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## A Cashless Economy: How to Protect the Low-Income

Samuel Erlanger  
*Cardozo Law Review*

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CARDOZO LAW REVIEW  
*de•novo*

A CASHLESS ECONOMY: HOW TO PROTECT THE  
LOW-INCOME

*Samuel Erlanger*<sup>†</sup>

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## INTRODUCTION

Envision a low-income neighborhood outside a large metropolitan area. Most of the community pinches pennies just to live under a roof and feed their families. Families keep their savings as cash hidden away somewhere in their houses because outdated, illegal bank redlining still lingers.<sup>1</sup> As a result, an insufficient number of banks and automated teller machines (ATM) are within walking distance. Cars are expensive to maintain, and it is nearly impossible to afford to park downtown in the city where most of the community works.

From this community, a Black middle-aged man commutes to work by train in midday because he works late hours in the middle of the night as the maintenance and cleaning crew for one of the hundreds of city skyscrapers. It is four o'clock in the morning, and his shift just ended. The man is hungry and walks into a nearby bodega to buy food. He places the food near the cashier, who rings up the total to eight dollars. As the man pulls out a ten-dollar bill from his wallet, the cashier quickly puts his hand out to stop the man and informs him that the bodega recently became cashless and only accepts debit and credit cards since it was robbed a few weeks prior.<sup>2</sup> The man claims that he does not have a card

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<sup>1</sup> See Aaron Glantz & Emmanuel Martinez, *Modern-Day Redlining: How Banks Block People of Color from Homeownership*, CHI. TRIB. (Feb. 17, 2018, 2:30 PM), <https://www.chicagotribune.com/business/ct-biz-modern-day-redlining-20180215-story.html> [https://perma.cc/6BP3-ACGJ].

<sup>2</sup> See Paul Davidson, *More Retailers Go Cashless to Cut Costs, Theft as Holiday Shopping Ramps Up*, USA TODAY (Nov. 28, 2018, 6:01 AM), <https://www.usatoday.com/story/money/2018/11/28/holiday-shopping-more-retailers-just-saying-no-cash/2063747002> [https://perma.cc/9FRE-U4XM].

and can only pay in cash. The cashier apologizes that he cannot sell the man the food and rejects the cash.

The man walks out of the bodega and sees a cheap diner across the street. He decides he will treat himself to a freshly cooked meal and enters the diner. Unbeknownst to him, the diner is also cashless. The cost of maintaining the right amount of cash and dealing with employee theft forced the diner to switch to cashless. After the man finishes his meal, the waiter leaves the check on the table. The man places down the same ten-dollar bill that was rejected at the bodega across the street. The waiter stops by the table to pick up the payment and notices the money. The waiter kindly notifies the man about the diner's cashless policy, and the aggravated man asserts that he only has cash. The man already ate his food and the diner only accepts cards—what happens next?

This scenario will be a growing trend as more businesses reject cash and become entirely cashless.<sup>3</sup> Businesses are finding cashless operations ever more attractive as the practice thwarts robberies and maintains efficiency.<sup>4</sup> Many low-income households mostly use cash to purchase goods and services, and typically only have a savings account from a bank.<sup>5</sup> Cashless businesses harm these types of low-income families, which tend to be minorities.<sup>6</sup> Currently, mostly luxury businesses are cashless, but there is a push by many to remove or limit cash from their business operations.<sup>7</sup> Low-income households, especially minorities, will find it increasingly difficult to purchase necessities with cash and may be unfairly precluded from participating in fundamental economic activity.

Unfortunately, there are almost no legal avenues by which to address cash discrimination.<sup>8</sup> A plaintiff can claim an Equal Protection violation, but this cannot constitutionally reach private businesses.<sup>9</sup> A plaintiff can demonstrate the difficulty of obtaining a checking accounts from banks or the inefficiency of buying prepaid cards at retail stores, but this is unlikely to persuade a court to enjoin cashless businesses from refusing

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<sup>3</sup> See *The War on Cash: More Businesses Go Cashless, but Is It Legal?*, MOTLEY FOOL (Feb. 6, 2019, 12:12 PM) [hereinafter *The War on Cash*], <https://www.fool.com/investing/2019/02/06/the-war-on-cash-more-businesses-go-cashless-but-is.aspx> [<https://perma.cc/SB7H-GXB9>].

<sup>4</sup> See Jay Zagorsky, *Do Businesses Have to Accept Cash?*, JAY ZAGORSKY'S RES. & BLOG (Aug. 5, 2016, 4:14 PM), <https://u.osu.edu/zagorsky.1/2016/08/05/do-businesses-have-to-accept-cash> [<https://perma.cc/4YS4-UU34>].

<sup>5</sup> See GERALD APAAM ET AL., FED. DEPOSIT INS. CORP., FDIC-038-2018, 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS: EXECUTIVE SUMMARY 9 (2018), <https://www.fdic.gov/householdsurvey/2017/2017execsumm.pdf> [<https://perma.cc/7YMX-HNMK>].

<sup>6</sup> See *id.* at 2.

<sup>7</sup> See *The War on Cash*, *supra* note 3.

<sup>8</sup> See discussion *infra* Part II.

<sup>9</sup> See discussion *infra* Section II.A.

cash.<sup>10</sup> A plaintiff can argue that legal tender<sup>11</sup> must be accepted at sit-down restaurants under contract law, but the vagueness of the relevant precedents would not provide a clear path to outright success.<sup>12</sup> This is a problem in need of a solution but it will not come from litigation. Instead, it must come from the legislature.

This Note proceeds in three parts. Part I illustrates the background of the U.S. dollar and its status as legal tender, the relationship between the low-income and banks, and the advancement of cashless businesses and the relevant applicable law in the United States and in other countries. Part II addresses why there is no cognizable claim for a plaintiff to stop cashless businesses. Part II highlights that, although minorities and minors are disparately harmed by cashless systems, asking a court for an injunction on Equal Protection grounds would likely fail. Furthermore, Part II explores why a legal-tender claim against a sit-down restaurant will not persuade a court. Part III reviews Congress's Commerce Clause power and proposes the need for legislation grounded in that power to enact a cash discrimination statute to protect groups such as the low-income and minorities. Part III also encourages state and local governments to adopt similar cash policies in addition to a federal statute. Lastly, the proposal offers a middle-ground solution to encourage cashless business growth while providing payment options for low-income customers.

## I. CASH AND THE DIGITAL WORLD

### A. *Legal Tender and Its Decline*

#### 1. What is "Legal Tender?"

Both the Federal Reserve and the Department of the Treasury consider coins and bills to be legal tender for all debts.<sup>13</sup> Every note's

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<sup>10</sup> See discussion *infra* Section II.A.

<sup>11</sup> Legal tender is "[t]he money (bills and coins) approved in a country for the payment of debts, the purchase of goods, and other exchanges for value." *Legal Tender*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>12</sup> See discussion *infra* Section II.B.

<sup>13</sup> 31 U.S.C. § 5103 (2018) ("United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues."); 31 C.F.R. § 100.3 (2019) ("The official agencies of the Department of the Treasury will continue to exchange lawfully held coins and currencies of the United States, dollar for dollar, for other coins and currencies which may be lawfully acquired and are legal tender for public and private debts."); *cf. Legal Tender*, BLACK'S LAW DICTIONARY, *supra* note 11.

front side displays in print that the note is legal tender for all public and private debts.<sup>14</sup> This means that government services and private businesses must accept the banknotes for payment of debt.<sup>15</sup> Although it is the popular belief that merchants are required to accept cash,<sup>16</sup> private businesses are not, in fact, mandated by federal statute to accept any type of currency for their goods or services.<sup>17</sup>

One way to understand legal tender is through example. In a first example, a driver pulls up to a gas station and pumps twenty dollars' worth of gas into his car. When he offers to pay in cash, the attendant must accept it because the driver owes twenty dollars for the gas.<sup>18</sup> Now, to repeat the scenario, the driver pulls up to the gas station, but this time the attendant says it costs twenty dollars to pump the gas. In this version, the gas station can choose to reject cash and turn away business because the driver is not yet indebted to the gas station.<sup>19</sup>

Additionally, the gas station attendant may stipulate which note denominations (i.e., different bill types) he will accept, as long as the driver has not already pumped gas.<sup>20</sup> For example, many gas stations late at night refuse large denominations, such as \$50 and \$100 bills, to prevent robberies.<sup>21</sup> This style of deterrence is legal as long as the driver is not indebted to the gas station; the gas station can choose any means of payment, including the denominations of bills.<sup>22</sup> Accordingly, the driver could not sue the gas station, nor could any plaintiff sue any business, for

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<sup>14</sup> *The Seven Denominations*, U.S. CURRENCY EDUC. PROGRAM, <https://www.uscurrency.gov/denominations> [<https://perma.cc/CG4M-HJY3>] (“This note is legal tender for all debts, public and private.”). This also applies to coins even though no notice is imprinted on them. See 31 U.S.C. § 5103.

<sup>15</sup> *Legal Tender*, BLACK’S LAW DICTIONARY, *supra* note 11.

<sup>16</sup> See Zagorsky, *supra* note 4; see also BILL MAURER, HOW WOULD YOU LIKE TO PAY? HOW TECHNOLOGY IS CHANGING THE FUTURE OF MONEY 28 (2015); *Legal Tender Status*, U.S. DEP’T OF THE TREASURY, <https://www.treasury.gov/resource-center/faqs/Currency/Pages/legal-tender.aspx> [<https://perma.cc/2R4J-FZML>] (last updated Jan. 4, 2011, 4:47 PM).

<sup>17</sup> *Is It Legal for a Business in the United States to Refuse Cash as a Form of Payment?*, BOARD OF GOVERNORS OF THE FED. RES. SYS. [hereinafter *Is It Legal to Refuse Cash?*], [https://www.federalreserve.gov/faqs/currency\\_12772.htm](https://www.federalreserve.gov/faqs/currency_12772.htm) [<https://perma.cc/4Z8G-YHFT>] (last updated June 17, 2011) (“There is . . . no Federal statute mandating that a private business, a person, or an organization must accept currency or coins as payment for goods or services.”).

<sup>18</sup> See Zagorsky, *supra* note 4.

<sup>19</sup> See *id.*

<sup>20</sup> See *Legal Tender Status*, *supra* note 16 (“[M]ovie theaters, convenience stores and gas stations may refuse to accept large denomination currency (usually notes above \$20) as a matter of policy.”). For the list of legal tender Federal Reserve notes, see 12 U.S.C. § 418 (2018) and *Federal Reserve Note*, BLACK’S LAW DICTIONARY, *supra* note 11 (“The Federal Reserve Banks issue the [Federal Reserve] notes in denominations of \$1, \$2, \$5, \$10, \$20, \$50, and \$100. Until 1945, the United States Mint also printed \$500, \$1000, \$5000, and \$10,000 bills.”).

<sup>21</sup> See *Legal Tender Status*, *supra* note 16.

<sup>22</sup> See Zagorsky, *supra* note 4.

turning away legal tender as long as the plaintiff is not indebted to the business.

## 2. What Backs Legal Tender?

The United States dollar has a long and complex history, but the modern dollar found its beginning in 1913.<sup>23</sup> After several economic panics,<sup>24</sup> especially the Panic of 1907, citizens believed banking reform was needed to better adapt to a fluctuating economy.<sup>25</sup> President Woodrow Wilson signed the Federal Reserve Act of 1913, which created the Federal Reserve System and gave it the authority to issue Federal Reserve Notes.<sup>26</sup> Congress required all nationally chartered banks to purchase non-transferrable stock in their regional Federal Reserve banks and set aside reserves to become members of the Federal Reserve System.<sup>27</sup> From 1913 through today, banknotes have been backed by the Federal Reserve's assets.<sup>28</sup> The Federal Open Market Committee, created in 1933, practices debt monetization when it purchases its assets, which are generally Treasury securities.<sup>29</sup>

For a time, there were two types of dollar bills in circulation: the United States Note and the Federal Reserve Note, which coexisted and

<sup>23</sup> For purposes of this Note, the history of the U.S. dollar from before 1913 has been omitted.

<sup>24</sup> “A condition of widespread apprehension in relation to financial and commercial matters, arising in a time of monetary difficulty or crisis, and leading to hasty and violent measures to secure immunity from possible loss, the tendency of which is to cause financial disaster.” *Panic*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>25</sup> See B. MARK SMITH, A HISTORY OF THE GLOBAL STOCK MARKET: FROM ANCIENT ROME TO SILICON VALLEY 99–100 (2004); *The Senate Passes the Federal Reserve Act*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Senate\\_Passes\\_the\\_Federal\\_Reserve\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Senate_Passes_the_Federal_Reserve_Act.htm) [<https://perma.cc/C8U5-UEQX>] (“The need for a central bank became painfully evident during the financial panic of 1907, when the stock market collapsed, banks failed, and credit evaporated.”).

<sup>26</sup> See Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. § 226 (2018)); *The History of American Currency*, U.S. CURRENCY EDUC. PROGRAM, <https://www.uscurrency.gov/history> [<https://perma.cc/F2MA-MZ99>].

<sup>27</sup> *The Structure and Functions of the Federal Reserve System*, FED. RES. EDUC., <https://www.federalreserveeducation.org/about-the-fed/structure-and-functions> [<https://perma.cc/L7UN-A3MU>] (“All member banks hold stock in Reserve Banks and receive dividends. Unlike stockholders in a public company, banks cannot sell or trade their Fed stock.”).

<sup>28</sup> See 12 U.S.C. § 412 (2018); *Wilson Signs the Currency Bill, Promises Friendly Aid to Business*, N.Y. TIMES, Dec. 24, 1913, at 1.

<sup>29</sup> See *The Structure and Functions of the Federal Reserve System*, *supra* note 27; Kimberly Amadeo, *How the Fed Monetizes the U.S. Debt*, BALANCE, <https://www.thebalance.com/how-is-the-fed-monetizing-debt-3306126> [<https://perma.cc/L9QN-U238>] (last updated Jan. 6, 2019); *Federal Open Market Committee*, FRASER, <https://fraser.stlouisfed.org/theme/18> [<https://perma.cc/F25X-52GM>].

maintained the same value, yet were different.<sup>30</sup> The United States Note was a bill of credit that the Treasury would directly circulate, interest-free, but the government could never guarantee gold to individuals who redeemed the notes, even if the Treasury was authorized to do so.<sup>31</sup> The Federal Reserve Note is a bill of debit that chartered banks purchase from the Federal Reserve, dollar for dollar. The Federal Reserve holds assets equal in value to the notes it purchases from the Bureau of Engraving and Printing.<sup>32</sup> As of 1933, the notes cannot be exchanged for the collateral held against them and are never redeemable for any precious metal.<sup>33</sup>

Inevitably, the United States Note found its end. In 1933, Congress banned all private ownership of gold except for jewelry, coins, and some minor items, but notes could be exchanged for silver.<sup>34</sup> By 1968, the United States' changed to a fiat currency—paper currency not backed by metals<sup>35</sup>—thus removing the option to exchange notes for silver.<sup>36</sup> With little to differentiate between both notes, the United States Note ceased circulation by January 1971.<sup>37</sup>

Later in 1971, the dollar battled devaluation by foreign price-gougers.<sup>38</sup> Between the end of the Great Depression and 1966, the dollar fared well. The 1944 Bretton Woods System created an international monetary system that allowed foreign countries to maintain their international accounts in dollars, which could be converted into gold at a fixed exchange rate made redeemable by the United States government.<sup>39</sup> The United States briefly benefitted from the system, especially after World War II, when the United States dollar was the anchor to gold

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<sup>30</sup> See *Legal Tender Status*, *supra* note 16.

<sup>31</sup> See *id.*

<sup>32</sup> These assets provide government backing of the note.

<sup>33</sup> See Emergency Banking Relief Act, Pub. L. No. 73-1, ch. 1, 48 Stat. 1; *Legal Tender Status*, *supra* note 16 (“United States Notes were redeemable in gold until 1933, when the United States abandoned the gold standard.”); Stephen Greene, *Emergency Banking Act of 1933*, FED. RES. HIST., [https://www.federalreservehistory.org/essays/emergency\\_banking\\_act\\_of\\_1933](https://www.federalreservehistory.org/essays/emergency_banking_act_of_1933) [https://perma.cc/A5B7-N8R9] (last updated Nov. 22, 2013).

<sup>34</sup> See *Hoarding of Gold*, N.Y. TIMES, Apr. 6, 1933, at 16.

<sup>35</sup> *Fiat Money*, BLACK’S LAW DICTIONARY, *supra* note 11 (“Paper money that, in contrast to hard currency, is not backed by reserves [of gold and silver] but instead derives its value from government regulation or law declaring it legal tender.”).

<sup>36</sup> See Coinage Act of 1965, Pub. L. 89-81, 79 Stat. 254.

<sup>37</sup> *Legal Tender Status*, *supra* note 16 (“Since [1933], both currencies have served essentially the same purpose, and have had the same value. Because United States Notes serve no function that is not already adequately served by Federal Reserve Notes, their issuance was discontinued, and none have been placed in to circulation since January 21, 1971.”); see *The History of American Currency*, *supra* note 26.

<sup>38</sup> See DAVID FRUM, *HOW WE GOT HERE: THE 70’S*, 295–98 (2000).

<sup>39</sup> See Sandra Kollen Ghizoni, *Creation of the Bretton Woods System*, FED. RES. HIST., [https://www.federalreservehistory.org/essays/bretton\\_woods\\_created](https://www.federalreservehistory.org/essays/bretton_woods_created) [https://perma.cc/369K-8UCX] (last updated Nov. 22, 2013).



convertibility; nevertheless, as Germany and Japan recovered from the war, the nation's debt grew from the Vietnam War, and other national and global events occurred, the United States' gold reserve fell.<sup>40</sup> By 1971, nations began to redeem their notes for gold and back out of the system.<sup>41</sup> President Nixon issued Executive Order 11615<sup>42</sup> to dissolve the Bretton Woods System, freeze wages and prices for ninety days, and levy a ten percent surcharge on imports.<sup>43</sup> This is widely known as the "Nixon Shock."<sup>44</sup> Since then, no metal or commodity—besides assets held as collateral, which maintain the note as legal tender and provide public reliance on the dollar—has backed the dollar.<sup>45</sup>

### 3. Cashless Business Growth

Advancement in payment technology, mostly due to the payment system and card reader Square,<sup>46</sup> has encouraged small and large American businesses to move towards cashless point-of-sale (POS) systems.<sup>47</sup> Many businesses conclude cash hurts their operations and are

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<sup>40</sup> See *id.*; see also William Glenn Gray, *Floating the System: Germany, the United States, and the Breakdown of Bretton Woods, 1969–1973*, 31 *DIPLOMATIC HIST.* 295, 298 (2007); Robert L. Hetzel, *Launch of the Bretton Woods System*, *FED. RES. HIST.*, [https://www.federalreservehistory.org/essays/bretton\\_woods\\_launched](https://www.federalreservehistory.org/essays/bretton_woods_launched) [<https://perma.cc/KJ36-5F4C>] (last updated Nov. 22, 2013) ("Although the United States continued to run current-account surpluses, heavy investments by residents of the United States in Europe produced an overall deficit in the balance of payments and gold outflows intensified. The intention had been for the system to mimic the working of the gold standard: With member countries pegging their currencies to the dollar and the United States pegging the value of the dollar to gold at \$35 per ounce, gold outflows from the US would require contractionary monetary policy.").

<sup>41</sup> See Gray, *supra* note 40, at 315–16.

<sup>42</sup> Exec. Order No. 11615, 36 *Fed. Reg.* 15727 (Aug. 17, 1971).

<sup>43</sup> See *id.*; see also Michael Bryan, *The Great Inflation*, *FED. RES. HIST.*, [https://www.federalreservehistory.org/essays/great\\_inflation](https://www.federalreservehistory.org/essays/great_inflation) [<https://perma.cc/2K9K-XE8L>] (last updated Nov. 22, 2013).

<sup>44</sup> Gray, *supra* note 40, at 312 ("During a weekend retreat with his economic advisers at Camp David, Nixon approved a drastic shift in America's monetary relations with the world. The 'gold window' was closed: henceforth the dollar was no longer freely convertible at \$35 per ounce. More brazenly, the United States imposed a border tax of 10 percent on all imports—a primitive lever to force Europe and Japan to make trade concessions and to revalue their currencies vis-à-vis the dollar. Though sudden and brutal, the 'Nixon shock' of 15 August 1971 was in keeping with the administration's previous behavior.").

<sup>45</sup> See Bryan, *supra* note 43; see also *supra* text accompanying note 28.

<sup>46</sup> Square is a company that provides chip, magstripe, and near-field communication (NFC) payments from cards and phones. Square's first product was a card reader that connects to a phone's audio jack. This allowed small business owners to use their own phones and tablets to accept cashless payments without purchasing expensive card-reading terminals and equipment. See *About Square*, SQUARE, <https://squareup.com> [<https://perma.cc/W8QG-VLWQ>].

<sup>47</sup> See MAURER, *supra* note 16, at 17–18; see also Jonathan Kauffman, *Bay Area Restaurants Go Cashless, But What About the Consequences?*, *S.F. CHRON.* (Aug. 16, 2018), <https://>

willing to pay the small fees to only take plastics. It takes time and money to maintain an adequate number of each denomination and to travel to the bank to deposit the revenue.<sup>48</sup> Furthermore, employee theft costs businesses up to \$200 billion each year, worrying small businesses that accept cash.<sup>49</sup>

Large companies, such as Starbucks and Amazon, have noticed the drawbacks to cash and have tested cashless stores.<sup>50</sup> According to Professor Jonathan Zhang at the University of Washington's Foster School of Business, customers in the location of Starbucks' cashless test location mostly use plastic or mobile payment, so Starbucks only loses approximately five percent, at most.<sup>51</sup> However, shaving seconds per order over a year can be more beneficial than the loss of cash buyers.<sup>52</sup>

While Starbucks is considered a luxury rather than a necessity, Amazon's acquisition of Whole Foods Market and creation of Amazon Go plans to disrupt the traditional supermarket worldwide.<sup>53</sup> Amazon Go is a new grocery market concept that allows customers to pull items off the shelves, walk out of the store, and have their debit or credit cards charged without any interaction with a cashier.<sup>54</sup> It is essentially a cashierless, checkout line-free store.<sup>55</sup> This is accomplished through Amazon's mobile application and radio-frequency identification (RFID) technology.<sup>56</sup> Supermarkets nationwide plan to imitate Amazon Go's

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[www.sfchronicle.com/restaurants/article/Bay-Area-restaurants-go-cashless-but-what-about-13161301.php](http://www.sfchronicle.com/restaurants/article/Bay-Area-restaurants-go-cashless-but-what-about-13161301.php) [https://perma.cc/ZQ8T-MPQQ].

<sup>48</sup> See MAURER, *supra* note 16, at 22.

<sup>49</sup> See Barry Moltz, *7 Sneaky Ways Employees Steal and How to Prevent It*, AM. EXPRESS (Nov. 12, 2013), <https://www.americanexpress.com/us/small-business/openforum/articles/7-sneaky-ways-employees-steal-and-how-to-prevent-it> [https://perma.cc/L7WW-U4EE].

<sup>50</sup> See Rami Grunbaum, *Starbucks Tests No-Cash Policy at Downtown Seattle Store*, SEATTLE TIMES (Jan. 17, 2018, 1:16 PM), <https://www.seattletimes.com/business/starbucks/starbucks-tests-no-cash-policy-at-downtown-seattle-store> [https://perma.cc/T8TS-P7VD]; see also Meghann Farnsworth, *Photos: Here's What the New Amazon Go Cashierless Convenience Store Looks Like*, RECODE (Jan. 21, 2018, 10:02 AM), <https://www.recode.net/2018/1/21/16913984/what-does-photos-amazon-jeff-bezos-seattle-new-no-cashier-line-grocery-story-amazon-go> [https://perma.cc/RX4S-9HH9].

<sup>51</sup> See Grunbaum, *supra* note 50.

<sup>52</sup> See *id.*

<sup>53</sup> See Paul R. La Monica & Chris Isidore, *Amazon is Buying Whole Foods for \$13.7 Billion*, CNN (June 16, 2017, 3:47 PM), <https://money.cnn.com/2017/06/16/investing/amazon-buying-whole-foods/index.html> [https://perma.cc/4D8L-KJLQ]; Maddie Tillman, *What is Amazon Go, Where is it, and How Does it Work?*, POCKET-LINT (Feb. 18, 2019), <https://www.pocket-lint.com/phones/news/amazon/139650-what-is-amazon-go-where-is-it-and-how-does-it-work> [https://perma.cc/W2YB-26WG].

<sup>54</sup> See Farnsworth, *supra* note 50.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; Tillman, *supra* note 53.

business model to cut costs.<sup>57</sup> For example, Microsoft is developing a system similar to Amazon's and plans to sell its product to supermarkets, while Walmart tested a checkout-free "Scan & Go" service.<sup>58</sup>

Cutting costs will drive other large and regional markets to follow suit. As markets adopt cashierless technology, it will be increasingly difficult, or even impossible, to pay with cash and food stamps.<sup>59</sup> This will bar individuals and households who strictly use cash and food stamps to purchase necessities, such as groceries and household items, from supporting their families.

## B. *Obstacles for the Public in the Cashless Economy*

### 1. Unbanked and Underbanked

As of mid-2018, approximately 7.5% of the United States' population—around 24.5 million people<sup>60</sup>—remains unbanked.<sup>61</sup> An individual or family is deemed unbanked when they do not have a checking or savings account with a bank.<sup>62</sup> The unbanked tend to include minority races and other classes like the less-educated, the youth, the indigent,<sup>63</sup> and the foreign-born.<sup>64</sup> According to the Federal Deposit Insurance Corporation's (FDIC) latest survey in 2017, Black people are nearly six times more likely to be unbanked than Caucasian people, while

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<sup>57</sup> See Elizabeth Weise, *No More Grocery Checkout Lines: Microsoft May Rival Amazon with Tech that Cuts Out the Cashier*, USA TODAY (June 14, 2018, 2:28 PM), <https://www.usatoday.com/story/tech/2018/06/14/microsoft-may-rival-amazon-grocery-store-technology-cuts-checkout-line/701723002> [<https://perma.cc/D5EE-HWTU>].

<sup>58</sup> *Id.*

<sup>59</sup> See Leanna Garfield, *Amazon is Missing Out on a Multimillion-Dollar Opportunity with Its New Grocery Store of the Future*, BUS. INSIDER (Feb. 11, 2018, 11:00 AM), <https://www.businessinsider.com/amazon-go-grocery-store-food-stamps-seattle-2018-2> [<https://perma.cc/93G8-AWTA>].

<sup>60</sup> *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock> [<https://perma.cc/HL6Z-GECU>].

<sup>61</sup> See Henry Grabar, *No Shirt, No Swipe, No Service*, SLATE (July 24, 2018, 5:24 PM), <https://slate.com/business/2018/07/cashless-stores-and-restaurants-are-on-the-rise-to-the-delight-of-credit-card-companies.html> [<https://perma.cc/G5KJ-B2TL>].

<sup>62</sup> *Unbanked*, BLACK'S LAW DICTIONARY, *supra* note 11 ("Lacking a formal relationship with a bank or other financial institution."); *see also* APAAM ET AL., *supra* note 5, at 1.

<sup>63</sup> *See generally Indigency*, BLACK'S LAW DICTIONARY, *supra* note 11 ("The quality, state, or condition of a person who lacks the means of subsistence; extreme hardship or neediness; poverty."); *Indigent*, BLACK'S LAW DICTIONARY, *supra* note 11 ("A poor person.").

<sup>64</sup> See Christopher Berry, *To Bank or Not to Bank? A Survey of Low-Income Households 20* (Harvard Univ. Joint Ctr. for Hous. Studies Working Paper Series, Paper No. BABC 04-3, 2004), [http://www.jchs.harvard.edu/sites/default/files/babc\\_04-3.pdf](http://www.jchs.harvard.edu/sites/default/files/babc_04-3.pdf) [<https://perma.cc/6ESG-8JQ9>]; *see also* APAAM ET AL., *supra* note 5, at 2.

Hispanic people are nearly five times more likely to be unbanked than Caucasian people.<sup>65</sup> The survey shows nearly 17% of Black households and 14% of Hispanic households are unbanked.<sup>66</sup> Low levels of income and education are common themes of the unbanked: two years prior, the 2015 survey showed nearly 37.5% earned \$30,000 or less, and about 33% did not have any college education.<sup>67</sup>

Even with an increase of brick-and-mortar banks in low-income communities, many individuals still do not use banks due to the fees and minimum balances required to maintain an account.<sup>68</sup> However, many communities still lack sufficient access to financial services provided by banks, so most of their members tend to manage their finances through check-cashing services and microloans.<sup>69</sup> This hardship is known as underbanking. As of 2017, underbanked households represent nearly 19% of the nation's population, which includes a higher proportion of Black and Hispanic households than does the unbanked population.<sup>70</sup> Even though the underbanked have accounts at banks, nearly 70% use these accounts to electronically pay bills, and 52% use them to write personal checks.<sup>71</sup>

Ultimately, the unbanked use cash and the underbanked rely on cash or debit cards to make most of their purchases.<sup>72</sup>

## 2. Know Your Customer

In 2002, the United States began to require all banks to acquire and confirm the identity of each client under a Customer Identification

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<sup>65</sup> See APAAM ET AL., *supra* note 5, at 3.

<sup>66</sup> See *id.*; Sidney Fussell, *Who Wins When Cash Is No Longer King?*, ATLANTIC (Dec. 21, 2018), <https://www.theatlantic.com/technology/archive/2018/12/cashless-amazon-walmart-workers/578377> [<https://perma.cc/7RX2-JAPD>] (“Seventeen percent of all black households and 14 percent of all Hispanic households had no bank account in 2017 . . .”).

<sup>67</sup> See SUSAN BURHOUSE ET AL., FED. DEPOSIT INS. CORP., FDIC-037-2016, 2015 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 15 (2016), <https://www.fdic.gov/householdsurvey/2015/2015report.pdf> [<https://perma.cc/9ADW-H54U>].

<sup>68</sup> To prevent banks fleeing from low-income neighborhoods, also known as “redlining,” the Community Reinvestment Act (CRA) was enacted in 1977. See MEHRSA BARADARAN, *HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY* 154 (2015); Kori Hale, *How J.P.Morgan Plans to Beat Bank of America in Low-Income Area*, FORBES (Mar. 19, 2019, 8:23 AM), <https://www.forbes.com/sites/korihale/2019/03/19/how-j-p-morgan-plans-to-beat-bank-of-america-in-low-income-areas> [<https://perma.cc/Y296-YXGM>] (explaining that Chase bank will open new branches in low-income areas to not only comply with the CRA, but to also battle with competitors).

<sup>69</sup> See APAAM ET AL., *supra* note 5, at 1; see also Kauffman, *supra* note 47.

<sup>70</sup> See APAAM ET AL., *supra* note 5, at 2.

<sup>71</sup> See *id.* at 12.

<sup>72</sup> See *id.*

Program.<sup>73</sup> The initiative, commonly known as Know Your Customer (KYC), was enacted under the 2001 USA PATRIOT Act to strengthen security after the terrorist attacks on September 11, 2001.<sup>74</sup> Along with the Bank Secrecy Act of 1970, KYC regulations, which require banks to collect information about its customers, were put into place to detect money laundering attempts, to prevent terrorist organizations from receiving laundered money, and to thwart fictitious bank accounts.<sup>75</sup> Banks may ask their potential customers as many personal questions as they wish, but most banks require their customers to disclose their Social Security numbers, dates of birth, phone numbers, email addresses, physical U.S. addresses, citizenships, and debit cards or other account information.<sup>76</sup>

Banks' excessive KYC requirements cause many indigent and low-income families to disregard bank accounts as inconvenient, untrustworthy, and inefficient options for saving money.<sup>77</sup> Surveys confirm that the KYC requirements may have an impact on the unbanked: around thirty percent of unbanked households cited that they remain unbanked because they do not trust banks, and twenty-eight percent cited that they avoid banks to give themselves more privacy.<sup>78</sup> Additionally, nearly fourteen percent of the unbanked cited issues with valid identification, proper credit, or former bank accounts as a reason they are unbanked.<sup>79</sup> KYC is undoubtedly valuable to antiterrorism and anti-money laundering efforts, but it creates a strain on low-income Americans who struggle to gain access to banks.

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<sup>73</sup> See 31 C.F.R. § 103.121(b)(2)(ii) (2010); see also MAURER, *supra* note 16, at 123.

<sup>74</sup> See USA PATRIOT Act, Pub. L. No. 107-56, § 326, 115 Stat. 272, 317 (2001); 31 C.F.R. § 103.121(b)(2)(ii); see also Mark E. Plotkin & B.J. Sanford, *The Customer's View of "Know Your Customer"*, 1 BLOOMBERG CORP. L.J. 670, 670, 672 (2006), <https://www.cov.com/~media/files/corporate/publications/2006/09/747.pdf> [<https://perma.cc/XL7C-AFRC>].

<sup>75</sup> See MAURER, *supra* note 16, at 123; Rachel Siegel, 'Are You a U.S. Citizen?' This Question Locked a Kansas Couple Out of a Bank Account, WASH. POST (July 31, 2018), <https://www.washingtonpost.com/business/2018/08/01/are-you-us-citizen-this-question-locked-kansas-couple-out-bank-account> [<https://perma.cc/T7Z4-LC99>].

<sup>76</sup> See *id.*

<sup>77</sup> MAURER, *supra* note 16, at 123 ("[I]t is precisely the high kyc requirements of banks that keep many of the poor away . . .").

<sup>78</sup> See APAAM ET AL., *supra* note 5, at 4.

<sup>79</sup> See *id.*

### C. Responses to Cashless Economies

#### 1. Kenya: A Cashless System that Works

A cashless economy is possible even in developing countries. For example, observe Kenya and M-Pesa (em-pesa).<sup>80</sup> In a country with a population of over forty-four million people, more people are subscribed to M-Pesa than those who have a bank account.<sup>81</sup> M-Pesa is a mobile phone-based money-transfer application provided by Safaricom Network Company.<sup>82</sup> M-Pesa established its dominance by targeting micropayments from “the one shilling,” which covers around 18.5 million Kenyans who live below the poverty line<sup>83</sup>—a staggering forty-two percent of the forty-four million Kenyans.<sup>84</sup>

To use M-Pesa, a user must create an account with an already-registered Safaricom SIM card at one of Kenya’s 40,000-plus M-Pesa agent locations.<sup>85</sup> Additionally, documentation of identification, such as a government identification card or passport, is required.<sup>86</sup> Once registered, an updated menu will appear on the user’s phone. The user can then deposit money into their M-Pesa account by giving cash to any M-Pesa agent.<sup>87</sup> With money in their account, a user can send money to

<sup>80</sup> MAURER, *supra* note 16, at 32 (“This simple yet revolutionary service transformed the lives of millions of Kenyans, especially those in poverty.”).

<sup>81</sup> *Id.* at 11; *see id.* at 21 (“[B]y 2011, M-Pesa was in use by more than 50 percent of all households . . .”).

<sup>82</sup> Vodafone owns about thirty percent of a minority stake in Safaricom. *See Completion of Transfer of 35% Interest in Safaricom to Vodacom*, VODAFONE (Aug. 7, 2017), <https://www.vodafone.com/content/index/media/vodafone-group-releases/2017/safaricom-vodacom.html> [<https://web.archive.org/web/20190504141557/https://www.vodafone.com/content/index/media/vodafone-group-releases/2017/safaricom-vodacom.html#>].

<sup>83</sup> *See* Kieron Monks, M-Pesa: Kenya’s Mobile Money Success Story Turns 10, CNN, <https://www.cnn.com/2017/02/21/africa/mpesa-10th-anniversary/index.html> [<https://perma.cc/W26Z-MWRU>] (last updated Feb. 24, 2017, 9:26 AM) (“Micro-payments drove M-Pesa to a position of dominance and the CEO has faith that the same model can sustain success into a second decade. ‘We target the one shilling,’ [the CEO] says. ‘The banking sector across the world has always ignored the so-called base of the pyramid. We haven’t because we understand that the base of the pyramid needs to be served and there’s also commercial viability in doing that.’”).

<sup>84</sup> *Kenya at a Glance*, UNICEF, [https://www.unicef.org/kenya/overview\\_4616.html](https://www.unicef.org/kenya/overview_4616.html) [<https://perma.cc/GK2V-UN9R>] (“Forty two percent of its population of 44 million, live below the poverty line.”).

<sup>85</sup> *See Register for M-PESA*, SAFARICOM, <https://www.safaricom.co.ke/personal/m-pesa/getting-started/register-for-m-pesa> [<https://perma.cc/2GHN-WFS9>]; *see also Experience M-PESA*, SAFARICOM, <https://www.safaricom.co.ke/personal/m-pesa/getting-started/experience-m-pesa> [<https://perma.cc/7SFF-FSHE>].

<sup>86</sup> *See Register for M-PESA*, *supra* note 85.

<sup>87</sup> *See Using M-PESA*, SAFARICOM, <https://www.safaricom.co.ke/personal/m-pesa/getting-started/using-m-pesa> [<https://perma.cc/U4AN-NKJH>].

another by selecting the “Send Money” option and entering their M-Pesa PIN and the recipient’s phone number.<sup>88</sup> Users may even pay bills by entering the company’s corresponding M-Pesa code.<sup>89</sup> Users can withdraw cash by visiting an agent, selecting the “Withdraw Cash” option, and entering the withdrawal amount, their M-Pesa PIN, and the agent’s number.<sup>90</sup>

While M-Pesa provides users with money-transfer efficiency, these services come at a cost. M-Pesa charges users a fixed fee based on the amount transferred. For example, to withdraw between 2501 and 3500 Kenyan shillings (KES),<sup>91</sup> M-Pesa presently charges 49 KES, which is between 1.4% and 2% of the withdrawal total.<sup>92</sup> M-Pesa encourages users to transfer money to other M-Pesa users since transfer rates are higher for users to transfer to a non-M-Pesa account.<sup>93</sup>

M-Pesa offers additional services other than just a mobile money-transfer platform. All M-Pesa accounts are trust accounts and are owned by external trustees, which allows M-Pesa accounts to gain interest on the money left in them. However, this interest does not benefit the user, but is instead used to fund bank and audit fees, with the surplus used to fund charitable projects.<sup>94</sup> For example, 70% of Kenya’s government bonds are owned by M-Pesa.<sup>95</sup> M-Pesa provides customers with an M-Shwari savings account, which offers customers up to 6.65% interest per annum, as well as up to 70% of the Central Bank Rate for a Lock Savings Account.<sup>96</sup> Furthermore, M-Shwari provides customers with the opportunity to receive microloans.<sup>97</sup> M-Pesa also partners with KCB

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<sup>88</sup> *Id.*

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*

<sup>91</sup> As of September 20, 2019, 2501 KES and 3500 KES are around \$24.11 and \$33.73 U.S. dollars, respectively. *See Current and Historical Rate Tables*, XE, <https://www.xe.com/currencytables/?from=USD&date=2019-09-20> [<https://perma.cc/7TYS-65EW>] (last updated Sept. 20, 2019, 4:00 PM).

<sup>92</sup> *See M-Pesa Kenya, How Does it Work? Rates, Charges*, ANSWERS AFR., <https://answersafrica.com/m-pesa.html> [<https://perma.cc/YWR8-8ZXH>].

<sup>93</sup> To compare the difference between transfer rates for M-Pesa account holders and non-account holders, see *id.*

<sup>94</sup> *See Quest Means Business, M-Pesa Rules, Cash App and Venmo Drool 5:30*, YOUTUBE (Nov. 1, 2018), <https://www.youtube.com/watch?v=rloG1sGBCKE>.

<sup>95</sup> *See id.* at 5:50.

<sup>96</sup> *M-Shwari & KCB M-PESA*, SAFARICOM, <https://www.safaricom.co.ke/personal/m-pesa/do-more-with-m-pesa/loans-and-savings> [<https://perma.cc/PP3C-U2T4>] (“In line with the Banking (Amendment) Act 2016, all deposits on M-Shwari will earn interest of up to 70% of the Central Bank Rate.”). A Lock Savings Account is similar to a certificate of deposit (CD), where the savings account is locked from withdrawals for a fixed period but accrues interest at a higher rate. *See id.*

<sup>97</sup> *See id.*

Bank Kenya Limited, another financial services provider, to offer services similar to those offered by M-Shwari.<sup>98</sup>

## 2. Europe: A Cautionary Tale of Misfortune

M-Pesa's initial success was largely linked to its mass-distribution network when the service launched, but it did not find the same results when it expanded into Eastern Europe.<sup>99</sup> For M-Pesa to offer low transaction rates, it must have millions of daily transactions; but it lacked the "critical mass" in its test countries of Romania and Albania, and accordingly discontinued its services in Eastern Europe.<sup>100</sup> The reason is unclear, but it could be inferred that Eastern Europe's teenagers and young adults failed to embrace the technology.<sup>101</sup> M-Pesa could not reach the one-million-user "critical mass" as it did in its first year of business in Kenya.<sup>102</sup>

Despite M-Pesa's failure in Eastern Europe, Sweden is one of the many countries like Kenya moving rapidly towards a cashless society.<sup>103</sup> As of 2018, Sweden's outstanding value of bills and coins in circulation sat at one percent of Swedish gross domestic product (GDP).<sup>104</sup> Most Swedes use either cards or Swish, the instant-payment application created by Sweden's seven big banks' and which has been downloaded by more than half of Sweden's population of around ten million.<sup>105</sup> Swedish banks feel the burden of cash, known as krona, and have been dismantling ATMs and storing less cash on-site;<sup>106</sup> around half of Sweden's banks already do not accept cash deposits.<sup>107</sup>

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<sup>98</sup> *See id.*

<sup>99</sup> *See* Quest Means Business, *supra* note 94, at 7:10.

<sup>100</sup> *Cf. id.* (explaining European teenagers did not embrace M-Pesa like Kenyans did).

<sup>101</sup> *See M-Shwari & KCB M-PESA*, *supra* note 96.

<sup>102</sup> *See* Quest Means Business, *supra* note 94, at 8:20.

<sup>103</sup> *See* Liz Alderman, *Sweden's Push to Get Rid of Cash Has Some Saying, 'Not So Fast'*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/business/sweden-cashless-society.html> [<https://perma.cc/QDC3-MDFX>].

<sup>104</sup> Cecilia Skingsley, *Why Sweden's Cashless Society Is No Longer a Utopia*, WORLD ECON. F. (Nov. 10, 2018), <https://www.weforum.org/agenda/2018/11/sweden-cashless-society-is-no-longer-a-utopia> [<https://perma.cc/C4YL-LFJD>].

<sup>105</sup> *See id.*; *see also* Alderman, *supra* note 103 ("[C]ash is being squeezed out so quickly—with half the nation's retailers predicting they will stop accepting bills before 2025—that the government is recalculating the societal costs of a cash-free future."); Ryan Browne, *People in Sweden Barely Use Cash—and That's Sounding Alarm Bells for the Country's Central Bank*, CNBC (May 3, 2018, 1:15 AM), <https://www.cnbc.com/2018/05/03/sweden-cashless-future-sounds-alarm-bells-for-the-central-bank.html> [<https://perma.cc/JT8D-A6DT>]. *See generally* Alderman, *supra* note 103 (noting Sweden's population of ten million people).

<sup>106</sup> *Cf.* Alderman, *supra* note 103 ("A fifth of Swedes . . . do not use [ATMs] anymore.").

<sup>107</sup> "About half of Sweden's 1,400 bank branches no longer accept cash deposits." *Id.*



While Sweden's culture embraces technology,<sup>108</sup> its legislature is worried about the future of going cashless. Lawmakers are concerned about the elderly and refugees who need access to physical cash.<sup>109</sup> More importantly, if Sweden goes completely cashless, the Riksbank—its central bank—would struggle to be the country's sovereign governor of cash; society would solely rely on the private sector to access money and payments, which is without precedent.<sup>110</sup> The country would be unprepared if there was a crisis, such as an infrastructure failure, in which demand for physical cash would surge and the Riksbank would have little supply to place into circulation.<sup>111</sup>

The summer of 2018 illustrated what may occur when cashless options are unavailable. Some Visa customers in Europe, including in the United Kingdom, experienced card-payment outages due to a hardware failure.<sup>112</sup> Banks and supermarkets were just a few of the many retailers who struggled to provide services—some stores even put up “cash only” signs.<sup>113</sup> The issue was resolved within a matter of hours,<sup>114</sup> but it reminded the world of a hypothetical crisis becoming reality.

Sweden is weighing two proposals to address its cashless concerns.<sup>115</sup> The first would require the biggest banks to maintain cash on-site; however, the banks are adamant that holding a regulated amount of cash and providing accessibility to it nationwide are unduly burdensome.<sup>116</sup> Second, the Riksbank in 2019 will pilot a digital currency called e-krona, which complements cash and preserves the central bank's function of maintaining a currency backed by the state.<sup>117</sup> It would have

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<sup>108</sup> See Skingsley, *supra* note 104.

<sup>109</sup> See Browne, *supra* note 105.

<sup>110</sup> See Skingsley, *supra* note 104; *see also* Alderman, *supra* note 103.

<sup>111</sup> “Demand for cash would likely increase in a crisis situation, the Riksbank said, but with less notes and coins in circulation, supply would be restrained.” Browne, *supra* note 105.

<sup>112</sup> *Visa Service Disruption*, VISA, <https://www.visaeurope.com/newsroom/news/visa-service-disruption> [<https://web.archive.org/web/20180603174007/www.visaeurope.com/newsroom/news/visa-service-disruption>] (last updated June 2, 2018, 6:43 PM); *see* Shannon Liao, *Many Visa Cards in Europe Aren't Working Due to a Network Outage*, VERGE (June 1, 2018, 5:34 PM), <https://www.theverge.com/2018/6/1/17418684/visa-cards-europe-not-working-network-outage> [<https://perma.cc/8H96-5B3W>].

<sup>113</sup> Liao, *supra* note 112.

<sup>114</sup> *See Visa Service Disruption*, *supra* note 112.

<sup>115</sup> Alderman, *supra* note 103.

<sup>116</sup> *Id.* (“Parliament wants just the biggest banks to handle cash. The central bank is holding out for all banks to keep money flowing. Swedbank, SEB and other big Swedish financial institutions are fighting the lawmakers' demands, saying it would place an undue burden on them to provide greater access.”).

<sup>117</sup> *See id.*; Skingsley, *supra* note 104 (“If the e-krona offers zero interest, which makes it equivalent to cash in this regard, it could have negative effects for conducting expansionary monetary policy if interest rates in the economy are low. On the other hand, an e-krona with interest could become a new policy tool for the central bank.”).

a one-to-one conversion with kronor held in accounts within the Riksbank or stored on cards or in mobile applications.<sup>118</sup>

### 3. Approaches by States and Cities to Preserve Legal Tender

The Federal Reserve takes a hands-off approach when it comes to private businesses' payment policies; however, these policies must comply with state law.<sup>119</sup> For example, Massachusetts law states that any retail business which offers goods or services may not discriminate against cash buyers by requesting credit only and must accept all legal tender.<sup>120</sup> But a lack of enforcement and specificity of what is considered a "retail establishment" have resulted in most Massachusetts residents and businesses being unaware of the law.<sup>121</sup> In one instance, Sweetgreen, a popular national salad chain, went cashless in its Massachusetts stores until the Boston Globe inquired about the policy's lawfulness,<sup>122</sup> after which Sweetgreen quickly removed its cashless policy in those stores to comply with the statute.<sup>123</sup> In contrast, some small shop owners are aware of the law, but choose to ignore it.<sup>124</sup> While some get away with it, not all are successful. One location of Clover Food Lab, a Boston-area restaurant, went cashless during the late evening and early morning shifts for security reasons; however, the City of Cambridge found out and sent Clover Food Lab a cease-and-desist letter.<sup>125</sup>

The vagueness of what defines a "retail establishment" has left businesses wondering whether their operations fall under the law's

<sup>118</sup> Skingsley, *supra* note 104.

<sup>119</sup> *Is It Legal to Refuse Cash?*, *supra* note 17 ("Private businesses are free to develop their own policies on whether to accept cash unless there is a state law which says otherwise.").

<sup>120</sup> MASS. GEN. LAWS ANN. ch. 255D, § 10A (West 2017) ("No retail establishment offering goods and services for sale shall discriminate against a cash buyer by requiring the use of credit by a buyer in order to purchase such goods and services. All such retail establishments must accept legal tender when offered as payment by the buyer."); *see also* Zagorsky, *supra* note 4.

<sup>121</sup> *See* Megan Woolhouse, *No Cash Allowed: Stores Refusing to Accept Money*, BOS. GLOBE (Aug. 4, 2016, 8:17 PM), <https://www.bostonglobe.com/business/2016/08/03/paying-cash-some-stores-say-thanks-greenbacks-credit-only/a4EvjwgTPl7r4ID3xVOENO/story.html> [https://perma.cc/3YRG-EQ6X] ("[T]he Office of Consumer Affairs and Business Regulation makes no mention of it on its website, and several consumer watchdogs said they'd never heard of it."); *see also id.* (noting "there is no catchall definition for the term 'retail' in state law" but courts have generally defined it as a matter of common law).

<sup>122</sup> *Id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* ("I think it's not fully legal what we're doing," D'Alessio said. "But it's something not really enforced, either.").

<sup>125</sup> *See* Chris Sweeney, *Should Boston Stop Using Cash?*, BOS. MAG. (Feb. 6, 2018, 5:44 AM), <https://www.bostonmagazine.com/news/2018/02/06/cashless-boston> [https://perma.cc/C4BS-26YD].

umbrella. Some claim that even though the term “retail establishment” may be vague, courts generally define it as a business that intends to sell or offer goods or services.<sup>126</sup> This ambiguity has led to parking garages going cashless and to Greater Boston’s Massachusetts Bay Transportation Authority’s (MBTA) plan to go cashless by 2020 for its trains and buses.<sup>127</sup>

As a precaution, nevertheless, the MBTA will accept cash at some stations.<sup>128</sup> The MBTA plans to remove cash payment on all buses, trolleys, and commuter trains. Instead, the MBTA will install vending machines at stops for customers to use cash to load rides on a plastic fare card.<sup>129</sup> With an abundant number of stops on its bus routes, the MBTA will not be able to install vending machines at every stop, but its plan includes increasing the availability of fare cards at vendors around the city.<sup>130</sup> Although retailers are hesitant to sell the cards due to the low 1.8% commission rate, the MBTA continues to negotiate with them to expand fare-card availability near its stops and stations.<sup>131</sup> The MBTA plans to provide free cards to low-income riders, who make up a large portion of the 7% of bus riders who pay with cash.<sup>132</sup> An MBTA survey revealed that about 4% of its passengers do not own a debit card, credit card, or smartphone, about half of whom are minorities and more than three-quarters of whom pay with cash or receive passes from their schools or employers.<sup>133</sup>

To combat cash discrimination and the challenges it creates among the socioeconomic ladder, New Jersey advanced the first state-level bill in nearly fifty years to ban cashless retailers, which was signed into law by the governor in March 2019.<sup>134</sup> The newly enacted statute not only

<sup>126</sup> Woolhouse, *supra* note 121 (“[T]here is no catchall definition for the term ‘retail’ in state law, but the [Massachusetts] courts have generally defined a retailer as a ‘person (or business) who sells, offers or exposes for sale, or has in his possession with intent to sell, tangible goods or services.’”).

<sup>127</sup> *See id.*

<sup>128</sup> *See* Sweeney, *supra* note 125.

<sup>129</sup> Katherine Conti, *The MBTA Wants to Go Cashless. What About People Who Might Be Left Behind?*, BOS. GLOBE (Nov. 27, 2017, 5:44 PM), <https://www.bostonglobe.com/metro/2017/11/27/removing-board-cash-payment-could-impact-low-income-riders-advocates-say/DvUJvsBak7eKl4zfvAXeRM/story.html> [https://perma.cc/349V-BECR].

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See* 2019 N.J. Laws ch. 50 (codified at N.J. STAT. ANN. § 56:8-2.33 (West 2019)); Carmin Chappell, *New York City and New Jersey Lawmakers Target Cashless Businesses, Saying They Discriminate Against the Poor*, CNBC (Dec. 13, 2018, 2:49 PM), <https://www.cnbc.com/2018/12/13/nyc-nj-target-cashless-businesses-alleging-bias-against-the-poor.html> [https://perma.cc/3ZTA-QD6B]; *see also* Megan Geuss, *New Jersey Becomes Second State to Ban Cashless Shops and*

prohibits cashless retailers, but also imposes a fine of \$2500 for the first violation, a fine of \$5000 for the second violation, and climbing fines for each violation thereafter.<sup>135</sup> Yet, the law exempts some retailers from its requirements, such as those in airports, certain parking facilities, and car rental businesses.<sup>136</sup> Conglomerates such as Amazon are pushing back, worried that the bill circumvents their heavy investment in their cashless brick-and-mortar book stores and future grocery stores.<sup>137</sup> In the meantime, however, Amazon is accepting cash to comply with state and local laws.<sup>138</sup>

Fortunately for Amazon, some cities are considering the idea of prohibiting cashless businesses while preserving Amazon's business model.<sup>139</sup> Large metropolitan cities like Philadelphia, the first U.S. city to enact a cash discrimination bill,<sup>140</sup> recognize the implications of a growing cashless economy. While the new section of the Philadelphia Code added by the ordinance uses words similar to Massachusetts's statute, the former's language is less ambiguous than the latter's.<sup>141</sup> In addition to making it unlawful to refuse cash as payment, the Philadelphia ordinance prohibits other certain conduct by those "selling or offering for

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*Restaurants*, ARS TECHNICA (Mar. 18, 2019, 6:23 PM), <https://arstechnica.com/tech-policy/2019/03/new-jersey-becomes-second-state-to-ban-cashless-shops-and-restaurants> [https://perma.cc/2L76-B88V].

<sup>135</sup> See Geuss, *supra* note 134.

<sup>136</sup> N.J. STAT. ANN. § 56:8-2.33(c). There are some restrictions to the exceptions. For example, retailers in airports are exempt only if at least two nearby food vendors in the airport that accept cash. *Id.* § 56:8-2.33(c)(1).

<sup>137</sup> See *NJ Lawmakers: Brick-and-Mortars Must Accept Cash*, PYMNTS (Dec. 6, 2018), <https://www.pymnts.com/cash/2018/nj-senate-bill-bans-cashless-stores> [https://perma.cc/7CEY-82XY].

<sup>138</sup> See Christian Hetrick, *Amazon Go Stores to Accept Cash After Philly, New Jersey Ban Cashless Stores*, PHILA. INQUIRER, <https://www.inquirer.com/business/amazon-go-accept-cash-ban-cashless-stores-philadelphia-new-jersey-20190410.html> [https://perma.cc/MGT5-JENC] (last updated Apr. 10, 2019).

<sup>139</sup> See *infra* text accompanying notes 140-150.

<sup>140</sup> See PHILA., PA., ADMIN. CODE § 9-1132 (2019); see also Karen Zraick, *Philadelphia Bans 'Cashless' Stores Amid Growing Backlash*, N.Y. TIMES (Mar. 7, 2019), <https://www.nytimes.com/2019/03/07/business/cashless-stores-philadelphia.html> [https://perma.cc/64DE-M27D].

<sup>141</sup> Compare PHILA., PA., ADMIN. CODE § 9-1132 ("(1) A person selling or offering for sale consumer goods or services at retail is prohibited from refusing to accept cash as a form of payment to purchase goods or services. A person selling or offering for sale goods or services at retail shall not: (a) Refuse to accept cash as a form of payment; (b) Post signs on the premises that cash payment is not accepted; [and] (c) Charge a higher price to customers who pay cash than they would pay using any other form of payment."), with MASS. GEN. LAWS ch. 255D, § 10A (2017) ("No retail establishment offering goods and services for sale shall discriminate against a cash buyer by requiring the use of credit by a buyer in order to purchase such goods and services. All such retail establishments must accept legal tender when offered as payment by the buyer.").

sale goods and services at retail,” including posting anti-cash signs on the premises and charging higher prices to cash-paying customers.<sup>142</sup>

However, the ordinance’s second subsection is unique: it defines “at retail,” albeit by listing the types of businesses *not* required to accept cash.<sup>143</sup> The list exempts from the law’s mandate parking lots and garages, Internet and phone purchases, rentals, retailers that require a membership, and more.<sup>144</sup> Philadelphia also exempted retailers that require mobile application accounts to purchase goods and services,<sup>145</sup> which allows businesses like Amazon Go and Uber to still operate.<sup>146</sup> Any business that violates the section can be fined up to \$2000.<sup>147</sup>

Some cities, like Philadelphia, have banned cashless stores, while others have considered doing so. In May 2019, San Francisco banned brick-and-mortar retail businesses from rejecting cash, except for mobile retail outlets like food trucks and Uber.<sup>148</sup> Chicago indefinitely postponed a vote on an ordinance to prevent businesses from going cashless,<sup>149</sup> and

<sup>142</sup> PHILA., PA., ADMIN. CODE § 9-1132(1) (“A person selling or offering for sale goods or services at retail shall not: (a) Refuse to accept cash as a form of payment; (b) Post signs on the premises that cash payment is not accepted; (c) Charge a higher price to customers who pay cash than they would pay using any other form of payment.”).

<sup>143</sup> *Id.* § 9-1132(2) (“For purposes of this Section 9-1132, ‘at retail’ shall include any retail transaction conducted in person and shall exclude: (a) any telephone, mail, or internet transactions; (b) parking lots and parking garages; (c) transactions at wholesale clubs that sell consumer goods and services through a membership model; (d) transactions at retail stores selling consumer goods exclusively through a membership model that requires payment by means of an affiliated mobile device application; (e) transactions for the rental of consumers goods, services, or accommodations for which posting of collateral or security is typically required; [and] (f) consumer goods or services provided exclusively to employees and others authorized to be on the employer’s premises.”).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* § 9-1132(2)(d).

<sup>146</sup> See Farnsworth, *supra* note 50 (noting that shopping at Amazon Go requires the Amazon Go mobile application); *How Does Uber Work?*, UBER RIDER HELP, <https://help.uber.com/riders/article/how-does-uber-work?nodeId=738d1ff7-5fe0-4383-b34c-4a2480efd71e> [https://perma.cc/33SD-DUZ9].

<sup>147</sup> PHILA., PA., ADMIN. CODE § 9-1132(3) (“Violations of this Section shall be subject to penalties set forth in Section 9-1121(1).”); PHILA., PA., ADMIN. CODE, § 9-1121(1) (2019) (“Any person who shall willfully resist, prevent, impede or interfere with the Commission, its members, agents or agencies in the performance of duties pursuant to this Chapter, or shall violate any order of the Commission or any provision of this Chapter shall be subject to a fine in addition to such order or decree as may be issued by any court. Such fine shall be in an amount not more than two thousand (2,000) dollars for each violation.”).

<sup>148</sup> See Karen D’Souza, *Here’s Why a Cashless Society is Not Coming to San Francisco*, MERCURY NEWS (May 8, 2019 1:18 PM), <https://www.mercurynews.com/2019/05/08/heres-why-a-cashless-society-is-not-coming-to-san-francisco> [https://perma.cc/2EYC-2VQS].

<sup>149</sup> Fran Spielman, *Vote Postponed on Measure Requiring Chicago Businesses to Accept Cash*, CHI. SUN TIMES (DEC. 6, 2017, 3:43 PM), <https://chicago.suntimes.com/2017/12/6/18420549/vote-postponed-on-measure-requiring-chicago-businesses-to-accept-cash> [https://perma.cc/Q3ZF-LSTU].

Washington, D.C., has introduced a similar bill for approval.<sup>150</sup> A New York City councilman has also proposed a ban on cashless retailers similar to New Jersey's, but with a significantly smaller fine of \$250 for a cashless retailer's first violation and \$500 for each subsequent violation.<sup>151</sup>

Aware of both states' and cities' responses towards the anti-cash movement, Congress joined the effort and introduced two cash discrimination bills in 2019.<sup>152</sup>

## II. NONVIABLE LITIGATION CLAIMS

### A. *The Disparate Impact of Cashless Businesses and Why an Equal Protection Claim Is Not the Solution*

Brick-and-mortar businesses in the United States that run cashless operations accept payment via debit and credit cards or mobile phones.<sup>153</sup> Even where mobile phones are accepted, their payment capabilities are usually linked to an individual's debit or credit card.<sup>154</sup> To acquire a debit or credit card, most go through a bank and must open an account.<sup>155</sup>

The government's KYC regulation requires banks to obtain personal information from anyone inquiring to open a checking account, which includes, among other criteria, a permanent home address.<sup>156</sup> Homeless and low-income individuals struggle to provide a permanent home

<sup>150</sup> See Council B. 875, 22d Council Period (D.C. 2018); Chappell, *supra* note 134.

<sup>151</sup> See Chappell, *supra* note 134.

<sup>152</sup> Payment Choice Act of 2019, H.R. 2650, 116th Cong.; Cash Should Always be Honored (CASH) Act, H.R. 2630, 116th Cong. (2019); Jacob Passy, *Two Democrats Introduce Legislation in Congress to Ban Cashless Stores*, MARKETWATCH (May 17, 2019, 5:11 AM), <https://www.marketwatch.com/story/two-democrats-introduce-legislation-in-congress-to-ban-cashless-stores-2019-05-17> [<https://perma.cc/64GC-W4Y4>]. For a discussion of these bills, see *infra* Section III.D.

<sup>153</sup> See Joshua Sophy, *20 Digital Transaction Options for Small Businesses*, SMALL BUS. TRENDS, <https://smallbiztrends.com/2014/06/digital-payment-options-small-business.html> [<https://perma.cc/YZ4R-SFJB>] (last updated Nov. 1, 2017).

<sup>154</sup> See Haley Stiel, *10 Ways to Pay with Your Smartphone*, FUELED (Aug. 8, 2017), <https://fueled.com/blog/10-ways-to-pay-with-your-smartphone> [<https://perma.cc/LYC6-GW7Q>].

<sup>155</sup> See Justin Pritchard, *How to Get Debit Cards*, BALANCE, <https://www.thebalance.com/where-and-how-to-get-debit-cards-315260> [<https://perma.cc/FDC5-8DXS>] (last updated Oct. 22, 2018); see also Latoya Irby, *How to Get Your First Credit Card: Ways to Get Your First Credit Card*, BALANCE, <https://www.thebalance.com/how-to-get-your-first-credit-card-960189> [<https://perma.cc/2CWX-F4F2>] (last updated Jan. 30, 2019).

<sup>156</sup> For a list of major U.S. banks that require addresses to open checking accounts, see François Briod, *How to Open a Bank Account Online in the U.S. Without Proof of Residency*, MONITO, <https://www.monito.com/en/wiki/open-bank-account-us-even-without-proof-residency> [<https://perma.cc/3JQX-V9WF>] (last updated July 16, 2019).

address because they either cannot afford housing or live among family members within different homes. While there are ways to overcome the absence of a permanent home, such as using a volunteering homeless shelter's address or a post office (PO) box,<sup>157</sup> many of these individuals are deterred from checking accounts and from banks overall.<sup>158</sup> Additionally, the main reason households remain unbanked is because they do not have enough money to maintain the minimum account balance.<sup>159</sup> Without checking accounts, the unbanked and underbanked lack the means to pay without cash. Because the majority of the unbanked and underbanked are racial minorities,<sup>160</sup> people of color are disparately impacted; that is, they are discriminated against as a protected group by the negative effect of these facially neutral practices.<sup>161</sup>

While most businesses do intend to racially discriminate, a business that requires cashless payment adversely impacts many minorities who cannot pay for the goods or services.<sup>162</sup> Some businesses go cashless explicitly to maintain a specific type of consumer, such as an upscale cashless restaurant that believes individuals without checking accounts should not be eating in its establishment.<sup>163</sup>

Cashless restaurants inadvertently discriminate against age as well.<sup>164</sup> Minors must appoint a legal guardian to open a checking account, and without a checking account, minors are forced to use cash as their only means of payment.<sup>165</sup> Some cashless shops see up to ten minors a day walk out without a purchase upon learning about the shop's cashless policy.<sup>166</sup>

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<sup>157</sup> See 31 C.F.R. § 103.121(b)(2)(ii) (2010); see also USA PATRIOT Act, Pub. L. No. 107-56, § 326, 115 Stat. 272, 317 (2001).

<sup>158</sup> See Richard A. Moran, *Why Don't Poor People Have Bank Accounts?*, MEDIUM (Aug. 8, 2019), <https://medium.com/@richardamoran/why-dont-poor-people-have-bank-accounts-2a196a4fdbd9> [<https://perma.cc/5UZ7-2PZP>].

<sup>159</sup> See APAAM ET AL., *supra* note 5, at 4.

<sup>160</sup> See *id.* at 3.

<sup>161</sup> *Disparate Impact*, BLACK'S LAW DICTIONARY, *supra* note 11 ("The adverse effect of a facially neutral practice . . . that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity. Discriminatory intent is irrelevant in a disparate-impact claim.").

<sup>162</sup> See discussion *supra* Section I.B.

<sup>163</sup> See, e.g., Melissa McCart, *The Problem with Cashless Restaurants*, EATER (Feb. 15, 2018, 10:29 AM), <https://www.eater.com/2018/2/15/16974980/cashless-restaurants-credit-card-only-legal-problem-discriminatory> [<https://perma.cc/X2E8-ZE3K>].

<sup>164</sup> See *id.*

<sup>165</sup> See Justin Pritchard, *Bank Accounts for People Under 18*, BALANCE, <https://www.thebalance.com/bank-accounts-for-people-under-18-315365> [<https://perma.cc/Z375-XMPX>] (last updated Jan. 18, 2019).

<sup>166</sup> See Kauffman, *supra* note 47.

The only way for the unbanked, the underbanked, and minors to work around the need for checking accounts is to purchase prepaid cards or gift cards at stores that still accept cash<sup>167</sup> and then use those cards at other businesses. This process is both inefficient and burdensome.<sup>168</sup> Individuals will need to rely on third parties to provide payment options for cashless businesses. A third party's operating hours, location, and stock of prepaid cards will be key factors in determining accessibility to a means of acceptable payment, and may create hardship on and unfair dependence by individuals who only use cash.<sup>169</sup> This burden will be borne by both minorities and minors who engage with private businesses or government services.

Normally, to fight discrimination by the government, a plaintiff can claim an Equal Protection Clause violation. The Fifth and Fourteenth Amendments prohibit the federal and state governments, respectively, from denying any person of a suspect classification any fundamental right guaranteed by the Constitution.<sup>170</sup> The Supreme Court has held that a suspect class is a group that meets a list of criteria which indicates the group is a probable target of discrimination.<sup>171</sup> The type of suspect class dictates which category of scrutiny a court will use to assess the constitutionality of the law at issue.<sup>172</sup> Typical suspect classes that trigger either strict or intermediate levels of judicial scrutiny include race, alienage, and gender.<sup>173</sup>

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<sup>167</sup> See APAAM ET AL., *supra* note 5, at 7.

<sup>168</sup> See Jim Puzanghera, *Users of Popular Prepaid Debit Cards Finally Get Some Federal Consumer Protections*, L.A. TIMES (Oct. 4, 2016, 9:05 PM), <https://www.latimes.com/business/la-fi-prepaid-card-rules-20161004-snap-story.html> [<https://perma.cc/MK6B-RKDN>].

<sup>169</sup> See, e.g., *Visa ReadyLink Locator*, VISA, <https://usa.visa.com/pay-with-visa/cards/readylink-locator.html> [<https://perma.cc/6XF5-ZVTF>] (showing where ReadyLink is available). Stores may also choose to not replenish these cards or may close at odd hours, which may create uncertainty as to their availability and to access for those who depend on the cards.

<sup>170</sup> U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); see U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); see also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (explaining that "discrimination may be so unjustifiable as to be violative of" the Fifth Amendment's Due Process Clause).

<sup>171</sup> *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."), *abrogated*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>172</sup> See *id.*

<sup>173</sup> See *id.*; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) ("[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must . . . show[] at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" (quoting *Wengler v.*



A court may still find a violation of the Equal Protection Clause where neither a suspect class nor a fundamental Constitutional right are implicated if the law does not reasonably further a valid objective within the state's power to regulate.<sup>174</sup> For example, while indigency is not considered a suspect classification that triggers strict scrutiny, wealth discrimination may be analyzed under the lower standard of rational-basis review, where a law or the enforcement of a law will be upheld as long as it is rationally related to a legitimate government interest.<sup>175</sup>

Regardless, an Equal Protection argument would not be effective against cashless private businesses because it thwarts only discrimination by state or federal laws or conduct.<sup>176</sup> But one might sustain a claim under the Equal Protection Clause if government-sponsored public services, such as public transportation and highway tolls, refuse to take cash.<sup>177</sup> But such a claim is unlikely to prevail when scrutinized under rational-basis review if the government can show that its statute or action is rationally related to a legitimate interest like preventing robberies or refining processes to lower costs and increase efficiency.<sup>178</sup> Courts have generally defer to states' policy judgments concerning electronic toll disputes as long as the decisions benefit commuters.<sup>179</sup> Additionally, the government could likely show it already provides multiple options for

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Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)); *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny to laws that classify based on alien status).

<sup>174</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 26–27 (1973) (stating that even if there is no violation to a suspect class, the issue must be analyzed using a rational-basis judicial review); *see, e.g., id.* at 17 (“We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.”).

<sup>175</sup> *See id.* at 28 (“[Indigents] have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”); *see also James v. Valtierra*, 402 U.S. 137, 141 (1971).

<sup>176</sup> *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.”).

<sup>177</sup> *See id.*

<sup>178</sup> *See Rodriguez*, 411 U.S. at 17; *supra* text accompanying notes 174–175.

<sup>179</sup> *E.g., Cochran v. Illinois State Toll Highway Auth.*, 828 F.3d 597, 601 (7th Cir. 2016) (“The use of transponders decreases traffic, increases efficient use of the highway, and decreases the resources required to operate tollbooths, all legitimate governmental interests.”); *Yerger v. Mass. Tpk. Auth.*, 395 F. App'x 878, 884 (3d Cir. 2010) (“[I]mplementing a policy to benefit commuters is ‘surely a constitutionally valid purpose.’” (quoting *Doran v. Massachusetts Tpk. Auth.*, 348 F.3d 315, 321 (1st Cir. 2003))).

cashless payment; for example, cashless bridge tolls scan a driver's license plate and send the bill to the driver's registered address to pay by cash, check, money order, or credit card.<sup>180</sup> Therefore, a cash discrimination claim against either a state government or the federal government will fall short.

### B. *The Legal-Tender Argument*

The impact of a cashless practice on minorities and minors is not the only problem. The dollar as legal tender for all debts is an unrecognized fallacy and a problem that affects many. Legal-tender theory has flaws, and a cashless system, combined with legal tender notes, clashes with the classic law of contract. For example, in the United States, customers generally pay after consuming their meals in sit-down restaurants.<sup>181</sup> This custom is heavily rooted in implied-in-fact contract theory.<sup>182</sup> The Supreme Court has held an implied-in-fact contract is a legally binding contract upon the meeting of the minds from the conduct of both parties.<sup>183</sup> The customer and restaurant are parties to an implied-in-fact contract when the customer's actions indicate they will purchase food for the price on the menu from the restaurant and will be responsible to pay the bill afterwards.<sup>184</sup> After a customer consumes the restaurant's food, the customer is in debt to the restaurant.<sup>185</sup> Under legal-tender theory, a restaurant must accept cash from the indebted customer because dollar bills are legal tender for all debts, public and private.<sup>186</sup> Restaurants like Sweetgreen do not run into a legal-tender problem because they hand

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<sup>180</sup> See *All Electronic Tolling on the Golden Gate Bridge*, GOLDEN GATE BRIDGE, HIGHWAY & TRANSP. DISTRICT, <http://goldengate.org/tolls/tollpaymentoptions.php> [<https://perma.cc/8FNE-LGDR>].

<sup>181</sup> See Michael Procopio, *Check, Please: How to Pay Without Looking like a Fool or Making Everyone Uncomfortable*, KQED (May 22, 2009), <https://www.kqed.org/bayareabites/3920/check-please-how-to-pay-without-looking-like-a-fool-or-making-everyone-uncomfortable> [<https://perma.cc/5L74-2V42>].

<sup>182</sup> An implied-in-fact contract is “[a] contract that the parties presumably intended as their tacit understanding, as inferred from their conduct and other circumstances.” *Implied-in-Fact Contract*, BLACK’S LAW DICTIONARY, *supra* note 11.

<sup>183</sup> *Klebe v. United States*, 263 U.S. 188, 192 (1923) (“A contract implied in fact is one inferred from the circumstances or acts of the parties; but an express contract speaks for itself and leaves no place for implications.”); *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923) (“[A]n agreement ‘implied in fact,’ founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.”).

<sup>184</sup> See *Implied Agreement: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/implied-agreement> [<https://perma.cc/U47F-EB52>].

<sup>185</sup> See discussion *supra* Section I.A.I.

<sup>186</sup> See discussion *supra* Section I.A.I.

over the food once a customer pays—the customer is never in debt.<sup>187</sup> Potential plaintiffs looking to recover from “cafeteria-style” restaurants will fall short because they never are in debt.

Furthermore, potential plaintiffs looking to recover from cashless sit-down restaurants will not find success since these restaurants circumvent this issue through proper notification. Most cashless restaurants post notifications on their entrance doors or as one enters the establishment. For example<sup>188</sup>:



However, the lack of regulations means there is no guidance as to where exactly these warning signs should be placed. Should regulators instruct retailers to post notifications or give verbal warnings? The trend tends to be the former, but how visible a sign should be is unclear.<sup>189</sup> As long as there is a sign in clear view either upon entry or when sitting down, most

<sup>187</sup> See discussion *supra* Section I.A.I.

<sup>188</sup> The pictures below were taken by the author in New York City.

<sup>189</sup> See Zlati Meyer, *More Restaurants Go Cashless, Accept Only Cards and Other Forms of Payment*, USA TODAY (Apr. 15, 2018, 6:01 AM), <https://www.usatoday.com/story/money/2018/04/15/cashless-restaurants-like-tenders-greens-rising-number-at-growing-number-restaurants-cash-no-longer-m/319618002> [<https://perma.cc/G4LA-EFSK>]. Typically, when a customer does not have enough or any cash to pay the restaurant, the restaurant can obtain identification and send an invoice or file criminal charges. Restaurants could file suit against the customer for breach of contract, but the legal fees would heavily outweigh the damages reward or the loss to “eat up” the cost of food. However, uncertainty arises when a restaurant follows its cashless guidelines, but an indebted customer can only pay with legal tendered cash. Since it is not worth the cost to sue the customer, most restaurants either accept the cash or waive the meal as free. *See id.*

customers would be on notice and would legally accept the stipulation that they must pay in a form other than cash.<sup>190</sup>

### III. A LEGISLATIVE SOLUTION

#### A. *Why Private Businesses like M-Pesa Cannot Help Disparate Impact Victims in a Cashless America*

Although M-Pesa and similar systems work for countries like Kenya by facilitating mobile-to-mobile or mobile-to-online payments,<sup>191</sup> the global North favors POS systems like Square that use RFID technology rather than mobile-to-mobile payment.<sup>192</sup> Even if American businesses switched to an M-Pesa-like system, such a cashless structure would be detrimental to the indigent and the homeless. M-Pesa requires a form of identification,<sup>193</sup> which is difficult for many homeless individuals to obtain because of the associated costs and the need for proof of residency.<sup>194</sup> Additionally, M-Pesa users must have a service plan for their mobile phones.<sup>195</sup> Forty-six million Americans, around fifteen percent of the population, live below the poverty line and cannot afford mobile phones with service providers.<sup>196</sup>

Although the indigent and the homeless are able to purchase mobile phones without service-provider contracts,<sup>197</sup> many families who do pay for such a contract share phones, but switch out SIM cards to personalize

<sup>190</sup> See *Notice of Contract: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/notice-of-contract> [<https://perma.cc/P8CH-3833>] (explaining the difference between implied and express notices).

<sup>191</sup> MAURER, *supra* note 16, at 32 (“This simple yet revolutionary service transformed the lives of millions of Kenyans, especially those in poverty.”).

<sup>192</sup> *Id.* at 71 (“In the global North, mobile money systems generally take advantage of RFID or NFC chips. Transit systems already use them, people are familiar with the tap-and-go concept, and embedding or overlaying a chip onto a mobile phone is relatively easy.”).

<sup>193</sup> See *Register for M-PESA*, *supra* note 85.

<sup>194</sup> SARA SIMON TOMPKINS, NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, PHOTO IDENTIFICATION BARRIERS FACED BY HOMELESS PERSONS: THE IMPACT OF SEPTEMBER 11 (2004), [https://nlchp.org/wp-content/uploads/2018/10/ID\\_Barriers.pdf](https://nlchp.org/wp-content/uploads/2018/10/ID_Barriers.pdf) [<https://perma.cc/JX8F-B6CM>] (“Homeless persons who attempt to acquire a photo ID frequently experience tremendous obstacles. Many cannot obtain an ID because they cannot prove ‘residency’ in their state due to lack of a physical address. Others simply cannot afford the cost of an ID.”).

<sup>195</sup> See *Register for M-PESA*, *supra* note 85.

<sup>196</sup> MAURER, *supra* note 16, at 109 (“A quarter of the world’s population lives in poverty. About 15 percent of Americans—more than forty-six million—live below the poverty line. Simply put, many people cannot afford a subscription to a mobile network service. That does not prevent them from using a mobile phone, however.”).

<sup>197</sup> *Id.* (“Even the poor can purchase a phone without subscribing to a service, and, instead, buy airtime as needed, ‘topping up’ their phone whenever they run out of minutes.”).

the phone to the individual using it at the moment.<sup>198</sup> Today, the stigma that the homeless cannot afford mobile phones is untrue: around ninety-four percent of homeless individuals either own or have owned a cell phone while being homeless, and fifty-six percent of those who owned a mobile phone owned two or more.<sup>199</sup> With the reality of mobile payment, like Apple Pay and Samsung Pay, the issue is not whether a cashless society unfairly excludes the homeless because they lack access to mobile phones; the homeless have access to mobile phones, and in many large cities, even have access to public Wi-Fi to use the Internet on their phones.<sup>200</sup> Rather, the pressing issue right now is that homeless and low-income individuals do not have the means to add a checking account to their mobile phones to facilitate mobile payment.

While M-Pesa does provide checking accounts, the “critical mass” that sparked its success in Kenya would be incredibly difficult to achieve in American culture for similar reasons that M-Pesa’s Eastern European expansion failed.<sup>201</sup> With competing financial applications that provide money-transfer services, such as Venmo<sup>202</sup> and Zelle,<sup>203</sup> it is unlikely to convince millions of Americans to use another payment application that encourages customers to use its unique feature of exchanging cash for credit at local convenience stores. M-Pesa would be just another money-transfer application among several in an already-crowded market.

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<sup>198</sup> *Id.* at 110–11 (“Conversely, people may own multiple phones and/or multiple sim cards . . . . If we imagine mobile phones are held onto by one person, and used by only that one person—then we miss the family dynamics and social relationships that support shared-phone use in the developing world.”).

<sup>199</sup> Harmony Rhoades et al., *No Digital Divide? Technology Use Among Homeless Adults*, 26 J. SOC. DISTRESS & HOMELESS 73, 74 (2017).

<sup>200</sup> *See, e.g., How Wicked Free Wi-Fi Works*, CITY OF BOS., <https://www.boston.gov/departments/innovation-and-technology/wicked-free-wi-fi> [<https://perma.cc/NM42-HHFW>] (providing information about Boston’s public Wi-Fi); LINKNYC, <https://www.link.nyc> [<https://perma.cc/8YGC-SZ46>] (providing information about New York City’s public Wi-Fi); *San Francisco Wi-Fi*, CITY & CTY. OF S.F., <https://sfgov.org/sfc/sanfranciscowifi> [<https://perma.cc/P4NZ-48UT>] (providing information about San Francisco’s public Wi-Fi).

<sup>201</sup> *See Quest Means Business*, *supra* note 94, at 7:13; *supra* text accompanying notes 99–102.

<sup>202</sup> Venmo is a mobile application that allows users to pay others with the application. A user can add money to their Venmo account and send money with their “Venmo balance, bank account, debit card or prepaid card” for free. Users may transfer their Venmo balance to their bank account for no charge. *How it Works*, VENMO, <https://venmo.com/about/product> [<https://perma.cc/YYYY3-DTEM>].

<sup>203</sup> Similar to Venmo, Zelle is also a mobile application that allows users to pay others with the application. Zelle has built partnerships with major financial banks to be integrated with the bank’s mobile app. Users can transfer money straight from their accounts to others by using either their bank’s application or the Zelle application. *See How it Works*, ZELLE, <https://www.zellepay.com/how-it-works> [<https://perma.cc/TM9N-KBQV>].

### B. *The Development of Congress's Commerce Clause Power*

Consumers hurt by a cashless society can look to Congress's enumerated Commerce Clause power to ameliorate the problematic practice.<sup>204</sup> The Commerce Clause provides Congress the ability to regulate interstate commerce which falls into one of three categories: (1) channels, (2) instrumentalities, and (3) intrastate commerce that has a substantial effect on interstate commerce.<sup>205</sup> While many Supreme Court cases have greatly influenced Congress's power to regulate commerce, a few cases have been most important in shaping and molding the present-day Commerce Clause.

The Commerce Clause found its broad economic application as Congress attempted to regulate the booming industrial economy. After the Court rejected several of Congress's attempts to regulate a laundry list of the Progressive movement's core beliefs, the Court appeared to finally succumb to political pressure in *United States v. Darby*.<sup>206</sup> To curb

<sup>204</sup> See U.S. CONST. art. I, § 8, cl. 3.

<sup>205</sup> A trilogy of cases laid the foundation for an era between the 1930s and 1990s of great deference to allowing Congress to exercise its Commerce Clause. In particular, these cases were *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and *substantial relation* to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (emphasis added)); *United States v. Darby*, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . ."); and *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's activity be local and . . . may not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of . . . what might at some earlier time have been defined as 'direct' or 'indirect.'").

<sup>206</sup> 312 U.S. 100. *Darby* either overruled or limited previous rulings that inhibited Congress's attempts to regulate commerce. See e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by Darby*, 312 U.S. 100. Following the Supreme Court striking down eight out of ten New Deal bills and his landslide re-election in 1936, President Franklin Roosevelt introduced the "court-packing proposal" in 1937. See MICHAEL E. PARRISH, *THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY* 24 (2002); see also *United States Presidential Election Results*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> [<https://perma.cc/BQC8-6UTZ>] (last updated Feb. 3, 2017) (noting President Roosevelt's 60.2% of the popular vote and 523 electoral votes, compared to his opponent's 36.5% and 8 electoral votes). While the proposal would lessen the load for older Justices, President Roosevelt's ulterior motive was to obtain the authority to appoint new Justices who would compose a majority of the Court and who would uphold New Deal legislation. PARRISH, *supra*, at 24. In what became known as "the switch in time that saved nine," many contemporary observers believed that Chief Justice Charles Evans Hughes and Justice Owen Roberts joined the majority in *West Coast Hotel Co. v. Parrish* to end the opposition to the New Deal and eliminate President Roosevelt's push for his "court-packing proposal." See *id.* at 38–39. However, this idea has been undermined by other factors. See, e.g., *id.* at 38 (noting *West Coast Hotel* was decided after the election, but before the "court-packing proposal" was unveiled); see

the Great Depression, President Franklin Roosevelt wanted to combat poor labor conditions then-present among all forty-eight states and believed states' initiatives were fruitless.<sup>207</sup> The Fair Labor Standards Act of 1938 was enacted to establish a federal minimum wage, a forty-four hour work week, and requirements for overtime pay.<sup>208</sup> Darby, a successful Georgia lumber company, was cited for violating the Act and successfully petitioned the U.S. District Court for the Southern District of Georgia to quash the indictment.<sup>209</sup> The Supreme Court unanimously disagreed and held that Congress could regulate employees' production of goods shipped across state lines.<sup>210</sup> Accordingly, Congress could constitutionally regulate through its interstate commerce power the poor labor practices permitted by the states to benefit their own individual economies.<sup>211</sup>

The Court later held Congress could regulate intrastate activities affecting interstate commerce,<sup>212</sup> including small, local activities, because those activities in the aggregate may affect the nation as a whole.<sup>213</sup> In *Wickard v. Filburn*,<sup>214</sup> an Ohio farmer was fined for growing wheat on his farm for feeding his livestock in violation of the government's wheat-production limit instituted to stabilize wheat prices.<sup>215</sup> The farmer, Filburn, argued his wheat production for livestock

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*also id.* at 38–39 (explaining how Chief Justice Hughes' vote in *West Coast Hotel* was consistent with his judicial philosophy).

<sup>207</sup> See Peter Cole, *The Law That Changed the American Workplace*, TIME (June 24, 2016), <http://time.com/4376857/flsa-history> [<https://perma.cc/4S82-W56W>].

<sup>208</sup> “Since, as we have held, Congress may require production for interstate Commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it.” *Darby*, 312 U.S. at 125. The forty-four hour work week was later changed to the standard forty hours as seen today.

<sup>209</sup> *Id.* at 108. The District Court ruled the Act violated Tenth Amendment, but the Supreme Court held the Tenth Amendment to be a truism that does not override the Commerce Clause. *Id.* at 124 (“The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”). See generally U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>210</sup> *Id.* at 125–26 (“One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act.”).

<sup>211</sup> *Id.*

<sup>212</sup> In *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), the Court extended Congress's Commerce Clause power to regulate milk prices.

<sup>213</sup> *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

<sup>214</sup> *Wickard*, 317 U.S. 111.

<sup>215</sup> See *id.* at 114–15.

did not affect the supply of wheat nationally; but the Court sided with Congress in holding that if all farmers were permitted to produce their own wheat, it could have a significant nationwide effect when aggregated.<sup>216</sup>

Congress later strategically gambled the scope of its Commerce Clause power to eradicate racial discrimination.<sup>217</sup> After Congress enacted the Civil Rights Act of 1964, which mainly prevented businesses from discriminating against people of color, the Heart of Atlanta Motel maintained its practice of racial discrimination and filed suit in federal court.<sup>218</sup> In addition to other constitutional claims, Heart of Atlanta claimed Congress overstepped its authority to regulate interstate commerce in its attempt to regulate a private business providing a public accommodation, even though seventy-five percent of its clientele was from out of state and it was located near two major interstate highways.<sup>219</sup> Separate from Heart of Atlanta, a barbecue restaurant in Alabama owned by Ollie McClung challenged the Civil Rights Act on similar grounds.<sup>220</sup> Ollie's Barbecue restaurant, located near an interstate highway, bought approximately half of its produce from an out-of-state supplier and served Black people via take-out only.<sup>221</sup>

On the same day, the Court rejected the claims in both *Heart of Atlanta Motel* and *McClung*. Under a rational-basis review test, the Court upheld Congress's determination that interstate travel would be deterred, and thus interstate commerce would be negatively impacted, if motels and restaurants could discriminate against minorities.<sup>222</sup> In doing so, the Court explained that Congress may regulate intrastate activity if it substantially affects interstate commerce cumulatively.<sup>223</sup>

The Court did not limit the wide breadth of Congress's Commerce Clause power for nearly thirty years. But in 1995, the Court declined to extend Congress's power to regulating a non-economic activity.<sup>224</sup> In

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<sup>216</sup> See *id.* at 125, 127–28.

<sup>217</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257–58 (1964).

<sup>218</sup> See *id.* at 242–43.

<sup>219</sup> *Id.* at 243–44 (“The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under Art. I, § 8, cl. 3, of the Constitution of the United States.”).

<sup>220</sup> See *Katzenbach v. McClung*, 379 U.S. 294, 295 & n.1 (1964).

<sup>221</sup> See *id.* at 296.

<sup>222</sup> *Heart of Atlanta Motel*, 379 U.S. at 254–62; see also *McClung*, 379 U.S. at 295, 303–05. In both *Heart of Atlanta* and *McClung*, Justice Goldberg agreed with the outcome, but believed that Congress did not need to the Commerce Clause to support the validity of the Civil Rights Act of 1964. See *Heart of Atlanta Motel*, 379 U.S. at 291 (Goldberg, J., consenting) (“The primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity and not mere economics.”).

<sup>223</sup> See *McClung*, 379 U.S. at 301–05 (articulating the scope of Congress's power to regulate local activities).

<sup>224</sup> See *United States v. Lopez*, 514 U.S. 549, 560–61 (1995).



*United States v. Lopez*,<sup>225</sup> twelfth-grade student Alfonso Lopez carried a concealed weapon onto school property and was charged with violating the federal Gun-Free School Zones Act of 1990.<sup>226</sup> Lopez unsuccessfully moved to dismiss his indictment by arguing that Congress had acted beyond its Commerce Clause power by attempting to regulate public schools.<sup>227</sup>

On appeal, the government failed to persuade the Supreme Court that violent crimes create substantial expenses and that the presence of firearms on school property deters students from attending and gaining an education, which both lead to a weaker national economy.<sup>228</sup> A conservative Court drew a line that the Commerce Clause could not regulate a non-economic activity such as the pure possession of a gun,<sup>229</sup> nor could an aggregation analysis save the Act by finding the statute had substantial economic effects similar to those in precedential cases.<sup>230</sup> Chief Justice Rehnquist clarified three categories to which Congress's Commerce Clause power extends: (1) channels of interstate commerce, such as highways, airspace, and the Internet;<sup>231</sup> (2) instrumentalities of interstate commerce, such as cars, buses, boats, and people;<sup>232</sup> and (3) activities that substantially effect interstate commerce.<sup>233</sup> In disagreement with the majority, Justices Breyer and Souter dissented on the basis that the Court should defer to Congress's determination concerning the

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<sup>225</sup> *Lopez*, 514 U.S. 549.

<sup>226</sup> *Id.* at 551.

<sup>227</sup> *Id.* at 551–52.

<sup>228</sup> *See id.* at 563–64.

<sup>229</sup> The Court examined previous decisions to determine if pure possession maintained a jurisdictional element for Congress to regulate commerce. *Id.* at 562 (“The Court thus interpreted the statute to reserve the constitutional question whether Congress could regulate, without more, the ‘mere possession’ of firearms.”).

<sup>230</sup> “Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.” *Id.* at 560 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

<sup>231</sup> “The transportation of passengers in interstate commerce . . . is within the . . . power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the *channels of interstate commerce* free from immoral and injurious uses has been frequently sustained, and is no longer open to question.” *Id.* at 558 (emphasis added) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)).

<sup>232</sup> *Id.* (citing *Hous., E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342 (1914)). “[The Commerce Clause’s] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic.” *Shreveport Rate Cases*, 234 U.S. at 351.

<sup>233</sup> “The Court held that intrastate activities that ‘have such a close and *substantial relation to interstate commerce* that their control is essential or appropriate to protect that commerce from burdens and obstructions’ are within Congress’ power to regulate.” *Lopez*, 514 U.S. at 555 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

connection between economic activity and the effects of gun restrictions.<sup>234</sup>

Five years later, the Court in *United States v. Morrison*<sup>235</sup> restated its holding from *Lopez* that local non-economic activity by itself—in this case, gender-based violence—could not be viewed in the aggregate to validate Congress’s use of its commerce powers.<sup>236</sup> Although Congress justified the Violence Against Women Act through an abundance of evidence illustrating how gender-based violence had a substantial effect on interstate commerce, the Court found no jurisdictional connection between the two.<sup>237</sup> Writing for the majority and drawing from *Lopez*, Chief Justice Rehnquist articulated a four-part test to determine whether Congress exceeds the bounds of its Commerce Clause power in enacting a statute. This analysis requires a court to ask whether there is: (1) a jurisdictional element, such as moving in interstate commerce; (2) a legislative finding of an economic link between the regulated activity and the interstate commerce goal; (3) a sufficiently substantial effect on interstate commerce by the regulated activity; and (4) a non-economic activity being regulated by Congress.<sup>238</sup>

In both *Lopez* and *Morrison*, the Court acknowledged Congress’s findings that the lack of regulation of firearms in school zones and of gender-based violence, respectively, had substantial effects on interstate commerce, but also that Congress failed to express an element which would limit the reach of each of the statutes at issue.<sup>239</sup> The Court feared the creation of a slippery slope from which Congress would have unlimited power to regulate all non-economic activities.<sup>240</sup>

During the Obama administration, the Court shifted gears from evaluating the regulation of an activity’s substantial effect on interstate commerce to that of an inactivity.<sup>241</sup> The Affordable Care Act, famously known as Obamacare, forced uninsured individuals either to enroll in a health insurance plan or to pay a penalty tax to the Internal Revenue

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<sup>234</sup> See *id.* at 603 (Souter, J., dissenting); *id.* at 620 (Breyer, J., dissenting).

<sup>235</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>236</sup> *Id.* at 609–10, 617; see also *Lopez*, 514 U.S. at 560.

<sup>237</sup> *Morrison*, 529 U.S. at 613–14.

<sup>238</sup> See *id.* at 610–12.

<sup>239</sup> “The second consideration that we found important . . . was that the statute contained ‘no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.’” *Id.* at 611–12 (quoting *Lopez*, 514 U.S. at 526).

<sup>240</sup> See *id.* at 617–19.

<sup>241</sup> See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

Service (IRS).<sup>242</sup> When the law was challenged in *National Federation of Independent Businesses v. Sebelius*,<sup>243</sup> Congress justified the statute on multiple grounds, one of which was that the law was a constitutional exercise of its commerce power. Congress argued that the failure of individuals to buy insurance had a substantial effect on interstate commerce because of cost shifting; if the young and healthy did not buy health insurance, the healthcare industry supporting the elderly and the sick would collapse.<sup>244</sup> Chief Justice Roberts declined to extend Congress's Commerce Clause authority to the regulate individuals' inactivity under the guise of regulating commerce.<sup>245</sup> The Court explained that authorizing Congress to use its commerce power in such a way, even doing so would compel citizens to act in a manner beneficial to society, would start to shape a federal police power not envisioned by the Framers as a part of the Constitution's scheme.<sup>246</sup>

### C. *How Congress Can Address Cash Discrimination*

Congress may reach private actors by enacting a cash discrimination statute under the Commerce Clause. However, any such statute must first fall into one of the three categories discussed in *United States v. Lopez*.<sup>247</sup>

The first category requires a determination of whether the statute regulates channels of interstate commerce, such as highways, airspace, or the Internet.<sup>248</sup> The use of cash to purchase goods and services would not be a channel of interstate commerce since it is not a physical path or gateway between two or more states. The first category is not met.

The statute must next be assessed under the second category: whether it regulates any instrumentalities of interstate commerce, such as

<sup>242</sup> See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 244 (2010); see also *Read the Affordable Care Act*, HEALTHCARE.GOV, <https://www.healthcare.gov/where-can-i-read-the-affordable-care-act> [<https://perma.cc/9LKT-3L5D>].

<sup>243</sup> *Sebelius*, 567 U.S. 519.

<sup>244</sup> See *id.* at 547–48.

<sup>245</sup> “The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’” *Id.* at 558.

<sup>246</sup> See *id.* at 555.

<sup>247</sup> See *United States v. Lopez*, 514 U.S. 549, 558–60 (1995); *supra* text accompanying notes 231–233.

<sup>248</sup> “The transportation of passengers in interstate commerce . . . is within the . . . power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the *channels of interstate commerce* free from immoral and injurious uses has been frequently sustained, and is no longer open to question.” *Id.* at 558 (emphasis added) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)).

cars, buses, boats, or people.<sup>249</sup> Cash does not transport individuals or objects between states. Thus, the second category of the analysis would not apply to cash regulation.

Lastly, if the prior two categories are unmet, the statute must regulate activities that substantially affect interstate commerce in order to constitutionally survive under the Commerce Clause.<sup>250</sup> The regulation of cashless businesses would likely affect interstate travel because individuals will not travel to and patronize businesses that do not accept their available means of payment.<sup>251</sup> While cash discrimination that impacts interstate commerce is not as severe or immoral as racial discrimination—as seen in *Heart of Atlanta* and *McClung*—the economic activity of spending cash significantly affects the purchase of goods and services among interstate commerce.<sup>252</sup> Ultimately, a regulation to force both public and private actors to accept physical cash would fit the third category articulated by Chief Justice Rehnquist: economic activity that has a substantial effect on interstate commerce.

It is likely that regulating businesses such that they must accept the nation's physical legal tender would be accepted as having a substantial effect on the United States' economy. Some may argue, however, that most businesses that decline cash affect only a small percentage of their customers and therefore do not *substantially* affect the economy.<sup>253</sup> But with the growth of cashless businesses and the aggregated total of cash-paying customers declined by businesses in the United States, a *Wickard* aggregation argument would likely prevail.<sup>254</sup> To invalidate any Act that is enacted under the Commerce Clause and that relies on a *Wickard* aggregation argument, it must be compared to the *Lopez* and *Morrison* exceptions of non-economic activities. Since a cashless regulation is an economic activity, there is no need to apply the *Morrison* factors.<sup>255</sup>

The last hurdle to regulate a substantial effect of an activity is to apply a *Sebelius* inactivity analysis where the primary question is whether

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<sup>249</sup> *Id.* (citing *Hous., E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342 (1914)). “[The Commerce Clause’s] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic.” *Shreveport Rate Cases*, 234 U.S. at 351.

<sup>250</sup> “The Court held that intrastate activities that ‘have such a close and *substantial relation to interstate commerce* that their control is essential or appropriate to protect that commerce from burdens and obstructions’ are within Congress’ power to regulate.” *Lopez*, 514 U.S. at 555 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

<sup>251</sup> See *Heart of Atlanta Motel*, 379 U.S. 241.

<sup>252</sup> See *id.* at 258; see also *Katzenbach v. McClung*, 379 U.S. 294, 300–02 (1964).

<sup>253</sup> See *Grunbaum*, *supra* note 50.

<sup>254</sup> See generally *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942); *supra* text accompanying notes 220–223.

<sup>255</sup> See generally *Morrison*, 529 U.S. at 610–12.

Congress is attempting to regulate a citizen's lack of activity.<sup>256</sup> If the answer is yes, the regulation would be an overstep of Congress's Commerce Clause power.<sup>257</sup> If Congress were to impose a requirement to accept payment by cash, this would likely be considered a regulation of an activity. Therefore, the law would be upheld under a *Sebelius* standard.

D. *A Practical Cash Discrimination Statute and How to Enforce It*

Plaintiffs will be unable persuade a court to enjoin all cashless businesses. As cashless businesses grow, minorities will continue to experience buying-power discrimination. Recently, two bills were introduced in Congress to prevent retailers from going cashless: the Cash Always Should be Honored (CASH) Act<sup>258</sup> and the Payment Choice Act.<sup>259</sup> While these proposed bills are still new and in development,<sup>260</sup> they are steps in the right direction. More members of Congress should support and encourage the exercise of its Commerce Clause power to prohibit all businesses from operating as cashless business entities.<sup>261</sup>

The unbanked and underbanked, who are predominately members of low-income households, rely on cash to purchase goods and services.<sup>262</sup> These low-income households tend to be comprised of racial minorities and immigrants.<sup>263</sup> Even without malicious intent, cashless businesses may hinder the interstate travel of people, particularly minorities, who can only pay with cash. As the number of cashless businesses grow, more low-income households will bear the burden of having to apply for checking accounts to use debit cards, credit cards, or checks. If low-income households are denied accounts, they will be unable to pay for basic needs. Therefore, Congress should enact a cash discrimination statute to prohibit a cashless economy from completely

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<sup>256</sup> “The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012).

<sup>257</sup> *Id.*

<sup>258</sup> Cash Should Always be Honored (CASH) Act, H.R. 2630, 116th Cong. (2019).

<sup>259</sup> Payment Choice Act of 2019, H.R. 2650, 116th Cong.

<sup>260</sup> *See* Passy, *supra* note 152.

<sup>261</sup> *See generally* U.S. CONST. art. I, § 8, cl. 3.

<sup>262</sup> *See* Justin Pritchard, *How the Underbanked Handle Finances in the U.S.*, BALANCE, <https://www.thebalance.com/how-the-underbanked-handle-finances-in-the-u-s-4175509> [https://perma.cc/L6JV-JM9S] (last updated Mar. 6, 2019).

<sup>263</sup> *See* LYNETTE A. RAWLINGS ET AL., URBAN INST., IMMIGRANT INTEGRATION IN LOW-INCOME URBAN NEIGHBORHOODS 29–32 (2007), <https://www.urban.org/sites/default/files/publication/46851/411574-Immigrant-Integration-in-Low-income-Urban-Neighborhoods.PDF> [https://perma.cc/TL58-U8TB].

barring from participation those individuals and households whose socioeconomic statuses cannot support a cashless lifestyle.

While more state and local governments should enact statutes and adopt policies to alleviate the growing concern of cashless business growth, a federal regulation should be implemented first.<sup>264</sup> Separate regulations across the United States will create difficulty for large, national businesses to operate on a national scale because they will have to comply with the regulations of different markets. For instance, Philadelphia's ordinance provides exceptions for businesses like Amazon Go and Uber,<sup>265</sup> but not every city or state may want to adopt this exception. On the other hand, if all cities and states adopt this exception, this may create a loophole where all businesses change to a membership model.<sup>266</sup> Since it is unclear whether a membership model must be free to customers, restaurants, markets, and stores could potentially require an online or mobile account to bypass any cash-acceptance requirement. Massachusetts's cash discrimination statute<sup>267</sup> and Philadelphia's ordinance are steps in the right direction, but—because of their vagueness, lack of enforcement, and loopholes—the statute and ordinance create more problems than solutions.<sup>268</sup>

Some may argue that state governments, through their Tenth Amendment police powers to protect the public welfare, safety, and health of their intrastate residents, are better equipped to enforce cash discrimination policies.<sup>269</sup> But as more state and local cash discrimination regulations are adopted, a tangle of loopholes will materialize similar to Philadelphia's ordinance. Philadelphia's list of exceptions creates a slippery slope.<sup>270</sup> It is best left to the federal government to enact a minimum-requirement statute on top of which states may legislate their own policies to fine-tune the federal statute to their local needs.

As a national interest, Congress should protect legal tender. As physical cash loses its authority and relevance with the growing number of cashless businesses, the supply and demand for cash will fall as well. A decline in the necessity for cash will affect the supply local banks purchase from the Federal Reserve.<sup>271</sup> Without an e-currency in development, like in Sweden, and with the continued level of printing

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<sup>264</sup> An analysis of whether cities and states are better equipped to enact and enforce laws is outside the scope of this Note.

<sup>265</sup> See PHILA., PA., ADMIN. CODE § 9-1132(2)(d) (2019).

<sup>266</sup> See *id.*

<sup>267</sup> MASS. GEN. LAWS ch. 255D, § 10A (2017).

<sup>268</sup> See discussion *supra* Section I.C.3.

<sup>269</sup> See U.S. CONST. amend. X.

<sup>270</sup> See PHILA., PA., ADMIN. CODE § 9-1132(2).

<sup>271</sup> See *The Structure and Functions of the Federal Reserve System*, *supra* note 27.

bills, the U.S. dollar could become unstable and at risk of inflation. The printing of the \$100 note will continue to grow and be used for foreign transactions and illegal use, while small denominations to purchase goods domestically will slow in production.<sup>272</sup> In the meantime, as the federal government develops an e-currency backed by the Federal Reserve and works on helping low-income families to adapt to cashless practices, cash acceptance at all businesses should be preserved.

Congress should use an improved-on combination of Massachusetts's cash discrimination statute and Philadelphia's ordinance that precludes ambiguity. Congress's proposed statute should look like this:

- (1) A *public or private entity* selling, *renting*, or offering for sale consumer goods or services at retail is prohibited from refusing to accept *legal tender* as a form of payment to purchase goods or services. A *public or private entity* selling, *renting*, or offering for sale goods or services at retail shall not:
  - (a) Refuse to accept *legal tender* as a form of payment;
  - (b) Post signs on *or around* the premises that *legal tender* payment is not accepted; *and*
  - (c) Charge a higher price to customers who pay *with legal tender* than they would pay using any other form of payment.
- (2) For purposes of this *statute*:
  - (a) 'at retail' shall include any retail transaction conducted in person *on the physical premises*. *If the individual making the payment is not physically present in the physical retail premises at the time of the transaction, then section (1) shall not apply; and*
  - (b) '*legal tender*' shall include *United States currency, note, or coin*.

The italicized words emphasize the additions to Philadelphia's ordinance.<sup>273</sup> These edits aim to solve the confusion of the definitions of a person and of legal tender. The revision also allows mailed, telephone, and online transactions to be cashless. Removing the list of exclusions prevents both public and private businesses from evading the regulation. Additionally, by excluding quantitative qualifiers such as "any" or "all"

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<sup>272</sup> Mark Gimein, *Why Digital Money Hasn't Killed Cash*, NEW YORKER (Apr. 28, 2016), <https://www.newyorker.com/business/currency/why-digital-money-hasnt-killed-cash> [https://perma.cc/XB4R-ADVT] ("In the last two decades, the number of ones and twenties in circulation has risen a bit more slowly than the rest of the economy . . . [but] the number of hundreds that banks have been asking for has skyrocketed. Hundred-dollar bills in circulation have gone up fourfold . . . [with] estimates that fifty per cent of [hundred] bills in circulation are held abroad—and that share has almost certainly been increasing.").

<sup>273</sup> See generally PHILA., PA., ADMIN. CODE § 9-1132.

from “United States currency, note, or coin” in subsection (2)(b), the statute allows retailers—like gas stations—to maintain the practice of refusing large denominations to prevent robberies.<sup>274</sup>

There are multiple ways low-income individuals and households could benefit from a federal cash discrimination statute. Not only would indigent and low-income individuals have the power to purchase goods and services with their cash, but their communities may prosper from businesses that violate any cash discrimination statute. Businesses that do not conform to the law would face fines that could be directed to programs in low-income communities such as federal housing programs, community parks, and after-school activities. Improvements to low-income communities would incentivize the enforcement of a cash discrimination law.

Even though Congress may rely on its Commerce Clause authority to enact such a law, there may be policy concerns among individuals and political parties who support a free-market approach and fewer regulations. To find a healthy medium between businesses who want to grow their cashless operations and cash buyers who do not have access to cashless payment methods, Congress could require businesses to accept cash solely for purchases of ten dollars and below. For any total purchase above that cost, the business may choose to accept only cards and mobile payments. Nonetheless, the total purchase cost does not have to be ten dollars; it can be any amount deemed reasonable by Congress. But to adjust for inflation or other situations, the statute would need to allow for the flexibility to change the total purchase cost. It may not be perfect, but regulating businesses to accept cash for purchases under ten dollars would allow indigent and low-income individuals to purchase low-quantity necessities at cashless grocery and farmers’ markets, convenience stores, and fast food restaurants.

#### CONCLUSION

The concept of a cashless world has already begun, and in no way should countries stunt or outlaw its global expansion.<sup>275</sup> Yet, the pace of a completely cashless economy is too fast for low-income individuals and households to keep up. Plaintiffs have almost no legal claim to remedy the disparate impact of a cashless economy. The United States has at least two paths to protect victims of cashless practices. First, Congress should enact a cash discrimination statute using its Commerce Clause power to

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<sup>274</sup> See *Legal Tender Status*, *supra* note 16.

<sup>275</sup> See Simone Rensch, *The Move to a Digital, Cashless World*, PUB. FIN. INT’L (Jan. 7, 2019), <https://www.publicfinanceinternational.org/feature/2019/01/move-digital-cashless-world> [https://perma.cc/GVU5-NF4V].



force all businesses to accept legal tender. Second, and additionally, state and local governments should develop loophole-free laws governing cashless businesses and should enforce its policies to reassure low-income individuals that their purchasing power will not be hindered due to their socioeconomic status. Cashless businesses should be encouraged, but not all Americans are financially ready to make the leap to that type of economy yet.<sup>276</sup> Low-income Americans should not be left behind.

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<sup>276</sup> See Grabar, *supra* note 61.