, BALLS & STRIKES (Sept. 25, 2023), <https://ballsandstrikes.org/scotus/cfpb-v-cfsa-preview-rights-of-loan-sharks-supreme-court> [<https://perma.cc/FS5Z-QSFU>].

90. Brief for The Foundation For Gov’t Accountability as Amici Curiae Supporting Respondents at 12, *CFPB v. Cmty. Fin. Servs. Ass’n*, 143 S. Ct. 978 (2022) (No. 22-448) (focus on restraining the administrative state).

91. Lilith Fellowes-Granada, Devon Ombres & Alexandra Thornton, *CFPB v. CFSa: How the Supreme Court Could Harm Consumers and Financial Markets*, CTR. AM. PROGRESS (Sept. 28, 2023), <https://www.americanprogress.org/article/cfpb-v-cfsa-how-the-supreme-court-could-harm-consumers-and-financial-markets/> [<https://perma.cc/4AYK-QBN7>] (describing the payday lending industry).

5,000 complaints against payday lenders.⁹² Payday lenders lure consumers into short-term, high cost loans due on consumer paydays, without regarding the ability to repay the loan.⁹³ This puts borrowers in a constant cycle of debt, a burden born disproportionately by Black and brown communities—one report found that Black families were almost twice as likely to live near a payday lender.⁹⁴ Reverse redlining, or the placement of more predatory financial institutions in minority communities, is effective: Black Americans are the most likely out of any racial or ethnic group to use payday loans.⁹⁵ As Elise C. Boddie argues, racialized spaces “reinforce cultural norms about spatial belonging and power.”⁹⁶ Reverse redlining and the hypervisibility of predatory loan institutions is an example of racial territoriality that keeps Black communities trapped in cycles of poverty.⁹⁷

Payday lenders are invested in the type of business that exploits Black borrowers. As demonstrated, the CFPB intended to address the racist history and continued discriminatory practices in the lending industry. Yet, *Community Financial*, a case wagered by the payday lending industry against the CFPB, contains no racial context inside the courtroom. The next Part analyzes why this is the case.

92. *Id.*

93. *What is a Payday Loan?*, CFPB (Jan. 17, 2022), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567> [<https://perma.cc/DTH3-U4QV>].

94. Claire Williams, *It’s What We Call Reverse Redlining: Measuring the Proximity of Payday Lenders, Pawn Shops to Black Adults*, MORNING CONSULT PRO (Jul. 23, 2020), <https://pro.morningconsult.com/articles/black-consumers-payday-loan-banking-services> [<https://perma.cc/6CE6-YPK8>].

95. Nick Bourke, Alex Horowitz & Tara Roche, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, PEW CHARITABLE TRUSTS 10, (July 2012), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/pewpaydaylendingreportpdf.pdf [<https://perma.cc/4D2K-96GS>].

96. Elise C. Bodie, *Racial Territoriality*, 58 UCLA L. REV. 401, 438 (2010).

97. *Cf. id.* at 433 (describing redlining as an example of racial territoriality).

III. THE IMPOSSIBILITY OF A SUCCESSFUL RACIAL APPEAL IN DEFENDING THE CFPB

A. RACE IS RELEGATED TO THE MARGINS OF THIS CONTROVERSY BECAUSE THE LAW DOES NOT RECOGNIZE RACIAL JUSTICE AS A LEGALLY COGNIZABLE THEORY, NOR RACIAL HARM AS A LEGALLY COGNIZABLE INJURY OR DEFENSE

The simple answer to why the *Community Financial* arguments do not center race is because the law neglects “to advance a more comprehensive understanding of operative racial harm[s].”⁹⁸ Because the law is written via the perpetrator perspective,⁹⁹ all civil rights laws (including ECOA, for example), exclude radical and fundamental challenges to the status quo because rather than accounting for historical wrongs, the law operates “on a non-discriminatory baseline.”¹⁰⁰ Neil Gotanda describes how “[e]ven in cases where the problems are obviously related to dysfunctional interracial relations . . . the issues are discussed as though they have no history or context at all.”¹⁰¹ There is no room for the CFPB to argue that the prospective racial harms of dismantling the CFPB warrant consideration because the Constitutional challenge exists in a colorblind, “liberty-based” vacuum.¹⁰² The Black and brown low-income borrowers, tenants, students, and families who will face the consequences are in turn rendered invisible.¹⁰³

Race is pushed to the margins of the discourse surrounding *Community Financial*, but as Critical Race Theory scholar Cheryl Harris describes, race is always a party to financial transactions due to the perpetual property interest in

98. *Id.* at 425.

99. Freeman, *supra* note 1, at 29.

100. Johnson, *supra* note 35.

101. Neil Gotanda, *A Critique of ‘Our Constitution is Color-Blind’*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257, 266 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., New Press 1995).

102. Bell, *supra* note 83 (describing facially race neutral “liberty-based critiques” of agencies like the CFPB and arguing that “the freedom gained by the disadvantaged . . . as a result of the imposition of government regulations upon the powerful is often not viewed as a form of liberty equivalent to that correspondingly lost by those whose freedom from government intrusion is impaired”).

103. *Id.*

whiteness.¹⁰⁴ Harris argues that “[w]hiteness as property assumes the form of the exclusive right to determine rules.”¹⁰⁵ Under this theory, whiteness is a property interest in this case because the payday lenders continue to benefit from the financial exploitation of Black borrowers even with the CFPB *intact*, and yet they seek to push for deregulation that will allow abusive tactics to go entirely unmitigated.¹⁰⁶ The payday lenders are determining the rules, and the CFPB did not even *attempt* to rewrite the rules by reinserting racial harms into the case.

B. IF THE COURT DISMANTLES THE CFPB, IT WILL ENDORSE FUTURE CHALLENGES AGAINST AGENCIES AND STATUTES THAT HAVE BROAD, REMEDIAL PURPOSES

If the Court finds the CFPB’s funding model unconstitutional, it will create racial power by threatening other agencies and implementing further constitutional hurdles in future challenges to services that benefit low-income communities of color.¹⁰⁷ This strategy has been consistent and effective in neutering civil rights laws throughout history.¹⁰⁸ Crenshaw, Gotanda, Peller, and Thomas describe how the Roberts’ Court has “effectively conscripted liberal theories of race and racism to wage a conservative attack on governmental efforts to address the persistence of societal-wide racial discrimination.”¹⁰⁹ With “colorblind” theories thriving at the high Court, future

104. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1992).

105. *Id.* at 1766.

106. *Cf. id.* at 1767 (describing the Court’s “chronic refusal to dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks”).

107. Fellowes-Granada, Ombres & Thornton, *supra* note 91 (noting that dismantling the agency would “leave similarly structured federal financial agencies vulnerable to future legal challenges, potentially creating regulatory and economic chaos”).

108. *See, e.g.*, ANDERSON, *supra* note 18, at 48 (describing the rollback of the Civil Rights Movement by white elected officials as an organized effort to “contain and neutralize the victories . . . by painting a picture of a ‘colorblind,’ equal opportunity society whose doors were now wide open”).

109. Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii, xxix (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., New Press 1995).

challenges against agencies and statutes with broad, remedial purposes will undoubtedly arise and succeed.¹¹⁰

C. EVEN IF THE COURT UPHOLDS THE CFPB, ADDITIONAL RACE-CONSCIOUS HARMS SHOULD BE RECOGNIZED IN ORDER TO REALIZE THE MISSION OF THE DODD FRANK ACT AND RECENTER THOSE MOST BURDENED

Commentators suggest that the Court seemed skeptical of Community Financial's argument and may keep the CFPB intact.¹¹¹ This is, of course, the right decision based not only on avoiding racial harms, but also on policy, history, and legislative supremacy.¹¹² Nonetheless, this case serves as a prime example of the need to reimagine our legal system as one that can name and center race-conscious arguments.

Scholars suggest both particularized and wide-ranging paths forward in this direction. For one way to increase the viability of the CFPB as a tool for racial justice, Diane E. Thompson argues that an increased complaint mechanism at the CFPB (assuming it is sustained) is necessary to serve and center the marginalized communities most burdened by exploitative financial practices.¹¹³ This intra-agency move would be helpful in furthering the CFPB's commitment to equity, however, it would not prevent race from being marginalized in future "race-neutral" threats.

110. See, e.g., Panditharatne, *supra* note 81 (outlining Justice Jackson's critique at oral argument that cases like these endorse a version of the judiciary as a "super-legislature" that can give "agency by agency" a "thumbs up or thumbs down" at the whim of the Court).

111. E.g., Adam Liptak, *Supreme Court Skeptical of Argument That Could Hobble Consumer Watchdog*, N.Y. TIMES (Oct. 3, 2023), <https://www.nytimes.com/2023/10/03/us/supreme-court-cfpb.html> [<https://perma.cc/8SU2-YU66>] (observing that the Justices "appeared unpersuaded by the argument that the way Congress had funded the Bureau had crossed a constitutional line").

112. *Id.* (describing the grounds for the decision as "authorized by the plain words of the Constitution and [with] deep historical roots"); see also Fellowes-Granada, Ombres & Thorton, *supra* note 91 (describing that Congress desired to implement the funding mechanism as is and it should be respected to prevent judicial overreach).

113. Diane E. Thompson, *Pay Attention! Marginalized Communities, The Consumer Financial Protection Bureau, and Regulatory Advocacy*, 82 MONT. L. REV. 343, 394 (2021) (arguing for an increased consumer complaint mechanism at the CFPB to better serve marginalized communities).

Since 1989, Kimberlé Crenshaw's intersectionality framework has demonstrated a viable way (albeit still an unpopular way¹¹⁴) for the courts to recognize intersecting identities in anti-discrimination law, which would encompass broad enforcement of ECOA and mitigate the marginalization experienced by intersecting identities.¹¹⁵ Unlike Thompson's suggestion for the CFPB itself, a broad reaching "intersectional claim" would help achieve substantive representation for people experiencing multiple intersecting types of marginalization.¹¹⁶ Still, it is unclear how racial harms could enter the courtroom in a future constitutional challenge to the CFPB, given the confines of intersectional discrimination theory to a Plaintiff's prima facie case of discrimination or retaliation.¹¹⁷

Alternatively, Elise C. Boddie's methodology by which courts could acknowledge racial territoriality in equal protection and substantive due process cases is instructive in imagining a way for racial harms to be centered in cases such as *Community Financial*.¹¹⁸ Boddie outlines how courts could analyze the role of white and Black spaces in any case to demonstrate that racialized spaces produced an unlawful racial hierarchy.¹¹⁹ Boddie's framework helps civil rights violations exist outside of onerous burden-shifting schemes that depend on a comparator.¹²⁰

As applied to *Community Financial*, we can imagine payday lending institutions as a site of racialized power for courts to contextualize. If courts could view disproportionate placement of payday lenders in Black communities, the ongoing and historic racial wealth gap, and the history of *de jure* barriers to wealth accrual for Black borrowers as prima facie evidence of the CFPB's remedial purpose, race would enter the courtroom. Because the payday lending industry's history of discrimination

114. Elena S. Meth, Note, *Title VII's Failures: A History of Overlooked Indifference*, 121 MICH. L. REV. 1418, 1422 (2023).

115. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, UNIV. CHI. L. F. 139, 139 (1989).

116. *Id.* at 140.

117. *Id.* at 146 (describing how the lack of recognition of intersectional identities poses harm to the viability of a prima facie discrimination case).

118. Boddie, *supra* note 96, at 446.

119. *Id.* at 453.

120. *Id.* at 454.

“convey[s] a particular racial purpose,”¹²¹ the likelihood of prospective racial harms could enter the record next to the “liberty-based”¹²² constitutional challenge.

Neil Gotanda also offers a solution to incorporate race into constitutional jurisprudence. Gotanda harnesses the increasingly deferential religion jurisprudence¹²³ and suggests that because the religion cases at least offer “a serious effort by the court to address a complex of social issues with nuanced, historically grounded legal distinctions,” they provide a roadmap for “free exercise” of race and a prohibition of the “establishment” of racial subordination and white supremacy.¹²⁴ This mirroring of the religion clauses would allow “constitutional adjudication in the area of race to supplant the color-blind model.”¹²⁵

Using Gotanda’s proposed framework, *Community Financial* implicates both the “exercise” and the “establishment” clause of race and racism.¹²⁶ Free exercise of race, Gotanda argues, calls for “open discussion and implementation of governmental remedies to address the historical legacy of racial discrimination.”¹²⁷ If the CFPB could argue in defense that invalidation would infringe the “free exercise” of a governmental initiative intended to address racism in housing and lending, the Court would have to then weigh the constitutional protection of free exercise of race against the constitutional challenge to the CFPB’s structure. If it was unlawful to establish white supremacy under an “establishment clause,” the Court could consider the racial consequences that invalidating the CFPB would cause, like furthering the racial wealth gap.

CONCLUSION

Even if Boddie’s proposal is never actualized or Gotanda’s vision is never adopted, discourse regarding racist legacies, sites of racialized harm, and prospective racial injuries should be brought into the record. For example, the fact that race-based claims exist in the *Amici Curiae* briefs suggest that there was

121. Boddie, *supra* note 96, at 454.

122. Bell, *supra* note 83.

123. Gotanda, *supra* note 101 at 273.

124. *Id.* at 272–73.

125. *Id.* at 273.

126. *Id.*

127. *Id.*

nothing stopping counsel from making race-based arguments in their briefs or oral arguments save for internal decisions regarding the relevance or legitimacy of race.¹²⁸ However, it is too late to ever center racial harms in *Community Financial*.

Edward Said's "antithetical knowledge" framework describes the importance of counter-accounts of social and economic realities.¹²⁹ Going forward, courageous lawyers should proffer counter-accounts of the "colorblind" baseline and call attention to the inherent racialization of threats to services, agencies, or statutes designed with the purpose of helping those most burdened in our society.¹³⁰ For racial harms to ever be cognizable, the "victim perspective" must be brought inside the courtroom.¹³¹

128. See *supra* Part II.C.1.

129. Crenshaw, Gotanda, Peller & Thomas, *supra* note 109 (quoting Edward Said).

130. Bell, *supra* note 83.

131. Freeman, *supra* note 1, at 29.