CONSUMER REMEDIES FOR CIVIL RIGHTS

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ABSTRACT

This Article considers whether the consumer protection doctrine offers a more promising avenue to remedying certain forms of discrimination than the antidiscrimination doctrine. Using a housing discrimination story as a case study, this Article breaks down the doctrinal trade-offs between seeking redress through a consumer protection claim and an antidiscrimination claim. This Article argues that a consumer protection claim is not only a viable avenue to remedying certain forms of discrimination but also has a higher likelihood of success than a traditional antidiscrimination claim.

Consumer protection claims might appear undesirable because they lack the important anti-subordination and group-based equality norms at the root of civil rights law. This Article argues that this is something of an illusion. Civil rights advocacy historically focused on economic citizenship, but formal civil rights doctrine came to omit economic protections. The antidiscrimination doctrine developed narrowly, constraining the reach of its remedies. Antidiscrimination statutes thus have failed to reach advocates' aspiration for achieving group-based equality. Consumer protection law, solidly grounded in the protection of economic citizenship, is well-suited to those aspirations. Consumer protection claims therefore usefully align with and supplement the objectives of civil rights law.

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INTRODUCTION

Julia Forman is a forty-two-year-old Black woman.[1] She is seeking an apartment in Raleigh, North Carolina. She reads about an open two-bedroom apartment at Orange Haven Apartments on rent.com that is available for $750 per month. The apartment building is old and near a highway, but it has amenities, including a pool, workout facility, and in-unit laundry. It is also near a bus stop, which would allow Julia easy access to employment opportunities. The neighborhood in Raleigh is racially diverse, but a recent influx of upper-class White families has led to quicker responses from emergency services, community and economic development, and a high-end grocery store. Julia goes to the apartment complex to inquire about the available apartment. The landlord, Bill Herman, tells Julia that all of the two-bedroom units have been rented, but that a one-bedroom apartment might be coming available in the following month. He quotes her $800 per month for the one-bedroom apartment. Bill does not ask Julia about her income or credit history and tells her to check back in three weeks if she is still interested.

Julia checks the rent.com listing when she gets home and notes that the two-bedroom apartment at Orange Haven Apartments is still listed as available. Suspicious, she asks her friend George Simon, a forty-five-year-old White man, to swing by the apartment complex on his way home from work to see if he can get any information about either the two-bedroom or one-bedroom apartment. When George arrives, he too is greeted by Bill Herman. Bill informs George that, indeed, he has a two-bedroom unit available and quotes him the same price listed on rent.com—$750 per month. He also tells George that he has a one-bedroom apartment available, offers to show him the apartment, and tells George that it rents for $650 per month. When George leaves the apartment complex, Bill sends him off with a rental application and lets George know that he will follow up in the next couple of days. Bill never asks about George's income or credit history.[2]

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[1] For reasons I set forth in an earlier work, I choose to capitalize the terms "Black" and "White" unless they appear in a quotation. *See* Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1, 6 n.19 (2015). In keeping with the trend of omitting hyphens when using terms that combine ethnicities or nationalities, I also employ the term "African American" without a hyphen. *Id.*

[2] This case study is a hypothetical. The facts, however, are representative of fair housing cases from around the country. Julia's visit to the apartment complex, followed by George's visit to the apartment complex, is similar to testing that is designed to uncover subtle housing discrimination. Courts have recognized the legitimacy of testing such evidence in housing discrimination cases. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) ("That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury . . . ."). Reputable organizations, including the United States Department of Justice ("DOJ"), have entire teams devoted to fair housing testing. *See Fair Housing Testing Program*, DOJ, https://www.justice.gov/crt/fair-housing-testing-program-1 [https://

This Article uses Julia's story as a tool to consider whether the consumer protection doctrine affords a viable avenue to remedy discrimination, especially for individual plaintiffs.[3] It analyzes Julia's experience under both an

perma.cc/M4AY-8RFQ] (last visited Feb. 19, 2019) (stating that testing is a valuable tool to investigate housing market practices and to document illegal housing discrimination); *see also* Steve Tomkowiak, *Using Testing Evidence in Mortgage Lending Discrimination Cases*, 41 URB. LAW. 319, 321 (2009) ("Testing is specifically authorized in the Fair Housing Act under the Fair Housing Initiatives Program (FHIP) and the Fair Housing Assistance Program (FHAP), each of which is administered and managed by the Department of Housing and Urban Development (HUD)."). For example, the Seventh Circuit Court of Appeals accepted testing evidence in a Fair Housing Act ("FHA") case, including one test where a Black tester was informed that a one-bedroom apartment was $500 per month and a White tester was later informed that the same apartment was $480 per month. United States v. Balistrieri, 981 F.2d 916, 924 (7th Cir. 1992) (accepting "testing" as method of ferreting out discrimination and explaining how it was used in this case). Testers were also used in *Metro Fair Housing Services, Inc. v. Morrowood Garden Apartments, Ltd.*, 576 F. Supp. 1090 (N.D. Ga. 1983), where a resident manager told the Black tester that no two-bedroom apartments were available and that she could place her name on a waitlist for a one-bedroom apartment; he then told the White tester that no two-bedroom would be available until fall but that a one-bedroom apartment would be available the following month. *Id.* at 1095 (denying defendant's motion for summary judgment for plaintiff's Fair Housing Act claim); *see also* Miller v. Spring Valley Props., 202 F.R.D. 244, 246-47 (C.D. Ill. 2001) (detailing how apartment rental agent allegedly misrepresented availability of apartments to African Americans at several properties); Davis v. Mansards, 597 F. Supp. 334, 337-38 (N.D. Ind. 1984) (explaing how apartment agent told Black applicants that there were no units available to rent when, in fact, there were twenty appropriate units vacant at property). Unlike the amateur test Julia and George put together, most tests undertaken by professional fair housing investigators would isolate one variable protected class (i.e., race or sex). *See* U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. & RESEARCH, *Paired Testing and the Housing Discrimination Studies*, EVIDENCE MATTERS (2014), https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html [https://perma.cc/8BP5-6RZY]. Julia's situation, however, more accurately describes the set of facts and circumstances that an individual prospective renter might face in trying to determine whether he or she has been the victim of housing discrimination or an unfair or deceptive act.

[3] While this Article focuses on a particular case study, it does so to illustrate the costs and benefits of two statutory schemes and doctrines. It looks to the federal FHA to illuminate the benefits and risks of using antidiscrimination law to remedy civil rights violations. It looks to state unfair and deceptive practices acts to illuminate the benefits and risks of using consumer protection law to remedy civil rights violations. While not every fact pattern involving discriminatory conduct could take advantage of the analysis herein, this Article is relevant to myriad fact patterns and multiple laws. For further analysis, see *infra* notes 21-22, 237-244 and accompanying text (explaining how consumer protection doctrine offers a plausible means of remedying discrimination under several causes of action). More importantly, the Article concludes that consumer protection claims can and should be utilized as a tool for achieving civil rights, especially in light of the historical inability of antidiscrimination law to fully reach its anti-subordination and group-based equality goals. Such a conclusion is unconstrained by the specifics of the case study used to develop and illustrate its analysis.

antidiscrimination and a consumer protection framework, setting out the doctrinal benefits and drawbacks of pursuing each claim. It argues not only that a consumer protection claim is a viable avenue to remedying certain forms of discrimination commonly considered under traditional antidiscrimination law, but also that such an approach has fewer hurdles to clear and a higher likelihood of success than a traditional civil rights claim.

Substituting a consumer protection claim for a traditional civil rights claim is not, however, without normative implications. A consumer protection approach is a universalist approach to remedying discrimination. In other words, its remedies are available to all people without regard to identity-based protected classes.[4] Such approaches can be, and have been, critiqued for failing to achieve anti-subordination or group-based equality goals inherent in civil rights protections.[5] Primarily, critics contend that universalist approaches adopt, and thus condone, a post-racial, colorblind perception of modern America.[6] This Article recognizes the value and legitimacy of such arguments. Even so, it argues that the history of civil rights advocacy and the failure of the antidiscrimination doctrine to achieve group-based equality goals counsels toward enlarging the legal mechanisms for achieving civil rights remedies. Further, the historic understanding of economic citizenship[7] as a measure of full and free participation in a democratic society suggests that consumer protection can—and should—be a primary tool in the fight for equality.[8]

Part I of this Article analyzes the doctrinal relationship between antidiscrimination and consumer protection jurisprudence. It asks: (1) can one use consumer protection law to remedy discrimination and (2) what are the trade-offs between an antidiscrimination claim and a consumer protection claim? Offering Julia's case as an example, this Article considers the elements and the remedies of an antidiscrimination claim under the federal Fair Housing

[4] Professor Samuel Bagenstos defines "universalist" and "universalistic" approaches to civil rights synonymously as a methodology that "either guarantees a uniform floor of rights or benefits for all persons or, at least, guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes (e.g., race, sex) highlighted by our antidiscrimination laws." Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2842 (2014).

[5] *See infra* notes 197-209 and accompanying text (discussing critiques of universalist approaches to civil rights violations).

[6] Charlotte S. Alexander, Zev J. Eigen & Camille Gear Rich, *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 12 (2016) (defining "post-racial" as "a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America's and Americans' pronounced racial progress"); *infra* Section III.A (explaining how universalist approaches have been criticized as adopting post-racial colorblind perception of America).

[7] *See infra* note 10 (tracing historical development of "economic citizenship" concept).

[8] *See infra* Section II.A (discussing relationship between economic citizenship and civil rights).

Act ("FHA") and of a consumer protection claim under a state law prohibiting unfair and deceptive consumer transactions ("UDAP").[9] It concludes that Julia's UDAP claim is not only viable but also more likely to succeed than her antidiscrimination claim. The analysis and conclusion of Part I begs the normative question: even if consumer protection *could* provide a path to remedying certain forms of discrimination, *should* scholars, advocates, and victims take that path?

Part II provides context for the normative discussion, exploring the historic development of the antidiscrimination doctrine. It makes two relevant observations: (1) civil rights advocacy throughout American history has promoted economic citizenship as a key component of civil rights and (2) the antidiscrimination doctrine has developed narrowly, severing the relationship between economic and civil rights, and otherwise constraining the ability of civil rights law to achieve anti-subordination and group-based equality goals. "Economic citizenship" in this context is defined as "the achievement of an independent and relatively autonomous status that marks self-respect and provides access to the full play of power and influence that defines participation in a democratic society."[10] Finally, Part III tackles the normative question head

[9] JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES AND MATERIALS 97-98 (4th ed. 2013) (defining and explaining development of state unfair and deceptive consumer practices laws, often known as "little FTC acts" or "UDAP statutes"). State statutes have different names, different designs, and arose from a variety of models. *See* Dee Pridgen, *Wrecking Ball Disguised as Law Reform: ALEC's Model Act on Private Enforcement of Consumer Protection Statutes*, 39 N.Y.U. REV. L. & SOC. CHANGE 279, 286-91 (2015) (recognizing that National Conference of Commissioners on Uniform State Laws (now known as Uniform Law Commission), American Law Institute, and Council of State Governments, drafted model acts that were widely used by states as they developed state UDAP laws). For ease of reference, this Article refers to state laws prohibiting unfair and deceptive consumer transactions as "UDAP statutes."

[10] ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 12 (2001) (defining "economic citizenship" and discussing it through feminist theory lens). Civil rights activists sought full and free access to traditional routes to economic and financial well-being, including access to credit, home mortgages, and goods and services. *See* THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE 1 (2009) ("Dreams of economic justice had long been central to the black freedom struggle and to King's social gospel vision."). The concept of "economic citizenship" has been critiqued by scholars challenging the "exclusionary tendencies" of citizenship in America and internationally. *See* Mary Condon & Lisa Philipps, *Transnational Market Governance and Economic Citizenship: New Frontiers for Feminist Legal Theory*, 28 T. JEFFERSON L. REV. 105, 113 (2005) ("In addition, post-colonial and critical race scholars have called attention to the normative presuppositions of Western concepts of citizenship and the denial of citizenship privileges to racialized, colonized, and foreign others."); Annelise Orleck, *Gender, Race, and Citizenship Rights: New Views of an Ambivalent History*, 29 FEMINIST STUD. 85, 95 (2003) ("[N]arrow constructions of U.S. citizenship . . . long excluded more people than they

on. It considers what might be gained by turning to consumer protection to remedy discrimination. Situated in the literature on colorblind, universalist, and race-conscious approaches to civil rights concerns, it also considers what might be lost.

This Article fills a hole in the academic literature about the relationship between the antidiscrimination and consumer protection doctrines.[11] It suggests that, paradoxically, the consumer protection doctrine, a universalist approach to remedying economic injustice, might in certain circumstances be a better avenue to remedying discrimination than relying on traditional civil rights remedies. And it goes one step further, arguing that, in light of the historical economic citizenship goals of the civil rights movements and failures of the current antidiscrimination doctrine, consumer protection law and advocacy can and should be understood as a critical tool in the fight for full and adequate civil rights.

I. ASSESSING THE ALTERNATIVES

This Part considers whether the consumer protection doctrine can afford a legal remedy for victims of discrimination. Using Julia's story as a case study,

included."). Nevertheless, this Article uses the language and lens of "economic citizenship" because it best describes the overlapping language and principles of the civil rights and consumer movements of the mid-twentieth century. *See* MEG JACOBS, POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 150-64 (2005) (recognizing unique coalitions in the wake of the New Deal that centered around desire to increase consumer purchasing power); Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2701 (2014) (recognizing how economic justice-minded leaders in civil rights movement pushed Dr. Martin Luther King, Jr. and others to include a vision of economic citizenship as part of civil rights movement platform); William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 702-09 (2000) (tracing concept of economic citizenship through overlapping civil rights and labor movements). As used in this Article, the concept of "economic citizenship" bears no relationship to one's legal status in America.

[11] Although there has been significant academic treatment of the relationship between the labor movement and the civil rights movement, *see, e.g.*, JACKSON, *supra* note 10, at 15-23 (discussing Dr. King's role in labor movement), the role of the consumer movement in that conversation has been largely ignored. And while scholars have considered discrimination in retail, car sales, and lending, *see* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 15-43 (1992) (retail); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818 (1991) (car sales); Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REFORM 527, 529 (1993) (lending); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 276 (2001) (retail); Robert G. Schwemm, *Introduction to Mortgage Lending Discrimination Law*, 28 J. MARSHALL L. REV. 317, 332 (1995) (lending), outside of lending discrimination, there has been little attention paid to the overlap of the antidiscrimination and consumer protection doctrines.

it argues that both antidiscrimination and consumer protection doctrine afford Julia legal remedies to vindicate her rights. It then breaks down the doctrinal trade-offs between a consumer protection claim and a traditional antidiscrimination claim. It concludes that, due in large part to the original design of the consumer protection and antidiscrimination statutes and their subsequent doctrinal development, the consumer protection doctrine affords individual victims of discrimination an easier path to and greater likelihood of attaining a remedy under law. Although this Part focuses its attention on Julia's story of housing discrimination, the analysis in this Article is not limited to such specific factual situations—the final section of this Part briefly explores additional applications.

A. *The Claims*

1. The Antidiscrimination Claim

The relevant antidiscrimination statutes under which Julia's claim could arise are the federal FHA,[12] the North Carolina State Fair Housing Act,[13] or both. The FHA prohibits discrimination in any dwelling, private or public, intended as a residence for one or more families, including vacant land on which a residence might be placed.[14] The FHA prohibits discrimination based on certain protected classes—race, color, religion, sex, familial status, national origin, and

[12] 42 U.S.C. §§ 3601-3619 (2012) (laying out general policy of United States to provide for fair housing).

[13] N.C. GEN. STAT. §§ 41A-1 to 41A-10 (2018). Like many state fair housing statutes, the North Carolina State Fair Housing Act parallels the protections in the federal FHA. *Compare* N.C. GEN. STAT. § 41A-4 (prohibiting discrimination related to housing because of race, color, religion, sex, national origin, handicapping condition, or familial status), *with* 42 U.S.C. § 3604 (prohibiting discrimination related to housing because of race, color, religion, sex, national origin, handicap, or familial status). Most states and many localities have analog fair housing statutes, some of which prohibit discrimination on the basis of additional protected classes. *See, e.g.*, COLO. REV. STAT. § 24-34-502 (2015) (protected classes include race, color, religion, creed, sex, national origin/ancestry, disability/handicap, sexual orientation (defined to include "transgender status"), marital status, and familial status); N.Y.C. ADMIN. CODE § 8-107 (2018) (including as protected classes race, color, religion/creed, national origin, disability, sexual orientation, marital or partnership status, age, alienage or citizenship status, gender, gender identity, lawful occupation, lawful source of income, pregnancy, presence of children, and status as victim of domestic violence). For ease of reference, the remainder of the Section assumes that an antidiscrimination claim is made pursuant to the federal FHA.

[14] The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." 42 U.S.C. §§ 3602(b), 3603(a)(2) (defining dwelling to include, after Dec. 31, 1968, all public and private dwellings not otherwise exempted).

disability.[15] Specifically, the FHA prohibits a landlord or other housing provider from refusing to sell or rent housing; making housing unavailable; discriminating in the terms, conditions, or privileges of rental; making or publishing a statement indicating a preference or limitation of resident; and/or falsely telling a prospective resident that housing is unavailable because of such individual's membership in a specified protected class.[16] Courts have read the fair housing protections broadly, especially the prohibition against "otherwise mak[ing] unavailable or deny[ing] a dwelling."[17]

To prevail on her claim of housing discrimination, Julia would need to establish that Bill Herman: (1) made the apartment unavailable to her; (2) discriminated against her in the terms or conditions of the rental; and/or (3) represented to her that the two-bedroom apartment was not available, even though it was ready for occupancy. Julia would also need to establish that Bill took those actions because of her race, color, and/or sex. To prove improper motive, Julia would likely rely on the test set forth in *McDonnell Douglas Corp. v. Green*.[18] She must prove intentional discrimination based on her membership in a protected class and subclass.

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[15] *Id.* § 3604.

[16] *Id.* § 3604(a)-(d). The FHA also prohibits steering, discrimination in real estate transactions, and failure to design and construct housing built after 1991 in accordance with accessibility requirements, among other prohibitions. *Id.* §§ 3604(e)-(f), 3605 (setting forth accessibility requirements and prohibiting discrimination in residential real estate-related transactions).

[17] *Id.* § 3604(a); City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731-32 (1995) (recognizing the FHA's "'broad and inclusive' compass" and "according a 'generous construction' to the Act's complaint-filing provision" (quoting Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 212 (1972))); Nat'l Fair Hous. All., Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 56 (D.D.C. 2002) ("[P]laintiffs persuasively argue that it would have been unreasonable for Congress to include a laundry list of all possible housing-related transactions covered by the FHA, and that the broad, general language—reflected in phrases such as 'otherwise make unavailable or deny'—was intended to be flexible enough to cover multiple types of housing-related transactions."); Woods v. Foster, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995) (interpreting phrase "otherwise make unavailable or deny a dwelling" to be "as broad as Congress could have made it").

[18] 411 U.S. 792, 802 (1973). For further explanation, see *infra* Section I.B.1 (explaining *McDonnell Douglas* prima facie case and burden-shifting framework). Courts have looked at the specific facts of FHA cases to determine whether the plaintiff has sufficiently pleaded and proved intentional discrimination, looking to *McDonnell Douglas* as a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (noting that *McDonnell Douglas* framework was "never intended to be rigid, mechanized, or ritualistic" (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978))). Julia could also rely on the "mixed-motive" test developed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) *superseded by* Civil Rights Act of 1991 102-166, § 107, 105 Stat. 1074 (1991) (codified in scattered sections of 42 U.S.C.), to establish that she was a victim of housing

2. The Consumer Protection Claim

Julia may have multiple consumer protection claims arising from her experience at Orange Haven Apartments. Most clearly, she could bring state law claims under a state UDAP statute or pursuant to a common law or statutory fraud claim.

To make out a claim of fraud in North Carolina, Julia would need to establish: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which did in fact deceive, (5) resulting in damage to her.[19] Because fraud is widely recognized as a difficult claim to win,[20] the remainder of this Section focuses on a claim under a UDAP statute.[21]

To make out a claim under the North Carolina UDAP statute, Julia must establish: "(1) an unfair or deceptive act or practice, (2) in or affecting

discrimination. *Id.* at 244-45 (holding that once plaintiff "shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role"). *Price Waterhouse* was superseded by the Civil Rights Act of 1991, section 107, which allows an employment discrimination claim to proceed if the plaintiff establishes that her protected class status was a "motivating factor" in the adverse employment action, even where other factors were also considered. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1074, 1075 (codified at 42 U.S.C. § 2000e-2 (2012)). Not all civil rights claims can take advantage of mixed-motive findings. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176-77 (2009) (holding that age must be "but for" cause of discrimination under Age Discrimination in Employment Act). *Gross* has not (yet) been extended to the FHA. *See* Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 616 (2d Cir. 2016) ("Although *Gross* may cast doubt on this conclusion, by its terms, *Gross* applies only to the ADEA, and we decline to address whether *Gross* applies to the FHA in the absence of clearer guidance from the Supreme Court.").

[19] Ragsdale v. Kennedy, 209 S.E.2d 494, 500 (N.C. 1974) (laying out five-prong test).

[20] Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 48-51 (2005) (exposing difficult hurdles inherent in making out common law fraud claim and recognizing that federal and state unfair and deceptive trade practices statutes fill in gaps to remedy such violations); Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 917 (2017).

[21] The goal of this Article is not to set forth a litigation plan for those seeking to use UDAP statutes to pursue discrimination remedies; rather, this Article is designed to be a thought experiment—what would happen if we considered discrimination through the lens of consumer law? It matters less whether Julia can make out a specific claim under a specific law in a specific state than whether scholars and advocates should consider reframing the conversation through a consumer protection, rather than antidiscrimination, framework. If the reader is persuaded that the consumer protection doctrine offers a plausible and effective means of remedying certain forms of discrimination, including facts similar to those set forth in Julia's story, the reader should consider the possibilities under several consumer protection theories, including UDAP and common law fraud.

commerce, which (3) proximately caused actual injury to [her]."[22] A practice is unfair when it "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[23] A litigant can also prove a claim under the state UDAP statute by showing a "deceptive" act or practice, which is one that "possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception."[24] While North Carolina courts have held that the plaintiff must plead and prove some kind of egregious or aggravating circumstance beyond a breach of contract,[25] they have also recognized that a "party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position."[26] North Carolina and other state courts look to federal law construing the Federal Trade Commission Act ("FTCA") to define "unfair" and "deceptive."[27] As is true in many other states, North Carolina courts have applied the state UDAP statute to the relationship between landlords and tenants.[28] To make out her UDAP claim, Julia would need to establish that Bill engaged in at least one unfair *or* deceptive act.

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[22] Melton v. Family First Mortg. Corp., 576 S.E.2d 365, 368 (N.C. Ct. App.), *aff'd mem.*, 597 S.E.2d 672 (N.C. 2003) (citing Boyce & Isley, PLLC v. Cooper, 568 S.E.2d 893, 901 (N.C. Ct. App. 2002)). This is consistent with other state UDAP laws. *See, e.g.*, Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 960 (Ill. 2002) (construing Illinois Consumer Fraud and Deceptive Business Practices Act to require: (1) deceptive or unfair act or practice by defendant, (2) defendant's intent that plaintiff rely on the deception, and (3) occurrence of deception during course of conduct involving trade or commerce).

[23] *Melton*, 576 S.E.2d at 368 (citing Marshall v. Miller, 276 S.E.2d 397, 403 (N.C. 1981)).

[24] *Id.* (citing Overstreet v. Brookland, Inc., 279 S.E.2d 1, 7 (N.C. Ct. App. 1981)).

[25] Phelps Staffing, LLC v. C.T. Phelps, Inc., 740 S.E.2d 923, 928 (N.C. Ct. App. 2013). The aggravating circumstance requirement generally arises in cases alleging both breach of contract and violation of UDAP; the plaintiff must allege something beyond breach of contract. *See* Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC, 808 S.E.2d 576, 579 (N.C. Ct. App. 2017) (stating that mere breach of contract is insufficent to establish UDAP claim).

[26] Supplee v. Miller-Motte Bus. Coll., Inc., 768 S.E.2d 582, 598 (N.C. Ct. App. 2015) (citing McInerney v. Pinehurst Area Realty, Inc., 590 S.E.2d 313, 316-17 (N.C. Ct. App. 2004)).

[27] *See, e.g.*, Martinez v. Freedom Mortg. Team, Inc., 527 F. Supp. 2d 827, 836-37 (N.D. Ill. 2007) (looking to FTC's definition of "unfair" to understand Illinois Consumer Fraud and Deceptive Business Practices Act).

[28] *See, e.g.*, Crawford v. Nawrath, No. 16-cv-15955, 2016 WL 4608184, at *3 (N.C. Ct. App. Sept. 6, 2016) (recognizing that "landlord, who collects rent after having knowledge of the uninhabitable nature of a house, or just a part of a house, is engaging in unfair trade practices in violation of Section 75-1.1"); Stanley v. Moore, 439 S.E.2d 250, 251-52 (N.C. Ct. App. 1994), *rev'd on other grounds*, 454 S.E.2d 225 (N.C. 1995) (stating it is "clear that a tenant is a consumer for purposes of the [UDAP] Act and that the leasing of residential property is within the purview of [N.C. GEN. STAT.] § 75-1.1," and that "landlord" is defined as "any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by [N.C. GEN. STAT.

B. *The Design and Doctrine*

This Section argues that the design of the antidiscrimination and consumer protection statutes, as the courts have developed and implemented them, significantly affects the ability of each doctrine to remedy discrimination. The design of antidiscrimination statutes focuses protection on specified protected classes—race, color, religion, national origin, sex, disability, and familial status, for example.[29] Although that design might have been meant to root out discrimination, the judicial development of the doctrine has constricted and limited its usefulness in three primary ways. First, the statutory design limits protection to discrete and rigid protected classes, acting as a gatekeeper for its protections. The judicial interpretation of that design has limited protection for victims of discrimination whose identities fall outside the protected class(es) and for victims of discrimination whose identities straddle protected classes ("intersectional" or "complex" plaintiffs).[30] Second, antidiscrimination statutes were designed to prohibit conduct that discriminates "because of" the plaintiff's membership in a protected class. For individual plaintiffs like Julia, that design requires proof of intent, which scholars have empirically shown is a significant

§ 42-40]"); Creekside Apartments v. Poteat, 446 S.E.2d 826, 833-34 (N.C. Ct. App. 1994) (holding that landlord's failure to maintain apartment in habitable condition could form basis of UDAP violation). For a catalogue of state UDAP statutes, case law, and their relationship to landlord-tenant law, see NAT'L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.2.6 (9th ed. 2016), https://library.nclc.org/UDAP [https://perma.cc/DM5G-HAXU] (cataloguing court decisions finding UDAP applicable to various landlord-tenant transactions, including residential lease practices, in numerous states). *See also* Sager v. Hous. Comm'n, 855 F. Supp. 2d 524, 558-61 (D. Md. 2012) (applying Maryland Consumer Protection Act to relationship between tenant and landlord housing authority); Anast v. Commonwealth Apartments, 956 F. Supp. 792, 802 (N.D. Ill. 1997) (citing cases establishing application of Illinois Consumer Fraud and Deceptive Business Practices Act to landlord-tenant relationships). In some jurisdictions, violation of state landlord-tenant law is a per se UDAP violation. *See, e.g.*, 940 MASS. CODE REGS. 3.17(6)(f) (2014) (stating landlord's interference with tenant's right of quiet enjoyment is per se UDAP violation).

[29] The laws differ slightly in the designations of protected classes. The FHA prohibits discrimination in housing because of race, color, religion, sex, national origin, disability, and familial status. 42 U.S.C. § 3604(b) (2012). Title VII of the Civil Rights Act of 1964, for example, prohibits discrimination in employment because of race, color, religion, sex, and national origin. *Id.* § 2000e-2; *supra* note 13 (providing examples of protected classes under different state laws).

[30] Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2494-517 (1994) (defining "complex plaintiffs"); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (defining intersectional plaintiffs); Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 301 (2005) (defining "intersectionals" as "persons who are members of more than one 'low-status' category, such as women of color, queer persons of color, or indigent women").

barrier to success under the law, especially for intersectional plaintiffs and plaintiffs alleging intersectional discrimination.[31] Third, the focus on the plaintiff's identity is at odds with the Supreme Court's recent turn away from robust identity-dependent civil rights protections.[32] Taken together, the design and doctrinal development of antidiscrimination law has limited and constrained the law's utility in vindicating individual plaintiff's civil rights.

This Section also compares the design and doctrine of antidiscrimination law to that of consumer protection law. Unlike a plaintiff invoking the antidiscrimination doctrine, a plaintiff asserting a consumer protection claim need not plead or prove her identity, nor must she connect that identity to the defendant's conduct. Rather, the legal inquiry is squarely and exclusively on proving the defendant's bad act. This Section argues that, because of that design difference, consumer protection offers a viable and important avenue for remedying certain forms of discrimination.

[31] This Article considers the use and role of antidiscrimination and consumer protection statutes in individual, rather than class action or pattern-or-practice challenges. While both legal structures can challenge large-scale discrimination, *see* Prigden, *supra* note 20, at 919-24 (discussing means of using consumer protection law to achieve group remedies); Shayak Sarkar & Josh Rosenthal, *Exclusionary Taxation*, 53 HARV. C.R.-C.L. L. REV. 619, 619 (2018) (arguing policies regarding property tax assessments can be challenged under FHA's disparate impact protections), class actions, organizational plaintiffs, and pattern-or-practice cases raise different doctrinal and normative considerations outside this Article's scope. This Article also focuses on intentional, or disparate treatment, discrimination. It limits its analysis to disparate treatment not only because it is the appropriate corollary to an individual consumer protection claim, but also because scholars have established that disparate impact claims are difficult to plead, prove, and win, especially in the wake of the Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). *See* Bethany A. Corbin, *Should I Stay or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 PENN. ST. L. REV. 421, 460 (2015) (recognizing that the Court upheld use of disparate impact under FHA, but that it did so by imposing "significant limitations" on its application, including a "robust causality" requirement); Justin D. Cummins & Beth Belle Isle, *Toward Systemic Equality: Reinvigorating a Progressive Application of the Disparate Impact Doctrine*, 43 MITCHELL HAMLINE L. REV. 102, 132 (2017) (recognizing limits of disparate impact doctrine after key Supreme Court cases); Daniel Sheehan, *Disparate Impact Liability Under the Fair Housing Act After Inclusive Communities*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 391, 392 (2017) (arguing that "majority opinion [in *Inclusive Communities*], written by Justice Kennedy, affirms that the FHA encompasses disparate impact liability for public and private actors, but it tightly constrains that liability"). *But see* Steven M. Dane, *The Potential Impact of* Texas Department of Housing and Community Affairs v. Inclusive Communities Project *on Future Civil Rights Enforcement and Compliance*, FED. LAW., July 2016, at 39 (arguing that disparate impact theory under FHA was confirmed by and remains potent after *Inclusive Communities*).

[32] *See infra* text accompanying notes 61-66.

1. The Constraints of Antidiscrimination Law's Design and Doctrine

Congress passed the Civil Rights Act of 1964,[33] followed closely in time by the Fair Housing Act of 1968.[34] Both statutes structured civil rights protections around identified protected classes. Those laws require a plaintiff to establish that a defendant discriminated against her "because of" her membership in a specific protected class.[35] The design of the legislation and the doctrine's development have constrained plaintiffs' ability to remedy discrimination.

In 1973, the Supreme Court decided *McDonnell Douglas*. In *McDonnell Douglas*, the Court developed a burden shifting analysis to permit civil rights plaintiffs to establish a prima facie case of discrimination based on direct or circumstantial evidence. To establish a prima facie case for employment discrimination under *McDonnell Douglas*, the plaintiff must establish:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[36]

At that point, the burden shifts to the defendant to show a valid and non-discriminatory reason for the adverse action.[37] If the defendant is successful, the burden shifts back to the plaintiff to establish that the stated reason is "mere pretext" for discrimination.[38] In its 1989 *Price Waterhouse v. Hopkins*[39] decision, the Supreme Court also developed a "mixed-motive" analysis,

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[33] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

[34] Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601 (2012)).

[35] This design is replicated in other civil rights statutes. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (2012) ("It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ."); Americans with Disabilities Act, 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

[36] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The *McDonnell Douglas* analysis extends across protected class and has been applied to other antidiscrimination statutes, including the FHA. *See, e.g.*, Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997).

[37] *McDonnell Douglas*, 411 U.S. at 802.

[38] *Id.* at 798.

[39] 490 U.S. 228 (1989), *superseded by* Civil Rights Act of 1991, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

whereby a plaintiff can "show[] that gender [or another protected class] played a motivating part in an employment decision" to establish liability under antidiscrimination law.[40] The defendant will be liable unless he can prove that he "would have made the same decision even if [he] had not allowed gender to play such a role."[41] The test set forth in *McDonnell Douglas*, supplemented by the analysis in *Price Waterhouse*, acts as the organizing principle for developing, pleading, and analyzing statutory civil rights claims.[42]

Antidiscrimination law's protected class design limits the utility of the law—it operates as both a gatekeeper and a labyrinth for plaintiffs seeking a judicial remedy for discrimination.[43] First, it is a gatekeeper. To prevail, a civil rights plaintiff must establish that she is a member of one of the designated protected classes.[44] She must also designate and establish her subclass.[45] In other words, if a plaintiff believes she was discriminated against because she is Black, she must state her protected class (i.e., race) and then establish how her membership in a subclass (i.e., African American) resulted in differential treatment.[46] Only then is she even eligible for the protections of the antidiscrimination doctrine. It is true that, in certain situations, courts have found violations of antidiscrimination law when individuals are aggrieved or injured by discrimination based on someone else's protected class and subclass membership, when the plaintiff is in the "zone of interest" protected by the

[40] *Id.* at 244.

[41] *Id.* at 244-45. For additional explanation, see *supra* note 18.

[42] *See* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 101 (2017) (arguing that statutory design of antidiscrimination law does not require that plaintiff prove that she is member of protected class to gain access to protections, but that doctrine has developed, primarily through application of *McDonnell Douglas* test, to apply such a requirement).

[43] *See id.* (arguing that "protected class gatekeeping" is undesirable).

[44] The protected classes are limited by the designations identified by Congress or state legislatures. For example, the FHA does not expressly prohibit discrimination on the basis of sexual orientation, gender identity, gender expression, marital status, source of income, or employment. *See* 42 U.S.C. § 3604 (2012) (designating only race, color, religion, sex, handicap, familial status, and national origin as protected classes).

[45] *See* Latta v. Otter, 771 F.3d 456, 485 (9th Cir. 2014); Elengold, *supra* note 1, at 4 ("In order to prevail, the plaintiff must show that she was treated differently because of her membership in a subclass of that protected class.").

[46] *See id.* at 4 n.12 ("For example, an African American alleging a violation of Title VII of the Civil Rights Act of 1964 may allege that she was the victim of discrimination because she is African American, a particular bounded subclass of race."). Certain provisions in the civil rights canon also provide for a disparate impact analysis. *See, e.g.*, Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015). Although much of the analysis contained herein is applicable to disparate impact cases, the focus of this Article is disparate treatment.

antidiscrimination statutes.[47] Even so, the plaintiff must still show intentional discrimination because of someone's membership in a protected class.

The protected class design limits access to civil rights protections for certain plaintiffs and excludes certain experiences of discrimination from its design. Most obviously, discrimination on the basis of certain identity traits falls outside of the designated protected classes and thus is excluded from protection. Courts have dismissed cases where the discrimination occurred because of sexual orientation,[48] nepotism,[49] socioeconomic status,[50] and profession.[51]

The protected class design is also a labyrinth for victims of discrimination. Once the plaintiff clears the gatekeeping hurdle, she must navigate the

[47] *See* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 178 (2011) (finding plaintiff was directly injured when his employer retaliated against him because plaintiff's fiancé/co-worker filed sex discrimination claim).

[48] *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1257 (11th Cir.) (holding that Title VII does not prohibit discrimination based on sexual orientation), *cert. denied*, 138 S. Ct. 557 (2017) (mem.); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258-59 (1st Cir. 1999) (same). *But see* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (holding that discrimination on basis of sexual orientation is discrimination based on sex in prohibition of Title VII); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351-52 (7th Cir. 2017) (en banc) (same).

[49] *See* Sogluizzo v. Local 817, Int'l Bhd. of Teamsters, 514 F. Supp. 277, 278-79 (S.D.N.Y. 1981) ("Nepotism of itself does not violate Title VII. To come within the Civil Rights Act, nepotism must somehow be related to a pattern of discrimination based on national origin or another protected class.").

[50] *See* Johnson v. Thompson, 971 F.2d 1487, 1495 (10th Cir. 1992) (finding that discrimination based on low socioeconomic status is "not actionable under section 504 [of the Rehabilitation Act of 1973]").

[51] *See* Simmons v. Braswell, No. 1:98-cv-01357, 1998 WL 333520, at *1 (N.D. Ga. May 19, 1998) ("Title VII does not grant this Court jurisdiction to hear complaints of discrimination based upon profession."). Scholars have argued that the protected class categories should be expanded. *See* ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 234 (2013) (arguing protected class categories should be expanded to include "interraciality"); Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 111 (2008) (proposing expansion of Title VII protections to victims of domestic and sexual violence); Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 497 (2012) (discussing "ways that the protected class approach has not kept pace with the demographics and lived experiences of an ever-changing workforce"); Karen Zakrzewski, *The Prevalence of "Look"Ism in Hiring Decisions: How Federal Law Should Be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 432 (2005) (proposing appearance-based discrimination be made illegal under antidiscrimination law). While this discussion is beyond the scope of this Article, it is relevant to highlight antidiscrimination law's current structural limitations as relative to consumer protection law's flexible protections.

procedural and evidentiary maze in connecting the defendant's bad acts to her membership in a protected class and subclass. For most civil rights plaintiffs, that means they must prove intentional discrimination *connected to* membership in the identified protected class and subclass.

Proving intentional discrimination is difficult because much of the evidence is circumstantial; there is rarely "smoking gun" evidence of intentional discrimination.[52] In fact, circumstantial evidence is so important to proving claims of discrimination that the Supreme Court built it into the *McDonnell Douglas* analysis.[53] Investigating and unearthing evidence of discriminatory intent is discovery-intensive, expensive, and time-consuming.

Even when civil rights plaintiffs do uncover evidence of intentional discrimination, they have difficulty convincing a judge or jury to ascribe malicious intent.[54] Studies show that even when there is *direct* evidence of discrimination, judges and juries are generally unwilling to "characterize a particular set of events as discrimination" if there is any other possible explanation.[55] Fewer than five percent of plaintiffs alleging discrimination succeed in getting litigated relief; dismissals on the pleadings constitute almost ninety percent of the litigated outcomes.[56] For women and minorities, bias in the

[52] *See* Robert C. Cadle, *Burdens of Proof: Presumption and Pretext in Disparate Treatment Employment Discrimination Cases*, 78 MASS. L. REV. 122, 122 (1993); *see also* Old W. End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1105 (N.D. Ohio 1987) ("An intent to discriminate is rarely openly expressed.").

[53] *See supra* text accompanying notes 18 and 36 (explaining *McDonnell Douglas* analysis).

[54] Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 (2012) ("Indeed, even when there is substantial evidence of traditional invidious discriminatory intent (including so-called direct evidence) most people will decline to make attributions to discrimination.").

[55] *Id.* at 1278, 1299 ("Collectively, then, psychology scholars have found extensive support for the conclusion that people are reluctant to make attributions to discrimination, even in the presence of compelling 'direct' evidence, and even when given objective measures of the likelihood that discrimination has occurred.").

[56] *Id.* at 1276 ("Indeed, less than 5% of all discrimination plaintiffs will ever achieve any form of litigated relief. In contrast, dismissals (on motions to dismiss or at summary judgment) are extremely common in discrimination litigation, accounting for a full 86% of litigated outcomes."). Professor Eyer also uses data and statistics to reject the notion that the failure of discrimination plaintiffs to achieve litigated successes is because the meritorious cases end in settlement. *Id.* at 1290-91; *see also* Alexander, Eigen & Rich, *supra* note 6, at 14-15 (citing to studies and scholars who have concluded that employment discrimination cases are difficult to prove, vulnerable to summary judgment rulings, and face uphill battles because judges and juries believe that employment discrimination has been "largely eradicated"); Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313, 317 (2015) (recognizing that borrowers have been largely unsuccessful in making out "reverse redlining" antidiscrimination claims for predatory lending in large part because "group-based or identity-based arguments are increasingly met with judicial opposition").

assignment of liability and award of damages can further depress the likelihood of success or the recovery of sufficient damages.[57]

The labyrinth is even more difficult to navigate for intersectional plaintiffs or plaintiffs experiencing intersectional discrimination.[58] Some individuals combine the attributes of more than one protected class. Such individuals include, for example, a Black woman, a Latino with disabilities, and a Muslim from India. Antidiscrimination law's protected class design forces such plaintiffs to try to separate the strands of their own identity to isolate a single basis for the perpetrator's discriminatory conduct. This is an artificial, impossible, and arguably harmful task.[59]

[57] Studies have shown that, in both civil and criminal cases, women and minority litigants are less successful than men and Whites. *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010) (recognizing disparities in success rates based on race and gender in tort cases); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 998 (2003) ((citing DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990)) (finding that defendants in two thousand Georgia capital murder cases were 4.3 times more likely to receive death penalty if victim was White than if victim was Black)); *see also* Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 1019 (2011) (sharing 2011 interdisciplinary study showing that both plaintiffs who allege discrimination on the basis of more than one ascriptive characteristic *and* plaintiffs who are identified with more than one traditionally subordinated group find less success in employment discrimination cases).

[58] *See supra* note 30 and accompanying text (describing challenges for intersectional plaintiffs). While all individuals have intersectional identities, individuals whose identities straddle traditionally subjugated subclasses have struggled to attain legal remedies under antidiscrimination law. *See* Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. REV. 457, 465 (2018) ("[P]laintiffs exhibiting identification with more than one traditionally subordinated group . . . and/or plaintiffs who allege discrimination on the basis of overlapping ascriptive characteristics . . . are less successful in employment discrimination actions.").

[59] Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1467-68 (1992) [hereinafter Crenshaw, *Race*] ("African-American women by virtue of our race and gender are situated within at least two systems of subordination: racism and sexism. This dual vulnerability does not simply mean that our burdens are doubled but instead, that the dynamics of racism and sexism intersect in our lives to create experiences that are sometimes unique to us."). Professor Crenshaw is widely recognized as legal scholarship's architect of intersectionality theory, which has explored the individual and community harm in requiring complex individuals to separate out and subjugate personal and group-identity characteristics. *See* Crenshaw, *supra* note 30, at 149-50 ("Black women's experiences are much broader than the general categories that discrimination discourse provides. Yet the continued insistence that Black women's demands and needs be filtered through categorical analyses that completely obscure their experiences guarantees that their needs will seldom be addressed."). Intersectionality theory and post-intersectionality theory have generated a large and impressive body of scholarship. *See, e.g.*, Abrams, *supra* note 30, at 2492-98 (assessing

Of course, an intersectional plaintiff could allege that the discrimination she endured resulted from bias due to multiple identity characteristics; nothing in the statutory scheme prevents such a complaint. Advocates and courts, however, have treated multiple claims as separate and distinct legal inquiries. Siloing of the protected class claims proves devastating to claims of intersectional discrimination. Quantitative and qualitative data establish that those claims are more likely to fail;[60] asserting multiple claims of discrimination proved to have an inverse relationship to success on the merits.[61]

how Title VII doctrine has accommodated intersectional plaintiffs); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 703 (2001) ("The project of this Essay is to demonstrate how identity performance theory—the area of discrimination in which we have done most of our work—builds on intersectionality's insight that discrimination is based both on inter-group and intra-group distinctions."); Crenshaw, *Race*, *supra* (discussing intersectional issues related to sexual harassment of African-American women); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243 (1991) ("Focusing on two dimensions of male violence against women—battering and rape—I consider how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism . . . ."); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 290 (2001) (looking to intersectionality and post-intersectionality literature to critique the essentialist considerations underlying the Human Rights Campaign's endorsement of Alfonse D'Amato in 1998); Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673, 686-90 (2000) (further developing cosynthesis as theoretical model to build on intersectionality and post-intersectionality theories); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280-90 (1997) (developing theoretical model of cosynthesis to conceptualize categories of race, gender, and sexual orientation); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 715 (2015) (discussing how "pre-history of intersectionality" shaped Title VII).

[60] *See* Abrams, *supra* note 30 *passim* (detailing courts' treatment of intersectional claims in civil rights suits); Mayeri, *supra* note 59, at 730 (documenting courts' failure to develop "robust canon of intersectionality case law").

[61] *See* Best et al., *supra* note 57, at 994-97 (explaining difficulties intersectional claimants face and discussing lack of empirical research on litigation outcomes); Emma Reece Denny, Note, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339, 340 (2012) ("This Article aims to fill a hole in the field of intersectionality research by introducing empirical data showing that courts do indeed treat plaintiffs bringing multiple claims of discrimination (multiple claimants) significantly worse than traditional, single-claim plantiffs (single claimants)."); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1491-92 (2009) (explaining difficulties complex claimants face in attempting to prove pretext); Mayeri, *supra* note 59, at 730 ("[R]ecent studies of how claims of 'complex bias' fare in court reflect a difficult climate for plaintiffs who claim multiple or intersectional forms of employment discrimination."); *see also* Bradley Allan Areheart, *Intersectionality and*

Finally, recent developments at the Supreme Court suggest a turn away from and antipathy to robust, group-based civil rights protections under federal law. Leading constitutional and civil rights scholars have traced a recent shift in Supreme Court jurisprudence away from robust substantive equal protection and civil rights doctrine.[62] Chief Justice John Roberts's 2007 assertion for the majority of the Court that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" exemplifies this shift.[63] Scholars have proposed different theories to explain the recent trend, including the Court's adoption of post-racialism,[64] anxiety about the increased pluralism in America,[65] increased focus on social cohesion,[66] or a backlash against the antidiscrimination movement.[67] Whatever the explanation, the Court's current approach to civil rights protections—constitutional and statutory—further limits the utility of the doctrine to remedy discrimination and exacerbates the barriers to success in any such legal action.

Identity: Revisiting a Wrinkle in Title VII, 17 GEO. MASON U. C.R.L.J. 199, 234-35 (2006) (proposing amendment to Title VII that expressly includes intersectional claims).

[62] Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1143 (2002) (theorizing that the Supreme Court's recent jurisprudence can be explained by antipathy to the "liberal" antidiscrimination movement and hostility to "the more 'radical' extensions of antidiscrimination law, especially those that seek to protect traditionally unprotected groups, extend antidiscrimination ideas to unusual contexts, or push the law beyond the principle of formal legal equality"); Reva B. Seigel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1286-303 (2011) (defining and describing "antibalkanization" perspective emerging from the Supreme Court in its construction of race equality cases); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) ("Over the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress's capacity to protect groups through civil rights legislation. . . . These cases signal the end of equality doctrine as we have known it.").

[63] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[64] Alexander, Eigen & Rich, *supra* note 6, at 4 ("Increasingly, courts and the public have begun to embrace post-racialism, that is, the view that race discrimination is rare and race-based protections are no longer necessary."); Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 395 (2017) ("The Supreme Court's equal protection jurisprudence is decidedly postracial, in the sense that decision after decision from the Court rests on postracial doctrinal principles and factual premises.").

[65] Yoshino, *supra* note 62, at 748 ("The jurisprudence of the United States Supreme Court reflects this pluralism anxiety. Over the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress's capacity to protect groups through civil rights legislation.").

[66] Seigel, *supra* note 62, at 1300 ("[T]he Justices at the center of the Court who have cast the deciding votes to uphold and limit race-conscious civil rights initiatives often explain their position in opinions concerned with threats to social cohesion.").

[67] Rubenfeld, *supra* note 62, at 1142 (theorizing that the Supreme Court's constitutional jurisprudence is developing as backlash against the "liberal" antidiscrimination movement).

2. The Benefits and Risks of the Antidiscrimination Claim

It is useful to put this in the context of Julia's case. To succeed on a claim under the FHA, Julia must prove that Bill refused to rent to her, misrepresented the availability of an apartment, and/or otherwise made housing unavailable to her.[68] She must also connect that bad act (or those bad acts) to her membership in a subclass (or subclasses) of protected class(es).

Julia is a Black woman. In her complaint, Julia must identify the subclass or classes upon which she believes Bill based his decision to deny her housing. In other words, prior to any discovery, she must identify the "correct" protected class (or classes) upon which Bill based his decision to make housing unavailable to her.[69] Then, to prove that Bill provided her false information about the availability or price of the apartment because of her protected class status, Julia will need to engage in extensive and expensive discovery. She will need to develop evidence that Bill lied to her about the availability and/or cost of the apartment and that it was because of her protected class status. To do that, she will need significant documentary discovery in hopes of finding notes, emails, or admissions to that effect. In the absence of documentary evidence, she will need to depose the landlord and likely several others to understand whether he had made statements or taken actions consistent with discriminatory leasing. Most likely, Julia will need to track down others who have fallen victim to Bill's discriminatory actions to corroborate her testimony and establish a pattern of discriminatory conduct. Such an undertaking will likely be prohibitively expensive and time-consuming.

Alleging discrimination may also be emotionally taxing for Julia. Because Julia is asserting that her damages flowed from discrimination against her because of her status as a Black person, a woman, or a Black woman, the defendant can ask questions about her identity, her prior experiences with racism and/or sexism, and her feelings about how race and/or sex played into this case. That discovery may very well be extensive and invasive, including intense and personal interrogatories, requests for production of documents, deposition questions, and cross examination. After all of that, Julia's antidiscrimination

[68] 42 U.S.C. § 3604 (2012) (making it unlawful to refuse to rent, misrepresent availability, or otherwise make unavailable a dwelling on the basis of plaintiff's protected class membership).

[69] If this was an employment discrimination matter, Julia would first need to make a complaint with the Equal Employment Opportunity Commission ("EEOC"). *See id.* § 2000e-5(f)(1) (describing administrative exhaustion requirements). She could also choose to fill out a similar form and file a complaint with the Department of Housing and Urban Development ("HUD"). *See id.* § 3610 (providing optional administrative adjudicative process). To do that, Julia would need to fill out a form, where she must check a box (or more than one box) asserting her relevant protected class(es). For a deeper understanding of how those forms constrain plaintiffs in antidiscrimination actions, see Elengold, *supra* note 58, at 472-74.

claim is still likely to fail, for all of the empirical and analytical reasons stated above.

That is not to say, however, that there are no doctrinal benefits for Julia in pursuing her claim under antidiscrimination laws. There are, in fact, several reasons why it makes sense for Julia to assert her claims under the FHA and/or the North Carolina State Fair Housing Act. First, there is a benefit to telling a standard story about a woman or a Black person who is the victim of housing discrimination. Such a narrative, sometimes known as a "stock story," draws on assumed social order in our communities and world.[70] In so doing, it resonates with judges and juries because it feels consistent with what they know and understand about how the world works, and thus seems credible.[71] Second, the antidiscrimination statutes provide comprehensive and significant remedies. If she prevails, Julia can seek compensatory damages, punitive damages, injunctive relief, and attorneys' fees.[72] Julia could recover monetary damages for actual, compensatory, and punitive damages. Her actual damages might, for example, include the additional amount she had to pay to rent an alternate unit, an amount representing time lost at work due to her interactions with Bill Herman, or an amount reflecting lost opportunity if she was forced into an apartment farther away from work or viable public transportation. She could also be compensated for the emotional distress she suffered. In addition to actual, economic, or out-of-pocket costs, courts have held that successful discrimination

[70] *See* Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117, 122 (2002) (describing persuasive storytelling as that which "resonate[s] with the values, beliefs and assumptions of our audience," including such stock stories as "the heroic firefighter, the Good Samaritan" and "pernicious stories" such as "the helpless woman victim, the crack whore, the lascivious f*g").

[71] *See* DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 49 (2d ed. 2002) (emphasizing importance of credibility in developing case theory).

[72] 42 U.S.C. § 3613(c) (providing that "[i]n a civil action . . . if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages," along with "any permanent or temporary injunction, temporary restraining order, or other order" and "a reasonable attorney's fee and costs"). The same is true for other civil rights statutes. *See* Smith v. Wade, 461 U.S. 30, 56 (1982) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."); Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 785 (9th Cir. 1986) (awarding attorneys' fees under Title VII); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 533-39 (1999) (clarifying reckless indifference standard for punitive damages under Title VII). Although not specifically related to Julia's individual relief, if Julia prevails, there is a broad social and professional cost to Bill Herman to be labeled a "racist." It is worth considering whether such an outcome might achieve one or more of Julia's goals, including warning others of Bill's malevolent intent.

plaintiffs can recover for the "embarrassment and humiliation they suffered" due to the discriminatory acts.[73] Such awards have been significant.[74]

Third, the FHA's statutory scheme offers varied avenues for Julia to seek legal redress. Julia could file a fair housing complaint with the Department of Housing and Urban Development ("HUD") or the North Carolina Human Relations Commission. The FHA's statutory scheme affords Julia an opportunity to file such a complaint at no initial cost to her.[75] After government investigators assess the merits of the complaint, the statutory scheme affords Julia an opportunity to conciliate or litigate her case in an administrative court.[76] She may also elect to have her case heard in federal court, whereafter she could be named an aggrieved person in a suit against the defendant brought by the United States, through which the federal government could seek damages on her behalf.[77] Julia, however, is not obligated to go through the administrative process. Because the FHA does not have an administrative exhaustion *requirement*, Julia could also choose to file her complaint directly in state or federal court.[78]

3. The Flexibility of Consumer Protection's Design and Doctrine

Consumer protection law requires a plaintiff to establish that the defendant engaged in a practice related to a consumer transaction that was unfair, deceptive, fraudulent, or that otherwise caused injury to the plaintiff. In many states, the doctrine has developed in a way that has enhanced a plaintiff's ability to remedy a wide range of problematic consumer transactions.[79]

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[73] Woods-Drake v. Lundy, 667 F.2d 1198, 1203 (5th Cir. 1982) (directing lower court to "award plaintiffs an amount which will fairly compensate them for [their] emotional distress," including "embarrassment and humiliation they suffered"); *see also* Littlefield v. McGuffey, 954 F.2d 1337, 1348-49 (7th Cir. 1992) (affirming jury award of fifty thousand dollars in compensatory damages and one hundred thousand dollars in punitive damages for race-based discrimination); Sec'y, U.S. Dep't of Hous. & Urban Dev. *ex rel.* Herron v. Blackwell, 908 F.2d 864, 872-73 (11th Cir. 1990) (recognizing relationship between "humiliation and embarrassment" plaintiffs suffered and damages awarded).

[74] *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 25:6 (2017).

[75] *See* 42 U.S.C. § 3610.

[76] *See id.*

[77] *Id.* § 3614(b). This option would limit Julia's financial costs for pursuing a claim under the FHA. It does not, however, necessarily limit the emotional costs. And, unless Julia intervenes as a plaintiff (and takes on the financial burden of litigating the case), under this option, Julia loses control of the strategy and resolution of the case.

[78] *Id.* § 3613(a)(1)(A).

[79] There is no private right of action under the FTCA. Therefore, individual plaintiffs often turn to state UDAP and other consumer protection laws to vindicate their rights. Because state laws vary, it is not accurate to say that the doctrine has universally developed to enhance a

Like all states, North Carolina has a UDAP statute,[80] patterned from the FTCA.[81] When Congress passed the FTCA in 1914, the Act aimed to prevent monopolies.[82] Then, in 1938, Congress passed the Wheeler-Lea Act to amend the FTCA to cover a broader range of abusive practices, prohibiting "unfair or deceptive acts or practices . . . ."[83] In his congressional testimony prior to the passage of the Wheeler-Lea Amendments, then FTC Commissioner Ewin L. Davis explained that the purpose of the amendment is:

> [T]o protect the public against acts and practices injurious to the public where no competition or injury to competitors may exist, or where competition or injury to competitors is so obvious that the Government should not be put to the time and expense of proving competition and injury to competitors, or where competitors may not be entitled to protection because of the same fraudulent character of their business.[84]

By the 1960s, however, critics claimed that the FTC was largely ineffective in remedying fraud and abuse against consumers.[85] The FTCA's failure to provide a private right of action further limited the FTC's ability to achieve remedies for individuals.[86] In response to the consumer protection movement of the 1960s,[87]

plaintiff's ability to achieve a legal remedy. *See infra* notes 123-125 and accompanying text (describing recovery under different state UDAP statutes).

[80] N.C. GEN. STAT. § 75-1.1 (2018) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practice in or affecting commerce, are declared unlawful.").

[81] 15 U.S.C. §§ 41-58 (2012).

[82] *See* Megan Bittakis, *Consumer Protection Laws: Not Just for Consumers*, 13 WYO. L. REV. 439, 442 (2013) (noting FTC's original focus on antitrust).

[83] Wheeler-Lea Act of 1938, Pub. L. No. 75-447, ch. 49, 52 Stat. 111 (codified at 15 U.S.C. § 45); *see also* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 440 (1991) (charting evolution of FTCA).

[84] *To Amend the Federal Trade Commission Act: Hearings on S.3744 Before the S. Comm. on Interstate Commerce*, 74th Cong. 19 (1936) (statement of Ewin L. Davis, Member, FTC); *see also* Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Act": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 375 (1990) (noting the Wheeler-Lea Act's legislative history "evidence[s] a clear intent that the Commission vigorously pursue questionable trade practices that adversely affected consumers, regardless of any resultant impact on competitive business").

[85] Sovern, *supra* note 83, at 442 (noting that the FTC was "harshly criticized as ineffective" by legal community in 1960s).

[86] Stephanie L. Kroeze, Note, *The FTC Won't Let Me Be: A Need for a Private Right of Action Under Section 5 of the FTC Act*, 50 VAL. U. L. REV. 227, 231-40 (2015) (outlining elements of federal consumer protection laws).

[87] Scholars have defined the consumer protection advocacy of the 1960s as a social movement. *See* Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and the Future Prospects and Perils*, 26 GA. ST. U. L.

the FTC encouraged states to adopt their own consumer protection statutes to mimic the FTCA's protections.[88] In 1964, the National Conference of Commissioners on Uniform State Laws developed a model consumer protection law as guidance for state legislatures.[89] State legislatures responded, passing statutes largely based on the FTCA that became known as "'UDAP' statutes, for 'unfair or deceptive acts or practices,'"[90] or "Little FTC Acts."[91] By affording individual consumers a private right of action, UDAP statutes filled a significant gap in the consumer protection doctrine.[92] By 1981, every state and the District of Columbia had passed a UDAP or Little FTC Act, varying in scope, remedy, and breadth.[93] Although the North Carolina law, for instance, includes a blanket

REV. 1147, 1183 (2010) (arguing that modern consumer movement of 1960s and 1970s fits within definition of a social movement, which includes: (1) sustained organizational effort to effect social change, (2) consumer lawyers acting as resources, and (3) multi-prong strategy that included law reform); Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 526-31 (1980) (describing "consumer movement" in 1960s and 1970s). In fact, for some, the 1960s "might well go down in history as the decade in which the consumers of America rose up to protect their interests and managed to obtain some response from government." DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 4 (1974). The movement was marked by increased activism by the FTC and passage of federal statutory consumer protections like the Consumer Protection Act, which included the Truth in Lending Act ("TILA"). *Id.* (describing Congress's response to consumer activism); Budnitz, *supra*, at 1149 (pointing to TILA as critical marker of modern consumer movement, especially because it was the first federal law "regulating the consumer financial services industry that provided consumers with a private right of action").

[88] Bittakis, *supra* note 82, at 443 (detailing efforts to encourage states to adopt analogous laws); Leaffer & Lipson, *supra* note 87, at 522 ("The Commission strongly encouraged these state-level activities, recognizing that enforcement of the Act's broad section 5 proscription against 'unfair or deceptive acts or practices' could not possibly be accomplished without extra-agency assistance.").

[89] Bittakis, *supra* note 82, at 443 (observing that model law ultimately proved "insufficient to protect individual consumers"). In a 1970 amendment, the Council of State Governments, in consultation with the FTC, followed up that guidance with three variations, all in an effort to provide choices to states to craft a better fit for their needs. *Id.*

[90] SPANOGLE ET AL., *supra* note 9, at 97.

[91] *Id.*; *see also* Sovern, *supra* note 83, at 446-52 (discussing details of "Little FTC Acts").

[92] Although the UDAP statutes originally limited enforcement authority to state agencies, states passed or amended many to include a private right of action. *See* Sovern, *supra* note 83, at 446.

[93] *Id.*; *see also* Karns, *supra* note 84, at 388-429 (detailing various state Little FTC Acts and their relationship to FTC's guidance).

exception for learned professions,[94] it is otherwise a good example of a standard state UDAP law.[95] It states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."[96]

State UDAP statutes provide certain protections against unfair and deceptive practices in the consumer context. The great majority provide a private right of action, coupled with some combination of statutory damages, compensatory damages, treble damages, and attorneys' fees provisions.[97] Those protections, in combination, have generally been considered successful at providing consumers a means of vindicating their rights. Professor Dee Pridgen notes that there are some detractors of UDAP statutes, but, for the most part:

> Over the years since their inception, the state UDAP statutes, with their private rights of action, have been instrumental in achieving justice for consumers. The litigated cases have been numerous, numbering in the thousands each year, with some states such as Texas, Washington, Massachusetts, and California, being particularly active. . . . In numerous cases individual consumers have been able, thanks to the state UDAP statutes, to gain legal representation, go to court, and be compensated for their injury, all the while providing legal precedents and strong remedies that are hoped to deter similar violations.[98]

UDAP statutes are widely considered the "bedrock protections" for consumers against "predators and unscrupulous businesses," and, unsurprisingly, their effectiveness varies across states.[99]

The design of the consumer protection doctrine is both relatively inclusive and flexible. Unlike the protected class orientation of the antidiscrimination doctrine, the consumer protection doctrine focuses specifically and uniquely on the defendant's bad act(s). Like the FTCA,[100] the great majority of UDAP

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[94] N.C. GEN. STAT. § 75-1.1(b) (2018) ("For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.").

[95] *See* Marshall v. Miller, 276 S.E.2d 397, 399 (N.C. 1981) (recognizing that language of North Carolina UDAP law tracks relevant section of FTCA, but adds private right of action).

[96] N.C. GEN. STAT. § 75-1.1(a).

[97] *See* Carolyn L. Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NAT'L CONSUMER L. CTR. 1, 9 (Mar. 2018), http://www.nclc.org/images/pdf/udap/udap-report.pdf [https://perma.cc/98TM-K5QG].

[98] Pridgen, *supra* note 9, at 290; *see also* Pridgen, *supra* note 20, at 911 ("The state UDAP laws were initially somewhat slow to be invoked, but their enforcement has now reached a level of maturity and strength that is quite impressive.").

[99] Carter, *supra* note 97, at 9.

[100] In the FTCA, Congress explicitly chose to avoid defining or detailing what would constitute "unfair or deceptive" practices, leaving it up to the FTC to develop guidance. S. REP. NO. 597, at 13 (1914) ("The committee gave careful consideration to the question as to

statutes include broad, general prohibitions against unfair and deceptive acts.[101] State courts look to federal guidance to define "unfair" and "deceptive." The 2010 Dodd-Frank legislation, for example, set forth a test for establishing "unfair" practices, defining such to require: "(1) substantial consumer injury (which can be by small injury to many consumers), (2) that is not reasonably avoidable by consumers, and (3) that is not outweighed by benefits to consumers and competition."[102] Federal law traditionally defined the term "deceptive" to require: "(1) a trade practice deemed to have a tendency or capacity to deceive; (2) the potential to deceive a member or members of the audience targeted by the trade practice; and (3) a requirement that the practice be material with respect to a consumer's purchase decision."[103] In 1981, the FTC issued a Deception Policy Statement, which, while criticized,[104] has universally reshaped the

whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."); H.R. REP. NO. 1142, at 19 (1914) (Conf. Rep.) ("It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country."); Bittakis, *supra* note 82, at 442 ("Rather than trying to describe every possible unfair and deceptive trade practice, Congress left the power of determining what constitutes such trade practices to the FTC.").

[101] Carter, *supra* note 97, at 12-14 (identifying forty-five states and District of Columbia with statutes that include broad substantive protections against deceptive practices and thirty-nine states and District of Columbia with broad protections against unfair practices).

[102] Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107, 125 (2012) (citing Dodd-Frank Act, Pub. L. No. 111-203, § 1031(c), 124 Stat. 1376, 2005 (2010) (codified as amended at 12 U.S.C. § 5531 (2012)). The FTC also issued a similar 1980 Unfairness Statement, which stated: "To justify a finding of unfairness the [consumer] injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer*, 17 YALE J. ON REG. 253, 282-83 (2000) (quoting FTC STATEMENT OF POLICY ON CONSUMER UNFAIRNESS JURISDICTION (1980), *reprinted in* Harvester, 104 F.T.C. 949, 1070 app. (1984)).

[103] Karns, *supra* note 84, at 381 (footnotes omitted).

[104] *See id.* at 386 ("Congress rejected the report as biased and non-neutral.").

definition of deception.[105] Based on that statement, the FTC defines "an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material."[106] Most state UDAP statutes provide a private right of action for individuals victimized by unfair or deceptive acts or practices in a consumer transaction.[107] Because the focus of a consumer protection claim is the defendant's bad act(s) wholly unconnected to the plaintiff's identity or membership in a particular group, the design of the consumer protection statutes is more inclusive and flexible than that of the antidiscrimination statutes.

4. The Benefits and Risks of the Consumer Protection Claim

Now return to Julia's case. To make a claim under North Carolina's UDAP statute, Julia would need to show that Bill engaged in an unfair or deceptive act or practice that affected commerce and proximately caused Julia's injury.[108] In contrast to Julia's discrimination claim, the UDAP statute affords Julia several benefits.[109]

The first benefit is Julia's likelihood of success on the claim. State UDAP statutes can protect against discriminatory actions like those Julia faced.[110] In

[105] *See id.* at 388-89 (detailing deference given to policy statement).

[106] Cliffdale Assocs., 103 F.T.C. 110, 174 (1984); *see also* Braucher, *supra* note 102, at 125 (detailing influence of FTC Statement on Consumer Financial Protection Bureau).

[107] Carter, *supra* note 97, at 53-65 (cataloging and assessing private rights of action under state UDAP statutes).

[108] Melton v. Family First Mortg. Corp., 576 S.E.2d 365, 368 (N.C. Ct. App.), *aff'd*, 597 S.E.2d 672 (N.C. 2003) (mem.) ("The necessary elements for a claim under [N.C. GEN. STAT.] § 75-1.1 are: '(1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimnant.'" (citing Boyce & Isley, PLLC v. Cooper, 568 S.E.2d 893, 901 (N.C. Ct. App. 2002))). This is consistent with other state UDAP laws. *See, e.g.*, Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 960 (Ill. 2002) (construing Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1 to /12 to require: "(1) a deceptive or unfair act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce").

[109] At the most basic level, state UDAP statutes have a broader scope than antidiscrimination statutes. Deanne Loonin, *Race Discrimination and Consumer Law: What Legal Services Can Do to Attain Justice in the Marketplace*, 36 CLEARINGHOUSE REV. 47, 50 (2002) (noting strengths of UDAP statutes for challenging discrimination).

[110] *See, e.g.*, Sager v. Hous. Comm'n, 855 F. Supp. 2d 524, 568 (D. Md. 2012) (allowing plaintiff's claim under Maryland Consumer Protection Act to proceed based on allegations that defendant housing authority induced plaintiff to sign "vacate agreement" for her subsidized housing); Anast v. Commonwealth Apartments, 956 F. Supp. 792, 802 (N.D. Ill. 1997) (rejecting defendant's motion to dismiss Illinois Consumer Fraud and Deceptive

fact, Julia can point to two separate acts that likely violated the UDAP statute. First, Bill misrepresented the availability of the two-bedroom apartment to Julia, a potential consumer. Second, Bill quoted Julia a price that was too high for the alternate one-bedroom apartment.[111] Julia prevails if she can prove that either one or both of those acts were either unfair or deceptive. There is a good argument that both acts are unfair and deceptive under the definitions set forth above.[112] The misrepresentations were unfair because Bill used information available only to him, to which Julia could not be privy, in order to deny her access to housing.[113] And misrepresentations or omissions of material facts are sufficient to prove deception.[114] In fact, false advertising—promising a consumer a product or price and then failing to deliver on that promise—is one of the most recognized forms of unfair or deceptive practices.[115]

Business Practices Act claim based on plaintiff's allegations that defendant evicted her from apartment in violation of lease requirements).

[111] This is clear because he quoted Julia a higher price for the one-bedroom ($800) than had been advertised for the two-bedroom ($750) and than he quoted to George ($650).

[112] *See supra* notes 102-06 and accompanying text (detailing what constitutes unfairness or deceptive practices and acts).

[113] *See* Supplee v. Miller-Motte Bus. Coll., Inc., 768 S.E.2d 582, 598 (N.C. Ct. App. 2015) (noting "party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power of privilege" (quoting McInerney v. Pinehurst Area Realty, Inc., 590 S.E.2d 313, 316-17 (N.C. Ct. App. 2004))).

[114] There are potential factual anomalies here that could make Bill's statements true or otherwise not misrepresentations. But if they are misrepresentations, Julia would not need to show improper motivation connected to her protected class; she would need only prove misrepresentation to satisfy that prong of the UDAP claim. *See* Krebs v. Charlotte Sch. of Law, LLC, No. 3:17-cv-00190, 2017 WL 3880667, at *11 (W.D.N.C. Sept. 5, 2017) (declining to dismiss class plaintiffs' UDAP claim against defendant based on misrepresentations made about school's accreditation and other misleading information to students, and recognizing that "North Carolina courts have traditionally applied this statute liberally, including claims involving negligent misrepresentation and failure to disclose material information"); Kron Med. Corp. v. Collier Cobb & Assocs., Inc., 420 S.E.2d 192, 196 (N.C. Ct. App. 1992) (finding failure to disclose information tantamount to misrepresentation and thus unfair or deceptive practice in violation of North Carolina's UDAP); Haigh v. Superior Ins. Mgmt. Grp., Inc., No. 17-cv-02582, 2017 WL 4848154, at *4 (N.C. Super. Ct. Oct. 24, 2017) (holding plaintiffs adequately pleaded North Carolina UDAP claim based on defendant's failure to disclose hidden commissions). North Carolina courts have found "sufficient aggravating circumstances" in cases involving "forgery or deception." Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC, 808 S.E.2d 576, 579 (N.C. Ct. App. 2017) (collecting cases). If Bill's statements were not misrepresentations, Julia may not have a successful UDAP case. The purpose of this exercise is not, however, to litigate Julia's claim. Rather, it is to set forth a factual scenario that allows courts, practitioners, and scholars to consider the benefits or detriments of one claim compared to the other.

[115] *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 7 (2005) ("The inadequacy of common law tools with

Of course, Bill could defend against Julia's UDAP and FHA claims by proving that his statements were not, in fact, misrepresentations. Julia must establish the elements of either the antidiscrimination or consumer protection claim. The difference between proving the two claims is that the antidiscrimination claim requires an extra step—proving that Bill made the misrepresentation *because of* Julia's membership in a protected class and subclass. The consumer protection claim requires only that Julia prove the misrepresentation itself. At the most basic level, the antidiscrimination claim requires an additional element. To prove a discrimination claim, Julia must prove *A* (misrepresentation) + *B* (intent); to prove a consumer protection claim, Julia must only prove *A* (misrepresentation).[116] State UDAP statutes, patterned from the FTCA, "eliminated the need to prove intent to deceive, and justifiable reliance."[117] Because Julia needs only prove Bill's bad actions, she is unburdened by the demands of proof and persuasion that accompany the added element of intent.[118] This is particularly salient for Julia because her identity as a Black woman would complicate her effort to attain a remedy under antidiscrimination law, but not under consumer protection law.

In addition to establishing that the act was unfair or deceptive, Julia must show that she was injured by the misrepresentation(s). Julia has strong arguments that she was so injured.[119] Julia could argue that she lost time responding to the advertisement stating that a two-bedroom was available. She may have given up an opportunity at another apartment or lost hours at work. She may have had costs associated with transportation. She may be forced to pay more somewhere else because she missed the beginning of the month or a special deal. She may be forced to either pay more for a smaller apartment, causing financial and emotional stress, or move to a different area, perhaps one without access to a grocery store or quality public transportation.

The second benefit of Julia's UDAP claim is the possibility of recovering significant money damages based on those injuries. State UDAP statutes generally give consumers a private right of action to seek compensatory damages, an injunction against the fraudulent practices, and, in most states,

which a consumer could address false advertising and deceitful commercial schemes in some circumstances eventually led Congress in 1914 to establish the Federal Trade Commission (FTC) and empower it to regulate such conduct.").

[116] *Compare* Clarke, *supra* note 42, at 109-41 (discussing how courts interpret elements of antidiscrimination statutes), *with* Melton v. Family First Mortg. Corp., 576 S.E.2d 365, 368 (N.C. Ct. App.), *aff'd*, 597 S.E.2d 672 (N.C. 2003) (mem.) (listing elements of consumer protection claim under North Carolina UDAP statute).

[117] Pridgen, *supra* note 20, at 918.

[118] *See supra* notes 52-57 and accompanying text (discussing proof issues in intentional discrimination claims).

[119] *See supra* Section I.B.2 (assessing Julia's claims).

attorneys' fees.[120] While some state statutes limit recovery to unfair or deceptive practices that negatively affect the community at large,[121] all state statutes permit compensatory relief,[122] and twenty-five state statutes permit consumers to recover double and treble damages.[123] Seven states that do not authorize multiple damages do authorize punitive damages for UDAP violations.[124] Although the ability to recover for emotional distress damages in antidiscrimination cases is a clear advantage, some UDAP statutes also permit recovery for mental anguish, physical pain and suffering, or consequential damages.[125] In Delaware, for example, a plaintiff was able to recover consequential damages in the amount of lost profits from the nursing home he had planned to operate on purchased real estate where the defendant omitted that the property was subject to imminent foreclosure.[126] In North Carolina, if successful on her UDAP claim, Julia would be *entitled* to treble damages for her injuries and may be eligible to recover attorneys' fees.[127] She may also be able to recover for emotional distress damages.[128] Depending on how well Julia connected the loss of this apartment to greater opportunity and employment, her damages may be extensive.

Third, litigating a UDAP claim in state court would be less expensive and less emotionally taxing than litigating an antidiscrimination claim in federal court. A state claim would more quickly move through the court system, offering Julia a more efficient means of exercising her rights. Because she need only prove that Bill lied to her, a fact that she could establish through her own testimony and

[120] Carter, *supra* note 97, at 35 (noting only five state UDAP statutes—Arizona, Delaware, Mississippi, South Dakota, and Wymoing—lack attorneys' fees provision).

[121] *Id.* at 39 (noting Colorado, Georgia, Minnesota, Nebraska, New York, South Carolina, and Washington UDAP statutes impose community impact limitation).

[122] *Id.* at 33.

[123] *Id.* at 42-43.

[124] *Id.* at 44 (listing California, Connecticut, Idaho, Kentucky, Missouri, Oregon, and Rhode Island).

[125] Michael C. Bruck, Unfair and Deceptive Trade Practices and Consumer Protection: Damages in UDAP Claims 23, 28 (July 25-Aug. 1, 2015) (unpublished presentation) (on file with author) ("A plaintiff's allegations of aggravation, inconvenience, mental anguish, and emotional distress suffered as a result of Defendant's conduct are sufficient to plead damages.").

[126] Nash v. Hoopes, 332 A.2d 411, 414 (Del. Super. Ct. 1975) (calculating damages).

[127] N.C. GEN. STAT. § 75-16 (2018). The North Carolina statute *requires* treble damages in successful suits. *Id.* ("[I]f damages are assessed in such case judgment *shall* be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict." (emphasis added)). Attorneys' fees are awarded in North Carolina at the judge's discretion and only upon a finding that the charged party "willfully engaged" in the prohibited activity. *Id.* § 75-16.1.

[128] Williams v. HomEq Servicing Corp., 646 S.E.2d 381, 388 (N.C. Ct. App. 2007) (recognizing that emotional distress damages are available under chapter 75 of North Carolina code).

testimony from George Simon, Julia may be able to avoid time-consuming and expensive discovery. And because she would not need to plead and prove her identity, Bill's intent to discriminate because of her identity, or emotional distress connected to the intentional discrimination,[129] Julia may be spared painful and invasive discovery. Finally, it is possible that, by choosing not to assert discrimination, Julia may escape the bias and unfair treatment that many discrimination plaintiffs face from judges and juries. To be sure, data suggests that women and people of color face discrimination in judgments whether or not they explicitly allege gender or race discrimination.[130] Telling a universal story that could happen to any consumer, however, may offer a point of connection between Julia and the factfinder, interrupting the factfinder's implicit or explicit biases.[131]

Unsurprisingly, Julia's UDAP claim also comes with risks and drawbacks. To begin, there are process concerns. State courts operate more informally and with less process than federal courts.[132] In fact, state courts around the country have been criticized for failing to consistently apply rules of civil procedure and for pushing parties to settle.[133] State court juries also tend to award lower judgments than federal court juries.[134] State court claims allow for less, or less formal, discovery, and have more pro se litigants.[135] Although those considerations are

[129] Of course, if Julia seeks emotional distress damages or seeks to connect Bill's bad acts to racist or other bias-oriented motivations, she will open herself up to some of the same downsides that accompany a discrimination claim. She will not, however, have to prove intent or motivation to prevail on her UDAP claim.

[130] *See* sources cited *supra* note 57 (detailing judge and jury bias in gender and race discrimination cases).

[131] Such an approach is not without concern. Part III takes up that analysis more fully.

[132] *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 395 (1992) (identifying four "main rationales at work in forum selection": (1) fears about state court's biases or competence, (2) concern about pace and/or cost of litigating the action, (3) use of procedure to browbeat opponent into settlement or gain some other tactical advantage, and (4) convenience for the attorney). Professor Miller's study shows different assessments of costs and benefits for state and federal court practice depending on whether the attorney was a defense- or plaintiff-side attorney. *Id.* at 400.

[133] *See* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1872 (2008) (detailing how advocates for the Class Action Fairness Act described state courts as "less careful" and as "'lax' tribunals that applied the rules of law 'inconsistently'" than federal courts (footnotes omitted)); *cf.* Sovern, *supra* note 83, at 458 (identifying small claims court venue as drawback to UDAP claim due to lack of uniform commitment to integrity of federal and state courts).

[134] *See* Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 434 (1996) (finding, in part, that jury "award levels are much higher in federal court than in state court").

[135] *See, e.g.*, Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving*

not per se negative, they do increase uncertainty and risk associated with litigation.

There are also normative concerns. Pursuing a UDAP claim places Julia's injury in the realm of a negative consumer transaction. It does not offer Julia an opportunity to connect her injury to historic and systemic discrimination against Blacks, women, or Black women in America. This Article takes up that normative analysis in Part III, below.

Finally, there are doctrinal concerns that extend beyond Julia's individual story. Specifically, there are concerns that the patchwork state laws are or will become ineffectual to achieve remedies for plaintiffs like Julia. A micro analysis suggests risks to relying on consumer protection to remedy certain civil rights violations. State UDAP statutes vary and some have fewer protections than others. For example, state courts in Michigan and Rhode Island have interpreted their state UDAP provisions very narrowly, leaving fewer covered transactions.[136] State UDAP statutes in Arizona, Delaware, Mississippi, South Dakota, and Wyoming prohibit successful plaintiffs from recovering attorneys' fees, making it financially challenging for consumers to take advantage of the protections.[137] And in Alaska, the UDAP statute requires unsuccessful consumers to pay attorneys' fees to the business they sued.[138] Patchwork state UDAP statutes lead to unequal treatment for individual victims of consumer protection violations across states and confused messaging to goods and service providers about what is acceptable and unacceptable consumer-related practice.

A macro analysis also highlights the risk of turning to consumer protection to remedy certain civil rights violations. Historically, as set forth below, lawmakers and the courts have narrowed civil rights protections generally and with respect

Litigation, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 166, 187 (2012) (recognizing that "[t]he pro se phenomenon had the harshest effect on courts hearing family law matters," which take place in state courts).

[136] *See* Smith v. Globe Life Ins. Co., 597 N.W.2d 28, 38 (Mich. 1999) (exempting any business activity already subject to regulation from the Michigan Consumer Protection Act); Carter, *supra* note 97, at 1 ("UDAP protections in Michigan and Rhode Island—the 'terrible two'—have been gutted by court decisions that interpret the statute as being applicable to almost no consumer transactions. These decisions were issued over ten years ago, yet the state legislatures still have not corrected them.").

[137] *See* DEL. CODE ANN. tit. 6, § 2513(a) (2017); MISS. CODE ANN. § 75-24-15(1) (2018) (allowing attorneys' fees for defendants but not plaintiffs); S.D. CODIFIED LAWS § 37-24-31 (2018) ("Any person who claims to have been adversely affected by any act or a practice declared to be unlawful . . . shall be permitted to bring a civil action for the recovery of actual damages suffered as a result . . . ."); WYO. STAT. ANN. § 40-12-108(b) (2017) (authorizing attorneys' fees only for class actions); Sellinger v. Freeway Mobile Home Sales, Inc., 521 P.2d 1119, 1123 (Ariz. 1974) (finding no right to recover attorneys' fees under Arizona UDAP statute).

[138] ALASKA STAT. § 45.50.537(c) (2017) ("[I]f the plaintiff is not the prevailing party . . . the court shall award a prevailing defendant . . . full reasonable attorney fees.").

to economic justice specifically.[139] There is a risk that, by using consumer protection to achieve antidiscrimination or race-based goals, politicians and judges will similarly narrow consumer protection law's flexibility and reach. It is only because of the narrow and rigid interpretation of civil rights statutes—law specifically designed to address group-based discrimination—that this Article and its analysis becomes necessary and important. It is conceivable that the same fate would befall the consumer protection doctrine.[140]

II. THE HISTORICAL CONTEXT

Before exploring the normative trade-offs inherent in choosing consumer protection or antidiscrimination law to remedy traditional civil rights violations, this Part briefly sets out the historical development of the current antidiscrimination doctrine.[141] It does so to provide context for the normative analysis. One must wrestle with two observations to engage fully in the normative discussion. First, that historically, civil rights advocates understood economic citizenship as a core component of robust civil rights protections. And second, that antidiscrimination law has developed narrowly, severing the relationship between economic rights and civil rights, and otherwise constraining the ability of those laws to achieve anti-subordination and group-based equality goals. This Article argues that these observations lead to dual conclusions. First, that by ignoring the import of economic citizenship and narrowly constraining its protections, civil rights laws designed to remedy and prevent race-based and other group-based discrimination have betrayed at least part of their original aims. And second, that because economic citizenship is inextricable from political and social citizenship, promoting full and fair access to consumer systems will advance the group-based equality goals of historic civil rights movements.

A. *The Relationship Between Economic Citizenship and Civil Rights*

Throughout American history, civil rights movements and advocacy have promoted economic citizenship as a key component of civil rights. In the wake of the Civil War and the Reconstruction period, advocates pushed for land grants and a robust Freedman's Bureau to support economic citizenship for recently-

[139] *See infra* Section II.B (discussing civil rights history).

[140] In fact, due in part to the strength and flexibility of the UDAP statutes, they have recently been subject to criticism and challenges. *See* Pridgen, *supra* note 20, at 937-41 (detailing and rebutting varied critiques of state UDAP laws and their robust enforcement).

[141] This Article merely skims the surface of a rich and complex history, borrowing from historians and legal historians who have contributed immensely to the scholarly literature. For a more complete picture of the development of civil rights and antidiscrimination law, see BRUCE ACKERMAN, WE THE PEOPLE VOLUME 3: THE CIVIL RIGHTS REVOLUTION (2014); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011).

freed Blacks.[142] As far back as 1865, the framers of the Thirteenth Amendment sought not just to abolish slavery, but to promote a broader understanding of economic citizenship.[143] They envisioned "free labor" as "not just the absence of slavery and its vestiges," but also "the guarantee of an affirmative state of labor autonomy," which were delineated by "specific freedoms that were the inalienable prerogatives of the working man."[144] In fact, in the 1940s and 1950s, civil rights lawyers at the U.S. Department of Justice turned to the Thirteenth Amendment to seek legal redress for various kinds of legal and economic coercion.[145]

The New Deal civil rights movement, developed and led by industrial labor unions, also recognized the relationship between social and economic citizenship.[146] Advocates fought for the right to work, the right to a livelihood, and the right to social insurance, connecting those measures of economic independence to full democratic participation.[147]

The civil rights movement of the 1950s and 1960s similarly recognized the import of economic justice in the fight for civil rights. Although the popular conception of that movement is a fight for formal equality,[148] a deeper study of the civil rights movement reveals that many civil rights advocates and activists shared a deep and abiding belief that economic access, economic justice, and

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[142] MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 17-23 (2017).

[143] The Thirteenth Amendment abolished slavery and prohibited involuntary servitude. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[144] Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 308 (1988); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438-39 (1989) (citing E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11 (1970)).

[145] Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1614 (2001) ("In the late 1940s and early 1950s, however, Civil Rights Section lawyers came to use the Thirteenth Amendment as a vehicle for instituting 'free labor,' broadly defined, and for prohibiting various kinds of legal and economic coercion.").

[146] Forbath, *supra* note 10, at 697 (tracing historical development of union-based New Deal civil rights movement and connecting it to church-based civil rights movement of 1960s).

[147] *Id.* at 698 ("Along with the right to work and a right to livelihood went a right to social insurance and a right to a measure of economic independence and democracy.").

[148] *See* Brown-Nagin, *supra* note 10, at 2700-01 (arguing that Professor Ackerman's influential volume "privileges the formal lawmaking process and popular consensus" and fails to honor "formal and informal influences on lawmaking, moments of consensus and contest, and federally ratified and locally sanctioned dimensions of the socio-legal agenda established during the civil rights era" (citing ACKERMAN, *supra* note 141, at 3-4, 5-7)).

economic citizenship are critical to the fight for civil rights.[149] Movement leaders, including Ella Baker, A. Philip Randolph, Bayard Rustin, and the leaders of the Student Nonviolent Coordinating Committee ("SNCC"), pushed for universal economic citizenship to sit at the forefront of the movement's platform.[150] They sought income guarantees, significant government investment in poor communities, and a right to housing.[151] Dr. Martin Luther King, Jr. recognized that the "inseparable twin of racial injustice was economic injustice"[152] and joined the Southern Christian Leadership Conference in Chicago to lead housing marches, end slums, increase the minimum wage, and eradicate mortgage and loan discrimination.[153] From Dr. King's choice to frame his famous "I Have a Dream" speech around the metaphor of a bank default[154]

[149] It has been suggested, in fact, that the fight against Jim Crow segregation was complementary, but secondary, to the fight for economic citizenship. Brown-Nagin, *supra* note 10, at 2714-15 ("From the bottom up, the labor roots of the movement and the struggle for economic equality are clear. The struggle against Jim Crow laws unrelated to economic rights is important but not dominant."). Economic citizenship is not, of course, the only facet of the civil rights movement that has faded from the national narrative. The role of Black feminists, for example, has also been lost in the dominant narrative of the civil rights movement. *See, e.g.*, Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1252 (2005) ("[V]irtually nothing in the dominant narrative would lead us to expect an image of the [1963 March on Washington] that showed women carrying signs demanding jobs for all, decent housing, fair pay, and equal rights '*NOW!*', thus asserting both their racial solidarity and their identities as activists and workers and thereby equals of men.").

[150] Brown-Nagin, *supra* note 10, at 2711 ("[Advocates in the civil rights movement] pushed Dr. King and lawmakers to pursue a progressive agenda of economic citizenship for all more quickly.").

[151] JACKSON, *supra* note 10, at 3-4 (discussing how activists believed racial and economic justice were "indissoluble").

[152] MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM, THE MONTGOMERY STORY 69 (1958).

[153] *50 Years Ago: MLK Jr.'s Speech at Soldier Field, March to City Hall with Demands for Daley*, CHI. TRIBUNE (July 10, 2016, 4:19 PM), http://www.chicagotribune.com/news/ct-martin-luther-king-jr-1966-speech-chicago-20160706-story.html [https://perma.cc/L5XJ-NQLZ] ("The Southern Christian Leadership Conference, then led by King, targeted Chicago 'due to high levels of institutionalized discrimination' in schools and housing. Mortgage and loan discrimination, tenants rights, quality education and job access were among the goals."); Linda Lutton, *Fifty Years Ago Today, Dr. Martin Luther King, Jr. Got a Chicago Address*, WBEZ NEWS (Jan. 26, 2016), https://www.wbez.org/shows/wbez-news/fifty-years-ago-today-dr-martin-luther-king-jr-gets-a-chicago-address/b9534b2d-cc7f-4e34-ab59-c024cbd5aa3b [https://perma.cc/57U2-SVEK] ("The dream King talked about in Chicago included a 60 percent increase to the minimum wage.").

[154] Martin Luther King, Jr., I Have a Dream, Address at the Lincoln Memorial, Washington D.C. 1-2 (Aug. 28, 1963), https://www.archives.gov/files/press/exhibits/dream-speech.pdf [https://perma.cc/X2H5-MAUN] (calling out America for "default[ing] on this promissory

to his call for full, fair, and equal access to credit and consumer markets at his speech at Soldier Field,[155] the connection between economic justice and racial justice can be traced throughout the civil rights movement.

In fact, consumer spaces were the nerve center and consumption tool of the movement's non-violent protest.[156] Blacks in Atlanta, Greensboro, Montgomery, Selma, and across the South took a stand against Jim Crow segregation at bus stops, lunch counters, motels, and retail institutions. When direct action turned violent, rioters targeted stores that had treated them unfairly and destroyed ledgers documenting oppressive debt.[157] Opponents of the civil rights movement also used consumer spaces to fight back against the movement. Segregationists fought integration and access to the ballot box by firing workers, denying Blacks public assistance, and withdrawing necessary credit and supplies for Black-run farms and businesses.[158] The latter struck at the heart of the Black community's access to consumer culture, financial markets, and wealth development.[159]

Today's civil rights advocates continue to recognize the relationship between economic citizenship and full and fair participation in our democracy. The Black

note insofar as her citizens of color are concerned. . . . America has given the Negro people a bad check, a check which has come back marked 'insufficient funds'"); *see also* BARADARAN, *supra* note 142, at 140 ("King, who chose his words carefully, was asking for a financial reckoning.").

[155] *50 Years Ago*, *supra* note 153; Lutton, *supra* note 153.

[156] *See* Martin Luther King, Jr., I've Been to the Mountaintop, Memphis, TN (Apr. 3, 1968), https://kinginstitute.stanford.edu/king-papers/documents/ive-been-mountaintop-address-delivered-bishop-charles-mason-temple [https://perma.cc/L62V-U2YD] (identifying economic action as tool of liberation and counseling followers to "anchor our external direct action with the power of economic withdrawal"). That is not to say that access to consumer spaces was the objective; rather, it was the means of demanding dignity. But, just as access to lunch counters was a symbol of full and free economic and democratic citizenship in the 1960s, analogous access to economic and consumer spaces is equally as symbolic today.

[157] BARADARAN, *supra* note 142, at 143-44 ("Looters destroyed the leather-bound books on which their debts were recorded before they destroyed anything else."); *see also* Anne Fleming, *Remaking the "Law of the Poor":* Williams v. Walker-Thomas Furniture Co. (1965), *in* THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES 32, 32 (Marie A. Failinger & Ezra Rosser eds., 2016) (pointing to study of uprisings in American urban centers in mid-1960s concluding that "city residents had '[s]ignificant grievances concerning unfair commercial practices'" (alteration in original) (citing UNITED STATES KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 274, 276 (1968))).

[158] JACKSON, *supra* note 10, at 13 ("[W]hen politicians and business elites mobilized massive resistance to southern desegregation and voter registration campaigns, thousands of rights activists faced job loss, eviction, coordinated denial of public assistance, and loss of credit and supplies crucial to their farms and businesses.").

[159] The White Citizens' Council in Alabama, for example, warned integrationists that they would register their opposition by making it impossible "to find and hold a job, get credit or renew a mortgage." *Id.* at 56.

Lives Matter movement's platform, for example, includes a call for economic justice, demanding "economic justice for all," defined as "collective ownership" of the same economic systems that sat at the heart of the earlier civil rights movements, including labor markets, housing markets, and credit markets.[160]

B. *The Failures of Implementation*

The framers of the Thirteenth Amendment, the labor organizers of the New Deal civil rights movement, the original lawyers of the DOJ's Civil Rights Division, the leaders of the 1960s civil rights movement, and the platform developers of the Black Lives Matter movement all recognized the relationship between economic citizenship and full and free participation in a democratic society. Yet, in response to each of these movements in American civil rights history, the protections developed in a way that dissociated economic citizenship from group-based political and social citizenship. Rather, the doctrines developed narrowly, by focusing on formal equality and compromising the laws' ability to realize comprehensive group-based equality goals.

Political pressures led to the collapse of the Freedman's Bureau and the promise of land grants, exchanging real economic citizenship for the grant of formal political rights.[161] And as labor and employment law developed, it did so without the broad conceptions of free labor discussed and debated by the framers of the Thirteenth Amendment.[162] Although scholars have pointed to the framers' broad conception of rights under the Thirteenth Amendment as a possible legal springboard for achieving anti-subordination principles,[163] the doctrine, as

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[160] *Economic Justice*, THE MOVEMENT FOR BLACK LIVES MATTER, https://policy.m4bl.org/economic-justice/ [https://perma.cc/3GCD-B4ZU] (last visited Feb. 19, 2019); *Platform*, THE MOVEMENT FOR BLACK LIVES MATTER, https://policy.m4bl.org/platform/ [https://perma.cc/Z6J9-L8EQ] (last visited Feb. 19, 2018).

[161] BARADARAN, *supra* note 142, at 22 (referencing W.E.B. DuBois's comment that "the Freedman's Bureau died, and its child was the Fifteenth Amendment").

[162] VanderVelde, *supra* note 144, at 498 ("Less than a decade after Reconstruction, however, influential treatises that codified the common law of master and servant virtually ignored these developments. As a result, the common law evolved without regard for the constitutional tradition of free labor; and that same common law has remained the law of employment relations in many states for most of this century.").

[163] Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 258-59 (2010) ("Since then, members of Congress enforcing the Thirteenth Amendment have relied on an anti-subordination model of equality, based not solely on equal treatment, but instead recognizing that both racial equality and economic rights are necessary for true equality. Section 2 of the Thirteenth Amendment gives Congress the authority to go beyond formal equality and remedy the socioeconomic disparities associated with race and gender that plagues our nation."); *see also* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313 (2007) ("Despite its seemingly simple command that '[n]either slavery nor involuntary servitude . . . shall exist within the United States,' the

developed, is unprepared to answer such a call. Due to inaction by Congress and deference to that inaction by the courts, the Thirteenth Amendment doctrine has developed narrowly.[164] Courts have consistently held that the Thirteenth Amendment's prohibitions are limited to "conditions of literal slavery or involuntary servitude."[165]

And while the laborers of the New Deal movement made the (sometimes tension-filled) connection between racial justice and economic justice,[166] the politicians effectively erased it. Lawmakers responded to the New Deal civil rights movement's call for labor and economic rights by excluding Southern labor markets from its legal protections.[167] This political maneuvering effectively omitted African Americans from the protections of the Social Security Act, the Fair Labor Standards Act, the National Industrial Recovery Act, and the Agricultural Adjustment Act.[168] By excluding agricultural and domestic workers from the protections of those Acts, Congress excised economic action from racial justice, forestalling and limiting wealth development in African American communities, while simultaneously creating protections and opportunities for wealth development in White communities.[169]

Thirteenth Amendment's scope remains ambiguous."); Marco Masoni, *The Green Badge of Slavery*, 2 GEO. J. ON FIGHTING POVERTY 97, 97-98 (1994) (arguing that environmental degradation of Black communities is a remnant of slavery).

[164] Carter, Jr., *supra* note 163, at 1315 ("In the absence of a definitive statement from the Court, lower courts have uniformly held that the judicial power to enforce the Amendment is limited to conditions of literal slavery or involuntary servitude.").

[165] *Id.*

[166] Forbath, *supra* note 10, at 702 ("By the late thirties the black vote was 'important and sometimes decisive' in scores of Northern congressional districts, and black workers had become a significant part of the nation's industrial work force. With the birth of the CIO, a new national labor organization welcomed black workers. During the 1930s blacks were central to union organizing throughout the nation—in southern metal and coal mining, longshore, and tobacco manufacturing as well as in northern auto, steel, and meatpacking. Equal rights for black workers was a defining demand of the new CIO, and friend and foe alike agreed that the new industrial unions would not have prevailed without the militant support they won from blacks.").

[167] *Id.* at 699 (describing how Southern Democrats allied with Northern Republicans to "strip[] the main pieces of New Deal legislation of any design or provision that threatened the separate Southern labor market and its distinctive melding of class and caste relations, its racial segmentation, and its low wages"); Goluboff, *supra* note 145, at 1678 (recognizing political compromise of New Deal legislation that left African Americans out of New Deal legislative protections).

[168] Forbath, *supra* note 10, at 700-01; Goluboff, *supra* note 145, at 1678; William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 5 (2012).

[169] Wiecek, *supra* note 168, at 5 ("Because they could not collect old-age or unemployment benefits, field hands, sharecroppers, maids, and nannies—constituting the bulk of the black labor force in the New Deal South—were shut out from even the most modest opportunity

Lawmakers scuttled the New Deal movement's attempts to enact a right to a "job for all who can work" and the "right to seek work without discrimination."[170] At the same time, New Deal bank reforms were subject to federal support and governance of FHA and Federal Deposit Insurance Corporation ("FDIC") insurance, which were largely unavailable to Black banks in primarily Black neighborhoods.[171] These political actions enlarged the racial gap in wealth development, and thus, the racial gap in economic citizenship.[172]

Like the New Deal legislative accomplishments, the civil rights movement of the 1960s led to significant legislation, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the 1968 FHA.[173] Each prohibits discrimination in accessing certain areas of national life: public accommodations, public institutions, employment, education, housing, and voting. Although the historic statutes made great strides in granting formal legal rights, they failed to address, in any meaningful way, the economic citizenship component of the movement's platform.[174] An excerpt from the legislative history of the FHA is symbolic.[175] Senator Walter Mondale, of the Senate

that whites enjoyed for wealth accumulation and survival assistance in economic downturns.").

[170] Forbath, *supra* note 10, at 705.

[171] BARADARAN, *supra* note 142, at 123 ("Certainly, under the state-by-state chartering regime, black banks had been denied charters as a result of discrimination, but under the new regime black banks rarely had enough capital to obtain charters. Black banks were almost categorically too weak to be granted FDIC insurance.").

[172] *Id.* at 101 ("The bulk of the New Deal reforms can accurately be described as 'white affirmative action' because state resources were used to provide direct financial advantages to white Americans at the expense of other racial groups.").

[173] ACKERMAN, *supra* note 141, at 11-19 (defining these three pieces of legislation as "civil rights canon"). Legal scholars and historians have challenged the idea that the civil rights movement, or even the civil rights canon, is limited to the battles fought and won in the 1950s and 1960s. *See* Brown-Nagin, *supra* note 10, at 2711; Forbath, *supra* note 10, at 697 (arguing that civil rights movement of 1950s and 1960s "had many roots in the labor movement of the 1930s and 1940s"); Hall, *supra* note 149, at 1235 (identifying and describing how the "'long civil rights movement' that took root in the liberal and radical milieu of the late 1930s, was intimately tied to the 'rise and fall of the New Deal Order,' accelerated during World War II, stretched far beyond the South, was continuously and ferociously contested, and in the 1960s and 1970s inspired a 'movement of movements' that 'def[ies] any narrative of collapse'" (footnote omitted)).

[174] JACKSON, *supra* note 10, at 13 ("One of the movement's greatest challenges stemmed from a dilemma of political and economic disempowerment."). There is also a compelling argument that the civil rights legislation does little, if anything, to address the civil rights movement's goal of public integrity for the Black community, another of the movement's major platform positions. *See* Martin Luther King, Jr., *supra* note 154, at 1.

[175] This Part focuses on the FHA because it forms the basis of Julia's civil rights claim. Similar sentiments highlighting equal access to programs can be found in the legislative history of other civil rights legislation. *See, e.g.*, 109 CONG. REC. 12044, 12102 (1963)

Committee on Banking and Currency, explained the limitations of the "fair housing bill" to the Subcommittee on Housing and Urban Affairs:

> For some weeks now this subcommittee has been engaged in many efforts to try to deal with some of the housing problems in American ghettos. I believe that the proposal for fair housing which we begin to deal with today is a part of that effort.
>
> . . .
>
> . . . We must show that we don't intend to live separately in this country but that we intend to live together.
>
> . . . [This measure] does not purport to end the ghetto by itself. But it would establish a legal climate under which the abolition of the ghetto could be achieved. It would then be the law of economics, not civil rights, which would determine who buys what house and who escapes the ghetto.[176]

Leaders in the civil rights movement fought for access to economic systems, and yet those action items are conspicuously absent from the antidiscrimination civil rights canon.[177]

As the statutes and doctrines responded to these civil rights moments in American history, economic protections were excised from "traditional" civil rights protections based on protected classes. Congress omitted economic citizenship rights from antidiscrimination legislation and the Supreme Court rejected the notion that economic rights are fundamental.[178] As an example, one need only look to the weakness of the FHA's requirement to affirmatively further fair housing. The statute requires that "[a]ll executive departments and

(containing Senator Philip Hart's speech in support of Title VI of the Civil Rights Act of 1964, in which he applauded the legislation's recognition that the United States is "a Nation that treats all its people with equal hand and equal justice, and does not have one window marked 'white' and another window marked 'colored,' in order that taxpayers, white and colored alike, may participate in Federal programs").

[176] *Fair Housing Act of 1967: Hearing on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Hous. and Urban Affairs of the Comm. on Banking and Currency*, 90th Cong. 2 (1967) (statement of Sen. Mondale, S. Comm. on Banking and Currency).

[177] Professor Mehrsa Baradaran makes a strong case that, instead of investing in the idea of economic citizenship, every administration since the Nixon Administration has instead relied on the idea of Black banking and Black capitalism to solve the economic crisis related to race. BARADARAN, *supra* note 142, at 1-2. She further argues, backed by significant historical data and analysis, that "Black banking has been an anemic response to racial inequality that has yielded virtually nothing in closing the wealth gap." *Id.* at 2.

[178] Dandridge v. Williams, 397 U.S. 471, 484-85 (1970) (declining to find substantive right to welfare benefits and applying rational basis review to restrictions on those benefits); Zietlow, *supra* note 163, at 258 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1973) (declining to find fundamental right to education in rejecting challenge to property tax-based funding of public schools)).

agencies . . . administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes [of the FHA]."[179] Although HUD released its rule providing guidance on the Act's requirement to affirmatively further fair housing in 2015 (forty-seven years after the Act's passage),[180] the general consensus is that the requirement to affirmatively further fair housing has had little effect on segregation, housing discrimination, or the ability of African Americans to develop property and wealth through home ownership.[181] And before the rule could make any inroads into changing those outcomes, the Trump Administration, under the leadership of HUD Secretary Ben Carson, has delayed its implementation[182] and aggressive enforcement appears unlikely.[183]

[179] 42 U.S.C. § 3608 (2012).

[180] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271, 42371 (Aug. 17, 2015) ("[A public housing agency] must establish . . . that it has complied with fair housing and civil rights laws and regulations, or has remedied violations of fair housing and civil rights laws and regulations, and has adopted policies and undertaken actions to affirmatively further fair housing.").

[181] *See, e.g.*, Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law [https://perma.cc/YYJ8-8JWL] ("Perhaps the starkest measure of the law's squandered potential is how little the torrent of federal dollars released by its passage has done to integrate U.S. communities."); Shanna L. Smith, *Incorporating Fair Housing into Affordable Housing Policy and Programs*, J. AFFORDABLE HOUS. & CMTY. DEV. L., Winter 2011, at 235, 235-36 ("Congress made clear its intent that the Fair Housing Act have two goals: to eliminate housing discrimination and to promote residential integration. Both goals have been virtually ignored by the federal government. In subsequent appropriations bills, Congress included a requirement that recipients of federal dollars must 'affirmatively further fair housing.' However, most recipients of federal dollars have never complied with this requirement.").

[182] Kriston Capps, *The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation*, CITYLAB (Jan. 4, 2018), https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/ [https://perma.cc/3BXT-E4KY] ("The Trump administration is rolling back the deadline for a key rule on fair housing made into law under President Barack Obama—a change with potentially broad consequences for racial segregation. The new guidance will give communities until well after 2020 to comply with an Affirmatively Furthering Fair Housing rule put in place two years ago.").

[183] Secretary Carson's previous statements rejecting the notion of affirmatively furthering fair housing suggest that it will not gain traction any time soon. Ben S. Carson, Opinion, *Experimenting with Failed Socialism Again*, WASH. TIMES (July 23, 2015), https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/ [https://perma.cc/EQ8U-8XMR] (critiquing HUD's rule on affirmatively furthering fair housing and referring to it as "social-engineering"); *see also* BARADARAN, *supra* note 142, at 170 (arguing that, after George Romney's retirement as HUD Secretary in

Congress's and courts' hesitance to recognize the relationship between economic citizenship and civil rights is consistent with the critiques of the antidiscrimination doctrine as formalistic and rigid.[184] The design of antidiscrimination law, especially as connected to intentional discrimination, represents a turn from structural equality and economic citizenship concerns to prohibition of discrimination against specific and targeted individuals.[185] As discussed in detail in Part I, the protected class design of antidiscrimination law has been understood and analyzed narrowly by the judiciary. Such a constrained view, focused on the individual plaintiff's identity, has operated to create significant obstacles to attaining judicial relief and combatting entrenched discrimination.[186] Some scholars have gone so far as to consider the antidiscrimination doctrine a wholesale failure in its attempts to remedy group-based discrimination and achieve structural anti-subordination goals.[187] Even for

1972, administrations would uniformly "follow Nixon's strategy of enforcing the FHA through litigating cases of outright discrimination . . . mak[ing] it clear that [they] would only concern [themselves] with racial and not economic discrimination").

[184] Zietlow, *supra* note 163, at 255-56 ("Notwithstanding the powerful symbolism that liberty has in the American psyche, liberty is largely absent from our late twentieth century understanding of civil rights, which instead is based on the Equal Protection Clause and its promise of formal equality. People of color and women of every race have made significant advances under the equal protection model of equality, but they continue to lag behind whites and men under virtually every economic index." (emphasis omitted)).

[185] Antidiscrimination law is not devoid of avenues to address structural discrimination. For example, disparate impact is a means by which to challenge structural bias. *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 960-67 (2012) (tracing antisubordination principles historically embedded in employment discrimination law); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 22 (2006) ("Taken as a whole, . . . disparate impact inquiry asks whether some aspect of the employer's structural arrangement facilitates or reflects biased decisionmaking, and whether the employer could reasonably structure things differently to avoid that result."). For intentional discrimination claims under Title VII and other antidiscrimination statutes, however, the design of the law is focused on a bad actor and an individual victim, leaving little room to address institutional or structural discrimination factors.

[186] *See* Clarke, *supra* note 42, at 167 (arguing that statutory design of antidiscrimination law does not require that plaintiff prove that she is member of protected class to gain access to protections, but that antidiscrimination doctrine has developed, primarily through application of *McDonnell Douglas* test, to apply such requirement); *supra* Section I.B (discussing antidiscrimination law's class design and doctrine limiting ability of plaintiffs to advance claims for judicial relief).

[187] Some scholars reject the antidiscrimination approach to equity because the design and implementation of the laws fail to remedy the actual needs of historically disenfranchised groups in favor of individual and isolated rights. *See, e.g.*, Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 95-96 (1999) (asserting that rights-based civil rights model was borne out of an understanding of the White experience, resulting in

those who find significant value in the current antidiscrimination doctrine, however, it is clear that the antidiscrimination doctrine has fallen short in achieving economic citizenship.

III. THE NORMATIVE ANALYSIS

Once it is clear that the consumer protection doctrine provides a doctrinal avenue to remedy certain forms of discrimination, it remains necessary to contend with the normative implications of using consumer protection to remedy group-based harms like race or sex discrimination. Part I detailed the doctrinal benefits and drawbacks of claims arising out of antidiscrimination law and consumer protection law—the different remedies available, the relative ease of proving the elements of each kind of claim, and the effect of the different venue options. Part II set out the historical context, tracing the role of economic citizenship in the fight for civil rights, its omission from the resulting antidiscrimination law and doctrine, and the structural failures of the resulting antidiscrimination doctrine. Recognizing the pragmatic benefit of the consumer protection doctrine to remedy discrimination, this Part contends with the downstream consequences that might flow from turning to a consumer protection claim to remedy traditional civil rights violations. Situated in the literature on colorblind, universalist, and race-conscious approaches to civil rights concerns, this Part recognizes that making such a choice could operate to erase subordination, oppression, and entrenched bias from the lawsuit. As law is one critical tool in developing social understanding and norms, "hiding" discrimination in a consumer protection claim could undermine civil rights advocacy and protection, and risk perpetuating and further entrenching inequalities.

A. *The Debate over Universalist Approaches*

Remedying discrimination using consumer protection law is a universalist approach to a civil rights problem. As the name suggests, universalist approaches to civil rights violations are universal in their application and neutral as to race, gender, disability, and other traditional identity-based protected classes.[188] Universalist protections, rights, or policies do not award or cabin

laws that failed to meet critical needs such as social and economic justice); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984) (critiquing rights-based theory and arguing that focus on rights obstructs progressive advances); *see also* Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1296-97 (2011) (explaining development and history of "so-called rights critique," which was "actually a multifaceted debate that included hard and soft lines on both sides"). *But see* Crenshaw, *Race*, *supra* note 59, at 1356-58 (recognizing both possibilities and dangers of rights-based approach to civil rights and racial equality).

[188] Bagenstos, *supra* note 4, at 2842 (defining "universalist approach to civil rights law as one that either guarantees a uniform floor of rights or benefits for all persons or, at least,

rights via protected classes or other group-based identifiers. In that way, universalist approaches differ both structurally and substantively from rights and protections created through antidiscrimination statutes. Scholars across constitutional and civil rights fields have analyzed and proposed universalist approaches for workplace discrimination,[189] voter discrimination and suppression,[190] and discrimination against people with disabilities,[191] for example. Those proposals utilize universalist laws and approaches across a varied spectrum, from litigation to legislation to policymaking.

For some, the universalist approach is rooted in a rejection of a rights-based approach to equality. Professor Richard Thompson Ford, for example, sets out a laundry list of complaints about rights-based approaches based on their downstream consequences.[192] He argues, for example, that rights-based approaches encourage narcissism and extremism.[193] Ford complains that "[t]he rhetoric of civil rights law has provided a convenience vehicle, if not an official apologia, for a culture of entitlement, self-obsession, and self-righteousness that warps popular politics and poisons popular culture."[194] This Article rejects those contentions. To the contrary, this Article suggests that rights-based antidiscrimination law has not gone far enough to protect Americans against group- and identity-based discrimination.

guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes (e.g., race, sex) highlighted by our antidiscrimination laws").

[189] Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1098 (proposing claims arising under Family and Medical Leave Act to remedy workplace inequality); Eyer, *supra* note 54, at 1343 (pointing to Family and Medical Leave Act as an alternate, universalist claim to remedy workplace discrimination).

[190] Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 113-25 (2013) (arguing for universal regulatory oversight of voting in wake of Supreme Court's Shelby County v. Holder, 570 U.S. 529 (2013), decision finding Voting Rights Act's section 5 unconstitutional); Richard H. Pildes, *The Future of Voting Rights Policy: From Antidiscrimination to the Right to Vote*, 49 HOW. L.J. 741, 748-55 (2006) (defending universalist approach to voting rights in the context of 2006 Voting Rights Act reauthorization).

[191] Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 70-75 (2004) (explaining advantages of advancing universal social welfare programs over targeted programs to advance interests of people with disabilities).

[192] RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY 20-25 (2011).

[193] *Id.* at 23-24 (arguing that rights extremism has been reinforced and perpetuated by popular culture, which has led to culture of entitlement and self-entitlement).

[194] *Id.* at 24. Ford also critiques rights-based civil rights laws because they obscure complexity, fail to challenge institutional and cultural injustices, limit the opportunity for cooperative and pragmatic solutions, risk being exploited at the expense of common sense, and crowd out new and creative means of achieving social justice. *Id.* at 19-25.

Other scholars propose a turn toward universalist approaches as a pragmatic solution to both a jurisprudential and cultural aversion to group-based rights and protections.[195] The concept is that judges, juries, legislators, and society at large will be more responsive to claims that do not rely on group-based, identity-driven rights and protections.[196] This Article aligns itself more with those scholarly approaches. Recognizing the failures of antidiscrimination law to achieve group-based equality goals, this Article suggests that consumer protection is an untapped resource to better achieve these goals. Because economic rights are inextricably linked to civil rights, however, this Article further argues that consumer protection law usefully aligns with and supplements the objectives of civil rights law.

Universalist approaches, however, have been met with significant and compelling critique. Primarily, critics contend that universalist approaches adopt, and thus condone, a post-racial[197] colorblind perception of modern America. The "colorblind" model[198]—a belief that the country has moved beyond race and that each individual should be evaluated on his or her own merits—has taken hold in our courts,[199] our classrooms,[200] and our national

[195] *See* Eyer, *supra* note 54, at 1299 (suggesting that seeking "extra-discrimination remedies" may allow plaintiffs to successfully sidestep judges' and juries' cultural and psychological aversion to ascribing discrimination to almost any set of circumstances, including those with direct evidence of animus).

[196] Bagenstos, *supra* note 4, at 2848 (explaining why proponents of universalist legislation and litigation advocacy "[posit] that universalist approaches are more durable" politically and when challenged in court); Darby & Levy, *supra* note 64, at 389-90 (arguing in light of deeply entrenched post-racial judicial and national narrative, advocates must embrace "postracial remedies" as "essential tools for realizing egalitarian aspirations in our racially exhausted society"); Yoshino, *supra* note 62, at 750 (suggesting that liberty-based dignity claims under substantive due process framework may find greater success than equity-based equal protection claims because the former "offers a way for the Court to 'do' equality in an era of increasing pluralism anxiety").

[197] Alexander, Eigen & Rich, *supra* note 6, at 12 (defining "post-racial" as "a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America's and Americans' pronounced racial progress" (footnote omitted)).

[198] Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 51 (1995) ("Colorblindness is based on the concept that, because race is immutable and arbitrary, race should be ignored in the allocation of burdens and benefits.").

[199] *See supra* notes 64-67 and accompanying text (discussing possible explanations for shift in Supreme Court's attitude toward robust group-based equal protection); *see also* Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 9 (2007) (reviewing dangers of color-blind approach to criminal justice).

[200] *Cf.* Robert A. Blake, Jr., *A Step Towards a Colorblind Society:* Shaw v. Reno, 29 WAKE FOREST L. REV. 937, 952-53 (1994) (discussing Supreme Court's plurality decision in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), which applied strict scrutiny to strike

image.[201] A critical review of the current state of American society, however, presents clear evidence that individual and systemic bias against people based on race, sex, national origin, and disability, among other traits and characteristics, remains pervasive in America.[202] In other words, even proponents' ideal of colorblindness is not the reality. In fact, as many scholars argue, the false narrative of colorblindness operates to obscure, perpetuate, and even advance racism and other biases.[203]

Even recognizing that universalist approaches afford some pragmatic benefit to victims of discrimination, Professor Kimberlé Williams Crenshaw, the architect of intersectionality theory and a prominent critical race theorist, warns against "post-racial pragmatism."[204] She admonishes post-racial pragmatists for condoning the existing power structure without naming or checking it.[205] Rather than framing universalist approaches as legitimate, pragmatic responses to a colorblind jurisprudence, Crenshaw warns that post-racial pragmatism "brings

down lay-off program which discharged white teachers at higher rate than Black teachers, even though program did not discriminate against historically discriminated group).

[201] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 11-12 (2010) (recognizing that colorblindness is a "public consensus that prevails in America today" and arguing that such sense has "blinded us to the realities of race in our society"); Crenshaw, *supra* note 187, at 1314 ("An entire industry of lawyers, politicians, pundits, and foundations has worked over the past twenty years to convince judges, policy makers, and voters that the project of racial reform was completed long ago."); *cf.* Jamin B. Raskin, *From "Colorblind" White Supremacy to American Multiculturalism*, 19 HARV. J. L. & PUB. POL'Y 743, 750-52 (1996) (arguing that nation is on fast-track to multiculturalism, and that embracing such diversity is critical to moving past "regime of white supremacy").

[202] *See* ALEXANDER, *supra* note 201, at 4 (detailing ways in which criminal justice system has "emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow"); MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 94-122 (2013) (revealing, through psychological studies and tests, hidden (or implicit) biases that shape our judgments about people's abilities, characters, and potential).

[203] *See* Chase, *supra* note 198, at 47 (arguing that colorblindness serves to obscure "root, scope, and depth of the problem" and to "defend the unwitting racist"); Crenshaw, *supra* note 187, at 1326 (arguing that colorblindness has been used as "justification for civil rights rollbacks"); Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 910 (1997) (arguing that failure to explicitly deal with race and gender does not erase subordination, but instead perpetuates it).

[204] *See* Crenshaw, *supra* note 187, at 1314 ("This pragmatism jettisons the liberal ambivalence about race consciousness to embrace a colorblind stance even as it foregrounds and celebrates the achievement of particular racial outcomes.").

[205] *Id.* at 1332 (arguing that, by failing to challenge the institutional power structure, post-racialism "permits a deeper alignment with forces that deny that significant racial barriers remain").

rock star marketability to colorblindness's legitimizing project."[206] Other scholars warn against "post-racial hydraulics," which are negative downstream consequences for embracing universalist approaches to employment discrimination.[207] They argue that ignoring group-based discrimination in favor of universalist claims will stagnate the antidiscrimination doctrine, reinforce the view that discrimination is a rare phenomenon, discourage lawyers from taking discrimination cases, and push universalist approaches on clients without respecting their autonomy and voice.[208] Even those who have urged a universalist response in certain arenas recognize the drawbacks to such an approach, including the fact that the broad strokes to such an approach may be less efficient or may result in backlash or "compassion fatigue."[209]

The following draws on the debate over universalist approaches to consider specifically what may be gained or lost by adopting consumer protection as a lens for remedying certain forms of discrimination.[210] This Article frames the choice of a consumer protection approach as a substitute for a civil rights approach, evaluating each as relative to the other. Although the Article analyzes antidiscrimination law and consumer protection law as substitutes for each other, it is not necessary to choose between the two claims for remedying discrimination. In fact, the two claims could be both substitutes and complements for organizing remedial demands.[211] A litigation strategy relying on consumer protection law could be part of a coordinated effort to address certain forms of discrimination through litigation, legislation, and non-legal means without limiting those extra-judicial methods to universalist strategies. Even among proponents of universalist approaches to remedying traditional civil rights issues, scholars have explicitly recognized that the universalist approach need not (and should not) be treated as a singular strategy.[212]

A litigant like Julia could also stack her legal claims, pleading both violations of civil rights law and consumer protection law. Although this Article frames Julia's claim choice as either/or (consumer protection or antidiscrimination), Julia could stack the claims by asserting violations of both (or multiple) laws. This Article treats antidiscrimination and consumer protection claims as

[206] *Id.* at 1326.

[207] Alexander, Eigen & Rich, *supra* note 6, at 41-43.

[208] *Id.* at 7; *see also* Kennedy, *supra* note 11, at 292-93 (rejecting universalist approach to dealing with consumer discrimination because, even in their successes, universalist claims do not "recognize the true nature of the harm—differential treatment because of their race").

[209] Bagenstos, *supra* note 4, at 2852.

[210] *See* Alexander, Eigen & Rich, *supra* note 6, at 41-43; Bagenstos, *supra* note 4, at 2841.

[211] *See* Zachary J. Gubler, *The Financial Innovation Process: Theory and Application*, 36 DEL. J. CORP. L. 55, 58-59 (2011).

[212] *See* Bagenstos, *supra* note 4, at 2841(recognizing that universalistic approaches can, and should, exist alongside particularistic approaches to address civil rights problems); Eyer, *supra* note 54, at 1357 (proposing "some balance between the remedies that will most effectively serve putative victims of discrimination now and the strategies that will most effectively enhance the public salience of discrimination in the long-term").

alternates rather than complements for two reasons. First, such a frame offers a cleaner lens for both the doctrinal and normative trade-off analysis. Second, the focus here is on substitutes because there are significant risks and downsides to stacking the claims. The consumer protection claims are likely to take a back seat to the more complex and discovery-driven discrimination claims, opening the plaintiff up to the downsides of the antidiscrimination claim without seeing much benefit from adding the consumer protection claim.

B. *The Negative: The Drawbacks of the Universalist Approach Outweigh the Benefits*

Relying exclusively on consumer protection law to remedy discrimination suffers from the overarching critiques of universalist approaches. It obscures the element of bias, which arguably pardons the perpetrator of discrimination. It diminishes the number of cases brought asserting housing or other discrimination, which may have a long-term negative effect on the doctrine or the social understanding of the rampant nature of housing discrimination.[213] Additionally, by divorcing the discrimination from the economic implications, it risks shrouding "the material consequences of racial exploitation and social violence—including the persistence of educational inequity, the disproportionate racial patterns of criminalization and incarceration, and the deepening patterns of economic stratification."[214] In fact, it risks reinforcing the Supreme Court's recent turn from robust group-based civil rights protections; if consumer protection affords an adequate remedy, identity-dependent civil rights protections become less necessary. Scholars often talk about "naming" a phenomenon; there is something about identifying and calling out an issue in the law that gives the issue credibility, urgency, and visibility.[215] In fact, much has been written about the power to call one's abuser to account and, with the full power of the judicial system listening, name the source of the injustice.[216] By ignoring the connection between a victim's identity characteristics (i.e. race or gender) and the perpetrator's adverse actions, consumer protection law ignores

[213] Alexander, Eigen & Rich, *supra* note 6, at 76 (warning that universalist strategies reinforce courts' and society's view that discrimination is rare phenomenon).

[214] Crenshaw, *supra* note 187, at 1327 (footnotes omitted).

[215] *See, e.g.*, Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 322 (1998) (pointing to Betty Friedan's work as beginning of feminist theorists' work to "ensure that the question of naming would emerge as a fundamental issue and as a hallmark of contemporary feminist theory"); *cf.* Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 407-08 (recognizing that power to name is power in and of itself).

[216] *See* Leissner, *supra* note 215, at 328 ("In order to be redressed, therefore, a harm must possess a name in law. One need only look at workplace sexual harassment, date rape, domestic violence, marital rape, and adultery to comprehend the importance of naming a harm." (footnote omitted)).

the institutional racial discrimination, and other biases, that have shaped our national economy.[217]

The specific consumer context also raises concerns related to the attention that market-driven consumer law pays to individual choices and responsibility. Consumer law relies on and adopts America's capitalist culture. In fact, a building block of the tort and contract law upon which consumer protection law was built is the concept of *caveat emptor*.[218] Such a concept is born of a "laissez-faire philosophy that placed a premium on individual bargaining skills and minimal government interference in standards of fair play."[219] Although the 1960s consumer movement for consumer protections was driven, in part, by a recognition of the danger of power and information asymmetry in consumer transactions, the system still operates within a market-driven capitalist structure.

America's capitalist culture privileges the "pull yourself up by your bootstraps," "American Dream" kind of mentality. The concept of individual merit and responsibility is so deeply connected to capitalism that it is hard to pull the two apart. Thus, relying on consumer law, with its focus on individual merit and responsibility, risks erasing more than just the role of bias or discrimination in the transaction. Rather, it risks adopting and reinforcing a system that elevates individual choice and intention above all; a system that often ignores the role of structural and institutional forces.[220] Structural, governmental, and institutional forces have limited the ability of traditionally oppressed groups in the United States to participate fully in consumer capitalism and to gain economic citizenship.[221] In fact, "[c]apitalist theory was even used

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[217] *See, e.g.*, Chase, *supra* note 198, at 5-6 (exposing ways in which slavery and racial oppression have shaped contract law, which has "became the means by which African-Americans became inalienably disempowered; outsiders to the system of justice and equitable economic opportunity"); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1002-03 (1985) (recognizing how contract law has failed women by stereotyping them into binary and closed roles).

[218] Frederick C. Wamhoff, *Property—Caveat Emptor—Duty to Disclose Limited to Commercial Vendors.* Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 288 N.W.2d 95 (1980) and* Kanack v. Kremski*, 96 Wis. 2d 426, 291 N.W.2d 864 (1980)*, 64 MARQ. L. REV. 547, 548 (1981) ("The more lengthy expression is *caveat emptor, qui ignorare non debuit quod jus alienum emit* which means let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution.").

[219] Robert Kwong, *Fraud and the Duty to Disclose Off-Site Land Conditions: Actual Knowledge vs. Seller Status*, 24 B.C. ENVTL. AFF. L. REV. 897, 901 (1997) (citing Wamhoff, *supra* note 218, at 552).

[220] *See* TRESSIE MCMILLIAN COTTOM, LOWER ED: THE TROUBLING RISE OF FOR-PROFIT COLLEGES IN THE NEW ECONOMY 187 (2017) (arguing that "perpetuating the inequalities resulting from intergenerational cumulative disadvantage doesn't require intent" and that "racism and sexism work best of all when intent is not a prerequisite").

[221] *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, at vii-viii (2017) (arguing that legacy of de jure

to fight basic antidiscrimination laws."[222] By ignoring the effects of generations of structural bias and oppression, "hiding" discrimination claims in a consumer law context risks erasing, and thus reinforcing, the problems of structural bias in our consumer and financial sectors.

C. *The Affirmative: The Benefits of the Universalist Approach Outweigh the Drawbacks*

There is, however, a flip side of the normative coin. While relying on a universalist tool to remedy civil rights violations might obscure the element of bias, the trade-off is a higher likelihood of success. In Julia's case, the doctrinal analysis resulted in a seemingly large differential in the likelihood of succeeding on her consumer protection claim relative to her discrimination claim. UDAP statutes are read broadly and have fewer essential elements of proof. Julia need not prove discrimination or intentional bias, which empiricists have established is not an easy task, especially as discrimination has become more subtle and harder to prove.[223] UDAP statutes are friendlier to intersectional plaintiffs like Julia, who are not forced to either identify or prove which thread of their identities led to the adverse or discriminatory action, an undertaking that theorists have established is nearly impossible and counter-productive.[224] This likelihood of success has implications for Julia and for society at large.

First and foremost, it achieves Julia's goals. It is impossible and unethical to ignore the client's desire for a legal remedy in analyzing these normative

structural segregation at local, state, and federal levels—even more than intentional individual discrimination—created and promoted wide-spread neighborhood racial segregation that persists today); Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1081 (2017) ("The 20:1 wealth gap between Blacks and Whites in the United States is not a manifestation of cultural or individual differences, but the product of a long history of discriminatory laws and policies that inscribed racial disparities into society."); *see also* BARADARAN, *supra* note 142, at 164-214 (tracing how focus on "black capitalism," without simultaneous reckoning with historic and systemic limitations on wealth development in Black communities, was "deployed as a decoy instead of an honest account of a systemic problem").

[222] BARADARAN, *supra* note 142, at 210 (citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962)).

[223] Eyer, *supra* note 54, at 1276 (noting "less than 5% of all discrimination plaintiffs will ever achieve any form of litigated relief"); *see also* Alexander, Eigen & Rich, *supra* note 6, at 14-15 (citing studies and scholars concluding that employment discrimination cases are difficult to prove, vulnerable to summary judgment rulings, and face uphill battles because judges and juries believe that employment discrimination has been largely eradicated).

[224] *See, e.g.*, Crenshaw, *supra* note 30, at 149-50 ("Black women's experiences are much broader than the general categories that discrimination discourse provides. Yet the continued insistence that Black women's demands and needs be filtered through categorical analyses that completely obscure their experiences guarantees that their needs will seldom be addressed.").

questions. The *Model Rules of Professional Conduct* make clear that a lawyer has a duty to zealously advocate for her client's position "despite opposition, obstruction or personal inconvenience to the lawyer" and "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[225] Although opponents of universalist approaches to civil rights issues critique pragmatist-lawyers, they do so without a convincing answer to a client facing a losing discrimination action. For example, in their compelling critique of universalist proposals and identification of the secondary post-racial hydraulics, Professors Alexander, Eigen, and Rich give little more than a nod to a lawyer's responsibility to achieve the client's goals.[226] When the client's goal is to recover money or otherwise succeed on a legal claim, does a lawyer not have a responsibility to find a viable legal claim that will achieve that goal? Alexander, Eigen, and Rich acknowledge that empirical studies evidence low success rates for employment discrimination plaintiffs and interviews with employment attorneys establish that Title VII cases are nearly impossible to win in court.[227] Yet they simultaneously condemn pragmatist-lawyers for choosing alternate universalist claims, arguing that the short-term win for the client is not worth the long-term harm to racial justice.[228] That might well be the case in the abstract, but it sits in conflict with the lawyer's ethical duty to the client, a foremost responsibility in lawyering.[229]

Second, there are long-term adverse consequences to racial justice initiatives if plaintiffs in discrimination suits lose in court. A loss in court, even one based on technical or evidentiary barriers, officially pardons the perpetrator for his conduct. Additionally, losses in discrimination actions reinforce the notion that discrimination claims have no merit, create bad precedent, and negatively affect the individual client and her community. In other words, pursuit of the losing argument may do more harm than good. Not only does the individual client lose possible damages and incur the financial and emotional costs of the lawsuit, but the antidiscrimination doctrine is padded with one more negative opinion.

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[225] MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2018).

[226] *See* Alexander, Eigen & Rich, *supra* note 6, at 51-52 (dismissing importance of client goals by stating that although "[s]ome plaintiffs will prefer the substitution of a universalist claim . . . [t]heir reasons for preferring universalism, however, may stem from disturbing factors that we should disrupt rather than accept as a matter of course").

[227] *Id.* at 12, 33-37 ("As an initial matter, the attorneys in our sample were united in their judgment that winning a Title VII claim in federal court is much harder today than in the past and in their perception that FLSA claims can be substantially easier to litigate, and thus more viable, than Title VII claims.").

[228] *Id.* at 12, 20 (criticizing universalist strategies, stating "[t]he mistake in such strategies is in emphasizing short term 'wins' rather than taking on the more difficult project of educating and persuading persons who are unprepared to recognize contemporary racism").

[229] Serious attention should be paid to the ethical implications of the universalist versus particularist debate in the civil rights literature. While a thorough analysis is beyond the scope of this Article, I look forward to taking it up in a future project.

There is also an argument that the universality of consumerism offers a point of connection across which coalitions might be forged and experiences shared.[230] As President Kennedy reminded Congress in 1962, "Consumers, by definition, include us all."[231] Consumer law and protection offer a potential lens through which those with different backgrounds could find common ground. This is particularly salient in the consumer protection context today. Americans are still reeling from deep-seated fraud and deception of consumers that led to the financial crisis of 2008 and the Great Recession. Scholars and advocates have made the profound connection between the predatory and discriminatory conduct aimed at vulnerable communities and the deep and lasting effects on the entire national economy.[232] It is, perhaps, a singular moment for varied and diverse groups to recognize that our consumer culture's failure to afford universal economic citizenship negatively affects both the direct targets of discrimination and the entire national culture and economy.

CONCLUSION

This Article reviews the potential connections and disconnections between the consumer protection and antidiscrimination policies and doctrines. While it does not argue that consumer protection law is always a better avenue to remedying relevant discrimination than traditional antidiscrimination law,[233] it offers a framework through which advocates, policymakers, and scholars can consider the claims. It observes that the civil rights movements and their leaders understood the inextricable relationship between economic and civil rights. It also recognizes that the antidiscrimination law, as developed, omits economic citizenship and leaves many victims of discrimination out of its protection. It suggests, therefore, that consumer protection may, perhaps paradoxically, better achieve certain civil rights goals than the antidiscrimination framework.

Thus, this Article asserts that, for victims of discrimination like Julia, and others who are consistently left out of the rigid protections of antidiscrimination

[230] *See* Bagenstos, *supra* note 4, at 2848-74 (arguing that one expressive benefit of universalist approach is de-essentializing of identity and opportunity to build unexpected coalitions).

[231] President John F. Kennedy, Special Message to Congress on Protecting the Consumer Interest, *in* 1962 PUB. PAPERS 235, 235 (Mar. 15, 1962).

[232] *See* Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 8 (2009) ("The frightening aspect, however, is that what began as a subprime lending problem has spread to other, less-risky mortgages, and contributed to excess home inventories, defaults, and foreclosures that have pushed down home prices for even the most responsible borrowers and homeowners."); Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2189 (2007) ("A host of empirical studies leaves no serious doubt that predatory mortgage lending is a significant problem for American society.").

[233] *See* BROWN-NAGIN, *supra* note 141, at 434 (warning scholars against coming to any "grand, absolutist theories about courts, lawyers, and social change").

law, consumer protection is a valid and valuable alternative. And it goes further. It reflects on the words of Richard Cordray, the first director of the Consumer Financial Protection Bureau:

> The foundations of justice and equality are essential in our economic affairs if we are each to find our way toward earning the fulfillment of our goals and aspirations. . . . [I]f we are to attain a true and full understanding of civil rights in this country, it must encompass not only political and legal rights, but also economic rights. . . . So together with the related rights to obtain money, to hold money, and to deploy money on fair and equal terms, the right to credit or fair lending becomes a basic pillar of the economic rights that are intertwined with civil rights in this particular society.[234]

Consumer protection is and should be seen as a tool in the fight for civil rights.

Such an approach is not limited to factual situations identical to Julia's. Consumer protection law might be applied to unlawful pre-employment contracts.[235] It may apply to prospective students.[236] The analysis herein could be applied to situations traditionally arising under Title II,[237] which involves discrimination in public accommodations, and Title III,[238] which involves discrimination in public institutions. Federal consumer protection laws prohibit misrepresentations in lending (Truth in Lending Act[239] and Equal Credit

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[234] Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Prepared Lecture on Economic Rights as Civil Rights at Michigan State University (Oct. 10, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-director-richard-cordrays-prepared-lecture-on-economic-rights-as-civil-rights-at-michigan-state-university/ [https://perma.cc/R9FE-BVBM].

[235] *See, e.g.*, Sara Lee Corp. v. Carter, 519 S.E.2d 308, 312 (N.C. 1999) (finding sufficient facts and circumstances existed to extend UDAP protections to individuals in employer-employee relationship where it was not a general employer/employee dispute and the actions affected commerce); Gress v. Rowboat Co., 661 S.E.2d 278, 282 (N.C. Ct. App. 2008) (finding that general presumption against application of the UDTPA did not apply outside of true employer-employee relationship).

[236] *See, e.g.*, Elmendorf v. Duke Univ., No. 1:14-cv-00697, 2015 WL 4094175, at *2 (M.D.N.C. July 7, 2015) (declining to dismiss plaintiff's claim under North Carolina UDTPA based on allegations that defendant engaged in conduct, including making false statements, to induce plaintiff to enroll at Duke rather than Princeton).

[237] 42 U.S.C. § 2000a (2012) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.").

[238] *Id.* § 2000b (stating Attorney General may institute civil actions when notified by individual of "being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof").

[239] 15 U.S.C. §§ 1601-1667 (2012) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more

Opportunity Act),[240] debt collection (Fair Debt Collection Practices Act),[241] leasing (Consumer Leasing Act),[242] credit reporting (Fair Credit Reporting Act),[243] and real estate mortgage servicing (Real Estate Settlements Procedures Act).[244] There are many opportunities to consider the role that consumer protection law can play in effectuating traditional civil rights goals, especially as between economic and civil rights.

Today, consumer protections sit at a crossroads. Major legislation like the Dodd-Frank Wall Street Reform and Consumer Protection Act and significant government oversight through the Consumer Financial Protection Bureau are facing legal and political challenges.[245] This Article suggests that a deeper understanding of the historical and modern connections between civil rights and consumer protection will prove useful to the national conversation on these issues. It challenges advocates, policymakers, and scholars to consider the role of economic rights in antidiscrimination law and the role of antidiscrimination in consumer protection law.

readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.").

[240] *Id.* § 1691 ("It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age.").

[241] *Id.* § 1692 ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.").

[242] *Id.* § 1667 (providing certain requirements for disclosure regarding personal property leases).

[243] *Id.* § 1681 ("There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.").

[244] 27 U.S.C. §§ 2601-2617 (2012) ("It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—(1) in more effective advance disclosure to home buyers and sellers of settlement costs; (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services; (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and (4) in significant reform and modernization of local recordkeeping of land title information.").

[245] *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75, 100 (D.C. Cir. 2018) (reversing court's prior ruling that Consumer Financial Protection Bureau's structure was unconstitutional); Gillian B. White, *Trump Begins to Chip Away at Banking Regulations*, ATLANTIC (Feb. 3, 2017), https://www.theatlantic.com/business/archive/2017/02/trump-dodd-frank/515646/ [https://perma.cc/N8VA-HP83] (detailing President Trump's plans to scale back significant provisions of Dodd-Frank legislation and target Consumer Financial Protection Bureau).