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African-American Farmers and Fair Lending: Racializing Rural Economic Space

by

Cassandra Jones Havard

"[T]he rules and the law may be color-blind, [but] people are not."
-J. L. Chestnut, Plaintiffs' Attorney
Pigford v. Glickman.[2]

In the context of small farm policy, two core democratic principles—federalism and neutrality—are ultimately flawed as applied.

I. INTRODUCTION

The relationship of the federal government to the economic development of the minority-owned farm as a business raises issues of political authority.[3] The United States Department of Agriculture's (USDA) loan qualification scheme allows locally elected farmers—who, with few exceptions, are white—to make substantive decisions regarding an applicant farmer's creditworthiness. For many African-American farmers, this structure has resulted in a sustained lack of access to USDA's low-cost funds and, eventually, to land loss.[4]

The congressional decision that local farmers are able to make the best determinations concerning borrower eligibility for federal agricultural loan funds leads to concerns as to whether Congress' federalism objective of delegation of authority to local constituents can ever be met. As an issue of political authority, the balance of power in the USDA loan scheme between the federal government and local citizens is unique and uneven. The USDA process—calling for the election of local representatives among the population of farmers within a particular county—gives elected farmers both critical discretion regarding loan eligibility and an opportunity for self-aggrandizement. Racial minority farmers' lack of access to credit—the by-product of this long-standing federal scheme—provides fertile ground for challenging the devolution of authority to local landowners. In the context of small farm policy, two core democratic principles, federalism and neutrality, are ultimately flawed as applied. The ideal of federalism—that state and local governments can share power with the federal government—is lost when programs are not monitored for compliance with stated goals and objectives. The presumed neutrality of the USDA's process for disbursing federal funds raises questions about the congressional purpose given a result that is, at best, described as the deleterious sacrifice of land owned by minority small farmers.[5] Negative biases that should not color a neutral governmental process have been given the aura of federal approval.

This article focuses on how to measure loss when racial discrimination dominates economic policies and results in identifiable economic injustice.[6] More importantly, it draws a nexus between credit availability and intergenerational property transmission.[7] This article concludes that the loss of African-American owned

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farmland due to discriminatory credit decisions decreases opportunities for inheritance of real property. The proposed changes in federal law set forth in this article can help to remedy the cumulative effects of USDA's financing inequities.

Part I of this paper presents an overview of USDA's role as a financial intermediary. It identifies the goals of the federal agricultural lending program and explains the authority and policy choices given to locally elected farmers. It illustrates the direct competition between friends and neighbors for low-cost loan funds and summarizes the recent class action settlement of claims between African-American farmers and USDA. Part II describes USDA's approach as one with federalist and economic underpinnings. It identifies the arguments supporting devolution of power from the federal government to local jurisdictions. It also examines the competing theories of information costs, transaction costs, and agency costs as they relate to USDA as a financial intermediary. Finally, it critiques both the federalism and economic justifications of USDA's decision to allow local farmers to make credit decisions. Challenging the fairness to minority constituent concerns of locally controlled political processes, the article suggests that local constituencies that do not mandate accountability for minority interests may unfairly influence the supposedly democratic majoritarian regime. Given the absence of monitoring for compliance within the federal programs, there is inadequate justification for the role of the county committee in the lending process.

Part III discusses fair credit law and concludes that the applicable statute, the Equal Credit Opportunity Act (ECOA) is an inadequate remedy when credit discrimination affects small businesses. That section proposes an alternative way to measure the harm and to correct the authority and operational imbalances. It recommends a change in the make-up of the county committee by allowing locally qualified citizens, who are not farmers, to make the credit decisions. Next, it argues for more stringent monitoring, record keeping and reporting requirements in order to determine promptly whether discriminatory lending patterns exist. Finally, the article recommends an alternative way to measure actual loss by allowing compensation for loss of prospective inheritance.

II. USDA AS LENDER

As a financial intermediary, USDA's credit-granting procedures are atypical. First, in contrast to a traditional lender, there is a lack of neutrality in the lending process. The local farmers charged with determining eligible borrowers are themselves eligible for the same USDA loan funds. Second, unlike a traditional lender, the denial of a USDA loan request entitles the applicant to an administrative review of that decision. The administrative review process becomes a proxy for the inherent conflict of interest in the loan eligibility scheme. For African-American farmers, the lack of neutrality in the decision-making process and the suspension of the administrative process used to challenge denials combines to create a political system that limits their economic rights.

A. IN THEORY: THE LOAN DETERMINATION AND REVIEW PROCESS

The 1935 Soil Conservation and Domestic Allotment Act[8] governs USDA's current financial assistance and loan distribution scheme. The primary objectives of the statute are to facilitate and provide agricultural credit to the country's farmers. As discussed below, that credit is distributed largely through a decentralized process of local- and state-elected farmers whose job is to promote USDA's policies and programs. Through the Farm Service Agency (FSA), USDA is the key intervener in the farm economy, providing price and income support and loans at a below-market rate to the country's farmers.[9]

USDA lends both directly and indirectly.[10] The direct loan program awards insured loans to borrowers who have been denied credit elsewhere.[11] Eligible borrowers are those who have training or experience in farming, operate a family farm, and are unable to obtain credit elsewhere at reasonable rates and terms.[12] The indirect lending program uses similar criteria but issues guarantees to non-government lenders who make farm ownership and operating loans.[13]

Small farmers favor USDA loans for several reasons. First, most small farmers tend to be unable to obtain credit from commercial institutions.[14] Second, the interest rates on USDA loans are generally lower than rates from commercial lenders. Finally, USDA has a special interest rate for "low-income, limited-resource" borrowers, and subsidized interest rates are available for guaranteed loans. Limited resource borrowers are low-income farmers who do not qualify even under normal USDA loan programs and who need to maximize their incomes from farming.[15]

USDA uses the county committee system to determine who will participate in its direct lending and benefit programs. All farmers residing in a county elect three to five local farmers to a committee that USDA authorizes to make these determinations.[16] The members of the county committee in turn elect a county executive who has the responsibility to assist farmers in applying for and receiving program funds and who makes recommendations to the committee on who should receive those funds. USDA pays both the county committee

members and the county executive for their services, although neither are federal government employees.[17]

The loan process is seemingly straightforward: the County Executive Director must assist the farmer in completing his application; the County Executive Director also does an initial review of the application. If the county committee approves the application, the farmer receives the subsidy or loan. If the application is denied, the farmer may appeal to a state committee and then to a federal review board.[18] Because USDA borrowers are unable to get loans from other lenders, the proper implementation of these programs and appeal of determinations is crucial.[19] As a federal government program, USDA has established procedures for review of loan denials when applicants' requests are rejected. In 1980, however, USDA dismantled its Civil Rights Division. Consequently, the complaints and appeals of black farmers whose loans were denied were never processed, investigated or forwarded to the appropriate agency. Most African-American farmers who used the USDA appeals process never received a response. USDA admits that its staff discarded some discrimination complaints without ever responding to or investigating them,[20] while others received a finding of discrimination, but no relief.[21] The lack of response by USDA to claims of racial discrimination in the loan eligibility process led to a national class-action lawsuit and the on-going settlement of claims by African-American farmers. We turn to a discussion of this case now.

B. In Practice: The Class Action Settlement of Claims

A national class action suit involving minority borrowers challenged USDA's dismantling of its civil rights investigation division as discriminatory. USDA responded to the lawsuit by announcing that there would be no foreclosures where the farmer had a pending discrimination claim.[22]

The *Pigford v. Glickman* class action suit arose after the plaintiffs, four hundred and one African-American farmers, alleged that USDA willfully discriminated against them when they applied for farm operating, ownership, disaster, and emergency loans.[23] When a farmer's loan application was denied on the basis of race or some other discriminatory basis, the farmers were to file an administrative claim with the Equal Opportunity Office and also with the USDA Secretary or the Office of Civil Rights Enforcement and Adjudication (OCREA).[24] Minority farmers allege that with the dissolution of OCREA in 1983, the complaints filed failed to be processed, investigated, filed, or forwarded. At best, farmers received a cursory denial to the claim, but most received no response whatsoever. Some farmers alleged that their claims were not investigated because they were lost, destroyed, or thrown away. The Office of Inspector General of USDA determined that minority farmers lost land and farm income due to the agency's discriminatory practices. In addition, the Office of the Inspector General stated that the agency failed to act in good faith, that the process for resolving complaints failed or was too delayed, and that many favorable decisions were reversed.[25]

The *Pigford v. Glickman* class certification was eventually granted for all African-American farmers who: (1) farmed, or attempted to farm between January 1, 1981 and December 31, 1996; (2) applied for participation in a federal farm credit or benefit program with USDA during that time and who believed that they were discriminated against on the basis of race in USDA's response to the application; and (3) filed a discrimination complaint on or before July 1, 1997.[26]

After almost two years of litigation, a consent decree was issued.[27] First, all class participants waived their right to appeal the decision of the adjudicator as well as to seek further review of these matters before any court or tribunal.[28] Second, the consent decree divided parties eligible for compensation into two different classes based on the amount of evidence the claimant possesses, Track A and Track B, to prove that the discriminatory action occurred. 25,105 claims were filed under the consent decree as of March 14, 2001, with 21,285 (or 99.4%) accepted under Track A, and 196 or .06% of the claims accepted for processing under Track B. However, 3,636 claims were rejected for processing as not being class members.[29]

Under Track A, claimants must meet the class definition and provide substantial evidence of credit discrimination to the adjudicator. The claim, which may provide direct or indirect proof of discrimination, is submitted in a written form describing the discriminatory conduct. USDA has the right to respond to every claim, with the adjudicator's decision being final. Of the 21,285 claims accepted for processing in Track A, 8,025 (39.6%) rulings were decided against the claimant and 12,253 (60.4%) rulings were decided in favor of the claimant.[30]

Under Track B, claimants that have better evidence of discriminatory action by USDA (*i.e.*, documents and witnesses) may elect to have a hearing before an arbitrator to present evidence that discrimination occurred.[31] USDA also has an opportunity to present evidence in its favor. Track B claimants must meet a higher standard of proof—a preponderance of the evidence. They present their individual circumstances seeking actual damages and forgiveness of outstanding USDA loans affected by the discriminatory conduct.[32] As of January 17, 2001, the arbitrator had issued five rulings—three in favor and two

against—out of the 198 claims accepted for processing. In addition, seven cases had been dismissed including two of which had been settled.[33] While the settlement of claims will provide a measure of monetary compensation for aggrieved farmers, the court's decree neither provides for nor critically examines how a supposedly neutral process became one of racial subordination and domination.

III. THE COMPOSITE OF FARM LENDING POLICY: THE DEVOLUTION OF POWER FROM USDA TO LOCAL FARMERS

Federalism in the United States offers a unique scheme of power sharing between the federal and state governments. As part of this system of federalism, the federal and state governments delegate their power to a diverse range of institutions that design and implement federal and state policies.

The devolution of design and implementation authority, especially within the federal sphere, critically affects the development and viability of economic markets at local levels—at those levels where local officials have significant implementation authority and/or influence, there is legitimate concern over federal policy being unduly slanted by the mores, traditions, and political realities of the local communities.[34] Knowing that judicial scrutiny of legislation intensifies where "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes . . . relied upon to protect minorities,"[35] it is legitimate to inquire as to whether a local community's prejudices curtail fair operation of federal policies so as to deprive the community's "insular minorities" of benefits that otherwise would be theirs.

Using the plight of small minority-owned farms under the 1934 Soil and Conservation Act as the basis for our discussion, this section reviews the intersection of political power and economic markets in the context of the small, minority-owned farm. It concludes that, while political decentralization has a capacity for providing an adequate and fair process, when that process is flawed sectors of the affected economic markets can be and often are damaged.

A. POLITICAL POWER: COOPERATIVE FEDERALISM AND CIVIC REPUBLICANISM

One of the underlying premises of the 1934 Soil and Conservation Act is that locally elected agents are more appropriate decision-makers than federal government bureaucrats when handling agricultural financing issues. New Deal era reforms[36] delegated power to the states to implement federal programs. [37] This restructuring allows states to exercise discretion in federal allocations, limiting the federal government's role to creating national standards and disbursing funds. [38]

Under a devolved power regime, the local or state authority is free from the rigidity of a federal system that may be unresponsive to the specific needs of its local constituents.[39] Such a regime has the decided advantage of allowing quick response when change is either proposed or imminent. States invariably argue for freedom to determine what solutions are best suited without the overlay of federal discretion. When federal program goals are broad, states can attain the program goals within federal guidelines, but without explicit federal direction.

Secondly, in theory, decentralization protects democratic principles. The notion is that representational governance allows for a truer determination of public choice. Civic republicanism, by encouraging citizen participation, seeks to join together the common interests of citizens. The theory suggests that the guarantees of liberty and the protection of property are best guarded by local citizens, who have the most to lose if these principles erode. Citizens who participate in non-federal governance expect that they will have the ability to express their choices free from federal interference.[40] Because the power of the government is made direct, accessible and less impersonal, citizens gain access that may be denied when they have to negotiate the bureaucratic maze of federal government.

Finally, when state and local governments are given discretion in allocating federal funds, they allow citizens bound by geography the opportunity to participate in the democratic process.[41] It is important to note that this construct presupposes that those citizens who choose to participate in the democratic process represent all factions of their diverse communities and not simply their own narrow interests. When this notion fails, the federal government's policy is at risk of not meeting its objectives and goals; consequently, as one scholarly argument posits, federalism becomes a concept which espouses a theoretical increase in citizen participation but does not necessarily lead to an actual increase in such participation.[42]

1. Flawed Representational Democracy and Critical Race Theory

A solid justification for local control and decision-making requires a mechanism for accountability of minority interests.[43] Although representational democracy presumes participating citizens will use the democratic process to fairly represent the best interests of fellow citizens, opponents of localism argue that the minority can become "voiceless" if elected citizens are swayed to partial considerations. The concern that local prejudices

may go unchecked by outside force underscores the need for a political process that recognizes competitive forces exist at the local level that can undermine guarantees of liberty and protection of property. Weaknesses in representational democracy are apparent when constituents become increasingly disenfranchised and silenced.[44]

In the case of small minority-owned farms, representational democracy as evidenced in the race-neutral process of the County Committee system has contributed significantly to the loss of African-American owned farmland. In this instance, I posit that critical race theory provides a basis for understanding how flawed representational democracy presents an example of political space and its consequences.[45] In other words, critical race theory provides a basis for examining the construction of race as a neutral, accepted dominant norm.[46] While there is a tendency to view what is really a failed attempt at power sharing between the federal and local government as successful cooperative federalism, I argue instead that the geographical space (the county) defines the political space (who becomes representatives or members of the county committee). The all-white composition of those committees turned the race-neutral process of determining loan eligibility into one of domination and subordination.

2. *Defining Space*

In current legal discourse, the term "space" denotes geographical communities of people with similar characteristics.[47] Often these geographical areas have become racialized [48] because of the groups of people that live within them. In many contexts, race and place have converged to represent a certain geographic pathos—places where low-income and/or marginalized people live and work.[49] As one noted scholar has written, "[a]n analysis of racialized space is complex for many reasons, as it involves at least the consideration of politics and public policy, racially signified and symbolized conflicts, and aspects of hegemony, such as the construction of our 'common sense' understandings of everyday life."[50]

The notion of geographic space raises questions about the allocation of power within communities and how that power is used to determine the community's cultural and social practices.[51] The basic inquiry focuses on whether conditions within geographic spaces have simply evolved due to private choices of individuals or whether they have been perpetuated through public laws and policy.[52] The evolution of almost exclusively white ownership of farmland suggests it is important to look at how the considerations of politics and public policy converged to define farmland ownership as simply a consequence of rational economic considerations. The circumstantial change in farmland ownership was not incidental, but developed because of the social and political forces that transformed the otherwise neutral USDA structure into a system that adversely affected African-American farmers.

3. *The County Committee Structure as Political Space*[53]

As a model of federalism, the county committee is made up of community representatives making decisions about the use of farmland in the communities in which they farm. They lose their individual identifications and become representatives or agents of USDA charged with making neutral, ideally self-effacing decisions about credit. County committee members are not asked to consider, nor do they seem concerned about, the impact of those decisions on minority farmers. They are instead allowed to make credit decisions in a vacuum, not assessing the impact on minority land ownership nor their own inherent self-interestedness.[54] Yet, the historical functioning of the county committee raises issues about how that structure has politically defined the ownership of property for African-American farmers.

One of the justifications for USDA's county committee structure is that it represents a balanced sharing of power. This line of reasoning argues for decentralized government because it provides the average citizen with an opportunity to participate in democratic functions. Such a theory posits that the county committee structure represents an appropriate mixture of local autonomy and control. As a political institution, the county committee structure emphasizes the values of citizen participation, market responsiveness, and managerial efficiency.[55] The optimal political structure involving local citizens, however, involves these citizens without creating group boundaries.[56] While USDA may argue that the county committee structure is a microcosm of democracy, an appropriate balance of federal and local control must be present to guard against the exercise of unfettered discretion by non-federal governing units. Any exercise of governmental power must be done in a way that is not captive to a biased dynamic.

Given the theory of civic republicanism, it is physical geography and the coincidence of residence that determine the boundaries of the county committee. Since its representatives are drawn from local counties and elected from local property owners, it is assumed that they are representative of the community at large. This creation of a democratic unit based on pre-existing geographical boundaries presumes similarities among citizens that may not in fact exist. Thus, as one scholar has argued, geography may haphazardly create a structure that is impenetrable by legal doctrine.[57] In this instance,

geography legitimizes the creation of a political unit that may not in fact be representational.

One of the effects of the county committee structure is that the county committee uses its decision-making power to create white space. Using facially neutral policies and procedures, the county committee structure allows the competition for scarce resources—USDA's yearly allocation of farm loans and subsidies—to determine the committee's operation as a governance mechanism. By making biased decisions about creditworthiness, county committees fail to render rational decisions about credit.[58] In this context, as in so many others, the transparency of race becomes evident.

Moreover, as a political unit, the County Committee is not accountable to the people it serves. While local farmers may withhold their power to vote for certain nominees, the real overseer of political responsibility in this case is USDA. A system of governance where decisions can be reviewed on the merit for bias or unfairness, but in fact were not, again creates a political unit that has an uncontrollable dynamic. The political unit becomes, in reality, self-perpetuating, with little regard to USDA policy. To the extent that the geographical boundaries create and give license to a political structure of citizen participation whose very nature impacts the market economy, one can ill afford to conclude that this political body's failure to account for the needs of all of its citizens is sanctioned simply because of the manner in which the political body was chosen. The long and sordid history of racial subordination in this country, especially in the Deep South, makes ludicrous any claim that the mere provision for a democratic ideal, such as an election, could ever rise above the narrow interests of the few who stood to benefit from discrimination against others. The system of agricultural financing through the county committee may have been designed primarily as an administrative function. The justification for the continuance of such a system falls far short, however, given USDA's failure to monitor the operations; it must be forced to hold accountable those elected locally to defend the democratic ideals and principles in action.

B. Local Economic Markets

USDA plays a central and unique role in providing financing to small farmers for several reasons. First, the small farm, as with other small businesses, faces difficulty in securing credit in the traditional financing market.[59] Second, the atypical valuation of agricultural products makes USDA an expert lender.[60] It has developed the capacity to base economic predictions on crop values and yields that more adequately balance the risk in the business of farming. Third, USDA functions as a lender to compensate for market shortages. As a lender of last resort, it closes the financing gap for borrowers who are unable to obtain credit from traditional financial institutions.[61] Given this country's general history of racial discrimination, with specific focus on issues of credit access, this third function makes USDA's procedures even more astonishing.

Why then did USDA not provide credit to minority-owned small farms? How does USDA perform its role as a financial intermediary, given market imperfections and frictions? Three costs—transaction, information, and agency—are the foundation of financial intermediation and provide an explanation of the role that USDA plays in lending to small farms, including those that are minority-owned. Identifying the informational disadvantages about USDA-guaranteed loans highlights the limits on access of minority-owned farmers have to capital.

1. *Information costs*

Information costs are incurred when lenders evaluate a borrower's creditworthiness. The lender evaluates the riskiness of the borrower's project before and after the grant of credit. In markets that operate in perfect efficiency, lenders have complete information, allowing well-advised decisions about a borrower's ability to repay. In less-than-perfect markets, lenders must incur costs to determine whether the borrower will perform as expected under the lending agreement.

To avoid incurring the information costs that accompany lending, theorists posit that lenders ration credit, making less credit available at lower rates of interest.[62] The lower rate of interest, however, attracts more borrowers to the lender. The lender then must determine how it will determine the less risky projects that are entitled to a lower interest rate.[63] Credit rationing is a way to attain equilibrium in the market. A lender raises and lowers the rate of interest according to the amount of risk that the borrowers' project presents.[64] Under this theory, all small farms, including minority-owned farmers, have unlimited access to credit at an interest rate that appropriately reflects the riskiness of their project. Credit rationing theory posits that because lenders have asymmetrical information about a borrower's ability to repay an obligation, the lender uses the borrower's profit projections to measure two different effects: the risk adverse effect and the moral hazard effect. These effects measure two separate types of behavior in which the average high-risk borrower is likely to engage: adverse selection and moral hazard.[65]

The adverse selection effect screens out potential borrowers before the loan is made.[66] It identifies the risk-adverse borrower by drawing a correlation between the borrower who is willing to pay a higher rate of interest with the riskiness of the project.[67] This borrower presents

contradictory information on expected profits, *e.g.*, she is willing to borrow at a high interest rate because she expects profits to increase with risk. The low-risk borrower, by contrast, will find higher interest rates prohibitive, and will look for credit at a lower cost. Lenders, who are not privy to sufficient information regarding the borrower's business operations, may thus limit the amount of credit that they are willing to extend to risk-adverse borrowers.[68]

The moral hazard effect refers to the borrower's behavior after the loan is made.[69] This effect measures the incentive that the borrower has to engage in risk-free behavior. This borrower is willing to pay a high interest rate because of the potential for a high return. The borrower's project, which is extremely risky, has a low probability of success. Should the project succeed, its return will be great. The lender is willing to lend to this type of borrower at a higher rate of interest to protect against default.

To the extent that there is asymmetrical information between lenders and small farmers, credit-rationing theory suggests that small farms with projects calculated to yield positive earnings may be unable to obtain financing at any cost. Thus, an intermediary such as USDA becomes a significant lender to the small farm market. USDA has arguably created a structure that provides it with screening and monitoring advantages that reduce the risks of adverse selection and moral hazard. The county committee structure allows USDA to become an "inside" lender, as compared with a public market lender, who operates with more limited information in making arms-length transactions.[70] Arguably, this relationship benefits the lender, who is able to ease the information asymmetry with some advantage accruing to the borrower who can benefit from financing terms that more realistically meet her needs.[71]

The USDA decision-making structure places a strong reliance on the county committee system. Theoretically, the task of local farmers is to abate informational deficiencies by providing informational advantages when screening credit applicants and monitoring borrowers. What is required is more circumspection into the adequacy of this structure given its composition of local landowners, who are engaged also in the business of farming.

The question becomes whether small, minority-owned farmers are getting all of the credit that is available to them, given the benefits of this "inside" informational advantage. Minority farmers would argue that within this efficiently operating system, credit rationing exists not in price increases but in reduced quantity or availability rationing.[72] While the county committee may be a crucial link to the production and transfer of information reducing information asymmetry and credit rationing, the next issue is whether the county committee plays a role in limiting transaction costs, which also tend to limit the supply of credit.

2. *Transaction costs*

Transaction costs are the costs of acquiring and verifying information and arise primarily through interactions between individuals.[73] To some extent, the difficulty that many small farmers have had in obtaining credit from private sources is due to transaction costs, which is why those farmers then turn to USDA for financing.

Credit is available from various sources, some of which are able to finance it more cheaply than others. Financing costs include the charges that the intermediary incurs for the credit review and documentation process. The financial intermediary incurs financing costs when it identifies and contacts borrowers and investors and when it negotiates, verifies and enforces the contracts.[74] These functions can be prohibitively costly and interfere with credit availability because they price the buyer out of the market.[75]

The transaction costs that a lender incurs and passes on to the borrower through the pricing of the loan are most likely less than those that the borrower would incur if the borrower were to find investors on her own.[76] There are several reasons why these costs are incurred. First, the typical borrower will have difficulty finding investors willing to invest in an illiquid asset, such as a small business.[77] Second, the illiquidity of the investment also contributes to its lack of diversification as an investment.[78] Finally, investors cannot be protected from the credit risks that accompany this unique investment.[79] Thus, because the borrowers' inability to identify investors willing to take on the risks of default, small farm borrowers are especially disadvantaged in the credit economy. Similarly, an intermediary's transaction costs will be less than those that the individual borrower may incur if she were to seek her own investors. Although a lender may have concerns about financing farm operations, banks, in particular, are able to attract investors who are willing to leave their funds on deposit with the bank for a variety of funding needs.

For qualifying borrowers, USDA as a lender reduces search costs.[80] Many farmers, including small farmers, seek financing from USDA because it is a readily identifiable source of funds. Although USDA, as a specialized lender, is concerned with the liquidity of its assets, its concerns are different because it is a governmental entity.[81] Unlike a bank, which must be concerned about the liquidity of a loan because of the investors who fund it, USDA has no similar concern.

USDA has no investors. Its primary concern is in maintaining congressional approval and confidence that the fund is well administered. The U.S. Treasury protects the solvency of USDA's guaranteed loan funds.[82]

Functionally, in its role as a financial intermediary, USDA's performance is enhanced through the use of the county committees. Its procedural structure operates to minimize transaction costs.[83] Financial intermediaries routinely diversify risk, evaluate investments, and provide liquidity to the investors. The county committee serves this function through its decision-making structure. To the extent that the county committee makes decisions about the availability of credit, it arguably makes those decisions based on predictors about loan performance. An adequate assessment of transactions costs develops a diversified portfolio among eligible borrowers. The committee has discretion to make awards based on the potential borrower's request or to determine that a lesser amount is more manageable for the particular borrower. Similarly, its cautious considerations on loan servicing for troubled borrowers allows it to determine which borrowers are less risky among the group of those that are financially troubled and deserving of debt restructuring. Thus, the county committee develops some expertise in determining who is most eligible for benefits, given some implied conditions. It also determines who actually receives benefits based on its translation of the information about the borrower and her ability to perform as promised. [84] These functions overlap with the agency costs (or the lender's costs) in managing the loan once the borrower actually receives the funds.

3. *Agency Costs*

Agency costs represent the cost that lenders must incur in determining whether the borrower performs as expected under the lending agreement. One way of doing this is to evaluate the business manager's acumen and character.[85] The business of farming, as in many other small businesses, requires a borrower who will advance the business through hard work and great effort.[86] The lender's manager must be able to assess the specific abilities of the borrower as farmer.

Small business borrowers who do not have equity will find it difficult to obtain credit from a lender. This is due in part to the moral hazard effect.[87] The borrower who has insufficient assets at risk has little incentive to refrain from dishonest conduct or to exert maximum effort.[88] The lender needs the ability to limit the borrower's moral hazard. This requires the lender to find alternatives to closely supervising the borrower, which is itself a cost that may not have a corresponding benefit.[89] Debt financing requires the lender to determine the net returns of the business in order to assess the ability to repay the obligation.[90] A part of this evaluation involves assessing the business manager's reliability. By relying on the borrower or her manager to carry out the business plan, the manager becomes the agent of the financing source.[91]

The desire to avoid agency costs may be implicit in the county committee structure. By delegating loan review function to local farmers, USDA is trying to improve its predictions about borrower performance. Its ability to monitor loan performance may provide some insight into the prominent role that USDA has assumed in financing small, minority-owned farms.

USDA loans are designed for borrowers who do not qualify for loans in the traditional market. Eligible borrowers are those who often are unable to obtain financing because they do not have sufficient collateral for the loan and equity investment in the business.[92] The high-risk borrower's actions are difficult to control and it is therefore unrealistic to think that she will behave as an agent of the lender in monitoring the business' adherence to its proposed plan. The borrower has little reason not to adopt a "win big, lose big" strategy.[93]

It is possible that the county committee, in its deliberations regarding minority farmers, is considering the agency costs of the loan. Appropriately, under agency theory, the committee may find that many farmers who come to USDA as a lender of last resort have little to lose or inadequate skill in business management, either of which would make them poor debt risks.[94] While this is a function of the committee, it is implicit at best, arising out of the economic justifications of the county committee structure.

If this is the case, the county committee is not applying the proper eligibility requirements to the loan application process. It is substituting its judgment of eligibility for the federal standard. The county committee may be using what it deems the standard should be and thereby creating a more onerous standard. By qualifying borrowers to receive USDA loans that have equity capital to invest,[95] collateral to put up,[96] or the ability to give personal guarantees,[97] the county committee as lender is safeguarding USDA funds against default but also is making loans to borrowers who would be eligible in the traditional market.

The county committee structure is a social and political force that makes race seem like a natural phenomenon rather than a social construction.[98] The exclusion of African-American farmers who should have qualified for USDA loans constructs segregated farming communities. As a result, race and space converge to impact the community in two ways. First, African-American farmers become defined by the members of the county committee as those who are not successful in their occupation. Second, the loss of income from farming

identifies African-American farmers as unworthy of loans, which begins the vicious cycle that can lead eventually to the loss of farmland for these farmers. This conduct by the county committee breeds the continuation of the white dominant norm. Because the exclusion of black farmers feels neutral to the members of the county committee and other local USDA officials, the perpetuation of whiteness and disappearance of eligible African-American farmers for USDA loans may be unapparent. The economic consequences are positive for those white farmers who themselves benefit from the domination of a race-conscious process that the white farmers can label as neutral and rational. In fact, the white farmers have racialized the neutral process to dominate economic access to USDA funds.

C. The Intersection Between Politics and Economics: Lack of Access to Credit as Reacialized Economic Space[99]

Because the business of lending is one of wealth maximization, the rationales of economic efficiency, capitalism, and the free market are more than adequate justifications for credit and lending decisions. Denial of credit based upon race or geographic location of property,[100] presuming the applicant is otherwise creditworthy, is clearly irrational because the lender would forego a favorable transaction.[101]

The county committee, acting on behalf of the lender, USDA, adheres to the principles of self-interest and wealth maximization.[102] As lenders, its rationalizations for lending based on race or geographic location of the person or property are arguably justifiable based on poor underwriting conditions, increased information costs, additional opportunity costs, and perceptions of risks. Given the facially neutral regulations that govern the eligibility for USDA credit, why are county committees reluctant to provide credit to eligible African-American farmers? A fundamental assumption is that as lenders, the county committees are engaging in the practice of redlining, a term that refers to making credit decisions based on the borrower's geographic location or the geographic location of the loan.[103]

First, it is reasonable to conclude that the county committees as lenders have decided to avoid entire geographical areas, *e.g.*, African-American owned farmland. The county committee's presumption that the borrowers are not creditworthy and that they are risk-averse leads to the conclusion that the property has a declining value. Using USDA procedures, those who did receive loans could be required to over-collateralize them. Loans made to African-American farmers were considered potentially unprofitable because of the threat of collateral depreciation or failure to repay. A failed credit obligation was presumed. Thus, when the county committees did make loans to African-American farmers, they were considered profitable only if credit was extended on unfavorable terms.[104]

Second, county committees could argue that higher monitoring and administrative costs justify failure to lend to African-American farmers. By identifying loans that might be unprofitable, USDA avoids the costs of collecting on bad debt.[105] The information costs of screening and monitoring make these loans more costly and less profitable. The extraordinary type of evaluative mechanism resulting in more processing serves as an adequate justification for failure to lend. Yet, this is precisely the type of informational advantage that a localized lending structure should yield.[106]

Third, county committee members rely on "risk stereotypes."[107] Their lending decisions are based on their subjective perceptions regarding the loan's profitability given their personal knowledge of the applicant and the applicant's financial status. Race and farming skill become indicators. Undoubtedly, county committee members would defend these perceptions as a needed dimension to determining the borrower's creditworthiness.[108] Presumably, this is one of the informational advantages that close the lending gaps instead of widening them. Subjective perceptions may directly impact the borrower's ability to secure the amount of credit she actually wants.[109] Inaccurate perceptions result in lower loan amounts, which in turn contribute to loan failure.[110]

Decentralized lending offers some inherent structural advantages. It appears, however, that the county committee system has failed to consider the need for fair lending. One of the advantages that localized lending should have alleviated is racial credit rationing and its justifications.[111] An underlying presumption of localized lending is that the decision-makers will assess the dynamics of lending to their communities. While this requires recognition of risks associated with lending, it also should alleviate lending disparities by developing more information about the communities and the borrowers that better predict loan performance. By devoting more resources to screening and monitoring, information costs are increased, but more reliable indicators of loan performance are also developed.[112]

Additionally, members of the county committees, unlike bankers, are not acutely concerned with the impact of the lending decision on the bank's solvency. A bank's profit increases with each profitable loan made. Unlike a bank, USDA's ability to lend is based only in small part on the performance of its loan portfolio.[113] FSA's congressional funding, while concerned with loan profitability and delinquencies, does not use loan

performance or yields as a sole determinant for access to federal monies. Borrowers are deterred from defaulting on these obligations because they are barred from receiving additional loan funds.[114] Thus the primary factor that defines irrational redlining (competitive market pressures) is absent in the federal agricultural lending sphere since it operates in a unitary market, providing loans to borrowers who are unable to receive credit elsewhere.[115] The geo-lending that results in credit denials to minority neighborhoods is less evident in the rural areas where white-owned or occupied farms may be adjacent to black-owned or occupied farmland.[116] Yet, a pattern in lending disparities persists, perhaps due to irrational racial redlining.

The failure to connect federalism and economic theories as having a combined impact limits the measures of needed reform. While local agrarian interests have received federal support as an institution, USDA's actions elevated the role of the county committee to that of a political institution that has the power to affect economic policy and development. Political institutions that rest on the attitudes and preferences of citizens as informed, unbiased decision-making but which are in fact operating with bias and self-interest are abusing majoritarian power. Any remedy addressing this type of abuse must recognize and compensate for the true nature of the economic harms.

IV. THE PROPOSAL: AN ALTERNATIVE MEASURE FOR THE LOSS OF DISCRIMINATORY ACCESS TO CREDIT IN THE SMALL BUSINESS CONTEXT

Legislation alone will not ameliorate the racial disparities in farm lending. Perceptions must be changed. Uniform federal laws and effective enforcement can, however, begin the process. In this section I recommend two changes that have the potential to decrease farm lending discrimination, improve the accountability of local leaders involved in the decision-making structure, and accurately meaure the complexities of the losses.

This section begins by explaining the deficiencies of existing anti-discrimination statutes as remedies and then recommends several modifications to the current USDA credit-granting policy towards small farm lending. First, it recommends changes in small business loan reporting requirements, particularly in the recording and publication of loan approval rates on small business loans to make county committees more accountable. The second recommendation calls for a change in USDA's eligibility criteria for service on county committees. This proposed change aims to cure the inherent conflict of interest among committee members that perpetuates bias and self-interest in lending practices. The third recommendation proposes a theory of prospective loss of inheritance when small business owners can prove a nexus between business failure and lack of access to credit.

A. THE EQUAL CREDIT OPPORTUNITY ACT: AN INADEQUATE REMEDY

The Equal Credit Opportunity Act ("ECOA")[117] allows an individual to challenge discrimination in economic or credit transactions based on intentional conduct and subtle acts and policies that amount to discrimination.[118] It applies to consumer as well as business lending.[119] ECOA would appear to provide the appropriate remedial approach for black farmers, given that small businesses were involved. The ECOA, however, has a narrower standing.

Under the act, a plaintiff may prove that a lender has unfairly discriminated by showing either disparate treatment or disparate impact.[120] Disparate treatment is established through explicit and unambiguous statements of hostility towards persons protected by ECOA.[121] Those statements must prove discrimination without inference or presumption.[122] The burden then shifts to the lender to prove that it would not have made the loan in the absence of impermissible criteria.[123] In a direct evidence case, a lack of qualification may be asserted as a means of evidence refuting causation.[124] Thus, the plaintiff must show that given the financial institution's lending policies, her proposed loan fell within those guidelines.[125] In a plaintiff's prima facie case, she must demonstrate that she was otherwise minimally qualified for a loan. The creditor then has the burden to raise as an issue of fact a legitimate, nondiscriminatory reason for the credit denial.

A disparate impact analysis makes it unnecessary for the plaintiff to show evidence of a discriminatory motive.[126] To prove a disparate impact case, a credit applicant must show that the lender's practices or patterns of behavior have a discriminatory effect and cannot be supported by a business necessity. Even though the policy or practice may appear facially neutral, the test measures whether the statistical effect disproportionately excludes or injures an applicant who is a member of a protected class.[127] The burden then shifts to the creditor to prove that the practice has a manifest relationship to the credit in question. The creditor's explanation must be specific and direct.[128] After such a showing, the burden then shifts back to the plaintiff to show that the practice is a pretext for discrimination.[129] The loan applicant has the evidentiary burden of proving that she was qualified for the loan, regardless of the theory of proof asserted.[130]

The lack of minority applicants in many of the counties demonstrates the disparate impact of USDA's marketing and lending committees in the Southeastern United States. Reported incidents included both overt acts

of discrimination and experience with latent policies that have the effect of either not lending to African-American farmers or lending to them on different terms than their white counterparts. This unwritten policy of racial discrimination is without solid business justification and has prevented black farmers from seeking or receiving USDA loan funds without regard to the qualification of the applicants. Statistics on the number of loan applicants received from white farmers and the number received from African-American farmers show the racial impact of these policies.[131] Yet, even in a successful case, the applicability of the remedy would be greatly limited.

B. CHANGES IN USDA'S REGULATORY STRUCTURE

1. *Uniform Applicability of Fair Lending Requirements*

Regulatory uniformity in lending practices can address USDA's systemic failure to eliminate discrimination and its lack of accountability in the county committee structure. Aggressive enforcement of the existing discrimination laws must be augmented by initiation of new enforcement mechanisms. More specifically, implementing criteria similar to the Home Mortgage Disclosure Act's (HMDA)[132] data-collection requirements would allow small lending advocates to uncover and investigate lending bias.[133] Only consistent and uniform records for review can allow fair decisions about who is receiving USDA loan funds.[134]

HMDA's primary purpose is to uncover redlining by lenders. It requires lenders to provide sufficient information for public inspection.[135] Lenders must report the number and total dollar amount of mortgage loans originated or purchased by the institution during each fiscal year, along with the overall approval and rejection rates for each lender. [136] The statute does not require the lender to disclose the reasons for rejection. Therefore, it is difficult to uncover intentional discrimination without a review of the complete loan file of a rejected individual.[137]

HMDA is effective because it allows fair lending advocates to use the data to show the disparities in the lending process. By exposing a lender's unwillingness to make objective decisions about lending based on income and ability to repay instead of geographical sites of the residential property, fair lending advocates have been able to become more vocal about the limited credit access in minority residential areas.[138]

Incorporating HMDA-like requirements into USDA's regulatory structure could provide a multi-faceted solution. First, it would require USDA as a lender to have adequate record-keeping and reporting requirements, alleviating some disparities in lending by using the reporting requirements to provide a basis for applicant comparisons. Implementing a HMDA-like scheme would provide a basis for minority applicants to demonstrate that they are being treated differently than non-minority applicants on credit determinants like farming experience, projected crop yields, and ability to repay. USDA needs to develop the internal capability to determine whether there is consistency in the loan approval process based upon statistical evidence. It can then become more accountable to its constituent farmers despite its decentralized lending scheme.

Furthermore, requiring the reporting of the reason for a denial of a USDA loan request can provide the basis for more efficient investigation into credit access. By requiring USDA to disclose the reasons for rejection, more appropriate comparisons can be made between minority and white applicants. Such a system would make possible a review of loan approvals with loan denials. Accordingly, USDA should be required, when requested by a rejected applicant, to make comparisons between the loans denied and those that were approved by similarly situated applicants.[139] The data then becomes a distinguishing basis for comparisons with other counties lending on size of the farms and income levels. These types of analysis will help unearth lending disparities.

Finally, unlike HMDA, the USDA legislative scheme should provide a private right of action to farmers experiencing discrimination in lending practices. This would allow the data to be used in a meaningful way by those who are directly impacted.[140]

HMDA relies upon regulatory examinations and supervision for compliance. The possibility of individual enforcement actions focuses the lender on the seriousness and immediacy of potential violations. The proposed schematic creates a relationship between the lender and the individual applicant. Thus, the threat of financial exposure, should a lending violation be found, creates incentives for more cautious lending determinations.[141] Moreover, a private right of action provides a fuller remedy because it creates direct accountability by the lender to the applicant.

2. *Monitoring the County Committee*

ECOA prohibits creditors from engaging in discrimination in any part of the lending process.[142] Although the statute does not specifically address unfair marketing practices, discouraging minorities from applying for credit is barred under the statute. This can be read to include a prohibition not only on the way that USDA identifies and assists borrowers in filling out loan applications, but potentially to reach the composition and authority of the county committees.

Local farm agents' differential treatment of minority applicants constitutes a discriminatory credit practice.

Under ECOA, USDA and its county committees are creditors and may be subject to violations of the statute for pre-application marketing and discrimination.[143] Under FSA guidelines, USDA employees at the local level are responsible for assisting farmers with the FSA loan application. The failure to assist minority farmers, many of whom tell tales of being denied an opportunity to even receive an application, reflects the USDA officials' influence over the applicant pool: it is difficult to assess the denial rate of minority farmers if they are not even given an opportunity to apply. This type of treatment by USDA representatives has served as an effective deterrent to minority farmers from low-interest, federally guaranteed loan funds.

The common discriminatory practices of the county committees may be effectively remedied under ECOA and through changes in USDA's regulatory structure. USDA needs a more rigorous means to identify appropriate borrowers and make the county committee system accountable for irregularities in its distribution of agricultural benefits and loans.[144] Mandatory changes can be as basic as requiring USDA to send notices in advance of yearly funding allocations to all farmers. It could also monitor the guidance and assistance that local USDA agents provide to individual farmers to ensure that it is provided in a non-biased way. A more significant change would be to establish an agricultural ombudsman that systematically and randomly reviews credit determinations for disadvantaged farmers. This type of self-enforcement can bring much-needed credibility to a prejudiced process.

USDA should address conflict of interest situations as well. It is problematic for those making the credit decisions to also be the ones who are in direct competition with potential borrowers for loan funds.[145] It should be a violation of credit discrimination laws for a member of the county committee, or his or her family, to purchase property that is subject to sale based on a denial of credit that has occurred within two years.[146] Instead of a county committee made up of local farmers, USDA should institute a committee system composed of disinterested persons who are qualified for make agricultural lending decisions. In order to draw upon a qualified pool of persons able to serve, USDA should offer a training and certification process that provides the opportunity for competent local citizens to assume these decision-making roles.[147]

Recognizing the unique nature of agricultural lending, there should be an expedited review at the national level of minority farmers' denied loan requests. By creating an immediate right to appeal, minority applicants who may have been unfairly discriminated against in the past will feel that the process is more sensitive to their concerns. Furthermore, unnecessary delays in planting and harvesting crops could potentially be avoided. The review can be based on previously collected information from prior years' determinations. If the information is readily accessible, the review process need not be unnecessarily prolonged. Finally, an opportunity for a review at the federal level gives farmers a better chance of assessing whether there is a pattern of lending disparity among the local decision-makers.

C. Measuring the Intangible Business Losses: Recovery for Prospective Loss of Inheritance

One of the complexities of the loss of a business is that it is an economic loss.[148] In tort law, economic harm unaccompanied by physical injury is not usually recoverable.[149] When there is pure economic loss due to negligence, however, the law recognizes a remedy.[150] Such are the rationales of statutes recognizing discrimination as compensable wrongdoing.[151] Actual losses in an ECOA case may be minimal.[152] Compensating the business that suffers credit discrimination allows recovery for the consequential losses of income or profits. Compensation for credit discrimination when the federal government is a defendant is limited to actual damages.[153] The question becomes whether that compensation alleviates the economic injustice.

For the small farm that has been put out of business by the federal government's complicity in a discriminatory lending scheme, there needs to be recognition that the discrimination wrongfully interfered with a business' development. In the case of the failure or insolvency of the business due to the discriminatory credit decisions, actual damages should include compensation for the loss of prospective inheritance. Such a contextual examination could result in a fuller remedial measure by recognizing the future stream of income that has been lost because of the discriminatory conduct.

1. *Loss of Prospective Inheritance*

ECOA creates a duty for creditors to make lending decisions in a non-discriminatory manner. In this regard, tort law defines its duties and remedies.[154] The statute allows compensation for actual damages and for punitive damages up to $10,000.[155] Although the statute is meant to halt discrimination for discriminatory lending to individuals and small businesses, its remedial scheme is flawed in that it fails to require a specific focus on the decline in the business' net worth as it affects beneficiaries and their loss of prospective inheritance.[156]

a. ***An analogy to the wrongful death recovery for loss of prospective inheritance***

Special damages are those that are peculiar to each individual case.[157] A damage award is held to be "special" if it arises naturally, yet not necessarily, from a wrongful act.[158] Damages for loss of inheritance are an example of the expanded scope of pecuniary damages currently available in wrongful death actions.[159] Loss of inheritance damages are generally defined in terms of the pecuniary advantage the decedent would have bestowed upon the beneficiary.[160]

Loss of inheritance as a damage remedy captures the rationale in tort policy that the injured plaintiff should be fully compensated for her injury.[161] Had the decedent lived a full and normal life, she would have accumulated property that would have passed to beneficiaries.[162] Loss of inheritance damages generally consist of the present value of property and earnings which the deceased reasonably would have been expected to add to the estate and, at natural death, would have left to her statutory beneficiaries.[163] Despite their speculative nature, the role of the jury in determining the propriety of a loss of inheritance award provides a proper balance.[164]

To prove loss of inheritance damages, the plaintiff must show that the decedent, but for her wrongful death, would have accumulated an estate and that the plaintiff would have been alive at the conclusion of the decedent's natural life to receive this inheritance.[165] Furthermore, the plaintiff must demonstrate that she would be one of the natural recipients of the decedent's estate.[166] Loss of inheritance presumes an increase in the pecuniary value of an estate, which the beneficiary must prove.[167]

b. Compensating discriminatory lack of access to credit that results in business failure

Property ownership, including ownership of a small business, represents authority and empowerment and thus entitlement.[168] Access to capital is crucial to the continuous ownership of any small business. Capital is needed to both stabilize and expand the business production. The issues surrounding entitlement and lack of access to credit combine to define future interests in failed business property.[169]

The loss of a business due to discriminatory lending practices is similar to the death of a party by tort. In place of bodily injury is economic injury. A past harm has occurred that warrants compensation because the tortfeasor owed a duty to the decedent. In this case, USDA is the tortfeasor because it had a duty to provide financing as a lender of last resort to farmers who qualified for USDA loans. Its actions—ceding authority to the county committees who made discriminatory decisions regarding minority farmers—proximately caused the injury suffered by those farmers.[170] Many minority farmers are limited resource farmers by definition who would qualify for USDA loans because they are unattractive to lenders on the open market.[171]

African-American farmers who lost their farms because they could not secure adequate financing owned an asset that was both business property and inheritable property. To the extent that the economic remedy for business loss seeks fairly and adequately to compensate the injured parties, there should be a recovery for the full economic loss and the loss to the injured parties, *e.g.*, the survivors.[172]

Moreover, farmland represents a business asset that is often bequeathed, making its loss more than just economic. Thus, a theory of loss recovery must value as a pecuniary interest the relationship between the small farm as a business entity, the owners of that entity, and the testamentary value of the property. The relationship should recognize the unique nature of land as property, the income-producing character of which is a business.

Analogizing further, the decedent is the small farm. The landowner is the beneficiary whose rights have been lost and should be compensated. What the landowner as beneficiary has lost is both the income of the farm and survivor rights that allow a choice about how the future interests of the small farm should be distributed.

This is similar to what occurs when owners dissolve a business. While the owner of a business has the right to receive its present income while in operation, that same owner has the right to receive future income that the business creates once it is dissolved.[173] Those rights are not extinguished because the business has ceased to operate; rather, they survive until there is no income produced by the business. While the length of this wind-up phase may be indefinite, what is significant is that the attachment of the right to the owner cannot be severed as long as there is an income-producing nature to the property.[174] Thus, the dissolved business owners' right to recoupment of the business' value, including income and profits, is a vested right independent of the actual legal existence of the business.

Defining property loss more broadly in this context gives value to all of the economic benefits that property ownership brings. By viewing discriminatory restrictions to credit as a pecuniary loss, the law is recognizing that racial disparity, in this context, affects federal agricultural finance. This theory compensates the value of the tangible and intangible assets of property ownership. In assessing the market value of the subsequent loss, it compensates for the fundamental harm suffered by black landowners because of USDA's discriminatory practices: loss of testamentary rights.[175] In conduct that intentionally harmed without justification, the lender pre-empted fair considerations and financially injured businesses. Thus, as a special damage, the loss of prospective inheritance

equalizes the real loss of land and the future interests that the land as a business income-producing entity represents. Discriminatory loss of credit becomes a lost business opportunity, re-defined for this specific context.

2. *Policy Rationales Supporting Compensating Prospective Inheritance Rights*

Considering inheritance rights as property might meet with resistance for several reasons. Among the concerns raised are: (a) inheritance rights are intangible property; (b) there is no entitlement nor expectation to an inheritance nor are heirs identifiable at the time of the loss; (c) the value of inheritance rights is too speculative for courts to determine the amount the parties should receive accurately; (d) future earnings are allowed in a business loss; and (e) awards based on loss of inheritance rights would be windfalls. None of these considerations should present a significant barrier to recovery in this instance.

a. *Inheritance rights are a tangible loss*

Some may argue that inheritance rights are intangible to the extent that they represent an initially unquantifiable loss. However, whether those losses are in fact immeasurable is a matter of perspective.[176] Property rights that ensure that the injured party is fairly and adequately compensated can be made tangible. The failure to recognize intangible rights because they appear to be based on conjecture does not mean that they do not exist but that the law has not developed a workable matrix for recovering them.

Inheritance rights represent compensation that is adequate and fair for injuries and losses. In determining the economic and legal bases for compensation, it is important to focus on the rationale for tort recovery. To the extent that the law intends to ensure that injured parties are compensated adequately and fairly for their injuries and losses, its optimal result is for the injured party to receive compensation equivalent to the full amount of her loss as well as the compensation that is proportional to the loss.

b. *Proof of expectation in inheritance is not critical*

The inability of the prospective heir to prove that she would receive anything is another stated objection to recovering for prospective inheritance loss. While there is no entitlement to an inheritance in our society, most property is inherited.[177] Recognizing a loss based on an established legal norm is admittedly broadening the definition of pecuniary loss, but the limitations on that remedy are established by the burden of proof that the heir assumes in establishing a right to a recovery under the theory.

What beneficiaries must prove in a future wrongful death context is again instructive. A plaintiff must prove that the decedent: (1) was a thrifty person; (2) would have accumulated an estate in excess of what they left at death; and (3) would have left this estate to the statutory beneficiaries as heirs.[178] In the business loss context, a beneficiary should be able to recover for loss of this inheritance if it can be established that: (1) the beneficiary has received in the past support or income maintenance; (2) the estate has the potential for an accumulated or appreciated value; and (3) inheritance is a pecuniary loss.[179] Inheritance rights, although not based on an expectancy theory, constitute compensation that is adequate and fair for the injuries and losses because it allows beneficiaries to recover the full amount of their loss as well as compensation that is proportional to the loss.

c. *The value of inheritance rights can be determined with accuracy*

Critics of inheritance rights base their objections on the uncertainty of the amount the parties should receive as well as the potential inability of the courts to determine that amount accurately. Critical to recovery are the heirs' proof of income and the prospect of its accumulation and appreciation. In this context, the plaintiff must demonstrate that the resulting losses were attributable to the defendant's tortious interference. Forseeability in tort law is assessed at the time that breach of duty occurs. Again, the limitations imposed on the beneficiary by the burden of proof serve as a control. Speculation is removed by requiring that the beneficiary adequately prove the accumulated value of the property, along with identifiable and intended beneficiaries.

d. *Future earnings may deny appropriate recovery*

Measuring business losses presents an array of options, depending on the financial status of the business at the time of the injury. These are losses that extend beyond the current asset value, some argue, and should be calculated based on lost future earnings. Lost future earnings measure the income that the injured party will not be able to receive because of the injury. Confining the measure to lost earnings, however, is inadequate compensation when there are limited assets. Those same limited assets are financially dependent on the sustained financial loss, since the farm needs the loan to survive. Thus, an award based on future earnings alone might be reduced because it fails to recognize how the income generating potential might have affected the financial need.

By measuring the present value of future increased earnings, courts must project the increased earnings over the business' existence expectancy and make an award

based on that projected amount.[180] This theory determines the actual economic value of the business and awards the beneficiary a fair share.[181]

e. ***Prospective loss of inheritance is not excessive***

A basic principal of remedial law is that the injured party should be restored to the status quo but should not receive more than is necessary to do that. As a remedy, opponents of inheritance rights argue that it represents a windfall because they seem to go beyond what is actually loss—the present income. However, that view does not take into account that tort injury also projects future losses that are impacted by the negligent behavior. To the extent that the recovery for injury serves a deterrent function, the measure for present as well as future losses serves to make the injured party whole.

Requiring the tortfeasor to pay the full cost of the harm done provides an economic incentive to prevent future harm. Compensating the prospective beneficiaries of the business that has failed should be an independent loss and injury when it can be proven that discriminatory access to credit resulted in the financial demise of the business.[182] This claim is especially needed when there is not an action for lost future earnings.[183] In the case of a failed business due to discriminatory lack of access to credit, there would be no basis for making a future earnings calculation.

In determining the economic and legal bases for compensation, it is important to focus on rationale for tort recovery. To the extent that tort law intends to ensure that injured parties are compensated adequately and fairly for their injuries and losses, its optimal result is for the injured party to receive compensation equivalent to the full amount of the loss, as well as the compensation that is proportional to the loss.

While this theory arguably expands the compensation rights of business owners in credit discrimination cases, failing to fully measure small business loss when racial discrimination dominates economic policies results in economic injustice. Economic discrimination through loan disbursement may affect not only present owners but prospective future owners as well. Specifically, compensating the intergenerational loss of land requires measuring the loss in terms of what the property truly represents—a testamentary and an income-producing asset. This measure is a more accurate measure of economic capacity at the time of actual loss.[184]

V. CONCLUSION

> [S]omewhere there should be reparations. It's good to know that you're saying that we're not going to have foreclosures, but what are you going to do about those hundreds of thousands of acres of land that have been lost, hundreds of thousands of black farmers who have been put out of business because of policies that were adverse to them?[185]

There is an inherent presumption in the USDA's funds distribution scheme that local jurisdictions are the most appropriate venue for determining federal agricultural assistance for small farmers. This presumption operates to make locally elected farmers federal agricultural policymakers. It is questionable whether this chosen operative is consistent with USDA's objectives. Beyond question is that the scheme has resulted in an indefensible reliance on the local county political consensus to meet the department's goals. Politically weak constituents, such as minority owners of small farms, are not fairly represented in a system of local governance that is captured by the participation of self-interested parties.

An economic analysis clarifies how the existing local structure is used. Yet economic principles, when viewed in isolation, disregard the legal and relational aspects of agency, authority, and hierarchy. A contextual examination of economic theory reveals that the small minority-owned farm is discriminated against as an economic unit. The county committee system allows biased decision-making to flourish.

USDA's current structure raises significant federalism concerns. Local control is not an adequate means of implementing national policy and goals because local farmers cannot be expected to execute national policies and goals without maximizing their own self-interest. The dire need for uniform and fair eligibility for, decision-making about, and accessibility to USDA funds can be remedied by more direct federal involvement in the distribution of agricultural financing. USDA must implement more stringent monitoring of credit availability and denials.

Critical to any review of USDA's credit structure is recognition of the economic disadvantages for the small, minority farmer. The remedial goal should fairly compensate those identifiable losses that are connected to the harm. In this regard, intergenerational loss recognizes that the damage extends beyond the immediate harm in discriminatory lending practice and is the needed counter-balance to a failed participatory governance scheme. USDA is uniquely situated as a financial intermediary. It must be held accountable.

NOTES

1 I dedicate this article to the memory, life, and work of my

father, Robert Fulton Jones, who jokingly referred to himself as a "book farmer" having earned a B.S. in agri-economics from Tuskegee University and a M.S. from North Carolina State University. My father's professional career at the United States Department of Agriculture spanned over 30 years. His first job assignment with USDA's Cooperative Extension Service was as a "Negro County Agent" in Wetumpka, Alabama in 1954. For many black farmers and their families living in central and southern Alabama, he was their "street lawyer," a compassionate friend, and their only contact with a fair and just USDA.

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[2] Pigford v. Glickman, 185 F.R.D. 82, 87 (D.D.C. 1999).

[3] Since 1935, the Secretary of Agriculture has enjoyed wide discretion to appoint county committees to implement agricultural credit programs under the Soil Conservation and Domestic Allotment Act (Parity Act) (Soil Erosion Act). 16 U.S.C.A. § 590h (2000).

[4] Most minority-owned farms are classified under USDA programs as limited resource farms. Congress created the Limited Resource Program (LRP) in 1978, allowing the Farm Service Agency (FSA) to make real estate and operating loans at low, subsidized rates to small and family size farmers. *See generally,* Agricultural Credit Act of 1978, Pub. L. No. 95-334, 92 Stat. 420, 7 U.S.C. § 1934 (2000). A limited resource farmer is defined as:

> [A] producer or operator of a farm: (a) with an annual gross income of $20,000 or less derived from all sources, including income from a spouse or other members of the household, for each of the two prior years; or (b) With less than 25 acres aggregated for all crops, where a majority of the producer's gross income is derived from such farm or farms, but the producer's gross income from farming operations does not exceed $20,000.

7 C.F.R. § 457.8.

Small farm is defined as:

> [A]ny farm (1) producing family net income from all sources (farm and nonfarm) below the median nonmetropolitan income of the State; (2) operated by a family dependent on farming for a significant though not necessarily a majority of its income; and (3) on which family members provide most of the labor and management.

7 U.S.C.A. § 2666(c).

See also U.S. DEP'T OF AGRIC., A TIME TO ACT: A REPORT OF THE COMMISSION OF THE USDA NATIONAL COMMISSION ON SMALL FARMS, 27 (Miscellaneous Publication 1545, 1998) *available at* http://www.reeusda.gov/agsys/smallfarm/ncosf.htm [hereinafter A TIME TO ACT] (describing small farms as those "with less than $250,000 gross receipts annually on which day-to-day labor and management are provided by the farmer and/or the farm family that owns the production or owns, or leases, the productive assets").

[5] As used in this article, the word "farmers" refers to farmers and ranchers as defined under USDA statutes and regulations. I use interchangeably the terms African-American and black.

[6] The growing decline of small farms represents a significant detriment in agricultural production. First, small farms are beneficial because of their diversity in production. Larger farms have mono-cropping operations, while smaller farms are able to offer crops in rotation and livestock production that results in both biological diversity and ecological resilience. *See* A TIME TO ACT, *supra* note 4, at 35. Secondly, the discriminatory credit denial negates USDA's mandate to assume a significant role as lender of last resorts. USDA's credit granting function is critical because of its expertise in farming. Farming is described as a "narrow-margin and high-risk business." *Id.* at 34. For this reason, many traditional financial intermediaries are not readily available as lenders for farmers. *Id.*

[7] African-American farmers account for about 3% of American farmers, owning less than four million acres of land as of 1991. There are reported annual losses of an average of fifty thousand acres resulting in a projected net loss of $2.5 million. This compares to ownership in 1920, when African- Americans owned fifteen million acres of land and 17.4% of farm operators were black. Lack of capital and access to financing and additional technological changes are cited as primary reasons for the decline. *See* Pigford v. Glickman, 185 F.R.D. 82, 83-84 (D.D.C. 1999).

[8] Soil Conservation and Domestic Allotment Act (Parity Act) (Soil Erosion Act) Act, April 27, 1935, c. 85, 49 Stat. 163, as amended, Pub. L. No. 106-274, 16 USCA § 590h.

[9] Money is specifically available for rural farming operations. Rural areas are defined in the statute as any place with a population of less than 50,000. 7 U.S.C. § 1932(d) (2000). *See generally* David Westfall, *Agricultural Allotments as Property,* 79 HARV. L. REV. 1180 (1966) (questioning as sound policy the continuous use of agricultural subsidies by farmers and arguing that they create an entitlement); and Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs,* 14 N. ILL. L. REV. 659 (1994).

[10] FSA is a federally created lending institution within USDA, which makes and guarantees loans to farmers and businesses in rural areas. It is often referred to as USDA throughout this section.

[11] Direct and guaranteed farm ownership and operating loans are granted to farmers who are temporarily unable to meet all their expenses and unable to obtain private or commercial credit, who lack sufficient financial resources, who have limited resources, or who have suffered financial setbacks from natural disasters. Direct loans are the more limited with a maximum loan size of $200,000 and are made and serviced by FSA officials who provide supervision and credit counseling. These direct loans are typically farm ownership, operating, and emergency loans but may also include youth project loans for agricultural students interested in pursuing a career in farming. A portion of direct loan funds is set-aside for minority applicants and beginning farmers. Guaranteed loans, however are made by conventional agricultural lenders for up to 95% of the principal and then guaranteed by FSA. The maximum loan size is $700,000 and is used for farm ownership and operating. As with the direct loan funds, a portion of the guaranteed loan funds is targeted at minority applicants and beginning farmers. *See* FSA Online, Farm Loan Programs (http://www.fsa.usda.gov).

[12] Borrowers may use the loans to acquire, enlarge, or improve farms and recreational facilities, to supplement farm income, to refinance existing indebtedness, or for loan closings. 7 U.S.C. § 1942. Amendments in 1996 eliminated the availability of both operating and ownership loans for small nonfarming business enterprises in rural areas and for other purposes. Pub. L. No. 104-127, §§ 602, 612(a), 110 Stat. 888, 1085, 1087, amending §§ 1923, 1942. Loans for small businesses are available from the SBA. *See also* 7 C.F.R. § 1941.

[13] USDA must target 25 percent of its farm operating and ownership loan awards or guarantees to beginning farmers and ranchers. 7 U.S.C. § 1994(b)(2) (1992). Government-backed debt interests are sold to generate funds to make insured loans to farmers. Insured loans are made to eligible borrowers, who are unable to obtain credit from commercial financial institutions and agree to ongoing supervision of their farming operations. Insured borrowers may eventfully become eligible for guaranteed loan funds through the USDA's indirect lending program. Under this program, USDA guarantees loans made to farmers by commercial lenders. The guarantee is for up to 90% of the lender's exposure. 7 U.S.C. § 1929(h); 7 C.F.R. pt. 1980 (1998).

[14] *See* Food, Agriculture, Conservation, and Trade Act of 1990, S. Rep. No. 101-357 (1990).

[15] 7 U.S.C. § 1934(a). The limited resource rate is half the interest rate on U.S. Treasury obligations with 5-year maturities, but with a statutory minimum of 5%. Limited resource rates, annual rates, and borrowers are reviewed annually for eligibility. 7 U.S.C. § 1927(a)(3)(B) (for low-income farm ownership loans under § 1934) and § 1946(a)(2) (for operating loans). If they are ineligible, borrower's loan rates are increased to the regular interest rate. Dodson & Koenig, *The Farm Service Agency's Limited Resource Interest Rate Program in the 1990s, in* ERS, USDA, AGRICULTURAL INCOME AND FINANCE SITUATION AND OUTLOOK REPORT (AIS-64, Feb. 1997) at 38, 39 [hereinafter ERS, AGRICULTURAL]. Because the FSA is a lender of last resort, the limited resource loan rates have been used by large numbers of borrowers. Between 1991 and 1995, 41% of operating loans and 65% of farm ownership loans carried limited resource rates, but more recently fewer dollars were loaned at those rates. During some time periods, limited resource borrowers have tended to carry greater debt loads and have lower net worth than regular rate borrowers, but in recent years there has been little significant difference between limited resource and regular borrowers. *Id.* at 39-41. In recent years, limited resource loan rates have been at the 5% statutory minimum for both farm ownership and operating loans, and since 1990 these loans have been targeted for beginning farmers. *Id.* at 38. For comparison, on January 1, 1996, limited resource rates were 5%; regular operating loans, 6.5%; regular farm ownership loans, 7%. *Id.* at 46.

[16] Congress re-authorized the committee's functions as recently as 1982, stating:

> "Congress finds that agricultural stabilization and conservation *county and community committees have served, and should continue to serve, a vital function in implementing, at the local level, farm commodity, soil conservation, and related programs*; and that, by assisting the United States Department of Agriculture to conduct such programs effectively, *such committees provide substantial benefits to agriculture and the Nation.* Congress further finds that the agricultural stabilization and conservation *county and community committee system has developed, over the years, into a highly efficient mechanism for implementing such*

programs at the local level. Therefore, it is the sense of Congress that the Secretary of Agriculture should ensure that the structure and operations of the agricultural stabilization and conservation county and community committees, as heretofore developed to enable such committees to meet the responsibilities assigned them under section 8(b) of the Soil Conservation and Domestic Allotment Act [subsection (b) of this section], and related statutes and regulations, be preserved and strengthened." Pub. L. No. 97-218, tit. IV, § 401, 96 Stat. 216 (1982) (emphasis added).

[17] *See* Pigford v. Glickman, 185 F.R.D. 82, 86 (D.D.C. 1999). One of the recommendations of the USDA's Civil Rights Action Team (CRAT) Report was to make these federal government positions, but to date that recommendation has not been adopted by USDA.

[18] FSA has a statutory obligation to provide its borrowers with detailed notices and appeals related to any "adverse action" of the agency. 7 C.F.R. § 1962.47 (1993). Congress conducted hearings investigating the independence of the FSA appeals branch. Although the National Appeals Staff is designed to be an independent body, the Administrator of the FSA appoints the Director of the National Appeals Staff. 7 U.S.C. § 1983b (2000); 7 C.F.R. § 1900.51-.100 (1993). The congressional concern led to a provision contained in the 1990 Farm Bill, which was intended to reinforce that independence. Pub. L. No. 101- 624, § 1812, 104 Stat. 3821 (1990).

[19] For example, when a farmer applies USDA funds or its benefits program, the County Executive Director is to assist him or her in completing the application; the County Executive Director also performed an initial review of the application.

[20] *See Pigford*, 185 F.R.D. at 86.

[21] *Id.* at 90.

[22] "No acceleration of loan repayment or foreclosure will take place on a claimant who has a claim pending." Pigford v. Glickman, 185 F.R.D. 82, 91 (D.D.C. 1999) (citing Consent Decree at ¶ 7).

[23] The court denied a previous attempt at certification of a class on the basis of lack of commonality. Williams v. Glickman, Civil Action No. 95-1149, Memorandum Opinion of February 14, 1997, at 7, WL 74547. The proposed class was all African-American or Hispanic-American individuals who had suffered from racial or national origin discrimination in the application or servicing of FSA loans, which caused them to sustain economic loss and/or mental anguish and/or distress damage. *Id.* This class was denied certification as being overly broad and too amorphous with claims that were not typical or representative of potential class members. Williams v. Glickman, 182 F.R.D. 341, 344 (D.D.C. 1998).

[24] This claim was to be filed with the Farmer's Home Administration (FmHA) Equal Opportunity Office. In 1994, FmHA was consolidated into FSA.

[25] Another 1997 report by the Office of Inspector General of USDA stated that USDA had a backlog of discrimination complaints that had not been processed or investigated and that the FSA program for discrimination complaints lacked "integrity, direction, and accountability." *See* Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), Plaintiff's Motion for Class Certification Exhibit A (Evaluation Report for Secretary on Civil Rights Issues) at 6.

[26] *See Pigford,* 185 F.R.D. at 92 (citing Consent Decree at ¶2).

[27] The court, in approving the settlement agreement, considered the objections of numerous groups and individuals. Those objections focused on the fairness of the settlement negotiations; the amount of discovery completed; the definition of the class; inquiries into collusion between class counsel and counsel for the federal government, and adequacy of notice and opportunity to be heard on the proposed settlement. *Pigford,* 185 F.R.D. at 82.

[28] *Id.* at 92 (citing Consent Decree at ¶ 9(a)(iv)).

[29] U.S. Dep't of Agric., *Pigford v. Glickman*: *Consent Decree in Class Action Suit by African-American Farmers, Latest Statistics on Claims* (last modified March 14, 2001) *available at* (http://www.usda.gov /da/status.htm).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See generally* Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 19 (1995) (explaining that a limited federal government's role in the markets facilitates the political and economic rights of citizens).

[35] United States v. Carolene Products Co., 304 U.S. 144, 152-153 (1938).

[36] Philip J. Weiser, *Towards a Constitutional Architecture for*

Cooperative Federalism, 79 N.C. L. REV. 663, 668 (2001) (describing the New Deal era as the beginning of the "modern administrative state" in which federal statutes provide for state regulation to meet federal policy goals).

[37] As in several areas of federal governance currently, there is a tendency to vest state governments with federal political powers. Daniel L. Rubinfeld, *Federalism and Economic Development*, 83 VA. L. REV. 1581, 1592 (1997) (describing cooperative federalism as congressional programs that combine federal and state authority). *See also* Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 552 (1999) (discussing how the ideals of federalism that suggest giving states policy authority contributed to the 1996 welfare reform legislation).

[38] *See* New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[39] *See*, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1905 (1994) (explaining the intersection between private entities which perform governmental purposes and racially identified space) [hereinafter Ford, *The Boundaries of Race*].

[40] Boraas v. Village of Belle Terre, 476 F.2d 806 (1973) (upholding town's zoning ordinance with a restrictive definition of 'family').

[41] Akhil Reed Amar, *Five Views of Federalism: "Converse — 1983" in Context*, 47 VAND. L. REV. 1229 (1994).

[42] *See* Edwin L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 915 (1994) (arguing that decentralization allows for many of the benefits of federalism).

[43] The authorization of citizen participation may in fact render license for abuse of minority interests. James Madison envisioned that local and popular biases could undermine a government designed to serve all of its citizens. *See* JAMES MADISON, THE FEDERALIST NO. 10; JOHN JAY, THE FEDERALIST NO. 3.

[44] In a somewhat similar context, one scholar has argued that the majoritarian regime does not always represent the interests of citizens and that representational democracy is weakened when the interests of *all* citizens are not considered. Lani Guiner, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) (arguing that black electoral success may not result in more responsive government because result of winner-take-all elections confines the successes to a geographically and socially isolated constituency).

[45] Martha R. Mahoney, *Symposium Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 CORNELL L. REV. 1309, 1322 (2000) (arguing that most whites fail to perceive whiteness as a separate and distinct phenomenon that results in racial power and subordination against the racial minorities).

[46] Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); and Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39 (1991).

[47] Keith Aoki, *Race, Space, and Place: the Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, (1993) (positing that geographic communities of marginalized people have not developed haphazardly simply because similar people have come to congregate in the same area but have been created through zoning regulations and government acquiescence in its placement of public housing and development of urban programs).

[48] The process by which racial meaning is assigned to a previously race-neutral social practice or group. John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope From a Mountain of Despair"* 143 U. PA. L. REV. 1233, 1235 (1995) (describing racialization as a "dialectical process of signification").

[49] Audrey G. McFarlane, *Race, Space, And Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295 (1999) (arguing that the Empowerment Zones Program cannot properly be classified either as a tool to achieve social justice or as a neutral, rational, and beneficial program for poor, inner-city communities because of the limits it places on economic development); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996) (discussing how urban policy has resulted in the homogeneity of communities thus denying residents of the opportunity to associate with people whose opinions, values, and culture are radically different from their own); and Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995).

[50] *See* Calmore, *supra* note 48, at 1237.

[51] Culture here is used to mean group ethos. Scholars have taken differing views about how culture should be determined in ways that are representative of the entire group. *See* Linz

Audain, *Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709, 781 (1995). Critical cultural law and economics is "the manner in which law and economics informs and is informed by culture." The study of this area has brought to light a culture of deindividualization, "the attribution of psychological characteristics on the basis of apparent and immutable physical characteristics." Due to the fact that the very idea of race is itself racist and thereby necessitates racial classifications and the psychological attribution, Audain proposes a radical theory of non-race.

[52] Ford, *The Boundaries of Race, supra* note 39, at 1844. As Ford explains, "political geography—the position and function of jurisdictional and quasi-jurisdictional boundaries—helps to promote a racially separate and unequal distribution of political influence and economic resources."

[53] As discussed in this section, the term "space" refers to the mental imagery that one conjures when certain geographical places become the primary residence of certain groups of people. *See* Akoi, *supra* note 48, at 819-825.

[54] *See, infra* Section IV. B.2.

[55] Ford, *The Boundaries of Race, supra* note 39, at 1886.

[56] *See generally* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990). *See also* Ford, *The Boundaries of Race, supra* note 39, at 1886.

[57] As Ford explains, when legal doctrine fails to inquire either whether boundaries should exist or how they came into being, it permits a legal geography that is opaque because that theory fails to address how the social and economic consequences have created local jurisdictions. *See* Ford, *The Boundaries of Race, supra* note 39, at 1841, 1858.

[58] This system has created racially identified space—white space. I use that term advisedly since the effects of the county committee system was actually to create virtually all "white" agricultural land ownership. *See* discussion *infra* at Section III.A.2. *See also* Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law, and Residential Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 CAL. W. L. REV. 185, 197-198 (1997).

[59] *See* Ronald J. Mann, *The Role of Secured Credit in Small-Business Lending*, 86 GEO. L.J. 1 (1997).

[60] MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 135-36 (1995).

[61] *See* A TIME TO ACT, *supra* note 4, at 1.

[62] *See* Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information*, 71 AM. ECON. REV. 393 (1981).

[63] Credit rationing consists of several models including divergent views on rationing, price rationing, redlining, and quantity/availability rationing. *See* Dwight Jaffee & Joseph Stiglitz, *Credit Rationing*, *in* 2 HANDBOOK OF MONETARY ECONOMICS 837, 847-49 (1990). The discussion that follows is based on the last two elements.

[64] *See generally* Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation*, 44 UCLA L. REV. 247, 284 (1996).

[65] Credit rationing in the debt market presumes that the borrower, not the bank, is the optimal source of information regarding ability to repay obligations. *See* Helmut Bester, *Screening vs. Rationing in Credit Markets with Imperfect Information,* 75 AM. ECON. REV. 850 (1985) (suggesting that banks can limit credit rationing with informational advantages about borrowers that effectively screen them for riskiness of repayment). *But cf.* Joseph E. Seidlitz & Andrew Weiss, *Asymmetric Information in Credit Markets and Its Implications for Macro-Economics*, 44 OXFORD ECON. PAPERS 694, 697n.7 (1992).

[66] *See* Lan Cao, *Looking at Communities and Markets*, 841 NOTRE DAME L. REV. 841 (1999) (arguing that community market formation can help to solve the problem of adverse selection).

[67] *See generally* George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanisms*, 84 Q.J. ECON. 488 (1970).

[68] Lenders operate under a model of equilibrium return, which can be achieved by combining the desired level of risk with lending at the risk-free rate. Thus, even loans with differing levels of risk can function as perfect substitutes given the "risk-adjusted"' rate of return. *See generally* William F. Sharpe, *Capital Asset Prices: A Theory of Market Equilibrium Under Conditions of Risk,* 19 J. FIN. 425, 436-42 (1964) (discussing the development of the Capital Asset Pricing Model); John Lindner, *Security Prices, Risk, and Maximal Gains from Diversification,* 20 J. FIN. 587, 597-601 (1965); and Jan Mossing, *Equilibrium in a Capital Asset Market,* 34 ECONOMETRIC 768, 769-783 (1966).

[69] Moral hazard refers to the tendency of those who are protected from loss through insurance or some other type of

guarantee to have reduced incentives to prevent or minimize the cost of loss. *See* Kenneth J. Arrow, *The Economics of Moral Hazard: Further Comment*, 58 AM. ECON. REV. 537 (1968). *See also* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

[70] *See, e.g.* Douglas W. Diamond, *Monitoring and Reputation: The Choice Between Bank Loans and Directly Placed Debt*, 99 J. POL. ECON. 689 (1991); Raghuram G. Rajan, *Insiders and Outsiders: The Choice between Informed and Arm's-Length Debt*, 47 J. FIN. 1367 (1992).

[71] Numerous studies have examined the relationship between inside lenders and borrowers, concluding that the relationship results in the lenders having information that grants screening and monitoring advantages not otherwise obtainable. *See, e.g.*, Christopher James, *Some Evidence on the Uniqueness of Bank Loans*, 19 J. FIN. ECON. 217 (1987); Scott L. Summer & John J. McConnell, *Further Evidence on the Bank Lending Process and the Capital-Market Response to Bank Loan Agreements*, 25 J. FIN. ECON. 99 (1989). Arguably, USDA policy replicates the empirical studies that indicate that inside lenders may have valuable information about firms. In this regard, county committees may produce valuable information about borrowers that USDA would not otherwise have.

[72] Congress appropriates money for FSA farm loans as part of the USDA budget each fiscal year. *See generally Agriculture Appropriations: Before the Subcommittee on Agriculture, Rural Development, and Related Agencies*, 107th Cong. (2000) (statement of Keith Kelly, Administrator), *available at* 2000 WL 11068714. Each state receives an allocation of money from FSA yearly. When funds in a loan program become depleted, FSA will usually pool funds, taking all of the unused loan money from the states and placing it in a national pool. *See generally Agriculture Credit Outlook: Before the House Agriculture Subcommittee on General Farm Commodities, Resource Conservation and Credit*, 106th Cong. (1999) (statement of Dale Leighty), *available at* 1999 WL 8084766. This allows FSA to move money from areas where it is not being used to areas where it is needed, with states being able to request funding on a loan-by-loan basis. FSA allocates money based on the number of farmers in each state, the value of farm assets, and net farm income. *Id.*

[73] Transaction costs comprise three different expenses that a lender incurs in making the loan transaction: 1) identification costs or the cost involve in the business partners identifying and contacting one another; 2) negotiation costs and 3) enforcement costs. *See* Eugene Faa, *Banking in the Theory of Finance*, 6 J. MONETARY ECON. 39 (1980). *See also* Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer?* 74 ORE. L. REV. at 239, (1995) (distinguishing between transaction and information costs).

[74] There is disagreement about the significance of transaction costs. As one author has said,

> "[O]n one side, the economic theorists have not focused on the practical significance or implications of the theory of transaction costs. On the other side, the more practically minded market-based law and economics scholars have failed to discuss seriously the theoretical implications of their conceptualization of transaction costs in terms of the ad hoc categories. The theory and practice of transaction cost analysis thus remain disconnected. And the concept of transaction costs thus remains something of a black hole."

Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1674 (1989).

[75] *See generally* Christopher James, *Some Evidence on the Uniqueness of Bank Loans*, 19 J. FIN. ECON. 217 (1987); Christopher James & Peggy Weir, *Borrowing Relationships, Intermediation, and the Cost of Issuing Public Securities*, 28 J. FIN. ECON. 149 (1990); Scott L. Summer & John J. McConnell, *Further Evidence on the Bank Lending Process and the Capital-Market Response to Bank Loan Agreements*, 25 J. FIN. ECON. 99 (1989).

[76] *See* Amy Bushaw, *Small Business Loan Pools: Testing the Waters*, 2 J. SMALL AND EMERGING BUS. L., 197, 216 (1998) (explaining that prohibitive costs deter small businesses from seeking their own investors independently of organized financial structures such as banks).

[77] *Id.*

[78] *See* Mann, *supra* note 59, at 28.

[79] *Id.*

[80] As USDA recognizes, "As is true for nearly all USDA direct loan programs, funding levels for direct [farm operating] loans have historically been less than farmers' demand for them. Many of these farmers are minority and beginning farmers who are without the resources to obtain credit from a commercial lender, even with a guarantee." *Agriculture Appropriations: Before the Senate Appropriations Subcommittee on Agriculture, Rural Development, and Related Agencies*, 106th Cong. (1999) (statement of August Schumacher, Jr., Under Secretary for Farm and Foreign Agricultural Services United States Department of Agriculture) *available at* 1999 WL 8085171.

[81] However, note that as with private lenders, USDA requires

collateral for its loans. *See*, 7 C.F.R. § 762.130 (loan approval and issuing the guarantee).

[82] In this regard, USDA's performance is subject to yearly monitoring by Congress. Its present loan performance rate is extremely good: it represents 38% of all non-tax debt owed to the treasury and its average delinquency rate of all debts is about 6%, compared to a Government-wide average (excluding USDA) of 23%. *House Agriculture Department Financial Management Committee*, 107th Cong. (2000) (statement of Sally Thompson, Chief Financial Officer, U.S. Department of Agriculture) *available at* 2000 WL 23833112. As with other government-sponsored enterprises, its debt is backed by the U.S. Treasury. *See generally* Carrie Stradley Lavargna, *Government-Sponsored Enterprises Are "Too Big to Fail": Balancing Public and Private Interests*, 44 HASTINGS L. J. 991 (1993).

[83] A traditional bank may seek to minimize transactions costs on the asset side of the bank through exploiting economies of scale, amassing and evaluating a diversified portfolio of loans, or on the liability side through issuing demand deposits and developing expertise in providing related payments services. *See* Eugene Faa, *Banking in the Theory of Finance*, 6 J. MONETARY ECON. 39 (1980).

[84] *See infra* notes 132-141 and discussion in Section IV.B.1. arguing that USDA needs HMDA-like requirements because of lack of record keeping and the inability to assess whether county committee structure actually abates transaction costs.

[85] By focussing on the manager's ability, the lender can evaluate the borrower's ability to achieve the stated goals and objectives in the loan proposal.

[86] *See generally* Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241 (1994); Donald R. Korobkin, *Vulnerability, Survival, and the Problem of Small Business Bankruptcy*, 23 CAP. U. L. REV. 413 (1994).

[87] *See supra* note 69 and accompanying text.

[88] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

[89] *Id.*

[90] *Id.*

[91] *See* Bushaw, *supra* note 76.

[92] 7 C.F.R. § 762.120 (loan applicant eligibility).

[93] *See generally* Howell E. Jackson, *The Expanding Obligations of Financial Holding Companies*, 107 HARV. L. REV. 509 (1994).

[94] FSA regulations require that the borrower must have some limited, successful farming experience as a condition of loan eligibility. *See* 7 C.F.R. § 762.102 (2000).

[95] *See* Mann, *supra* note 59, at 37.

[96] The use of collateral and the possibility of foreclosure is yet another way to deter the moral hazard that accompanies guaranteed lending. *See* Yuk-Shee Chan & Anjan V. Thakor, *Collateral and Competitive Equilibria with Moral Hazard and Private Information*, 42 J. FIN. 345, 347 (1987); *see generally* John D. Leeth & Jonathan A. Scott, *The Incidence of Secured Debt: Evidence from the Small Business Community,* 24 J. FIN. & QUANTITATIVE ANALYSIS 379, 380-82 (1989) (applying theories of secured lending to small businesses); *see also* Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901 (1986).

[97] *See* Douglas G. Baird, *Security Interests Reconsidered*, 80 VA. L. REV. 2249, 2263-66 (1994) (discussing the probability that an owner-manager's personal guarantee will be secured by the personal assets of the owner-manager).

[98] *See* Mahoney, *supra* note 45, at 2005.

[99] As used in this context, economic space refers to the acquisition of farmland by white farmers through the denial of USDA financing to black farmers.

[100] More generally, redlining refers to inappropriate behavior on the part of lenders who use differential treatment in the lending process to assess the creditworthiness of whites and non-minorities. *See* JACK M. GUTTENTAG & SUSAN M. WACHTER, REDLINING AND PUBLIC POLICY 5 (1980). *See also* David E. Runck, *An Analysis of the Community Development Banking and Financial Institutions Act and the Problem of "Rational Redlining" Facing Low-Income Communities,* 15 ANN. REV. BANKING L. 517 (1996); Stephen Trzcinski, *The Economics of Redlining: A Classical Liberal Analysis*, 44 SYRACUSE L. REV. 1197 (1993).

[101] *See* ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 60 (1990). Foregoing economically favorable transactions is not only irrational but inefficient behavior on the part of the county committees.

[102] Many lenders who complain about the scope of regulatory compliance within the banking industry argue that less

government regulation would lead to greater economic growth. *See generally,* Robert G. Boehmer, *Mortgage Discrimination: Paperwork and Prohibitions Prove Insufficient—Is It Time for Simplification And Incentives?* 21 HOFSTRA L. REV. 603 (1993).

[103] Redlining is defined in two ways: rational and irrational. Rational redlining describes a lender's determination of the creditworthiness of a loan based on the geographic location of the borrower or the property. Irrational redlining describes a lending philosophy that ignores the borrower's creditworthiness since a presumably creditworthy borrower would yield loan performance that would increase the bank's profit margin, regardless of the location of the borrower or the property in a low-income community. A. Brooke Overby, *The Community Reinvestment Act Reconsidered,* 143 U. PA. L. REV. 1431, 1451-52 (1995).

[104] *See* Runck, *supra* note 100, at 1203. Common reasons cited include collateral decline, the borrower's creditworthiness, and the higher incidence of collateral depreciation or the poor quality of the surrounding neighborhood.

[105] *See* Jonathan R. Macey and Geoffrey P. Miller, *The Community Reinvestment Act: An Economic* Analysis, 79 VA. L. REV. 291, 319-24 (1993).

[106] Lenders cite high agency costs as a reason to avoid lending in low-income neighborhoods. Borrowers from low-income neighborhoods tend to seek low dollar amount loans. The administrative costs of lending small amounts of money make it unfeasible for large profit center banks to pursue too many small loans since these administrative costs must be paid for each individual loan. Typically, the result is a strategy that declines to make any loans within a geographical area because an insignificant number of the loans made ultimately would be profitable. *See* Peter Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis,* 73 TEX. L. REV. 787, 818 (1995).

[107] Risk stereotyping is costless in that lenders are able to identify which loan opportunities to pursue and which to forego. *See* Phillips G. Gay, Jr., *Credit Discrimination: Significant Risk for the Unwary,* BANK MGMT., July 1991, at 53, 54. For example, it is very difficult, if not impossible, to use purely objective factors in determining whether an applicant has the character, attitude, and motivation to repay a mortgage loan. Consequently, lenders are often forced to rely on their personal values (which may encompass biases) when assessing an applicant's willingness to repay a mortgage loan. Risk stereotyping is prevalent. A 1990 study found that 62% of whites rated blacks as lazier than whites, and 78% thought them more likely to prefer welfare to being self-supporting. *See* Jeannye Thornton et al., *Whites' Myths About Blacks,* U.S. NEWS & WORLD REP., Nov. 9, 1992, at 41, 43.

[108] One scholar calls this "unconscious racism." Charles R. Lawrence, III, *The ID, the Ego, and Equal Protection: Reckoning with Unconscious Racism, in* CRITICAL RACE THEORY 235, 237-38 (Kimberle Crenshaw et al., eds., 1995) ("We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions."). Taibi argues that because credit decisions are based on subjective determinations of the applicant's creditworthiness, perceived cultural differences often factor into an examination of creditworthiness, making even the most well-meaning white loan officers to perceive minority borrowers as riskier than they really are. Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice,* 107 HARV. L. REV. 1465 (1994).

[109] Swire, *supra* note 106, at 791.

[110] In the context of small business lending, one researcher has identified that the smaller extensions of capital to minority-owned firms results in a higher failure rate. *See* Timothy Bates, *Impact of Preferential Procurement Policies on Minority-Owned Businesses,* 14 REV. BLACK POL. ECON. 51 (1985).

[111] The much-awaited reforms of the Community Reinvestment Act (CRA) recognized this principle. Among the benefits of changing the CRA examination component from a process oriented to a result-oriented one, is that lenders were required to develop the information networks and provide more lending in previously neglected neighborhoods. For examples of the type of activity which the CRA has encouraged, *see, CRA Lending Can Bring a Profit,* NAT'L MORTGAGE NEWS, Apr. 27, 1992, at 8; Roger R. Fross et. al., *CRA Is No Threat to Banks that Do Their Homework,* AM. BANKER, Dec. 13, 1990, at 5; Francis X. Grady, *CRA Success Starts with a Plan,* AM. BANKER, July 30, 1991, at 4; Donald Mullane, *A CRA Success Story: To Bank of America, Investing in the Community Isn't a Requirement, It's a Way of Doing Business,* MAG. OF BANK MGMT., Sept. 1991, at 37; Georgia Steele, *Seafirst Doing $1.5B CRA Program After SecPac Merger,* NAT'L MORTGAGE NEWS, July 20, 1992, at 10. But, a negative effect of the CRA is reflected in the stories of some minority banks. *See, e.g.,* Nanine Alexander, *Tough CRA Rules Hurting Minority Banks,* U.S. BANKER, Sept. 1991, at 70 (describing the concern of many specialized lending institutions that they will lose customers to mainstream lending institutions entering their markets in response to a strengthened CRA).

[112] Swire, *supra* note 106, at 833.

[113] *See* discussion *supra* in text accompanying notes 81-82.

[114] *See* 7 C.F.R. § 762.102 (2000).

[115] According to Guttentag and Wachter, anti-redlining legislation, community pressures, and adverse publicity are significant factors that keep irrational redlining at bay. GUTTENTAG & WATCHER, *supra* note 100, at 11.

[116] Banking laws prohibitions against redlining do not apply to USDA because it is not a federally regulated financial institution.

[117] Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 (2000). The Equal Credit Opportunity Act, implemented by the Federal Reserve Board ("FRB") through Regulation B, seeks to prevent discrimination in credit transactions. ECOA prohibits creditors from discriminating against any person seeking credit, "on the basis of race, color, religion, national origin, sex or marital status, or age." The statute defines "creditor" as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit . . . ." The fair lending laws apply to commercial banks, financial intermediaries, such as mortgage companies and credit unions, and to the federal government. The statutes each focus on different, but complementary aspects of providing credit to eligible borrowers.

[118] *See generally* GENERAL ACCOUNTING OFFICE, GGD-96-145, FAIR LENDING: FEDERAL OVERSIGHT AND ENFORCEMENT IMPROVED BUT SOME CHALLENGES REMAIN (Aug. 1996) (an assessment of the enforcement efforts by the federal agencies charged with ensuring the fair and equitable access to credit for minorities); Taibi *supra* note 109, at 1470 (arguing that the ECOA is flawed in its suitability for ensuring fair credit access to minorities); Craig E. Marcus, *Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low- and Moderate-Income Lending,* 96 COLUM. L. REV. 710 (1996) (discussing improved enforcement of the CRA and attempts by the DOJ to expand the reach of the anti-discrimination laws); Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act,* 85 GEO. L.J. 237 (1996).

[119] The statute applies to "extensions of credit to small businesses, corporations, partnerships, and trusts." 15 U.S.C. § 1691 (2000).

[120] *See generally* Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and its Effects*, 1981 WIS. L. REV. 655 (1981).

[121] Brown v. E. Miss. Elec. Power Ass'n, 989 F.2d 858, 861-62 (5th Cir. 1993); EEOC v. Alton Packaging Corp., 901 F.2d 920, 923 (11th Cir. 1990); Barabano v. Madison County, 922 F.2d 139, 145 (2d Cir. 1990); de la Cruz v. NY City Human Res. Dep't, 884 F. Supp. 112, 116 (S.D.N.Y. 1995), *aff'd*, 82 F.3d 16 (2d Cir. 1996), *cert. denied*, (1997).

[122] *See* Moore v. U.S. Dep't. of Agric., 55 F. 3d 991 (1995).

[123] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 276-77, (O'Connor, J., concurring) (1989).

[124] In a plaintiff's prima facie case, she must demonstrate that she was otherwise qualified for a loan. The creditor then has the burden to come forward with a legitimate, non-discriminatory reason for the credit denial. *See* Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 893 (1st Cir. 1992) (*citing* Tex. Dep't. of Comty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

[125] *See generally* Sayers v. General Motors Acceptance Corp., 522 F. Supp. 835 (W.D. Mo. 1981); Cragin v. First Fed. Sav. & Loan Ass'n, 498 F. Supp. 379 (D. Nev. 1980); Anderson v. United Fin. Co., 666 F.2d 1274 (9th Cir. 1982).

[126] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336n.15 (1977).

[127] The FRB's Official Commentary to Regulation B expressly states that it is not necessary for a plaintiff to show that a defendant has acted with intent to discriminate in order to prevail on a disparate impact claim: a facially neutral practice may violate the ECOA and Regulation B "even though the creditor has no intent to discriminate." Official Commentary, 12 C.F.R. § 202.6(a)-2.

[128] This governing standard is often described as the *McDonnell Douglas* framework. S.R. No. 94-589, at 4 (1976). Congress codified the *Griggs* holding in the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e to 2000e-2 (1994).

[129] Circuit courts have used varying approaches to statistical showing of discriminatory purpose, balancing test, burden-shifting, greater adverse impact, statistical showing of discriminatory purpose and discriminatory intent or purpose. *See* Metro. Hous. Dev. Corp. v. Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd sub nom.,* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[130] The present test employed in the circuit courts as a basis for determining that the conduct was unlawful in the mortgage lending area is the "functional equivalent test." This test of intentional discrimination is essentially the narrow disparate impact test set forth initially in *McDonnell-Douglass v. Green.* Similarly, Justice O'Connor in *Watson v. Fort Worth Bank and Trust*, 481 U.S. 1012, (1987) held that unlawful disparate

impact should be the "functional equivalent" of intentional discrimination. Thus, in addition to pleading with particularity the nature of the discriminatory conduct and identifying the appropriate applicant pool, the plaintiff must prove that the specified conduct resulted in the alleged discrimination. The defendant then has the burden of proving a business necessity, after which the burden shifts back to the plaintiff to show that there are less discriminatory alternatives under the ECOA.

[131] Pigford v. Glickman, 185 F.R.D. 82, 87 (D.D.C. 1999) (citing Exhibit B, U.S. Dep't of Agric. Civil Rights Action Team (Feb. 1997) at 38).

[132] Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1124, 1125 (codified as amended at 12 U.S.C. §§ 2801-2810 (1988)). As originally enacted, the HMDA applied only to federally chartered or insured lenders, such as commercial banks or savings and loan associations, and to lenders who sold their originated mortgages to Fannie Mae, Freddie Mac, or the Government National Mortgage Association (Ginnie Mae). *See* Home Mortgage Disclosure Act of 1975, § 303. In 1989, the Act was amended so that mortgage companies and other lenders would be subject to its data collection and reporting requirements. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 191 (codified at scattered U.S.C. sections). Small lenders are exempt, however. 12 U.S.C. § 2808 (1988). There is no HMDA requirement for USDA or for Small Business Association, both of which are sources of financing for agricultural loans.

[133] Although the CRA's prohibitions on redlining arguably apply, that type of geo-lending is less evident in the rural areas where white-owned or occupied farms may be adjacent to black-owned or occupied farmland. Therefore, a pattern in lending disparities due to the race of the applicant cannot be easily discerned. Redlining can be challenged under a disparate impact standard if minority small farmers have been denied credit in disproportionate numbers or by proving that the county committees as creditors excluded certain communities because of their race or ethnicity. Creditors must show that they have a justifiable business reason for treating certain communities differently.

[134] Although the subject of much debate, ECOA does not require statistics regarding small business loans to be reported. 12 C.F.R. pt. 202 [Regulation B] (2001).

[135] *See generally* Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REF. 527 (1993); Robert G. Boehmer, *Mortgage Discrimination: Paperwork and Prohibitions Prove Insufficient—Is it Time for Simplifications and Incentives?* 21 HOFSTRA L. REV. 603 (1993); Steven Kalar, *Two Steps Back: British Lessons For American Fair Lending Reform*, 19 HASTINGS INT'L & COMP. L. Rev. 139 (1995).

[136] 12 U.S.C. § 2803 (1988).

[137] *See* Thomas v. First Fed. Sav. Bank, 653 F. Supp. 1330, 1341 (N.D. In. 1987) (holding that HMDA data, standing alone and without additional evidence, did not prove a claim of redlining); George Galster, *Statistical Proof of Discrimination in Home Mortgage Lending*, 7 REV. BANKING & FIN. SERVS. 187, 196-97 (1991).

[138] Richard D. Marsico, *Shedding Some Light on Lending: The Effect of Expanded Disclosure Laws on Home Mortgage Marketing, Lending And Discrimination in The New York Metropolitan Area,* 27 FORDHAM URB. L.J. 481 (1999) (arguing that HMDA's requirements that banks disclose additional information about their residential real estate-related loans, including the number of applications they received, the race, income and gender of each applicant, the census tract in which the property was located, and the disposition of each application has resulted in more loans to low- and moderate-income persons).

[139] *See* Anne M. Regan, Note, *The Community Reinvestment Act Regulations: Another Attempt to Control Redlining,* 28 CATH. U. LAW REVIEW 635, 651, 658 (1979) (recommending HMDA require lenders to support justifications for mortgage loan denials by comparing the loans denied with loans granted in the nearby proximity).

[140] HMDA does not create a private cause of action for individuals against those who have violated the statute's provisions. In this regard, it does not prohibit discriminatory conduct or end discriminatory practices. HMDA data assists the financial institution regulatory agencies in uncovering patterns of bias by lenders and supporting industries. Its sole objective is to affect lender's marketing behavior through deterrence.

[141] *See generally* James W. Bowen, *Farm Credit: Is There a Private Right of Action under the Agricultural Credit Act of 1987?,* 43 OKLA. L. REV. 723 (1990); Eric J. Gold, *Implication of a Private Right of Action,* 1 J. LEGAL ADVOC. & PRAC. 203 (1999); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights,* 95 HARV. L. REV. 1193 (1982).

[142] 15 U.S.C.§1691(a) (1994). Under Regulation B, an "applicant" is anyone who "requests or who has received credit," and an "application" is an "oral or written request for an extension of credit." Regulation B, 12 C.F.R. § 202 (1998). In addition, the comments that accompany the note explain that a credit practice that treats applicants differently on a prohibited

basis violates the law because it violates the general rule against discriminatory treatment. Finally, only an "aggrieved applicant" can sue for damages or equitable and declaratory relief under the ECOA. 15 U.S.C § 1691e(a)-(c).

[143] Timothy C. Lambert, *Fair Marketing: Challenging Pre-Application Lending Practices*, 87 GEO. L.J. 2181, 2202 (1999).

[144] As the District Court found:

> The county committees do not represent the racial diversity of the communities they serve. In 1996, in the Southeast Region, the region in the United States with the most African American farmers, just barely over 1% of the county commissioners were African American (28 out of a total of 2469). *See* CRAT Report at 19. In the Southwest region, only 0.3% of the county commissioners were African American. In two of the remaining three regions, there was not a single African American county commissioner. Nationwide, only 37 county commissioners were African American out of a total of 8147 commissioners—approximately 0.45%.

Pigford v. Glickman, 185 F.R.D. 82, 87 (D.D.C. 1999) (citing Exhibit B, U.S. Dep't of Agric. Civil Rights Action Team, Feb. 1997 at 2).

A Civil Rights Action Team Report made recommendations that would potentially change the composition of the county committee and possibly the lending disparities suggested having at least one minority member on each committee. Therefore, if through the elective process the farmers do not elect a minority farmer, CRAT recommended that USDA appoint one. *Id.* At 87 (citing Exhibit B, U.S. Dep't of Agric. Civil Rights Action Team, Feb. 1997, at 2).

[145] In the banking context, the term "affiliated party" casts a wide net. The banking regulatory structure, which is a system of federal rules, requires that affiliated or interested parties disclose the presence of the conflict and not participate in the decision-making process. *See* 12 C.F.R. § 366.2 (2000).

[146] The two-year limitation presents a "cooling off" period and a safe harbor that allows any benefit inherent in the denial of the loan to pass. *See generally* 12 C.F.R. § 650.1(2000). *See also* Revised Model Business Corporation Act ("RMBCA") §§ 8.50 - 8.52 (defining potential conflict of interest as one that is material and in which the circumstances have altered so that a reasonable observer with knowledge of the relevant facts would conclude that the conflicting interest adversely affects the corporation's interests).

[147] While the present system recognizes that local farmers are the "experts," their decisions are recommendations that are made to the County Executive. In this regard, the USDA representative's consultative role would remain critical to an understanding of the specifics of agricultural lending. Many disciplines use independent persons trained in the specific area to make critical, neutral decisions. *See* Edward Burnett, *Arbitration and Constitutional Rights*, 71 N.C.L. REV. 81 (1992).

[148] Economic loss is defined as harm to one's financial interests which may include lost profits, diminution in value, consequential damages, etc. It does not include the financial harm that is derivative of bodily injury or property damage, such as lost earnings, medical expense, or cost of repair. *See* Frank Nussbaum, *The Economic Loss Rule and Intentional Torts: a Shield or a Sword?*, 8 ST. THOMAS L. REV. 473 (1996); Kelly M. Hnatt, *Purely Economic Loss: a Standard for Recovery*, 73 IOWA L. REV. 1181 (1988).

[149] *See* Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 U. MICH. J. REFORM 403, 420 (1999) (arguing that the fear of unlimited liability that bars compensation for purely economic loss can be controlled by the factors giving rise to the duty); *See also* Jay Feinmann, *Economic Negligence: Liability of Professionals and Business to Third Parties*, 51 BUS. LAW. 795 (1996) (recognizing an exception to the rule in cases involving pure economic loss of negligence).

[150] *See generally* Amanda K. Esquibel, *The Economic Loss Rule and Fiduciary Duty Claims: Nothing Stricter than the Morals of the Marketplace*, 42 VILL. L. REV. 789 (1997).

[151] *See generally* Scott Ilgenfritz, *The Failure of Private Actions as an ECOA Enforcement Tool: A Call for Active Governmental Enforcement and Statutory Reform*, 36 U. FLA. L. REV. 447 (1984); David H. Harris, Jr., *Using the Law to Break Discriminatory Barriers to Fair Lending for Home Ownership*, 22 N.C. CENT. L.J. 101 (1996).

[152] The actual loss may be the cost that a plaintiff incurs in locating a second creditor.

[153] 15 U.S.C. § 1691e(b).

[154] *See* Vander Missen v. Kellogg-Citizens Nat'l Bank of Green Bay, 83 F.R.D. 206 (E.D.Wis. 1979).

[155] *See* 12 U.S.C. §1591 (1994) (providing for punitive damages of up to $10,000 for individuals and up to lesser of $50,000 or one percent of creditor's net worth for class actions. 12 C.F.R. § 202.14 (1999) provides:

Sections 706(a) and (b) and 702(g) of the act provide that any creditor that fails to comply with a requirement imposed by the act or this regulation is subject to civil liability for actual and punitive damages in individual or class actions. Pursuant to sections 704(b), (c), and (d) and 702(g) of the act, violations of the act or regulations also constitute violations of other federal laws. Liability for punitive damages is restricted to nongovernmental entities and is limited to $10,000 in individual actions and the lesser of $500,000 or 1 percent of the creditor's net worth in class actions. Section 706(c) provides for equitable and declaratory relief and section 706(d) authorizes the awarding of costs and reasonable attorney's fees to an aggrieved applicant in a successful action.

[156] Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 55 (1993). The punitive damage award is designed to allow recovery based on the intentional and malicious nature of the wrongdoer's conduct. It is extra compensation–going beyond the obvious elements of ordinary compensation in order to punish or deter extreme conduct from acceptable conduct. By imposing a substantial monetary award, the award both deters similar misconduct by the defendant and expresses societal disapproval of the wrongdoer's misconduct.

[157] Alan E. Brownstein, *What's the Use? A Doctrinal and Policy Critique of the Measurement of Loss of Use Damages*, 37 RUTGERS L. REV. 433 (1985).

[158] Loss of earnings, loss of earning capacity, and lost profits are other examples of special damages.

[159] *See* Roy Ryden Anderson, *Incidental and Consequential Damages*, 7 J.L. & COM. 327, 336 (1987) (distinguishing incidental damages from consequential, damages with the conclusion that the distinction is often an unimportant one with respect to buyers).

[160] Damages for loss of support and loss of inheritance are recognized wrongful death remedies under maritime law. The award is usually conditioned upon a showing of full or partial dependency. Dependency is defined as the status of maintaining or helping to maintain a dependent in [her] customary standard of living. Petition of United States, 418 F.2d 264, 272 (1st Cir. 1969). *See also* Regina T. Drexler & Michael P. Matthews, *Calculating Net Pecuniary Loss Under Colorado Wrongful Death Law*, 24 COLO. LAW. 1257, 1260 (1995); Robert L. Klawetter & Lewis E. Henderson, *Damages Recoverable in Death Cases,* 72 TUL. L. REV. 717 (1997).

[161] *See* DOBBS, LAW OF REMEDIES, §3.1 (2d ed. 1993).

[162] This remedy is especially common in the maritime setting because of a statutory provision authorizing recovery for future earnings under a general maritime survival action. *See* Snyder v. Whittaker Corp., 839 F.2d 1085, 1093 (5th Cir. 1988) (holding that loss of inheritance damages are permissible and require that a wrongful death plaintiff must reasonably prove the expectation of pecuniary benefit, that the decedent would have accumulated substantial property, making adjustments in the projected accumulations for consumption and taxes). *But see* Hopper v. Waterman Steamship Corp., 1992 AMC 1087, 1991 (E.D. La. 1991); Ludahl v. Seaview Boat Yard, 869 F. Supp. 825, 827 (W.D. Wash. 1994) (interpreting to deny recovery for loss of inheritance damages); Miles v. Apex Marine Corp., 498 U.S. 19 (1990). *In Rohan v. Exxon Corp.*, 896 F. Supp. 666, 671-72 (S.D. Tex. 1995), the court distinguished *Hopper* and *Ludahl* and held that loss of inheritance damages should be distinguished from loss of future earnings remedies.

[163] Robert C. Jarosh, *Torts/Wrongful Death–Should a Wrongful Death Action Expire Before the Decedent Does? A Wrong Turn for Wrongful Death.* 35 LAND & WATER L. REV. 235 (2000). *See also* Edwards v. Fogarty, 962 P.2d 879 (Wyo. 1998).

[164] Other problems confronting courts considering loss of inheritance damages include tax inconsistencies and the difficulty of providing adequate and credible evidence to support the potential for double recovery. Loss of inheritance damages are recoverable under both state and federal law. *See generally* 46 U.S.C.A. § 761 (2000).

[165] Yowell v. Piper Aircraft Corp., 703 S.W.2d 630 (Tex. 1986).

[166] *Id.*

[167] *Id.*

[168] Thomas Husted & Lawrence W. Kenny, *The Effect of the Expansion of the Voting Franchise on the Size of Government,* 105 J. POL. ECON. (1967).

[169] African-American history and folklore are replete with references to the government's promises to newly freed slaves of forty acres and a mule—which never materialized. *See* Conley Dalton, *40 Acres and a Mule*, 80 NAT'L F. 21 (2000). For an exhaustive study of the effect of laws on newly freed slaves and free blacks, see generally A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR (1977).

[170] Daniel J. Steinbock, William M. Richman, Douglas E. Ray, *Expert Testimony on Proximate Cause*, 41 VAND. L. REV. 261 (1988) (discussing use of expert testimony to prove proximate cause).

[171] Inability to receive a loan on the open market is not synonymous with the inability to repay the loan. USDA's lending program discourages non-payment by rendering one who fails to repay ineligible to receive loans in the future. 7 C.F.R. § 767.120 (2000).

[172] In the tax area, human capital losses are recognizable. The phrase "human capital" refers to the capitalized value of an individual's labor as a factor of production. Expenditures that make individuals more productive—including expenditures on education, training, or health care—are investments in human capital. *See* ROGER L. MILLER, INTERMEDIATE MICROECONOMICS: THEORY, ISSUES, AND APPLICATIONS 418-19 (3d ed. 1987). *See also*, Mary L. Heen, *An Alternative Approach to the Taxation of Employment Discrimination Recoveries under Federal Civil Rights Statutes: Income from Human Capital, Realization, and Nonrecognition,* 72 N.C. L. REV. 549, 553 (1994) (discussing the theoretical issues raised by taxation of employment discrimination results in human capital loss and whether the remedies provided by federal antidiscrimination statutes compensate for that loss).

[173] *See* Philip Eden, *et. al.*, *Forensic Economics–Valuation of Businesses and Business Losses,* 16 AM. JUR. P.O.F. 2d 253, vol. 16 (1978) [hereafter Eden *et. al.*].

[174] Analogizing to the context of small farms that failed as businesses requires a presumption that should fall on the owners to prove: that had there been access to credit, the farms would have produced future income.

[175] J. Munford Scott, Jr., *Valuing the Closely Held Business,* 6 S.C. L. REV. 25 (1995).

[176] Such a perspective would be similar to the new approach to property law issues that Professor Singer has suggested. Singer characterizes property rights as shifting relationships among people. He argues that the theoretical underpinnings of our system of property law reflect moral values and that property law often fails to recognize those values and consequently where the actual ownership interest is. This theoretical re-characterization of the nonpecuniary interest entitles the holder to recovery for the value of what she has actually lost in relation to individually defined values. *See generally* Joseph W. Singer, *The Reliance Interest in Property,* 40 STAN. L. REV. 611, 637 (1988).

[177] Mark L. Ascher, *Curtailing Inherited Wealth,* 89 MICH. L. REV. 69 (1990).

[178] H. Renee Harris, *Yowell v. Piper Aircraft Corp.: Recovery of Lost Inheritance in Wrongful Death Actions,* 38 BAYLOR L. REV. 1023, 1029 (1986).

[179] *See* Eden *et al., supra* note 173.

[180] *See* Lynda J. Oswald, *Goodwill And Going-Concern Value: Emerging Factors in the Just Compensation Equation,* 32 B.C. L. REV. 283 (1991) (discussing measuring business losses in eminent domain proceedings); Kenneth M. Kolaski & Mark Kuga, *Measuring Commercial Damages via Lost Profits or Loss of Business Value: Are These Measures Redundant or Distinguishable?* 18 J.L. & COM. 1 (1998); *see also* Eden *et. al., supra* note 173.

[181] Loss of future earnings and loss of prospective inheritance are not both recoverable. *See* Wilbur Widicus, *Toward Just Compensation: A Statistical Comparison of the Total Offset Method of Valuing Lost Future Earnings Awards and United States Supreme Court Methods,* 59 TEMP. L.Q. 1131 (1986).

[182] Jeffrey R. Cagle, Craig D. Cherry & Melanie I. Kemp, *The Classification of General and Special Damages for Pleading Purposes in Texas,* 51 BAYLOR L. REV. 629, 657 (1999).

[183] *See* Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 633 (Tex. 1986).

[184] Tortious interference with business usually requires a contract as the basis for the claim. Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law,* 77 MINN. L. REV. 1097 (1993). Similarly, unfair trade practices require copyright or patent infringement. *See* Brent Rabowsky, *Recovery of Lost Profits on Unpatented Products in Patent Infringement Cases,* 70 S. CAL. L. REV. 281 (1996). *See generally* Christopher J. Curran, *Claims Against a Franchisor upon an Unreasonable Withholding of Consent to Franchise Transfer* 23 J. CORP. L. 135 (1997) (discussing business interference causes of action in the specific context of franchises).

[185] Participant, USDA's Civil Rights Action Team (CRAT) Listening Session, Memphis TN (1997). During 1997, USDA held 13 listening sessions across the country. CRAT encouraged participation by socially disadvantaged and minority farmers to gather information on USDA's civil rights performance, including the department's responsiveness on civil rights issues and focusing specifically on the department's program delivery.