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Obama's Moral Capitalism: Resuscitating The American Dream

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ARTICLES

Obama's Moral Capitalism: Resuscitating the American Dream

MITCHELL F. CRUSTO†

ABSTRACT

Fairness is a fundamental principle of American culture. Is it also a constitutional principle to redress economic oppression? Simply, does the U.S. Constitution protect its citizens from predatory lending practices? Will President Obama's call for empathy in constitutional jurisprudence protect America's middle and under-privileged classes from class discrimination?

This Article challenges the fairness of subjecting certain borrowers to overreaching, economically-oppressive lending practices. This seminal approach to the issue of predatory lending explores how established constitutional principles might protect and redress past, present, and future predatory lending victims, often socially and economically disadvantaged citizens. It seeks to define a novel constitutional theory, hereinafter entitled "moral capitalism," guaranteeing freedom from economic oppression and ensuring financial fair dealing. It concludes that class is the civil-rights' issue of the twenty-first century.

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Nor is the question before us whether the market is a force for good or ill. Its power to generate wealth and expand freedom is unmatched, but this crisis has reminded us that without a watchful eye, the market can spin out of control- and that a nation cannot prosper long when it favors only the prosperous. The success of our economy has always depended not just on the size of our Gross Domestic Product, but on the reach of our prosperity; on the ability to extend opportunity to every willing heart - not out of charity, but because it is the surest route to our common good.*

I. DOES THE U.S. CONSTITUTION PROTECT ITS CITIZENS FROM ECONOMIC OPPRESSION?: MORAL CAPITALISM, EMPATHY, AND THE CONSTITUTION

A. *What Is Moral Capitalism?*

1. RESUSCITATING THE AMERICAN DREAM

During the 2008 Presidential elections, an overwhelming majority of Americans responded affirmatively to then candidate and Senator, and now President, Barack Obama's message of change.¹ Attempting to negatively define Obama's change, then Senator and presidential candidate John McCain used the "s" word, labeling Obama a quasi-socialist.²

The United States is now facing an unprecedented challenge to our capitalism, the greatest since the Great Depression.³ Clearly, there are

* Barack Obama, President, United States, "Obama's Inaugural Address" (Jan. 20, 2009), available at <http://obamaspeeches.com/P-Obama-Inaugural-Speech-Inauguration.htm> (last visited July 2, 2009).

1. See New York Times, Election Results 2008, <http://elections.nytimes.com/2008/results/president/votes.html> (last visited September 10, 2009) (showing President Obama received 365 electoral votes compared to 173 for Senator John McCain).

2. See Elizabeth Bumiller, *McCain Embraces a G.O.P. Theme: No More Taxes*, N.Y. TIMES, Oct. 30, 2008, at A27.

3. See, e.g., PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 (2008) (describing how laissez-faire governing principles led to the worst financial crisis since the 1930s, and what policies are needed to respond).

many ways to reform our capitalism without resorting to socialism. Over the next several years, the Obama Administration will face the challenge of restructuring our nation's financial regulatory system, following the greatest demise of our financial systems and in the midst of billions in government bailout dollars for wealthy investment bankers.⁴ What change will President Obama represent, and what role might the U.S. Constitution play in that change?

Capitalism is the triumph of markets over individuals.⁵ Significant intellectual capital has rightfully been spent on the benefits of capitalism.⁶ On the other hand, there are recent critiques on the excesses or abuses of capitalism.⁷ These are particularly relevant as the Nation faces the greatest housing crisis in its history.⁸ Academic focus on capitalism issues, as evidenced in business-law casebooks, inadvertently ignores the rights of the Middle Class and the Under-Privileged. (The author capitalizes both the words Middle Class and Under-Privileged as a matter of emphasis.) Middle Class and Under-Privileged law is also curiously absent from legal restatement and codification efforts⁹ and from state statutory development, reflecting the fact that the rights of the economic Middle Class and Under-Privileged are solely ignored.¹⁰ Despite the absence in many corners of the law, the Middle Class and Under-Privileged and the legal complexities they face have recently gained the attention of some scholars.¹¹

2. ECONOMIC OPPRESSION: WAR ON THE MIDDLE CLASS AND ON THE UNDER-PRIVILEGED

Following the election of President Lyndon B. Johnson in the

4. See David Barstow, *Treasury's Oversight of Bailout Is Faulted*, N.Y. TIMES, Jan. 9, 2008, at B3.

5. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (Edwin Cannan ed., Modern Library 1994) (1776) (characterizing economic developments in Europe).

6. See, e.g., JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (Mgmt. Laboratory Press 2009) (1936); DAVID RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (Cosimo Classics 2006) (1817); SMITH, *supra* note 5.

7. See, e.g., JAMES K. GALBRAITH, *THE PREDATORY STATE: HOW CONSERVATIVES ABANDONED THE FREE MARKET AND WHY LIBERALS SHOULD TOO* (2008) (attempting to purge the liberal mind of the false economic idols of monetary control, balanced budgets and decreased governmental regulations).

8. See Sally Pittman, Comment, *ARMS, but No Legs To Stand On: "Subprime" Solutions Plague the Subprime Mortgage Crisis*, 40 TEX. TECH L. REV. 1089, 1101 (2008).

9. See, e.g., RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000); RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981).

10. Forms and connectors searches for "middle class" and "under-privileged" in the State Statutes database (ST-ANN-ALL) on Westlaw show no state statutes expressly relating to these two groups.

11. See, e.g., Lawrence M. Friedman, *Access to Justice: Some Comments*, 73 FORDHAM L. REV. 927 (2004).

1960s, there was a call for a “war on poverty.”¹² This Article calls for President Obama to develop constitutional principles to redress the conscious and unconscious “war on the Middle Class”¹³ and on the Under-Privileged.¹⁴ The victims of this so-called war on the Middle Class and the Under-Privileged include members of the military,¹⁵ students,¹⁶ children,¹⁷ and socially and economically disadvantaged citizens,¹⁸ at the very least.

This Article explores the appalling reality that under the U.S. Constitution no American, regardless of class, gender, race, ethnicity, religion, marital status, or other distinguishing feature, is protected against economic¹⁹ oppression²⁰ or what will hereinafter be referred to as “predation.”²¹ This Article will explore one form of predation, that of predatory²² lending,²³ specifically that of “subprime mortgages.”²⁴ Predation

12. See generally Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964) (discussing President Johnson’s war on poverty).

13. See generally LOU DOBBS, *WAR ON THE MIDDLE CLASS* (2006) (arguing big business and government are undermining the Middle Class).

14. Cf. Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 10 U. PA. J. CONST. L. 215 (2009) [hereinafter Crusto, *Unconscious Classism*] (seeking to expand constitutional principles to redress entity inequality between sole proprietors and other business owners); Mitchell F. Crusto, *Enslaved Constitution: Obstructing Freedom to Travel*, 70 U. PITTS. L. REV. 233 (2008) [hereinafter Crusto, *Enslaved Constitution*] (arguing the inherent constitutional right to intra-state travel as an expression of our Nation’s freedom over its enslavement paradigm).

15. See Dawn Goulet, Note, *Protecting Our Protectors: The Defense Department’s New Rules To Prevent Predatory Lending to Military Personnel*, 20 LOY. CONSUMER L. REV. 81 (2007).

16. See Bob Herbert, Editorial, *Stepping on the Dream*, N.Y. TIMES, Mar. 22, 2007, at A25.

17. See Editorial, *Mission Unaccomplished*, N.Y. TIMES, Aug. 24, 2006, at A26.

18. See Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITTS. L. REV. 721, 742 n.89 (2005).

19. “Economic” is defined in pertinent part as “of or relating to the science of economics” or “of, relating to, or concerned with the production, distribution, and consumption of commodities.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 720 [hereinafter WEBSTER’S] (1986).

20. “Oppression” is defined in pertinent part as “unjust or cruel exercise of authority or power esp[ecially] by the imposition of burdens.” WEBSTER’S, *supra* note 19 at 1584. This Article defines “economic oppression” as the legal ability of one party (“oppressor”) to take advantage of another (“prey”) and in doing so to cause injury to the prey to the benefit of the oppressor. It includes all forms of overreaching and leverage of power that results in the inability of the prey to enjoy a meaningful, stress free economic life for themselves and their families.

21. “Predation” is defined in pertinent part as “the act of preying or plundering: depravation, despoilment, rapacity.” WEBSTER’S, *supra* note 19 at 1785.

22. “Predatory” is defined in pertinent part as “disposed or showing a disposition to injury or exploit others for one’s own gain.” WEBSTER’S, *supra* note 19 at 1785.

23. This Article defines “predatory lending” as the legal yet unethical lending to marginalized people under lending terms that they cannot afford.

24. The term “subprime lending,” for purposes of this Article, refers to “engaging in deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower’s lack of understanding about loan terms . . . often combined with loan

will be analyzed in light of the current challenges facing American capitalism.

3. THE DEMISE OF SUPERCAPITALISM

In the 1987 movie, *Wall Street*, the protagonist, Gordon Gekko made a profound statement about the ethics or morality of American capitalism when he proclaimed, "Greed is good."²⁵ And yet we have clear signs that unregulated capitalism, or "supercapitalism,"²⁶ is not good. In fact, recent financial conditions demonstrate that unregulated supercapitalism is destructive both to our national economy and our citizens.²⁷ Can the U.S. Constitution serve as a counterbalance to supercapitalism? Is class the new civil-rights' issue? Should the Constitution protect a citizen's right to fair economic treatment regardless of his or her economic status as Middle Class or Under-Privileged? And what role might the Obama Administration play in developing such constitutional principles?

4. OBAMA'S MORAL CAPITALISM DEFINED

What, then, is Obama's "moral capitalism"?²⁸ It is a constitutionally-based approach to protecting citizens against economic discrimination on the basis of class. Moral capitalism is hereinafter defined as "the constitutional principle of regulating capitalism to protect citizens from predation and to redress economic exploitation due to one's class or economic condition."

B. *Economic Oppression through the Lens of Empathy and the Constitution*

1. ECONOMIC OPPRESSION AS A CONSTITUTIONAL-RIGHTS' ISSUE

What role would moral capitalism play in protecting U.S. citizens

terms that, alone or in combination, are abusive or make the borrower more vulnerable to abusive practices." Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 211 n.463 (2004).

25. WALL STREET (20th Century Fox 1987); Internet Movie Data Base, Memorable Quotes for Wall Street, <http://www.imdb.com/title/tt0094291/quotes> (last visited May 28, 2009).

26. See generally ROBERT B. REICH, SUPERCAPITALISM (2007) (arguing people's power has shifted from democratic power to consumerism-driven power).

27. See, e.g., KRUGMAN, *supra* note 3 (describing how laissez-faire governing principles led to the worst financial crisis since the 1930s, and what policies are needed to respond).

28. The term "moral capitalism" is coined by the author for purposes of this Article. Following a current search, the author has found no particular references in President Obama's policies specifically coined moral capitalism. Cf. MICHAEL KINSLEY ET AL., CREATIVE CAPITALISM: A CONVERSATION WITH BILL GATES, WARREN BUFFET, AND OTHER ECONOMIC LEADERS (2008) (debating the pros and cons of big corporations integrating good works into their business models).

from economic oppression? Take the case of subprime predatory mortgage lending, wherein the least financially capable are required to pay a higher interest rate for a mortgage.²⁹ Should protection against predatory lending be a constitutional-rights' issue?

There is no doubt that the foreclosure crisis has resulted from subprime predatory mortgage lending, by which hundreds of thousands of American citizens were provided allegedly unsuitable mortgage loans.³⁰ In 2007, "278 subprime-mortgage-related cases were filed in federal court," "that figure is likely to continue growing," and "[f]orty-three percent of those cases were borrower class actions, most involving inadequate disclosure regarding option (sic) adjustable-rate mortgages (ARMs) and discriminatory lending practices."³¹

The question then is on what basis can the law redress the victims or "prey"³² of subprime predatory mortgage lending? Clearly, redress is available in instances of fraud,³³ but proof of fraud places a tremendous litigation burden on the prey against the predatory lenders.³⁴ All levels of government, including the legislative, executive, and judicial branches, at the federal, the state,³⁵ and the local levels, have failed to develop an effective criteria short of fraud to redress subprime, predatory mortgage practices.³⁶

29. See PAUL MUOLO & MZYHER PADILLA, CHAINS OF BLAME: HOW WALL STREET CAUSED THE MORTGAGE AND CREDIT CRISIS (2008) (leading readers down the subprime money trail and through the quagmire of what went wrong inside the nation's subprime-lending firms that led to the mortgage and credit crisis).

30. PATRICK MADIGAN, OVERVIEW OF THE SUBPRIME FORECLOSURE CRISIS (2007), available at http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=13463&ricontentdisposition=file%3DMadigan%20-%20Subprime%20Foreclosures%20-%20Statement%20of%20the%20Case.pdf; National State Attorneys General Program at Columbia Law School, "Home Foreclosures and Predatory Lending," http://www.law.columbia.edu/center_program/ag/predatorylend (last visited May 28, 2009).

31. Allison Torres Burtka, *Predatory-Lending Litigation Looms*, TRIAL, May 2008, at 16, available at <http://staging.justice.org/Publications/trial/0805/news01.aspx> (last visited July 20, 2009).

32. This Article defines "prey" as at-risk borrowers who for various reasons are subject to greater likelihood of default on their payments. The term "risky borrower" has commonly been used by lenders, denoting some likely culpability on the borrower's part. The term "prey" is meant to emphasize the plight of the borrower rather than the potential loss to the lender. See, *supra* note 20 for a prior, brief introduction of the term "prey."

33. E.g., Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2248 (2007).

34. Cf. Roberta S. Karmel, *Outsider Trading on Confidential Information—A Breach in Search of Duty*, 20 CARDOZO L. REV. 83, 120 (1998) ("[I]t is easier to prove the facts of an insider trading case than to prove facts demonstrating that an issuer committed fraud . . .").

35. See, e.g., Nanette Byrnes, *These Tough Lending Laws Could Travel, North Carolina's Progressive Protection Laws for Borrowers Pay Become a Nationwide Model*, BUS. WK., Nov. 5, 2007, http://www.businessweek.com/magazine/content/07_45/b4057078.htm?chan=search.

36. See, e.g., Julie R. Caggiano et al., *Subprime Mortgage and Predatory Lending Law Developments*, 63 BUS. LAW. 625 (2008) (surveying new state and federal regulation and

Over the last several years, the law has been grappling with whether it should redress the abuses of the subprime, predatory mortgage crisis and if so how. "Predatory lending has become one of the most critical policy issues facing the financial services industry, particularly mortgage lending. . . . Despite a broad consensus to take action, efforts to end predatory lending have been modest at best."³⁷

2. EMPATHY AS A CONSTITUTIONAL PRINCIPLE

President Obama has introduced a new concept into constitutional jurisprudence, that of "empathy."³⁸ In his book, *The Audacity of Hope*, then-Senator Obama wrote:

That last sense of . . . character—a sense of empathy—is one that I find . . . at the heart of my moral code, and it is how I understand the Golden Rule—not simply as a call to sympathy or charity, but as something more demanding, a call to stand in someone else's shoes and see through their eyes.³⁹

Perhaps some Obama critics believed his empathy concept was mere political rhetoric. To the contrary, during the early months of his presidency, President Obama resurrected the empathy concept to apply to his judicial policy as an expressed criteria for judicial selection to the Supreme Court. When Justice David Souter announced his retirement plans, President Obama stated that the Court needs "empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes."⁴⁰ In naming a replacement to the Supreme Court, President Obama stated he was seeking in a candidate for the Supreme Court "someone who understands that justice isn't about some abstract legal theory or footnote in a case book."⁴¹ "It is also about how our laws affect the daily realities of people's lives—whether they can make a living and care for their families, whether they feel safe in their homes and welcome in their own

legislation impacting the mortgage industry); Stephen F.J. Ornstein et al., *Update on Federal Anti-Predatory Lending Legislative Efforts*, 61 CONSUMER FIN. L.Q. REP. 620 (2007) (describing and analyzing how the federal legislative efforts to curb predatory mortgage lending will make the credit availability problems significantly worse and longer-lasting).

37. JAMES H. CARR & LOPA KOLLURI, FANNIE MAE FOUND., PREDATORY LENDING: AN OVERVIEW 1 (2001), available at http://www.knowledgeplex.org/kp/text_document_summary/article/relfiles/hot_topics/Carr-Kolluri.pdf.

38. See Peter Slevin, *Obama Makes Empathy a Requirement for Court*, WASH. POST, May 13, 2009, at A3.

39. BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 66 (2006).

40. The White House- Blog Post- The President's Remarks on Justice David Souter, May 1, 2009, available at http://whitehouse.gov/the_press_office/Remarks-by-The-President-On-Justice-David-Souter/ (last visited September 10, 2009).

41. *Id.*

nation.”⁴² By focusing on economic infrastructure, class division, and institutional inequities, this Article seeks to use Critical Class theory to explore a constitutional-rights’ basis for redressing economic exploitation.

3. UNCONSCIOUS INSTITUTIONAL CLASSISM AND EMPATHY

With the election of the first African-American President, some constitutional commentators believe that as a constitutional imperative, race is now passé,⁴³ and perhaps the same can be said about gender for other reasons.⁴⁴ Neither are race nor gender truly passé, but both race and gender analysis have masked the extremely significant underlying issue of class discrimination. As a stand-alone issue, class discrimination ala economic oppression is clearly a critical, constitutional issue, essential to the exercise of personal liberty and freedom, and fundamental to other constitutional, human-rights’ issues, including slavery,⁴⁵ racial inequality,⁴⁶ and sexual inequality,⁴⁷ to name a few.

This Article concentrates on a constitutional basis to redress subprime mortgage predatory lending practices. In addition, shedding light on predatory lending illuminates many other important, tangential areas of constitutional inquiry and further validates economic oppression’s

42. *Id.* In nominating Judge Sonia Sotomayor to the United States Supreme Court, President Obama stated, “It is experience that can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of justice we need on the Supreme Court.” Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court, *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court (last visited June 6, 2009).

43. Jeffrey M. Chemerinsky & Kimberly C. Kisabeth, *Tracing the Steps in a Historic Election*, 85 DENV. U. L. REV. 615, 615–16 (2009); *see also* Sharon L. Browne & Elizabeth A. Yi, *The Spirit of Brown in Parents Involved and Beyond*, 63 U. MIAMI L. REV. 657, 676 n.149 (2009) (discussing today’s race-relations debates).

44. *But see* Gregory S. Parks & Jefferey J. Rachlinski, *A Better Metric: The Role of Unconscious Race and Gender Bias in the 2008 Presidential Election* (Cornell Legal Studies Research Working Paper, Paper No. 08-007, 2008).

45. *See* David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 981 (2004).

46. *See generally* DOUGLAS A. BLACKMAN, *SLAVERY BY ANOTHER NAME, THE REENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009). *See also* AURIANA OJEDA, *SLAVERY TODAY* (2004) (series of essays on slavery and labor issues); National Underground Railroad Freedom Center, “Slavery Today,” *available at* <http://www.freedomcenter.org/slavery-today/> (last visited July 18, 2009); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1942–43 (1999).

47. *See generally* Reva B. Siegel, *Home as Work: The First Woman’s Right Claims Concerning Wives’ Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994) (discussing women’s property claims in the mid-nineteenth century).

quintessential importance. These include criminal,⁴⁸ governmental benefits,⁴⁹ disparate education,⁵⁰ and comparative welfare⁵¹ issues. Consequently, this Article is dedicated to exploring the law's treatment of the constitutional dimension of protection against economic exploitation in the form of predatory lending.

Why doesn't the law treat home mortgage borrowers the same as it treats securities (such as stock) investors, in light of the fact that home mortgages are often sold as investments? Does subprime lending law disparately impact borrowers who often reside at the bottom rung of the socioeconomic ladder? What does an analysis of subprime mortgage lending unveil about the true meaning and rise of American capitalism? The answers to these questions are viewed from the sub-lens of Critical Class Theory, which is referred to hereinafter as "critical institutional classism."

Before outlining the direction of this Article, it is essential to present a perspective or lens through which class-rights' law will be viewed. What is "critical institutional classism" or "CIC"?⁵² Essentially, for purposes of this Article, CIC is the study of institutional classism, the phenomenon by which financial institutions, such as banks, mortgage lenders, credit-card companies, payday-loan companies, student-loan lenders, car-loan companies, and the like, consciously or unconsciously, take economic advantage of prey. One interesting aspect of critical institutional classism is that the same albeit legal predatory institutional behavior would clearly be illegal or at least unethical were it between one individual and another individual. Somehow, when institutions are the beneficial party to a transaction, the rules of ethics seem to go out the window. In other words, when it comes to institutional behavior, greed is good and legally acceptable.

This Article then addresses both conscious as well as unconscious institutional classism. Is there a place in constitutional theory to address both conscious and unconscious institutional classism? Beyond analyzing and remedying overt acts of inequity, constitutional-rights' theorists

48. See Carolyn Wolpert, *Considering Race and Crime: Distilling Non-Partisan Policy from Opposing Theories*, 36 AM. CRIM. L. REV. 265, 277-78 (1999).

49. See *Dandridge v. Williams*, 397 U.S. 471, 518-21 (1970) (Marshall, J., dissenting); Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247, 268-69 (2000).

50. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70-71 (1973) (Marshall, J., dissenting).

51. See Jane Maslow Cohen, *Equality for Girls and Other Women: The Built Architecture of the Purposive Life*, 9 J. CONTEMP. LEGAL ISSUES 103, 134-35 (1998).

52. See generally Crusto, *Unconscious Classism*, *supra* note 14 (presenting the analytical concepts of critical institutional classism and critical class theory for the first time).

have come to recognize the need to expand constitutional-rights' theory beyond overt acts to redress unconscious and institutional forms of rights violations.⁵³ This Article seeks to contribute to the Critical Class Theory of constitutional-rights' theory by presenting, in part, a framework for analyzing social and economic discrepancies by focusing on the economic infrastructure, class divisions, and institutionalized inequities manifest within the United States.

CIC continues the work started by Critical Race Theory (CRT),⁵⁴ Critical Feminist Theory (CFT),⁵⁵ and Critical Class Theory (CCT),⁵⁶

53. See, e.g., Jacquelyn L. Bridgeman, *Seeing the Old Lady: A New Perspective on the Age Old Problems of Discrimination, Inequality, and Subordination*, 27 B.C. THIRD WORLD L.J. 263 (2007) (arguing that current laws only address blatant racism and should be further refined); Ian F. Haney López, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007) (discussing the history of colorblindness in the context of antidiscrimination law); Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931 (2007) (arguing that federal courts treat federal affirmative action laws more leniently than they do state laws); cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (invalidating racial classifications in student-assignment plans); *Gutter v. Bollinger*, 539 U.S. 306 (2003) (upholding a public law school's use of race in admissions decisions to maintain a diverse student body).

54. See, e.g., CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (arguing that anti-racist scholars generally misunderstand the relationship between racial and other forms of oppression, and thus help perpetuate heterosexism); Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455 (2002) [hereinafter Hutchinson, *Progressive Race Blindness?*] (criticizing "progressive race blindness" theory for failing to embrace race as an important dimension of identity); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006) (suggesting that CRT should more adequately account for issues of class); Bailey Figler, Note, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723 (2006) (discussing the problem of unconscious racism in felon disenfranchisement).

55. See, e.g., Keith Aoki, *Does Nothing Ever Change; Is Everything New?: Comments on the "To Do Feminist Legal Theory" Symposium*, 9 CARDOZO WOMEN'S L.J. 415 (2003) (summarizing various works of CFT scholarship); Don S. Browning, *Linda McClain's The Place of Families and Contemporary Family Law: A Critique from Critical Familism*, 56 EMORY L.J. 1383 (2007) (proposing a theory of "critical familism" to challenge trends in family law theory); Verna L. Williams, *Private Choices, Public Consequences: Public Education Reform and Feminist Legal Theory*, 12 WM. & MARY J. WOMEN & L. 563 (2006) (discussing public education from a CFT perspective).

56. See, e.g., EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005); MARTHA R. MAHONEY ET AL., *SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW* (2003); Clark Freshman, *Foreword: Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship*, 55 STAN. L. REV. 2267 (2003) (book review) (suggesting an overlap between CRT and empirical studies of inequality); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005) (discussing discrimination in employment decisions); Kristin Brandser Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181 (2006) (arguing that

and in many ways is consistent with these theories. CRT calls for legal discourse intending to uphold the rights of those who are disadvantaged because of their race.⁵⁷ Similarly, CFT focuses on the social impact of gender discrimination.⁵⁸ However, these calls for legal discourse on race and gender equality have not reached their full potential because the economic element of how or why there is racial and gender discrimination often is not addressed.⁵⁹ CCT hopes that by focusing on the economic aspect of discrimination, one might understand that various forms of discrimination are by-products of class-based discrimination.⁶⁰ CCT assesses political and economic factors, in addition to social factors. One hopes that through the prism of CCT, various aspects of unconscious and institutionalized inequities will be redressed, as sometimes inequities result from the mentality of individuals and the socioeconomic impact of their prejudices.⁶¹ Through the tri-focal lens of CIC, combining CCT, CRT, and CFT, including recent theories of unconscious adverse behavior, and Obama's concept of empathy, this Article analyzes economic oppression and predatory lending law as outlined next.

C. *The Thesis and Overview of the Article*

Through the lens of CIC and Obama's concept of empathy, this Article argues that constitutional law should be reformed to recognize citizens' rights against economic oppression. In a manner consistent with the fiduciary-duty analysis used to protect minority shareholders in corporate law and the fairness/suitability principles found in investment/brokerage law to protect investors from unsuitable investments, this Article seeks to promote fairness in economic transactions and seeks to protect citizens from economic oppression, such as predatory lending

feminist legal theory requires broader thinking about matters relating to women's financial well-being); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996) (discussing disparate impact and class theory in the employment context); Rachel Bloomekatz, Comment, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963 (2007) (analyzing the statutory remedies available for U.S. workers to challenge employment discrimination in favor of immigrants).

57. See, e.g., Hutchinson, *Progressive Race Blindness?*, *supra* note 54, at 1477 (noting that critical race theorists and critical legal scholars agree that rights are socially constructed).

58. See, e.g., Williams, *supra* note 55, at 569 (discussing the workings of inner city public schools and how educational reform policies appear to condemn poor parents, who are often single women).

59. See, e.g., Mutua, *supra* note 54, at 391 (discussing the interrelation between class and race in critical race theory).

60. *Id.* at 389.

61. See, e.g., Hart, *supra* note 56, at 744 (explaining that in some contexts discrimination may be the result of individuals making subjective decisions).

practices.⁶²

Some critics will see this attempt to expand constitutional protection against class discrimination as a means to restrict or terminate a market for borrowers who without subprime lending would not have the ability to own a home.⁶³ Some will see it as an assault against free market principles.⁶⁴ Others will see it as the demise of capitalism and the victory of socialism. Despite the anticipated criticism, expanding constitutional rights to protect citizens against economic oppression is a worthy exercise.

An overview of the Article is appropriate. Part I presents the concept of moral capitalism as constitutionally-needed protection against economic oppression or predation, critical institutional classism through the lens of empathy, and an overview of this Article. Part II analyzes the current subprime mortgage lending/foreclosure crisis, the current failure to redress predation wrongs, and the need for constitutional reform. Part III proposes a new constitutional principle, that of moral capitalism, as the constitutional right against predation. Part IV makes the public policy and constitutional case for expanding constitutional-rights' theory to the freedom of predation, arguing that current constitutional case law is inadequate to remedy unconscious institutional classism, and that Substantive Due Process should ensure that fairness principles apply to protect citizens against predation.

Part V concludes that constitutional law should embrace class discrimination as the new civil-rights' agenda for the twenty-first century. This can be accomplished by recognizing the moral capitalism principle, the right to protection against economic oppression including predation. Such a constitutional development would realize President Obama's call for empathy in constitutional jurisprudence and would establish a protective human-rights' Constitution, protecting the rights of the least empowered in our society, and institutionalize our custom and value of fairness.

II. PREDATION AND THE NEED FOR CONSTITUTIONAL PROTECTION

They're telling us we're better off if we dismantle government - if we divvy it up into individual tax breaks, hand 'em out, and encourage everyone to go buy your own health care, your own retire-

62. See discussion *infra* Part III.

63. See Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 FLA. L. REV. 295, 304 (2005).

64. See C. Lincoln Combs, Comment, *Banking Law and Regulation: Predatory Lending in Arizona*, 38 ARIZ. ST. L.J. 617, 627-29 (2006).

ment security, your own child care, their own schools, your own private security force, your own roads, their own levees. . .

It's called the Ownership Society in Washington. But in our past there has been another term for it - Social Darwinism - every man or woman for him or herself. . . .

It has been the creation of a massive middle class, through decent wages and benefits and public schools - that has allowed all of us to prosper. . . .

Yes, our greatness as a nation has depended on individual initiative, on a belief in the free market. But it has also depended on our sense of mutual regard for each other, of mutual responsibility. The idea that everybody has a stake in the country, that we're all in it together and everybody's got a shot at opportunity. . . .

Our vision of America is . . . one that gives every American the opportunity to make the most of their lives. It's not one that tells us we're on our own, it's one that realizes that we rise or fall together as one people.⁶⁵

Part II analyzes how presently the law fails to redress unconscious institutional classism in the form of subprime mortgage lending. It presents a brief history of subprime mortgage lending, focuses on the amorphous legal definition of predatory lending, and analyzes subprime mortgage lending's relationship to predation. This Part establishes that the law currently lacks consensus on what constitutes illegal predatory lending and places too high a legal hurdle on lending prey who are seeking to redress subprime predatory lending practices. It argues that using a constitutionally-based rights' approach to redress predation is fair and promotes justice, especially in light of unconscious institutional classism.

A. *Subprime Mortgage Lending: A Case of Predation*

In the Batman movie, *The Dark Knight*, the sinister villain Two-Face uses a two-faced coin to determine the fate of his victims: one side meaning life, the other side death.⁶⁶ Like many things in life, mortgage lending has many faces, the good, the bad, and the ugly. The good face of mortgage lending is access to capital markets and the joys of homeownership.⁶⁷ The bad side of mortgage lending is the tremendous oppor-

65. Barack Obama's Speech at "AFSCME National Convention, Challenge for Labor," <http://obamaspeeches.com/086-AFSCME-National-Convention-Obama-Speech.htm> (last visited June 28, 2009).

66. See Internet Movie Database, Memorable Quotes for the Dark Knight, <http://www.imdb.com/title/tt0468569/quotes> (last visited May 29, 2009) ("The world is cruel, and the only morality in a cruel world is chance. [holds up his coin]: Unbiased. Unprejudiced. Fair.").

67. See Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1311 (2006) ("Most

tunity for abuse by subprime lenders through predatory lending practices.⁶⁸ Then there is the ugly side, which is where such predatory practices result in the foreclosure against the predatory prey, resulting in the loss of homes, equity, and initial upfront investment.⁶⁹

In addition to mortgage lending, all types of consumer lending are vital to both the U.S.⁷⁰ and world economies and, therefore, deserve serious scrutiny. Consumer lending is big business; in 2005 alone, Americans bought \$1.8 trillion worth of goods using credit cards.⁷¹ The continued vitality of consumer lending and its contributions to the economy have received national attention.⁷²

Looking closer at these statistics, one discovers two universes of lending. One universe represents individuals who are prime lenders. The other universe represents subprime borrowers. Many subprime borrowers are often located in inner-city and rural communities.⁷³ They are usually less able to negotiate the terms of their loans, despite the availability of fairer lending terms.⁷⁴ As a result, subprime borrowers often fail to participate in one of the greatest features of economic life in America, *the ability to access capital markets under reasonable terms*. This ability is hereinafter referred to as "Fair Credit Equality." In addition, subprime borrowers are subject to other economic pressures.⁷⁵ This Article is not about the interplay of these other economic pressures and subprime lending, although that is a meritorious discussion. Rather, this Article focuses on the fundamental unfairness of subprime lending.

What is predatory lending? Following the growth of the subprime mortgage market over the last decade,⁷⁶ there is the probing question: Is

subprime lenders provide a valuable service by giving borrowers access to credit to buy homes . . .").

68. See, e.g., *id.* at 1310–16.

69. See Azmy, *supra* note 63, at 343–45.

70. Steven Mercatante, *The Deregulation of Usury Ceilings, Rise of Easy Credit, and Increasing Consumer Debt*, 53 S.D. L. REV. 37, 37 (2008).

71. *Id.*

72. See, e.g., Sudeep Reddy, *Credit-Card Fees Curbed—Senate Approves Sweeping Restrictions, House Passage Seen*, WALL ST. J., May 20, 2009, at A1.

73. Cf. Kenneth N. Klee, *One Size Fits Some: Single Asset Real Estate Bankruptcy Cases*, 87 CORNELL L. REV. 1285, 1300–01 (2002) (discussing foreclosures in rural areas); Emily Jeffcott, Comment, *The Mortgage Reform and Anti Predatory Act of 2007: Paving a Secure Path for Minorities in the Midst of the Sub Prime Debacle*, 10 SCHOLAR 449, 450–55 (2008) (discussing subprime lending to minorities). While a study of subprime lending might also raise issues of this nature, such a study is beyond the scope of this Article.

74. *Id.*

75. See generally Cassandra Jones Harvard, *Democratizing Credit: Examining the Structural Inequities of Subprime Lending*, 56 SYRACUSE L. REV. 233 (2006) (discussing how subprime mortgages further subordinate the poor).

76. See California Progressive Report, http://www.californiaprogressreport.com/2007/03/the_subprime_fo.html (last visited May 29, 2008) (reporting that in 1994, the mortgage industry

subprime lending per se predatory? As previously mentioned, the legal definition of predatory lending is not clear. In addition to the practice of charging borrowers excessive interest and imposing unmanageable financial terms, predatory lending may take many forms.⁷⁷ In addition to subprime mortgage lending, predatory lending flourishes in various other areas of lending, including payday loans,⁷⁸ overdraft loans,⁷⁹ car-title loans,⁸⁰ credit cards,⁸¹ refund-anticipation loans,⁸² and mandatory arbitration.⁸³

Of course, not all lending is predatory; there are many underlying issues in the predatory lending debate: risk-based pricing, competition, financial education, caveat emptor, and discrimination. Risk-based pricing is "the practice of using a consumer's credit report, which reflects his or her risk of nonpayment, in setting or adjusting the price and other terms of credit offered or extended to a particular consumer."⁸⁴ In other words, lenders charge higher interest rates to borrowers more likely to default on a loan. And lenders charge lower interest rates to borrowers less likely to default on a loan. Defenders of risk-based pricing note that charging everyone equal interest rates penalizes those persons capable and likely to pay their loans by charging them for the default rates of riskier borrowers.⁸⁵ On the other hand, opponents argue that risk-based pricing further impoverishes the poor while enriching the affluent.⁸⁶ Indeed, when lenders charge low-income borrowers higher interest rates and hefty fees, those lenders are ensuring that low-income borrower will certainly fail to pay their loans.

issued thirty-five billion dollars in subprime loans, which was about one percent of the total market; and, by 2006, subprime mortgage loans reached \$665 billion or twenty-three percent of the market).

77. See OCC Advisory Letter 2003-2, at 2-3 (Feb. 21, 2003), available at www.occ.treas.gov/fip/advisory/2003-2.pdf.

78. See Goulet, *supra* note 15, at 86-88.

79. See Benjamin D. Faller, Note, *Payday Loan Solutions: Slaying the Hydra (and Keeping It Dead)*, 59 CASE W. RES. L. REV. 125, 155 (2008).

80. See Peterson, *supra* note 33, at 2223 n.214.

81. See Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1411-16 (2004).

82. See Goulet, *supra* note 15, at 84.

83. See Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 853-54 (2002).

84. Press Release, Bd. of Governors of the Fed. Reserve Sys. & Fed. Trade Comm'n, Agencies Issue Proposed Rules on Risk-Based Pricing Notices (May 8, 2008), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20080508a.htm>.

85. Cf. Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1147-49 (1979) (defending the secured-creditor-versus-unsecured-creditor distinction on the ability of borrowers to get lower interest rates in secured transactions and arguing against equality among lenders).

86. Cf. Harvard, *supra* note 75, at 235-36 (arguing that subprime lending further economically subordinates the poor).

In contrast to risk-based pricing critics, competition critics contend that, while risk-based pricing does not create problems, lenders abuse the risk-based-pricing methodology to overcharge borrowers.⁸⁷ Financial education, others argue, can solve the subprime problem. Theoretically, perfectly informed consumers would make a loan only if they would profit from it - that is, not default.⁸⁸ Financial education proponents argue that consumers should be better educated about financing.⁸⁹ Another debate concerns fiduciary duty as applied to mortgage lending. That is, even where a lender makes no attempt to deceive the borrower, should a lender have a higher duty to the borrower, such as a fiduciary/stockbroker's duty when buying and selling securities to investors? Lastly, others criticize financial institutions for engaging in racial discrimination. These critics do not allege intentional discrimination but systemic discrimination, reflecting the notion that minorities have a lower socioeconomic status and feel a disparate impact from subprime lending.⁹⁰ In any case, the current state of the law appears inadequate to address predation.

B. *The Current State of the Law Fails to Redress Subprime Mortgage Lending Predation Wrongs and Evidences the Need for a Constitutionally-Based Remedy*

The law's current views of predation are ripe for reform, especially as predatory lending practices have become commonplace.⁹¹ Unfortunately, such practices often have the support of law and of government. But that does not make them fair or constitutional. A brief analysis of the current theories of subprime mortgage liability shows that current theories do not result in justice for subprime lending prey. The following survey is a brief, non-exhaustive study of predatory lending case law. The author believes that this survey is sufficient evidence that, while predation is a major concern, the law has failed to develop sufficient mechanisms to protect citizens from it or to provide them redress as a result of it.

First, there is a definitional problem. Perhaps what makes subprime mortgage and predatory lending difficult to address "is the lack of con-

87. *Id.*

88. Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REG. 29, 53 (2006).

89. See, e.g., Kimberly M. Gartner & Elizabeth R. Schiltz, *What's Your Score? Educating College Students About Credit Card Debt*, 24 ST. LOUIS U. PUB. L. REV. 401 (2005).

90. *Id.*

91. See Laura Dietrich, Note, *Massachusetts' New Predatory Lending Law and the Expanding Rift Between Federal and State Lending*, 26 B. C. THIRD WORLD L.J. 169, 170 (2006) (noting that predatory lending has cost American homeowners nearly \$9.1 billion a year).

sensus on what constitutes illegal predatory lending.”⁹² In 2000, the Department of Housing and the Treasury published a report organizing predatory lending practices into four groups: loan flipping,⁹³ imposition of excessive fees and “packing,”⁹⁴ lending without regard to the ability to pay,⁹⁵ and fraud.⁹⁶

Second, there are not many cases finding lenders liable for predatory lending practices. Yet there are some developing theories of lender liability, the most prominent of which is “reverse redlining.” Reverse redlining occurs when lenders target residents residing in certain geographic boundaries and grant those targeted residents unfair loan terms.⁹⁷ As an example, a New Jersey court, in *Associates Homes Equity Services v. Troup*, held that reverse redlining violated not only the Fair Housing Act but also the Civil Rights Act and New Jersey’s Law Against Discrimination.⁹⁸ In holding that reverse redlining violated the Civil Rights Act and the Law Against Discrimination, the court relied on the allegation that the lenders mistreated African Americans via reverse redlining.⁹⁹ The disparate impact of reverse redlining sufficed - intentional discrimination need not exist.¹⁰⁰

Similarly, in *Munoz v. International Home Capital Corp.*, the U.S. District Court for Northern California found that reverse redlining violated the Fair Housing Act.¹⁰¹ The court enumerated four elements to create a prima facie case of reverse redlining. First, the homeowner must fit into a suspect class. Next, the homeowner must have applied and qualified for a loan. Then, the loan must have grossly unfavorable terms.¹⁰² Lastly, the lender must provide better loans to others who are similarly qualified.¹⁰³ Despite the fact that the *Munoz* plaintiffs did not allege the last element, the court refused to dismiss their complaint, for the plaintiffs could show that element through discovery.¹⁰⁴ Other courts

92. CARR & KOLLURI, *supra* note 37, at 1.

93. HUD-TREASURY TASK FORCE, CURBING PREDATORY HOME MORTGAGE LENDING 2 (2000), available at <http://www.huduser.org/publications/pdf/treasrpt.pdf>.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 185.

98. 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001); accord *Hargraves v. Capital City Mortgage Co.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000) (noting reverse redlining violated Fair Housing Act and Civil Rights Act). Other states have also held reverse redlining to violate state law. See *McGlawn v. Pa. Human Relations Comm’n*, 891 A.2d 757, 762 (Pa. Commw. Ct. 2006).

99. See *Associates Homes*, *supra* note 98, at 536.

100. *Id.* at 537.

101. No. C 03-01099 RS, 2004 U.S. Dist. LEXIS 26362, at *12 (N.D. Cal. May 4, 2004).

102. *Id.* at *12.

103. *Id.* at *13.

104. *Id.*

have agreed with the *Munoz* analysis.¹⁰⁵

Despite these courts' recognition that reverse redlining violates the law, *Associates Homes* has the farthest reach. For the court in *Associates Homes* not only noted that reverse redlining violated the law but also held that a borrower could use reverse redlining as an affirmative defense against foreclosure.¹⁰⁶ Thus, even if the statute of limitation runs on a claim against reverse redlining, a homeowner can impede foreclosure through an affirmative defense.¹⁰⁷ Not every court has agreed that reverse redlining constitutes a violation of the Fair Housing Act. In *Wiltshire v. Dhanraj*,¹⁰⁸ the federal district court refused to find a violation of the Fair Housing Act, despite allegations of reverse redlining.¹⁰⁹ Notably, the court underscored the lack of any allegation mentioning disparate impact.¹¹⁰

In addition to reverse redlining jurisprudence, there has been state statutory development to redress predatory mortgage lending. For example, in 1999, North Carolina adopted its Predatory Lending Law.¹¹¹ Over the following decade, nearly thirty states have followed North Carolina's lead and adopted similar laws.¹¹² Some states have specifically created new laws to forestall foreclosures. For example, in Massachusetts, the Attorney General used the Massachusetts's Predatory Home Loan Practice Act to enjoin one lender from foreclosing against certain homeowners.¹¹³ A lower court found that the Massachusetts Attorney General would likely prevail in showing four factors that, when combined, constituted a violation of the Predatory Home Loan Practice Act:¹¹⁴ The adjusted-rate-mortgage loans had an introductory period under three years; the introductory rate increased by more than three points when it reached its fully indexed value; the borrowers' debt-to-income ratio exceeded fifty percent if one calculated using the fully indexed rate; and the loan-to-value ratio was 100%.¹¹⁵ The Supreme Judicial Court of Massachusetts upheld the lower court's preliminary injunction, which prevented the lender from foreclosing on borrowers' homes.¹¹⁶ Interest-

105. See, e.g., *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002) (applying the same four elements as the *Munoz* court and refusing to dismiss claim).

106. *Associates Homes*, *supra* note 98, at 538-49.

107. See *id.* at 539-40.

108. 421 F. Supp. 2d 544 (E.D.N.Y. 2005).

109. *Id.* at 553.

110. *Id.* at 553 n.7.

111. *Dietrich*, *supra* note 91, at 185.

112. *Id.*

113. See *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548, 550-51 (Mass. 2008).

114. *Id.* at 554.

115. *Id.*

116. *Id.* at 562.

ingly, the Supreme Judicial Court of Massachusetts upheld the preliminary injunction despite the fact that the Predatory Home Loan Practice Act only prohibited high-cost-home mortgages¹¹⁷ and the fact that the loan in the case did not constitute a high-cost-home mortgage.¹¹⁸ The court looked beyond formalities and focused on the spirit of the law. Though practicing in a different context, the lender evinced the same fundamental unfairness outlawed by the Massachusetts law. Therefore, the courts could enjoin the lender's actions.¹¹⁹ Perhaps this is an example of what President Obama refers to as empathy in judicial decisions.

One other court mimicked the Massachusetts court's spirit-of-the-law, empathy-based analysis. In *Herrod v. First Republic Mortgage Corp.*, the borrowers alleged that the lender charged them ludicrous fees and alleged unconscionability.¹²⁰ The West Virginia Supreme Court of Appeals noted that the West Virginia Predatory Lending Law had not taken effect when the borrowers entered the loan agreement.¹²¹ Nevertheless, the courts could consider illegal actions under the Predatory Lending Law under the unconscionability doctrine.¹²² Yet another court solved the predatory lending crisis by placing a lender suitability test/duty on lenders. In *Mathurin v. Lost & Found Recovery, LLC*,¹²³ a New York court specifically noted the subprime-mortgage crisis in holding that "a lender underwriting a mortgage has a duty to investigate and ascertain the economic status of the purchaser/mortgagor and whether the purchaser/mortgagor may be committing a fraud against the seller in the underlying transaction."¹²⁴ Many courts require that a party seeking redress against predatory lending comply with procedural technicalities.¹²⁵

In response to the growing abundance of state predatory lending acts, the federal government has sought to preempt these state laws. For instance, as of 2004, the Officer of Comptroller of the Currency's regulations bars states' predatory lending acts from applying to nationally-chartered banks. As a result, arguably, state predatory lending acts apply

117. *Id.* at 559–60.

118. *Id.* at 560.

119. *Id.*

120. 625 S.E.2d 373, 376, 378 (W. Va. 2005).

121. *Id.* at 380.

122. *Id.*

123. 854 N.Y.S.2d 629 (Sup. Ct. 2008).

124. *Id.* at 631.

125. *See, e.g., Jones v. Rosenberg*, 940 A.2d 1109, 1120 (Md. Ct. Spec. App. 2008) ("[W]e are not unaware of the issues that exist with respect to subprime mortgage lending, and that some persons believe that current foreclosure procedures do not provide debtors with sufficient opportunities to challenge foreclosure. Assuming, *arguendo*, that that belief has merit, a debtor does not advance the debtor's cause by filing documents that do not comply with the Maryland Rules, are incomplete, inaccurate, and misleading.").

only to state-chartered banks.¹²⁶

In summary, credit is essential to a thriving American economy, fair credit terms are essential to creditor confidence and trust, and freedom from predation is essential to creditor confidence. Unfortunately, while there have been some statutory and judicial efforts to redress predatory lending, the law should consider a more protective approach to predation. From all of the above, it is posited that, as credit is fundamental to the American economy, freedom from predation is a fundamental constitutional issue.

III. MORAL CAPITALISM AND EMPATHY: RESUSCITATING THE AMERICAN DREAM

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."¹²⁷

Part III poses that the U.S. Constitution should recognize moral capitalism, that is, a citizen's right to be protected against economic oppression. Such a right shall hereinafter be referred to as the "freedom from predation." Freedom from predation challenges the current dearth of constitutional bases for such protection in subprime predatory lending cases. It addresses the reality that, when courts deny citizens the existence of a constitutional right to protection from economic oppression, they are consciously or unconsciously denying essential fairness and promoting economic oppression.

What is this constitutional principle of moral capitalism? Simply, and as stated in this Article's Introduction, it is a constitutionally-based approach to protect citizens against discrimination on the basis of class. As previously stated, moral capitalism is "the constitutional principle of regulating capitalism to protect citizens from predation and to redress economic exploitation due to one's class or economic condition."

What is the basis of moral capitalism? It is President Obama's concept of empathy as applied to constitutional jurisprudence. It is based on the fundamental right that every citizen has to be fairly treated in economic matters and not be a victim or prey of predatory lending practices, especially when dealing with large institutions. It introduces into consti-

126. Dietrich, *supra* note 91, at 195-96; see also Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274 (2004).

127. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). See generally CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987) (offering a comprehensive perspective on the legal and social context of the *Plessy* case and its outcome); LINDA PRZYBYSZEWski, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* (1999) (providing a thorough study of Justice Harlan and his judicial views); David S. Bogen, *Why the Supreme Court Lied in Plessy*, 52 VILL. L. REV. 411 (2007) (criticizing the Court's true motives in *Plessy*).

tutional dialogue the ancient concept of equity, that of fundamental fairness.

One application of moral capitalism follows from the Obama Administration's response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*¹²⁸ There, the Supreme Court denied Lilly Ledbetter's claim for pay discrimination, due to a 180-day limit for lodging such a complaint.¹²⁹ On the campaign trail, candidate Obama often criticized the Supreme Court's Ledbetter decision.¹³⁰ As one of his first acts as President, Obama signed into legislation, the Lilly Ledbetter Fair Pay Act of 2009,¹³¹ negating the Court's time restriction for submitting evidence of pay discrimination. Another statutory application of moral capitalism is the Obama Administration's passage of the Credit Card Accountability Responsibility and Disclosure Act of 2009.¹³² That Act's goal is to level the playing field for credit card consumers and is a clear example of President Obama's moral capitalism at work. To date, the Obama Administration has brought moral capitalism to statutory development; it is left to be seen how it will promote moral capitalism in constitutional jurisprudence.

IV. MORAL CAPITALISM AND THE CASE FOR EXPANDING CLASS-BASED SAFEGUARDS

"The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes."

Portia (impersonating an eminent judge), "The Merchant of Venice."¹³³

Empathy, not unlike mercy in Shakespeare's play "The Merchant of Venice," calls for kindness to those in distress. Part IV presents the public-policy arguments for moral capitalism and the freedom from predation, particularly in the context of predatory, subprime mortgage lending. First, it argues that the present state of constitutional-rights' theory fails to redress the unconscious institutional classism that citizens face under the current state of the law and needs to develop a constitutional

128. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5).

129. *Id.* at 628-29.

130. Slevin, *supra* note 38.

131. Pub. L. No. 111-2, 123 Stat. 5.

132. Pub. L. No. 111-24, 123 Stat. 1734.

133. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

basis for redressing predation.¹³⁴ And second, it argues that as fairness is a fundamental principle of American culture, as a matter of substantive due process, predatory, subprime lending should be prohibited as a violation of constitutional law.

A. *Current Constitutional-Rights' Theory Fails to Redress Predation*

Economic freedom is a fundamental value.¹³⁵ Credit is one of the most essential features of economic freedom.¹³⁶ A constitutional analysis of subprime mortgage lending demonstrates that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution does not compel states to protect at-risk borrowers from predatory lending abuses. Arguing in favor of moral capitalism under current constitutional jurisprudence would be a difficult task.

1. EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹³⁷ The Equal Protection Clause can be seen as an attempt to secure the promise of the United States' professed commitment to the proposition that "all men are created equal" by empowering the judiciary to enforce that principle against state abuses.¹³⁸ In the wake of the Fourteenth Amendment, the states could not, among other things, deprive people of the equal protection of the laws.¹³⁹ The Equal Protection Clause has been applied most significantly to protect the civil rights of African Americans.¹⁴⁰

134. Cf. Crusto, *Unconscious Classism*, *supra* note 14 (using a parallel analysis to analyze the constitutionality of disparate treatment of unincorporated sole proprietors).

135. Cf. Universal Declaration of Human Rights art. 21, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (guaranteeing right to work). *But see* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1936).

136. See Georgina W. Kwan, Comment, *Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai'i*, 24 U. HAW. L. REV. 245, 267 (2001).

137. U.S. CONST. amend. XIV, § 1. See generally PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (4th ed. 2000) (discussing the Fourteenth Amendment in historical context); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1989) (providing details on the rationale for the Fourteenth Amendment).

138. See generally BREST ET AL., *supra* note 137 (discussing the Fourteenth Amendment in historical context).

139. See *id.* (discussing the expanding application of the Fourteenth Amendment to protect civil rights through American history).

140. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that the states' maintenance of segregated educational facilities denied African-American children equal protection); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that Texas's state system of law schools, which educated blacks and whites at separate institutions, was unconstitutional); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that the Democratic primary in Texas, in which voting

In determining whether a law violates the Equal Protection Clause, the Supreme Court has applied three levels of scrutiny. Under strict scrutiny, a law is unconstitutional unless it is narrowly tailored to serve a compelling governmental interest. In addition, there cannot be a less restrictive alternative available to the state to achieve that compelling interest.¹⁴¹ Under immediate scrutiny, a law is unconstitutional unless it is substantially related to an important governmental interest.¹⁴² Finally, under rational basis, a law is constitutional so long as it is reasonably related to a legitimate governmental interest.¹⁴³

2. EQUAL PROTECTION AND COMMERCIAL REGULATIONS

Arguments for moral capitalism need to overcome the Supreme Court's deference to state regulation of economic concerns. With regard to state regulations of economic concerns, the Court is very deferential to the states:

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.¹⁴⁴

As a result, the Court has applied rational basis review to economic issues. The Supreme Court has articulated the governing standard of review as follows:

[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achieve-

was restricted to whites alone, was unconstitutional on equal protection grounds); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that a state's offering a legal education to whites but not to blacks violated the Equal Protection Clause); *Nixon v. Herndon*, 273 U.S. 536 (1927) (holding that the denial of the right to vote based on race was unconstitutional); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding that the exclusion of blacks from juries was a denial of equal protection to black defendants).

141. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 319 U.S. 432 (1943); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

142. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301-02 (1986) (Marshall, J., dissenting).

143. See *id.*

144. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (citation omitted).

ment of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.¹⁴⁵

3. EQUAL PROTECTION AND PREDATION

Working against equal protection relative to economic oppression in the form of predatory lending is the argument that creditors ought to charge low income and unqualified middle income borrowers a higher interest rate because those borrowers represent a greater risk of loss. From the vantage point of lenders, at-risk borrowers are fortunate to have loans made to them on any terms, even high rate ones. This viewpoint is reflected in commentary that blames predatory subprime lending prey for the current national recession, as if the victims were ultimately responsive for their inability to pay on exorbitant interest rate loans.¹⁴⁶ Is it possible that although it is legal to charge the less fortunate higher interest rates, that such a practice is a violation of equal protection?

One might argue that legislation that allows higher, arguably predatory, mortgage lending terms to be charged to the certain Middle Class and Under-Privileged borrowers is class legislation, and is class discrimination. Facing a similar argument relative to the law's unequal treatment of sole proprietors and partners compared to that of corporations and corporate officers, one California Court of Appeals stated:

[There is no] merit in the remaining contention that different statutory treatment of "sole proprietors or partners" on the one hand, and corporations and corporate officers on the other, is "class legislation" and a denial of "equal protection." Treatment of corporations as a distinct class has received widespread constitutional sanction. . . . "The equality guaranteed by the equal protection clause is equality under the same conditions, and among persons similarly situated. The Legislature may make a reasonable classification of persons and businesses and other activities and pass special legislation applying to certain classes. The classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished."¹⁴⁷

As a result, as of now, only heightened scrutiny would circumvent

145. *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961).

146. *See, e.g.*, Geoff Colvin, *A Return to Thrift*, WASH. POST, Oct. 21, 2008, at D3 ("Blaming subprime lenders has become popular, and in some cases they were deceptive, but most borrowers knew perfectly well what they could afford. Millions joined in the debt mania, and now we're paying the price.").

147. *Toppis & Trowsers v. Superior Court*, 107 Cal. Rptr. 60, 61 (Ct. App. 1973) (citation omitted).

the Court's deferential treatment of state economic regulatory concerns under rational basis review. To employ heightened scrutiny, the Court must find either that predatory lending prey constitutes a suspect classification¹⁴⁸ or that the differing treatment of certain Middle Class and Under-Privileged borrowers infringes upon their fundamental rights.¹⁴⁹

4. PREY AS A SUSPECT CLASSIFICATION

On the surface, subprime mortgage lending prey are not entitled to constitutional protection as a suspect class. Suspect classes typically have a "'history of purposeful unequal treatment' or [have] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."¹⁵⁰ An alleged disadvantaged class of individuals who choose to borrow mortgage loans with predatory terms is not obviously a "suspect" class.

But beneath the surface of this analysis one would discover that subprime lending mortgage prey are often representative of suspect classes, groups who have been historically discriminated against and have exhibited "obvious, immutable, or distinguishing characteristics that define them as a discrete group."¹⁵¹ Take, for example, the case of African-American, subprime mortgage lending prey. As the Supreme Court considers "African Americans" to be a suspect class, if they were to sue the state alleging they were discriminated against because they are African Americans, then the class is obviously suspect. However, if instead they were to argue that state law discriminates against them purely because they are subprime mortgage lending prey, then the class is obviously not suspect. An argument positing that the state discriminates against them because they are both African-American and subprime mortgage lending prey would trigger heightened scrutiny because they are African Americans.

The Supreme Court seems reluctant to expand what constitutes suspect classes. For example, in *City of Cleburne v. Cleburne Living Center*, the Court established criteria for determining suspect classifications, when grappling with the question of whether mental retardation should be a suspect class, after a group home for the mentally retarded

148. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (holding that mental retardation is not a suspect classification "calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

149. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that conditioning the right to vote on the payment of a tax violated the Equal Protection Clause).

150. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

151. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

was denied a special permit in Texas.¹⁵² The Court considered four factors before concluding that the mentally retarded were not a suspect class: (1) whether there is a history of "continuing antipathy and prejudice" against the group; (2) whether the group is "politically powerless in the sense that they have no ability to attract the attention of lawmakers"; (3) whether the group is defined by an "immutable" characteristic; and (4) whether that characteristic is one that is generally irrelevant.¹⁵³ Despite a finding that mental retardation satisfied the first and the third factors, the *Cleburne* Court denied suspect classification.¹⁵⁴ This analysis suggests that each factor must be fulfilled to warrant heightened scrutiny, which is more probing than rational basis review.

Relative to poverty, the Supreme Court has failed to find that poverty is the basis for suspect classification.¹⁵⁵ States have promulgated laws that allow for predatory lending practices, including allowing for higher interest rate charges to certain Middle Class and Under-Privileged prey in all lending areas, mortgages and pay-day loans. Contrary to current law, charging different citizen classes different loan interest rates is inherently discriminatory and unequal. Accordingly, because the Equal Protection Clause provides that no state can deny any person within its jurisdiction equal protection of the laws, it follows that the subprime mortgage lending prey should also be afforded the same treatment as regular borrowers. In addition, it might be argued that certain Middle Class and Under-Privileged borrowers should be granted suspect classification. Employing the four pronged test outlined by the Supreme Court in *City of Cleburne*, one would need to successfully argue that 1) there is a history of continued antipathy and prejudice against those impoverished (certain Middle Class and Under-Privileged citizens); 2) that impoverished people are politically powerless in the sense that they have no ability to attract the attention of lawmakers; 3) that impoverished people are defined by an immutable characteristic; and 4) that impoverishment is a characteristic that is generally irrelevant.

5. EQUAL PROTECTION CHALLENGES TO FACIALLY-NEUTRAL STATE STATUTES

If a suspect class of prey were to challenge the constitutionality of a state statute that discriminates between subprime borrowers and prime borrowers, they would face additional challenges to trigger heightened scrutiny. Presumably, the state statute would be facially neutral, mean-

152. See 473 U.S. at 442-46.

153. *Id.*

154. *Id.* at 446-47.

155. See NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 492 (3d ed. 2005).

ing the statutory language has no express mention of the suspect class. Hence, to succeed, the claim would need to allege that the facially-neutral law has a disparate impact among members of the suspect class and that discrimination against this class was the intent and purpose of the state act.¹⁵⁶ Middle Class and/or Under-Privileged borrowers to be a suspect class would add class discrimination to race and gender discrimination for constitutional consideration.

Not all regulations are equal. A legislature can present legitimate reasons for legislative acts that may disadvantage street vendors over store front merchants or for why the length of a cargo train should be less than twenty-four cars. But a legislature's arbitrary denial by default of equal treatment of borrowers indiscriminate of real risk can hardly be said to have a rational relationship to a legitimate state interest. In addition, another argument in favor of freedom from predation is that the legislative failure to grant such a right to subprime mortgage borrowers disadvantages homeowners in underserved, suspect-class communities far more frequently, and may rise to support an argument for disparate impact, although it may be difficult to prove discriminatory intent.

6. THE FREEDOM FROM PREDATION AS A FUNDAMENTAL RIGHT

Perhaps subprime borrowers can successfully argue that the freedom from predation is a fundamental constitutional right as a denegation of the right to the pursuit of happiness. A fundamental right, as defined by the U.S. Supreme Court, is "akin to free speech or marriage or to those other rights . . . that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated."¹⁵⁷ While it is difficult to imagine how subprime borrowing status might rise to a fundamental right, as the following analysis demonstrates, failing to provide subprime mortgage prey protection from predation by default and under operation of the rules and principles of the common law is inherently unfair and discriminatory in comparison to the law's treatment of other investors, namely, purchasers of securities. This is because the threats to the subprime mortgage prey are virtually identical to those facing other security investors. The securities laws embrace as an essential principle the concept of suitability, that in selling a security to an investor, the stockbroker must consider whether the investment is suitable to an investor's risk tolerance and financial needs. There is no doubt that the

156. See *Washington v. Davis*, 426 U.S. 229, 246 (1976) (upholding a police department's use of a written personnel test, even though it had a disproportionate impact on black applicants, because such impact alone could not infer a discriminatory intent on the part of the state).

157. *United States v. Kras*, 409 U.S. 434, 446 (1973).

reason why a homeowner chooses to buy rather than rent is ultimately an investment decision. As a result, a mortgage provider must consider the suitability of the mortgage and the risk tolerance of the borrower. Simply, mortgage borrowers should be treated the same way as security investors; they should not be sold mortgage products that they ultimately cannot afford.

An additional constitutionally-based argument in favor of granting subprime mortgage prey protection against predation might be made under the Dormant Commerce Clause. If it could be established that the lack of protection against predation unduly burdens interstate commerce, then differing treatment of the two groups of securities investors, traditional securities investors and mortgage borrowers, would be unconstitutional.

For the all the above reasons, an equal protection claim supporting the freedom from predation would not likely pass current judicial scrutiny.

7. FINAL WORD ON CURRENT CONSTITUTIONAL CONSIDERATIONS

While courts are generally deferential to economic regulations under rational basis review, state laws motivated by irrational beliefs, antiquated values, or stereotypic notions of class attributes may still be suspect under rational basis review. The lynchpin of the argument favoring the freedom from predation is that the current state of the law reflects antiquated notions of securities investors. Nowadays, subprime mortgage borrowers are just as deserving of securities law protection, including the suitability rule, as any other investor class. Evidence of this fact is the proliferation of investment vehicles targeted at the subprime market.

Some might argue that the Constitution is not and should not be concerned with economic equality. This position is contrary to case law; there are many areas of economic concern wherein the U.S. Supreme Court has found constitutional interests. Some of these include limitations on punitive damages,¹⁵⁸ limitations on the federal income tax,¹⁵⁹ and the constitutionality of New Deal legislation,¹⁶⁰ such as social security, to name a few. Hence, it cannot be argued that the freedom from predation is outside the purview of the U.S. Supreme Court merely because it relates to economic matters. If such an absurd argument were true, much of the Court's most important decisions would be negated.

158. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

159. See *Eisner v. Macomber*, 252 U.S. 189 (1920).

160. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Panama Ref. Co. v. Ryan*, 293 U.S. 338 (1935).

B. *As Fairness Is a Fundamental Principle of American Culture, Predatory, Subprime Lending Should Be Prohibited as a Matter of Substantive Due Process*

It could be argued that as fairness is a fundamental principle of American culture, that the freedom from predation is fundamental as predation is inherently unfair. It is instructive to analyze the freedom from predation in comparison to the right to intrastate travel, arguably a fundamental right that has yet to receive U.S. Supreme Court recognition. In a thoughtful analysis of the constitutionality of intrastate travel,¹⁶¹ the Third Circuit in *Lutz v. City of New York* examined six possible constitutional sources for the right and concluded that “no constitutional text other than the Due Process Clause could possibly create a right of localized intrastate movement.”¹⁶² The Third Circuit cited Justice Scalia’s narrow test of substantive due process, which states, “[T]he Due Process Clause substantively protects unenumerated rights ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’ . . . [T]he relevant traditions must be identified and evaluated at the most specific level of generality possible.”¹⁶³ In *Lutz*, the Third Circuit concluded that the right to move freely was “implicit in the concept of ordered liberty” and “deeply rooted in the Nation’s history.”¹⁶⁴

Using Justice Scalia’s standard, is fair dealing and protection against economic oppression so deeply rooted in the traditions and conscience of our people to be ranked as fundamental? It would appear so, for as Professor Ronald Dworkin has stated, a moral reading of the Constitution proposes that we interpret constitutional “clauses on the understanding that they invoke moral principles about political decency and justice.”¹⁶⁵ While to date, the U.S. Supreme Court has not found wealth or class as a suspect class, perhaps President Obama’s empathy criteria for selection of U.S. Supreme Court Justices and Obama’s moral capitalism will result in new inroads for the freedom from predation and for protection against economic oppression for the Middle Class and the Under-Privileged.

161. See Crusto, *Enslaved Constitution*, *supra* note 14.

162. 899 F.2d 255, 267 (3d Cir. 1999).

163. *Id.* at 268 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion)).

164. *Id.*

165. RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996).

V. EMPATHY AND THE CONSTITUTION: THE FREEDOM FROM PREDATION

In conclusion, the U.S. Supreme Court has not explicitly found that there exists a general right to be protected against economic oppression such as in the form of predation. As a result, a citizen has no constitutional protection against economic oppression, often resulting from unconscious institutional classism. Furthermore, with economic oppression comes consumer distrust of financial markets, foreclosures, bankruptcies, and an unhealthy economy. In addition, protection against economic oppression might help address wealth inequity that exists in America. Hopefully, moral capitalism will assist the vast number of Americans who face significant unmet civil legal matters annually.

Consistent with President Obama's call for empathy in judicial jurisprudence, this Article concludes that constitutional theory should be expanded so as to provide constitutional protection against predatory lending and other forms of economic oppression. The freedom from predation promotes inherent fairness and ensures the continued growth and protection of consumer markets. Consistent with President Obama's call for empathy, the strongest argument in support of the freedom against predation is substantive due process. According to Justice Scalia, in determining whether a right meets the substantive due process test, that right must be "so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁶⁶

When it comes to fundamental fairness and freedom from economic oppression, moral capitalism and the freedom from predation represent what is the best of America: life, liberty, and the pursuit of happiness. Predation is economic tyranny and a form of enslavement. In developing a human-rights' Constitution, the Obama Administration should embrace change in the form of the freedom from predation. This is Obama's moral capitalism, an empathic plan to resuscitate the American Dream.

166. *Michael H.*, 491 U.S. at 122 (plurality opinion) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)).