Fall 2001

Invisible Markets Netting Visible Results: When Sub-Prime Lending Becomes Predatory

Cassandra Jones Havard
University of Baltimore School of Law, chavard@ubalt.edu

INVISIBLE MARKETS NETTING VISIBLE RESULTS: WHEN SUB-PRIME LENDING BECOMES PREDATORY

CASSANDRA JONES HAVARD*

In this article, I argue that Ellison's metaphor of social invisibility—the societal undervaluing of minorities—is analogous to economic invisibility—the denial of fair access to credit to minorities. I then use the metaphor of invisibility as a basis for understanding the contemporary legal problem of predatory lending, or making credit available to borrowers at unreasonably high interest rates. Disguised as credit access to high-risk, underserved borrowers, predatory lending helps to create risk by offering borrowers products that do not adequately measure risk and that are not fairly priced.

INTRODUCTION

I am an invisible man. . . . I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me.

. . . [For those who do see me it is] a figure in a nightmare which the sleeper tries with all his strength to destroy.[1]

Is Ralph Ellison's literary work *Invisible Man* relevant to the law? Certainly that is the underlying premise of a symposium of scholars addressing Ellison and the law. Ellison's literary perspective strikingly underscores core democratic principles of fairness and equality as he

---

* J.D., University of Pennsylvania School of Law; B.A., with highest honors, Bennett College. Associate Professor of Law, Temple University Beasley School of Law. I am indebted to the *Oklahoma City University Law Review* staff for their research assistance.

1. RALPH ELLISON, INVISIBLE MAN 3-4 (2d Vintage Int'l ed. 1995) [hereinafter INVISIBLE MAN].

examines the apparent bases for racial inequality and challenges that status quo.[2]

While Ellison would classify himself as an artist and not as a protest writer, he addresses in relevant ways issues of legal and racial subordination.[3] His writing explores the deep entrenchment of American racial prejudice and arguably the laws that ensconce it.[4] His sense that all art aspires to cultural and social integration effectively confronts the complexity of American racial dynamics. By holding up for examination what it means to be human, Ellison classifies racial bias as an exemplar of human inequity.[5] In this same regard, his literary bent is to question limitations of race on the personal condition and to argue for a more universal acceptance of justice and equality.[6]

Ellison's character's indeterminate reaction—choosing to become

---

2. Written prior to the Civil Rights movement of the 1960s, Ellison's writing is described in literary criticism as classified as part of the "Beat era," a cultural movement that began in the late 1940s and continued into the 1960s. Many artists described as Beats characterized themselves as countercultural radicals.

3. Ellison feared that his literary contributions would be marginalized if he addressed issues of race. *See* Gerald Early, *Decoding Ralph Ellison*, 44 DISSENT, at para. 6 (1997), *available at* http://www.igc.org/dissent/archive/summer97/early.html.

4. Recent critiques of Ellison's writing classify it as nontraditional in the genre of jazz music since Ellison's style was to fuse together uncommon literary themes and interpret them as art. *See generally* Jabari Asim, *State of the Art*, WASH. POST, Dec. 16, 2001, § X, at T3 (describing literary critic Irving Howe's reaction to Ellison's work and Ellison's response that among the objectives of the black author is to "to transcend his condition through art"). *See generally* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992).

5. Ellison's approach is similar to that of contemporary critical race theorists. For example, Professor Neil Gotanda has argued that the Supreme Court's "colorblind" standard promotes white supremacy rather than racial equality. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991). *See* also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (arguing that a requirement of racist intent to prove a violation of the Equal Protection Clause ignores the unconscious and cultural influence of racism on creating law and public policy).

6. In later works, however, Ellison confronted head on the issue of legal subordination of black Americans. *See generally* RALPH ELLISON, *Perspective of Literature*, *in* GOING TO THE TERRITORY 321-38 (1986) (juxtaposing Thomas Jefferson's and other founders' ownership of slaves while drafting the Declaration of Independence and concluding that ultimately the American Constitution was flawed given the founders' own conflicts regarding human equality).

invisible—by analogy focuses on the contradiction in terms that legal rules provide in addressing issues of subordination and domination. A concrete characterization of invisibility is the perception that the law is neutral and determinate. It is this underlying current in Ellison's thinking that leads me to argue that his concept of invisibility has a broader application. To become or to treat one as invisible allows individuals to avoid reconciling the impalpability of political and social issues with their concrete effects. To uncover and understand the actual, invidious experiences of the human condition compels a confrontation and an upsetting of the status quo. The novel presents a contradiction in terms. Invisible Man becomes a failed challenger of racial inequality. He hesitates to reconfigure his actions once he determines that they are ineffective. This young man's optimism becomes dashed and a social and political paralysis takes hold when he comes to a truer understanding of the nature of adverse political conditions. Ellison, by leaving his character in this powerless state at the novel's conclusion, impliedly questions American law's ability to address issues of racial inequality.[7]

The visible effects of supposed neutrality can produce indeterminate results. One such exemplar is the economic subordination that sub-prime[8] mortgage lending can create. Market incentives encourage lenders to use unfair and deceptive practices and racial discrimination when making loans to sub-prime borrowers, or those who do not qualify for credit at lower rates. When making home-equity loans based on the value of the underlying asset or collateral, some lenders have structured transactions that are deleterious to borrowers. By basing the value of the loan on the collateral and not the borrower's ability to repay, lenders have encouraged borrowers to enter into transactions that are beyond their financial means to repay. By

---

7. Saul Bellow, *"Man Underground": Review of Ralph Ellison's* Invisible Man, COMMENTARY 608-10 (June 1952), *available at* http://www.english.upenn.edu/~afilreis/50s/ellison-main.html.

8. Sub-prime lending is making credit available to borrowers with damaged credit histories. Some non-prime lending is predatory, as characterized by both the costs and the terms of the loans. Borrowers who are either financially unsophisticated or financially desperate for credit may agree to unjustified high interest rates, payments that they cannot afford, frequent refinancing arrangements, high and unfair prepayment penalties, excessively high points or origination fees, and high broker fees. Predatory lending also involves abusive lending practices in which the terms of the loan are inadequately correlated to the riskiness of the loan. *See* Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473 (2000).

entering into structured transactions with unconventional and expensive terms, borrowers unwittingly agree to negative consequences. Furthermore, when the loan is asset-based but lenders do not concomitantly lower the borrower's interest rate, lenders fail to sufficiently value the underlying collateral. The effect occurs in communities where foreclosure then becomes the norm.[9]

When lenders inappropriately measure riskiness, sub-prime lending becomes predatory. Thus, I argue that as played out in the context of asset-based lending, the invisibility of the market validates undervaluing the collateral securing the loan. By ignoring the lack of speculativeness in asset-based loans, lenders fail to reconcile the invisible causes—racial or economic discrimination—with visible effects—losing homes to foreclosure due to inappropriately priced loans. Consequently, sub-prime lenders are not called upon to balance legally permitted practices with what is fair.

The discussion that follows focuses on the market forces that create predatory lending, the lender rationales about riskiness that justify predatory lending, and the resultant market failures that I argue demonstrate that the market is not self-correcting. The effect is a disregard of the economic consequences and legal rights wrought by the market's invisible hand.

I. THE *INVISIBLE MAN*: STORY OF ECONOMIC SUBORDINATION AND SURVIVAL

> "[A]fter I'm gone I want you to keep up the good fight. I never told you, but our life is a war and I have been a traitor all my born days, a spy in the enemy's country ever since I give up my gun back in the Reconstruction. Live with your head in the lion's mouth. I want you to overcome 'em with yeses, undermine 'em with grins, agree 'em to death and destruction, let 'em swoller you till they vomit or bust wide open." . . . "Learn it to the younguns . . . ."[10]

---

9. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, MORTGAGE DELINQUENCY AND FORECLOSURE RATES: 1980 TO 1998, at 526 tbl. 823 (1999), *available at* http://www.census.gov/statab/www.

10. INVISIBLE MAN, *supra* note 1, at 16. The naiveté of Invisible Man becomes clear during the "Battle Royal" scene. Invisible Man is blind to reality, and throughout the novel he struggles to remove the blindfold.

The Invisible Man is a nameless narrator who recounts the journey of self-discovery that leads him to a stance of unquieting self-responsibility. As a high school and then a college student, Invisible Man moves from naive blindness to a perceptiveness about the hatred that he experiences as a black person in America. The story chronicles a journey in which Invisible Man's physical eyes become "inner eyes." It ends as he calls himself to task by trying to reconcile his involvement in political activities which he mistakenly viewed as personally and socially liberating.

Three events symbolize Invisible Mans's social and economic progression: a college scholarship, the eviction of an elderly couple from their home, and losing his job with the Brotherhood. These demonstrate the humiliation of economic dependence and set the stage for the narrator's arguable social survival and freedom through invisibility. Three conditions—market forces, market rationales, and market failures—are foundational for predatory lending to exist.

Credit traditionally provides a measure of economic independence because it gives the borrower immediate access to capital that she can repay over time. As an American ideal, home ownership is one pinnacle of economic status. As the home appreciates in value over time, homeowners use the accumulated equity to obtain credit. When an equity loan is made, the accumulated value of the home serves as both a limit on the amount of the loan and as collateral in case of default. Yet, when the home-equity loan is inappropriately priced, economic independence is foiled. If foreclosure occurs, the homeowner's economic status changes and is not so readily perceptible.

II. ECONOMIC INVISIBILITY: THE JUSTIFICATIONS FOR PREDATORY LENDING

A. Market and Social Forces

> *I carried a heavy stone, the weight of a mountain on my shoulders.*[11]

Invisible Man's ultimate social alienation and isolation arise because he fails to know and understand the social codes for the environments in which he finds himself. He is surrounded by contradictions regarding his

11. *Id.* at 443.

expected behavior and by deceptions by those who are allegedly his supporters.

Similarly, homeowners who apply for and are granted home-equity loans are faced with numerous economic contradictions. The deregulation of interest rates heralded the beginning of the financial modernization.[12] As a result, many financial innovations, including the sub-prime loan, were sanctioned. While the easing on interest-rate restrictions seemed cause for alarm, market proponents argued that marketplace competition provides the needed balance to enlarge the sub-prime markets.[13] Deregulation has encouraged economic invisibility—a conspicuous and conscious disregard for the effects of lending. While it has always been common practice to secure a mortgage loan with a home, it has become more common in recent years to refinance mortgage loans, using the home as collateral and using the equity proceeds for diverse purposes unrelated to the home.[14] When loans are inappropriately priced, the risk of foreclosure becomes greater. If foreclosure actually occurs, the homeowner—by losing the ownership interest—becomes economically invisible. The rationales supporting the market forces that created predatory lending are (1) that the borrower has adequate information about the credit market and (2) that she understands the terms of the loan.

1. Perfect Borrower Information

The journey of self-discovery that Invisible Man begins by entering college is somewhat similar to the one that *redlined* homeowners feel when finally offered an opportunity to receive credit based on the accumulated equity in their homes. Traditionally denied credit access because of the location of the property or their race, these homeowners feel empowered when presented with the economic opportunity that credit provides. They are often unaware that they are about to enter an arena that could lead to economic woe if there are loan terms that are predatory.

---

12. *See generally* Thomas A. Durkin, *An Economic Perspective on Interest Rate Limitations*, 9 GA. ST. U. L. REV. 821, 833 (1993).

13. Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 419-23 (1994).

14. Loans secured by the equity in property, also known as "equity-skimming" loans, present threats to home ownership.

Likewise, Invisible Man, when the story begins, is unaware of what his future portends. The bright hopes that a college education will bring are prematurely ended. Invisible Man's tale of economic contradictions begins with the receipt of a scholarship to attend college, awarded by the town's white elite. Asked to recite a masterfully presented high school graduation speech to earn the scholarship, the young student is allowed to do so only after the elite become too drunk to listen, and he and the other black boys in attendance are made to fight each other for gold coins.

Not knowing or understanding the social code of "a proper Negro" is disastrous for Invisible Man. He is expelled from college because he took a visiting white college trustee to visit the "wrong side of town." The anger and displeasure of the college president are revealed when the president verbally chastises the young student and directs him to leave the school and the South. Invisible Man, expelled from school, is sent to the North, told to work to earn money and return to school with names and letters of references from prospective employers.

Borrowing money has its unwritten economic code and is laden with assumptions. Many would justify the rise of the sub-prime industry as an appropriate development of a free economic market. In its simplest form, that theory presupposes that the market fairly allocates credit to those who are deserving of having it. This theory assumes that the borrower who receives a sub-prime mortgage is well informed and is willing to pay a higher interest rate. The underlying reason is that the borrower understands that her creditworthiness requires a costlier loan or no credit at all.

The economic assumption of perfect borrower information assumes that the borrower is fully informed and correctly perceives risk. Lenders justify their lending decisions as rational judgments that borrowers accept. Lenders posit that based on a system of perfect information loans adequately reflect risk. The presumption is that the borrower is satisfied with the transaction. The borrower's unwillingness to reject the loan demonstrates that the borrower is satisfied with the loan's costs and its terms.

These presumptions are undergirded by basic principles of contract law—that is, that borrowers have not just the same knowledge as lenders but also have equal bargaining power.[15] The loan transaction is a contract requiring certain legal formalities to be enforceable. The final agreement

15. *See* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) (upholding FTC credit practice rule because of consumers' limited ability to shop for and bargain over terms).

represents all of the terms that the parties wanted included in the contract. Furthermore, the signed agreement represents both parties' acknowledgment that the terms are mutually satisfactory. The law will accord no relief when bargains have been freely entered into, because the parties have the responsibility to read and understand the terms.

While these foundational premises of contract law are well founded, their applicability in situations in which lenders target vulnerable borrowers seems open to question. Predatory lenders specifically target as potential borrowers the elderly, the illiterate, those for whom English is a second language, and the uneducated.[16] The mandatory disclosures designed to protect consumers are ofttimes ineffective. The inherently complex nature of credit, when coupled with situations of lender discrimination in pricing, indicates that this area is one in which market corrections are ineffective.

Not only does the borrower who enters into a predatory loan usually not have adequate information regarding credit availability and other alternatives, that borrower often does not understand the transaction itself.

2. Understanding Loan Pricing

Moving to a "new" world and receiving credit as a sub-prime borrower can both prove to be dichotomous. The deeper issues that run below the surface are masked. Specifically, the perceived economic status and financial independence for Invisible Man and the sub-prime borrower may not exist.

Harlem appears to be a place of economic freedom. Unlike the legally segregated South, blacks can live and work where they choose. This economic freedom, evolved from a legal system of segregation, seems promising. Yet, Invisible Man's economic freedoms are directly undercut when he uses the president's letters of reference. He learns that he has been betrayed when the very words he hoped would further his employment opportunities only bar him. The letters contain negative comments that bar employment opportunities from the very prospective employers that Invisible Man was told to visit.[17]

---

16. *See* Diana B. Henriques & Lowell Bergman, *Mortgaged Lives: A Special Report, Profiting from Fine Print with Wall Street's Help*, N.Y. TIMES, Mar. 15, 2000, at § A1 (discussing the enforcement action taken against a California lender that imposed more onerous loan terms on borrowers from minority neighborhoods).

17. The letter reads, "To Whom It May Concern, . . . Keep This Nigger-Boy Running." INVISIBLE MAN, *supra* note 1, at 33.

In many respects, the college president, while deceiving Invisible Man, served as a screener or risk calculator for Invisible Man's prospective employers. He also devised a way to completely deter the young college student. Having sent him away to earn funds, the president's scheme was to keep Invisible Man from re-enrolling in college the following year. He knew that the young college student would rely on his guidance and recommendations and that they would not be helpful at all.

Predatory lending is not the same thing as sub-prime lending. Sub-prime lenders focus on individuals who do not qualify for loans from traditional financial institutions. Fair lenders charge these "sub-prime" individuals more, but they do not engage in a number of abusive practices that define predatory lending. Generally, fair sub-prime lenders engage in risk-based lending, making loans that are appropriately priced to compensate for the risk of lending to a credit-blemished borrower. Predatory lenders engage in asset-based lending. They charge fees and interest rates far beyond the risk incurred, and price the loan based on the assets of the borrower, which are usually tied to the borrower's equity in a home.

Many borrowers do not recognize the distinctions between risk-based lending and asset-based lending. They do not know that certain deceptive and unfair practices regarding their refinanced mortgage or home-equity loan are prohibited under federal law. These practices include steering or deliberately putting borrowers with good credit into loans with high interest rates, selling borrowers unnecessary insurance with high premiums and low pay-outs, imposing prepayment penalties that lock borrowers into high-interest rate loans (making it difficult for borrowers to refinance or get out of the loans), loan flipping or the repeated refinancing of the loan by rolling the balance of an existing loan into a new loan, and imposing balloon payments that typically set up the loan so that at the end of the loan period the borrower still owes most of the principal amount borrowed.

Similarly, many who lend to sub-prime borrowers know that they are promoting delinquent debt. While lenders may be facilitating growth in formerly disinvested communities, borrowers need to become more informed about the credit products that are offered. Many low- and moderate-income borrowers do not know that lenders now find them attractive prospects. In contrast to redlining, where borrowers were ignored, now borrowers who own homes are aggressively solicited for credit. While it has always been common practice to secure a mortgage loan with a home, it has become more common in recent years to refinance mortgage loans using the home as collateral and using the equity proceeds for diverse purposes unrelated to the home. Loans secured by the equity in property, also known as "equity-skimming" loans, present threats to home ownership. Borrowers need to become more aware that these loans threaten their financial security, and are expensive, deceptive, and priced disproportionately to the loan's value.[18]

Although many low- and moderate-income neighborhoods have been denied access to capital, homeowners have amassed some economic value through the investment in their homes. Residential property as collateral raises distinct issues. The property is both shelter (or home) and collateral. As collateral, the predictability of property values in neighborhoods, especially in declining areas, is difficult to assess. The lender who secures a loan with a home focuses on the house as liquid security in case of borrower default. While borrower and lender share a common goal, their shared interest diverges as it relates to the property's accumulated value. By creating risk through high priced loans, the lender receives overpriced payments; and should the borrower default, the lender forecloses on the property, which can then be resold with some return of its accumulated value.[19] The owner, on the other hand, loses property that she owned outright previously.

Moreover, what is lost is neighborhood equity. Unmeasurable as an

---

18. Many predatory loans are flipped excessively and are not made with regard to the borrower's ability to repay. The issue of equity-skimming and its deleterious consequences has been the subject of much congressional investigation and study. *Problems in Community Development Banking, Mortgage Lending Discrimination, Reverse Redlining, and Home Equity Lending: Hearings Before the S. Comm. on Banking, Hous., & Urban Affairs*, 103d Cong. (1993); *The Home Ownership and Equity Protection Act of 1993: S. 924 Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 103d Cong. (1993); *H.R. 3153, The Home Ownership and Equity Protection Act of 1993: Hearing Before the Subcomm. on Consumer Credit & Ins. of the House Comm. on Banking, Fin., & Urban Affairs*, 103d Cong. (1994); *Community Development Institutions: Hearings Before the House Subcomm. on Fin. Insts. Supervision, Regulation & Deposit Ins. of the Comm. on Banking, Fin., & Urban Affairs*, 103d Cong. (1993); *Equity Predators: Stripping, Flipping and Packing Their Way to Profits: Hearing Before the S. Special Comm. on Aging*, 105th Cong. (1998); MICHAEL HUDSON, PREDATORY FINANCIAL PRACTICES: HOW CAN CONSUMERS BE PROTECTED? (1998).

19. Information costs are the costs of acquiring additional information to determine whether a prospective borrower is creditworthy. *See generally* William C. Gruben et al., *Imperfect Information and the Community Reinvestment Act*, FED. RES. BANK SAN FRANCISCO ECON. REV., Summer 1990, at 27, 29 (discussing the cost of risk assessment methods).

asset, it is the community investment that occurs in neighborhoods that have a high incidence of individual home ownership. Communities are stabilized where individuals feel invested through property ownership. Community development and improvements that have taken years are squandered as the stability of neighborhoods gives way to the decline that attends foreclosure.[20] Additionally, lower property values and social conditions such as increased crime and drug problems may arise. There may also be the cyclical effect. As the costs of neighborhood decline become more difficult to assess, lenders ration credit or make less credit available, thereby forcing even more high-risk borrowers to go into sub-prime markets.[21] In fact, what seems to be readily established is that the more vulnerable the borrower, the more likely lenders are to assert that there is a legitimate business justification.

B. Lenders' Rationales for Predatory Lending: High Rate and High Risk

> *You're black and living in the South—did you forget how to lie?*[22]
>
> *I had to be strong and purposeful to get where I am. I had to wait and plan . . . .*[23]

Invisible Man's "new" world masks many issues regarding the African

---

20. One report correlates sub-prime financing with foreclosure rates in African-American neighborhoods. *See* Harold L. Bruce et al., *Subprime Foreclosures: The Smoking Gun of Predatory Lending?*, *in* HOUSING POLICY IN THE NEW MILLENNIUM CONFERENCE PROCEEDINGS 259 (Susan M. Wachter & R. Leo Penne eds., 2001) (articles presented at the 2000 conference convened by the U.S. Department of Housing and Urban Development's Offices of Policy Development and Research and Housting), *available at* http://www.huduser.org/publications/polleg/hpcproceedings.html.

21. Given the phenomenon of moral hazard, the lender makes less credit available because of an inability to distinguish between those who are creditworthy and those who are risk-adverse. *See generally* James R. Barth et al., *Moral Hazard and the Thrift Crisis: An Empirical Analysis*, 44 CONSUMER FIN. L. Q. REP., Winter 1990, at 22 (describing moral hazard as those circumstances in which the risks to the insured bank are so low that the financial institution has a greater incentive to allow the institution to become insolvent rather than maintain a positive capital status).

22. INVISIBLE MAN, *supra* note 1, at 139. This and the following quoted passage are both spoken by Bledsoe and illustrate his views on how a black person should act in order to gain power.

23. *Id.* at 143.

American's economic status and independence. Uncertain about his future, the narrator makes contacts that lead to his employment in a paint factory. The factory's production of white paint is a metaphor for whitewashing the African-American experience into the American Dream.[24] The acceptance of a blue-collar job represents a change in the narrator's economic fortunes. It is significant for two reasons. First, implicitly the narrator abandons his dream of quickly resuming his formal education. Second, the narrator becomes responsible for his own economic survival.

A strict economic analysis requires the borrower to be responsible for her own economic survival. This line of reasoning attributes the lender's decision-making to private market mechanisms, with the market correcting the information deficiencies. When the market fails to respond to inaccurate information, however, sub-prime lending becomes predatory. The mechanisms that should actually reduce the costs fail to control them even though the economic variables indicate that there are lower risks.

Lenders argue that there is a basis for pricing the sub-prime equity loan. The explanation is that the borrower's previous credit history and threat of default on the obligation justify the high interest rate. Profit maximization requires the lender to shift the risk of loss to the borrower. An underlying predicate of predatory lending is that the lender's judgment and underwriting policies are adequately based. Lenders' judgments are favored when it is assumed that the costs of lending are fairly calculated. Inherent in this notion is the presumption that the lender treats all borrowers fairly, if not necessarily equally.

In the home-equity loan context, the economic assumption of a fair lender with rational underwriting standards presumably incorporates the collateral that secures the loan. It should follow that the availability of credit and rates offered are indicative of the borrower's actual creditworthiness. The lender's stereotyping of the borrower should not contribute to the borrower's risk nor the interest rate charged. Recent evidence belies the presumptions that favor the lender. Lenders price loans in tiers—correlating the rate to the risk classification. Within this purported tier-pricing, there is reported evidence of discriminatory pricing.[25] Many recent studies on

---

24. Richard Corliss, Obituary, *Invincible Man Ralph Ellison, 1914-1994*, TIME, Apr. 25, 1994, at 90.

25. *See Justice Settles First Suit on Overages: Laso Settles with Banks On Illegal Rates*, 65 BNA BANKING REP. 667 (Oct. 23, 1995) (settlement of lawsuit alleging higher interest rates were charged to African Americans).

mortgage lending that have made comparisons across racial lines find that, by far, minorities have not fared as well in the loan application and approval process of mortgage lending. If this is so, the lender's perceived judgments about the borrower's risk do not factor into the interest rate offered.

Most borrowers who lose or are under the threat of losing their home already own their home before taking out the sub-prime loan. The tremendously inflated costs of the sub-prime loan create most of the risk of default and foreclosure.[26] However, when the loan is secured by property, there appears to be little justification for the higher interest rate. Moreover, the market has not acted as a control for the charging of virtually unlimited interest rates on non-purchase-money loans secured by a borrower's residence. Even when these rates seem to be clearly usurious, there is no market control that makes the rates for these loans less high as interest rates fall.

The reality of Harlem as an impoverished economic community for blacks comes into focus when the narrator witnesses the eviction of a elderly couple for failure to pay rent.[27] As white men scatter all of the couple's belongings randomly onto the street, they explain that the action is *legal* and beyond their control. Invisible Man intervenes, speaking eloquently, and convincing the crowd to avoid an angry confrontation. He is also successful in convincing the owner to allow the couple to reenter the premises for a final time.[28] It is at this incident that the narrator is recruited to work for the Brotherhood, an integrated organization that supposedly addresses issues of social equality.

The scene represents the dispossession of a people and foreshadows the dispossession and conflict the narrator will feel as he becomes a part of an organization that he has not fully investigated and does not fully understand. Vastly different from the formal education he had hoped for, this particular "street" event will shape the informal education that he receives in Harlem.

---

26. *See* Mansfield, *supra* note 8, at 554 (comparing the disparate delinquency and foreclosure rates between conventional lenders and sub-prime lenders).

27. Invisible Man's "Northern" experience runs the gamut from being used as a guinea pig by medical researchers to his recruitment by communists who are allegedly fighting racial inequality.

28. INVISIBLE MAN, *supra* note 1, at 281.

Lenders rely on economic and social codes that borrowers do not understand or even realize fully. The culture of lending rests on the economic assumption that the risk of the loan justifies the cost. While sub-prime loans carry a high risk of default, it is unclear whether these risks are caused by the credit condition of the borrower before the loan is made or by the loans themselves. Lenders argue that sub-prime borrowers are a risky bunch, and that this causes high delinquency and default rates and also dictates the high cost of sub-prime loans.

The predatory loan industry typically justifies the high interest rates generated by its loans in several ways. Primarily, the industry maintains that because its borrowers are typically high-credit risks, interest rates must reflect that risk.[29] This argument assumes that high-risk borrowers will not pay off the loan. The industry contends that if the rates are lowered, it will be forced out of business due to the costs of unrecovered debt.[30] Yet lenders themselves admit that their customers *do* in fact pay off their loans.

The argument that lower rates will result in a detrimental loss of profits is exceedingly tenuous when the practices and statistics of lenders who choose to make sub-prime loans but do not use foreclosure practices are examined. These lenders are able to show profitability and an ability to recoup losses in case of default.[31]

Creditors arguably adjust interest rates according to the risk that they assume by making loans. Yet when the loan is collateralized by an asset that is valued at more than the loan, the lender has elevated the borrower's risk that missed payments may lead to foreclosure. The flawed assumptions of the free-market approach justify regulatory intervention.

---

29. *See* Statement of Elena Delgado, President, Irwin Home Equity Corporation, at Public Hearing on Home Equity Lending at the Federal Reserve Bank of San Francisco 17-20 (Sept. 7, 2000), transcript *available at* http://www.federalreserve.gov/events/Public Hearings/2000907/20000907am.htm.

30. *See* Mansfield, *supra* note 8, at 539-40.

31. *See* Statement of Robert Gnaizda, Policy Director & General Counsel, The Greenlining Institute, at Public Hearing on Home Equity Lending at the Federal Reserve Bank of San Francisco 20-23 (Sept. 7, 2000), transcript *available at* http://www.federal reserve.gov/events/PublicHearings/2000907/20000907am.htm (testimony of Irwin Mortgage Company).

III. ECONOMIC VISIBILITY: ADJUSTING FOR MARKET FAILURE

I'd been so fascinated by the motion that I'd forgotten to measure what it was bringing forth.[32]

Told that he was a good "spokesman for [his] people,"[33] Invisible Man reluctantly joins the Brotherhood. Working for the Brotherhood provides Invisible Man with an informal education. Initially charmed by its lofty principles, he later realizes that working for the organization requires a surrender of his political and economic independence and underscores his own naiveté and blinded perceptions. His initial caution is confirmed when he deviates from a written speech at a rally. After addressing the crowd with an impromptu and emotional speech that departed dramatically from the scripted version that had been prepared for him, he is told explicitly by one of the organization's leaders that he was not hired to think.[34] Although the narrator does not immediately recognize his own blindness to the organization's aims and objectives, the organization's plan to silence him points out his subordination. The narrator's own personality and thoughts must be subsumed within the organization's game plan.

Predatory lending has its own designs as well. Yet, its proponents argue that excessive regulation will eliminate competition from the market.[35]

A. Statutory and Regulatory Restrictions

The Home Ownership and Equity Protection Act of 1994 (HOEPA)[36] imposes disclosure requirements and other limits on certain high-cost, home-secured loans. A loan is covered by HOEPA if (1) the Annual Percentage Rate (APR) exceeds the rate for treasury securities with a comparable maturity by more than ten percentage points, or (2) the points

---

32. INVISIBLE MAN, *supra* note 1, at 444.

33. *Id.* at 293.

34. *Id.* at 348-49.

35. *See generally* Statement of Elena Delgado, *supra* note 29; Statement by Robert Gnaizda, *supra* note 31.

36. *See generally* Home Ownership and Equity Protection Act of 1994, 15 U.S.C. §§ 1640-41 (2000) (HOEPA).

and fees paid by the consumer exceed the greater of eight percent of the loan amount or $400.[37]

HOEPA does not prohibit creditors from making any home-secured loan, nor does it limit or cap rates that creditors may charge. Instead, HOEPA layers disclosure and timing requirements onto the requirements already imposed for consumer credit transactions. Creditors offering HOEPA-covered loans must provide abbreviated disclosures to consumers three days before the loan is closed. The disclosures provide that consumers are not obligated to complete the closing. They also remind borrowers that they could lose their home if they fail to make payments, and state a few key cost disclosures, including the APR, the regular payment, and, if the loan has a variable rate, a "worst case payment" if rates increase at the maximum rate and under the quickest period under the loan agreement.

In addition, creditors making HOEPA-covered loans are prohibited from including in their loan agreements, among other provisions, (1) balloon payments in loans with maturities of less than five years, (2) payment schedules that result in negative amortization, (3) higher default interest rates, and (4) prepayment penalties in most instances. Consumers entering into a HOEPA-covered loan may rescind the transaction for up to three years after closing if creditors fail to provide the

---

37. This rate is adjusted annually based on the Consumer Price Index. HOEPA is implemented by Section 32 of the Board's Regulation Z. *See* 12 C.F.R. § 226.32 (2001). HOEPA is part of the Truth in Lending Act (TILA). *See* 15 U.S.C. § 1601-67f (2000) (requiring disclosures and establishing certain substantive requirements in connection with consumer credit transactions). HOEPA creates special protections for consumers in certain non-purchase, high-cost loans secured by their homes.

Several other federal laws protect consumers. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 41-77 (2000); § 45(a) (broadly prohibiting unfair or deceptive acts or practices in or affecting commerce); Equal Credit Opportunity Act, 15 U.S.C. § 1691-91f (2000) (prohibiting discrimination against applicants for credit on the basis of age, race, sex, marital status, or other characteristics).

Home-purchase loans are not covered by HOEPA. Although reverse mortgages are exempt from the HOEPA requirements imposed for traditional mortgages, reverse mortgages are subject to an alternative detailed disclosure scheme under HOEPA. Home-equity lines of credit (open-end credit) are also exempt from HOEPA, as congressional hearings preceding enactment did not reveal evidence of abusive practices connected with open-end home-equity lending.

The Federal Reserve Board is authorized to make some adjustments to HOEPA's high-cost triggers that could affect the scope of the Act's coverage. The Board is also directed by HOEPA to prohibit certain acts and practices in connection with mortgage loans if the Board makes the findings required by the statute, as it has done recently.

early disclosures or if they include a prohibited term in the loan agreement.

Sub-prime lenders argue that imposing additional disclosure requirements and substantive provisions on sub-prime lending will only drive up the cost of credit or eliminate it altogether.[38] Those who argue for no change in HOEPA or the existing regulatory structure contend that borrowers would have to rely more heavily on the fringe banking industry for credit.[39] This is a common argument used in protesting the changes in consumer regulatory laws.[40]

The concerns that credit restrictions will shut individuals out of the credit market seem greatly exaggerated as long as such restrictions do not make consumer lending unprofitable. An increasing number of alternative sources of credit specifically seek to offer lower rates of interest to high-risk borrowers. Credit unions have begun to focus on expanding their memberships by extending credit to low-income borrowers.[41] Through education and counseling, some credit unions manage credit extension to high-risk borrowers. Although these alternative services require specialized services to educate the borrower in management and maintenance of credit, the long-term effect of their ability to prevent borrowers from perpetual debt is positive.

---

38. *See* Mortgage Bankers Ass'n of Am., *The Non-Conforming Credit Lending Committee Working Group Summary: Subprime Lending & High Cost Mortgages: Recommended "Best Practices" & "Legislative Guidelines," at* http://www.mbaa.org/resident/lib2000/0525a.html.

39. *See* Statement of Elena Delgado, *supra* note 29.

40. In response to predatory lending allegations, the Federal Reserve Board amended Regulation Z of the TILA to broaden the scope of loans subject to the protections of HOEPA by adjusting the price triggers that determine coverage under the Act.

The rate-based trigger is lowered by two percentage points for first-lien loans, and the fee-based trigger is revised to include optional insurance premiums and similar credit protection products paid at closing. Certain acts and practices in connection with home-secured loans are prohibited. There is also a rule to restrict creditors from engaging in repeated refinancings of their own HOEPA loans over a short time period when the transactions are not in the borrower's interest. *See* 12 CFR § 226.

41. *See generally* Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465, 1520-28 (1994) (arguing that bankers' disinvestment in minority communities should lead those communities to begin formation of their own credit sources).

B. Market Segmentation

Lending has become transparent. The availability of credit is affected by scoring and the secondary market. The securitization of the sub-prime market has created more access to capital for predatory lenders.[42] The effect is to create a steady capital flow for predatory lenders.

Lenders traditionally complain about the difficulty of accessing the creditworthiness of low-income markets.[43] Although lenders argue that there is a rationale for the pricing of the sub-prime equity loan, the location of the property or the race or sex of the borrower appear to continue to be indications of a borrower's creditworthiness. Predatory lenders identify neighborhoods that have been neglected by traditional markets. Individuals selected to receive sub-prime loans using this method of marketing may include not only those with poor credit histories, but also those who may be qualified to borrow at primary market prices.[44] Although access to capital satisfies a key component to revitalizing the inner cities, there is cause for alarm when that access raises the risk of future losses in those same communities.

At the novel's end, when the narrator recognizes that the Brotherhood exists to cause a "race riot" and had used him to further that goal, he becomes disillusioned. Once the riot erupts and the narrator is unable to escape the fighting, he goes underground into a manhole. Finding that he cannot break out, the Invisible Man takes up residence, literally rewiring this hole in the ground.

While the narrator would claim that he is subordinated due to the diminishing effects wrought by racism and prejudice, ironically the retreat underground represents an emergence to self-identity. The narrator realizes that his values are in direct conflict with all of those around him. His

---

42. DEP'TS OF TREASURY AND HOUSING & URBAN DEV., CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 45 (June 2000), *available at* http://www.huduser.org/publications/pdf/treasrpt.pdf.

43. Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 244 (1996) (discussing banks' complaints about the effectiveness of grassroots organizations in getting CRA concessions at time of merger applications).

44. *See generally* CTR. FOR RESPONSIBLE LENDING, EXECUTIVE SUMMARY: THE CASE AGAINST PREDATORY LENDING, *at* http://www.responsiblelending.org/CoalitionStudies/PL%20-%20Issue%20paper%20Exec%20summary%20rev%204-5%20expand.htm.

seclusion also represents a withdrawal from society while he ponders how to modify his approach to confronting racism. His economic freedom is symbolized by his invisible status, which allows him to live rent-free and use hundreds of light bulbs at no cost.

Market segmentation is another term for lenders' ability to select borrowers based on criteria other than credit factors. Lenders often identify borrowers, especially affluent ones, to target offers of credit opportunities. Lenders assess a borrower's ability and willingness to repay debt by looking at the borrower's prior credit history. Predatory lenders look at prior credit history as well. Unfortunately for some borrowers, predatory lenders segment the market by offering certain products only to low- and moderate-income homeowners.

Recognizing that predatory lenders have market power in certain communities raises issues about the effectiveness of competition as well as the lender's underwriting decisions.[45] When lenders identify distinct geographic markets or offer customers distinct products, price differentials for the same or similar products can occur.[46] More scrutiny must be placed on how lenders measure risk and then use that assessment to segment the market. It is unclear whether the current pricing mechanisms used in the industry adequately account for the market segmentation that has developed in the sub-prime credit industry.[47]

Credit access based on excessively high interest rates actually puts marginally qualified borrowers at a greater risk of failure. When the legal system fails to respond to this type of market segmentation, it is allowing the market to legitimately treat marginally qualified borrowers in ways that undercut a fair and efficient creditworthiness evaluation. Such behavior, while ultimately evidence of a dysfunctional and irrational market, is also devoid of legal protections.

---

45. *See generally* Timothy C. Lambert, Note, *Fair Marketing: Challenging Pre-application Lending Practices*, 87 GEO. L.J. 2181, 2189-92 (1999) (discussing market segmentation in the credit card industry).

46. Markets have two dimensions—product and geography. Product markets consist of the products for sale and reasonable alternatives. Geographic markets delineate the purchaser's and seller's competitive market. Mark Sievers & Brooks Albery, *Strategic Allocation of Overhead: The Application of Traditional Predation Tests to Multiproduct Firms*, 60 ANTITRUST L.J. 757, 768 n.24 (1992).

47. *See* Cassandra Jones Havard, *Credit Democracy: What's Sub-Prime Lending Got To Do With It?*, *in* FINANCIAL MODERNIZATION AFTER GRAMM-LEACH-BLILEY ___ (Patricia A. McCoy ed., forthcoming Mar. 2002).

IV. CHALLENGING THE LENDER'S NORM

I'm an invisible man and it placed me in a hole—or showed me the hole I was in . . . .[48]

Fair and responsible sub-prime lending benefits a wide range of borrowers who might otherwise not have access to credit. Thus, borrowers whose damaged credit histories had rendered them invisible become visible to lenders. While lenders facilitate growth in formerly disinvested communities, borrowers need to become more informed about the credit products that are offered. This need for self-responsibility does not diminish the law's examination of needed reforms as well.

Three specific reforms, if instituted, can help correct the flawed assumptions. They are measuring a borrower's ability to repay, limiting loan fees, and limiting steering.

First, as I have discussed previously,[49] lenders using residential property as collateral should be required to measure the borrower's residual income as a part of the loan qualification process.[50] A residual-income requirement for asset-based lending requires underwriters to document that the borrower will have an identifiable amount of income after making the loan payment to cover other expenses, including unexpected ones.[51] If this standard becomes the norm, lenders using risk-based pricing differentials will have to reconcile their hoped-for returns with the amount of risk the borrower assumes. Reports of poor documentation by lenders regarding what factors were considered in determining ability to repay demonstrate

---

48. INVISIBLE MAN, *supra* note 1, at 572.

49. *See* Havard, *supra* note 47.

50. Residual income, which is pegged to the cost of living in a relevant geographic area, and the number of persons within a household who must rely on the income, is a fixed dollar amount. For example, the residual income requirement applies to all Veterans Administration loans. *See* Mark D. Fleischer & Amy J. Mayer, *Increasing Involvement of Regulatory Agencies and Public Officials in Consumer Issues*, 1242 PRAC. L. INST. 581, 685 (2001).

51. Debt to income ratio (DTI) reflects the percentage of a borrower's income that is devoted to paying for the loan each month. *See generally* Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 IND. L.J. 17 (1989) (discussing some of the variables that compose the debt income ratio based on filed bankruptcy cases).

rampant, unlawful asset-based lending.[52] Requiring lenders to consider the ability to repay will correct the overall failure of lenders to ignore this criterion.

Second, loan fees to mortgage brokers, including yield spread premiums, should be sharply curtailed and in some cases prohibited.[53] Currently, yield spread premium practices compensate mortgage brokers who are able to convince borrowers to accept a higher interest rate loan. Mortgage brokers, who are independent loan officers that refer borrowers to financial institutions for loans, are not subject to any federal oversight.

A yield spread premium (YSP) is a financing option that allows a borrower to finance upfront settlement costs. YSPs are payments made by a lender to a mortgage broker in return for a referral of an "above par" loan. An above par loan is a loan with a higher interest rate. A par loan is a loan with an interest rate that a borrower qualifies for without paying discount points. A "below par" loan is a lower interest rate loan that a borrower pays discount points to receive.[54]

The average borrower who seeks the assistance of a mortgage broker has the expectation that the broker will provide a loan at the lowest rate the broker can find. The YSP is a specific broker fee that pays the broker for her services in finding the loan. The average borrower is not aware that the mortgage broker receives an additional fee from the lender.[55]

The premium has been described as particularly suited to borrowers who are low on cash and whose loan-to-value ratio has already reached the maximum permitted by the lender. One research study has determined that YSPs are being used principally to allow mortgage brokers to impose higher prices on borrowers who bear the cost of these charges.[56] Some

---

52. *See* Prepared Statement of the Federal Trade Commission Before the Board of Governors of the Federal Reserve System on Predatory Lending Practices in the Home-Equity Lending Market (Sept. 7, 2000), *at* http://www.ftc.gov/os/2000/09predatorylending.htm.

53. Yield Spread Premiums were the recent subject of a policy statement. *See* Department of Housing and Urban Development Statement of Policy 2001-1, 66 Fed. Reg. 53,052 (Oct. 18, 2001).

54. *See* Senate Banking Committee Hearing on Predatory Mortgage Lending Practices: Abusive Uses of Yield Spread Premiums (Jan. 8, 2001) (testimony of Ira Rheingold), *at* http://www.banking.senate.gov/02_01hrg/010802/rheingld.htm.

55. *Id.*

56. *See* Senate Banking Committee Hearing on Predatory Mortgage Lending Practices: Abusive Uses of Yield Spread Premiums (Jan. 8, 2001) (testimony of Prof. Howell E. Jackson), *at* http://www.banking.senate.gov/02_01hrg/010802/jackson.htm.

lenders and industry researchers have described the YSP as a financing tool that encourages discrimination.[57] Arguably, yield spread premiums are against the letter and spirit of federal laws designed to prohibit kickbacks and referral fees in mortgage transactions.[58]

Third, there is "end steering" to high-rate lenders of customers with good to reasonable credit records. All lenders, whether federally regulated or not, when making a loan secured by a mortgage, should verify that the loan is priced solely according to the risk. This can be accomplished in part by requiring the use of uniform underwriting standards for loans that are priced more than two points above the prime rate and when the collateral is located in communities defined as economically distressed.[59] There is tremendous diversity among sub-prime lenders because each lender maintains its own underwriting standards. By developing its own funding matrices, each lender sets certain criteria that define a borrower as sub-prime and further grades the borrower into a sub-prime category. These funding matrices purportedly categorize borrowers based on their credit histories, property values, loan-to-value ratios, and sometimes the borrower's credit scores. The matrices then set a loan rate based on the lender's categorization of the borrower. Under current regulations, when these matrices are flawed, borrowers suffer. Instead, a focus on equity-skimming loans would highlight loans which have the characteristics of "reverse-redlining"—targeting protected classes, particularly the elderly and minority homeowners, for more expensive credit unrelated to legitimate indicia of creditworthiness.

57. *See* Senate Banking Committee Hearing on Predatory Mortgage Lending Practices: Abusive Uses of Yield Spread Premiums (Jan. 8, 2001) (testimony of David Donaldson), *at* http://www.banking.senate.gov/02_01hrg/010802/dnldson.htm; Press release, Housing and Urban Development, New Reports Document Discrimination Against Minorities by Mortgage Lending Institutions (Sept. 15, 1999), *at* http://www.hud.gov/library/bookshelf18/pressrel/pr99-191.html.

58. Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 (2000) (RESPA).

59. Measuring loss of neighborhood goodwill ought to become important in lending decisions. An evaluation of sub-prime lending decisions in terms of the disparate consequences of those decisions on elderly, minority, and low-income borrowers provides a different perspective. *See generally* Zina Gefter Greene, *Reviewing Files for Mortgage Lending Discrimination*, *in* MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 573-87 (John Goering & Ron Wienk eds., 1996).

CONCLUSION

> *I have been hurt to the point of abysmal pain, hurt to the point of invisibility. . . .*
>
> *. . . .*
>
> *. . . You won't believe in my invisibility and you'll fail to see how any principle that applies to you could apply to me.*[60]

Invisible Man's economic, mental, and social subordination to the Brotherhood's hierarchical structure ends because of his voluntary seclusion. Inevitably, he realizes that none of the situations and circumstances that he encounters—beginning with the award of a college scholarship—are what they appear to be. In each case, human frailty masks economic power. His initial choice to withdraw at the novel's conclusion allows him to hide from political and economic forces and avoid coming to terms with his purposes and how to establish his identity. And yet, Invisible Man recognizes that invisibility is not a means to an end and that ultimately he must accept social responsibility and again work to cure society's ills.[61]

Ellison hoped that his work would fundamentally change the American political discourse, if not its community.[62] He used literature to reconstruct social institutions to reveal racial hierarchies. Ellison takes exception to the guises for racial equality that neutrality and objectivity pose.[63] His work introduces the dissonance of race consciousness, thereby underscoring the true indeterminacy of law when it fails to fully reconcile the rights of the

---

60. INVISIBLE MAN, *supra* note 1, at 579-80.

61. *Id.* at 580-81.

62. *See* Barbara Foley, *Ralph Ellison as Proletarian Journalist*, SCI. & SOC'Y (Winter 1998-99), *available at* http://www.victorian.fortunecity.com/holbein/439/bf/foleyreleft2.html.

63. *Cf.* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 872 (1997) (addressing the thesis that law suffers from indeterminacy of reasons, meaning the relationship between the set of available legal reasons and the justification of legal outcomes).

subordinate group with the obligations owed by the dominant one.[64] *Invisible Man* challenges all that renders one inferior and therefore of less consequence to another.

Fairness and efficiency are diametrically opposed. While efficiency concerns may affect credit access, those concerns need not dictate economic results in an inequitable way. Credit access based on excessively high interest rates actually puts marginally qualified borrowers at a greater risk of failure. To guard against unfair, fraudulent practices in the sub-prime credit industry, existing informational deficiencies need to be corrected in the current market structure.

Scrutinizing how lenders measure risk and then use that assessment to segment the market must become a policy priority. Lenders should be able to demonstrate that they have properly calculated the costs through underwriting that justify higher rates. Borrowers, too, need to be well-informed about the nature of the lending operation. Financial literacy requires that borrowers fully understand the agreements they sign.

Ellison's novel dissented from the dominant mores of the day. He deconstructed popular culture about the inferiority of African Americans and launched a debate about racial affirmation and identity. He refused to be bound to the characterization, tone, or accepted mores of what a "Negro" story should or should not be, or more importantly, how or what an author who happened to be black should write about.

Even still, Ellison challenges notions of racial inequity within and outside of the African-American community. His writing suggests that race is a social construct and thereby challenges the inherent biases that first must be excised before they are addressed. The presumption is that socially

---

64. As one legal scholar characterized the effects of inferiority:

> [T]he precept of inferiority did not define any specific right or obligation. Instead, "inferiority" spoke to the state of the mind and the logic of the heart. It posed as an article of faith that African Americans were not quite altogether human. What's more, "inferiority" did not owe its existence to the legal process. Although the law came to enforce the precept, it did not create it. From the time the Africans first disembarked here in America, the colonists were prepared to regard them as inferior. When the Thirteenth Amendment abolished slavery and, presumably, all its attendant conditions, it did not eliminate the precept of inferiority. Even much later, when the law abolished state-enforced racial segregation, it still did not eliminate the precept.

A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 9 (1996) (footnote omitted).

constructed principles cannot be race-neutral given a history of legally-mandated segregation.

Similarly, the economic forces that have combined to deny credit to underserved markets now identify those same communities as creditworthy. Nevertheless, denying prime credit to qualified borrowers and granting sub-prime credit to marginally qualified borrowers are on the same continuum: Neither adequately measures risk.