SCOPING AND DEFINING FINANCIAL INCLUSION, ACCESS TO CREDIT, AND SUSTAINABLE FINANCE

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I

INTRODUCTION

This is a symposium about using commercial law and financial regulation to improve lives. The COVID-19 pandemic has shown how economic inequality strains our financial and political systems. Distinguished contributors to this symposium agree that law and financial regulation can help combat inequality and provide new economic opportunities for disadvantaged demographics. Often, legal and regulatory proposals to achieve these goals invoke the terms "financial inclusion," "access to credit," and "sustainable finance," as does this symposium's title.

However, these ubiquitous terms remain poorly defined. For example, the World Bank's definition of financial inclusion encompasses both access to credit and sustainable finance.[1] Other definitions of financial inclusion are circular[2] or conclusory.[3] Similarly, writers on sustainable finance conflate it with the environmental, social, and governance (ESG) movement in corporate law.[4]

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1. *Financial Inclusion*, WORLD BANK, https://www.worldbank.org/en/topic/financialinclusion/overview [https://perma.cc/GG99-83T3] (Oct. 2, 2018) (defining "financial inclusion" as meaning that "individuals and businesses have access to useful and affordable financial products and services that meet their needs – transactions, payments, savings, credit and insurance – delivered in a responsible and sustainable way").

2. *See, e.g.*, Erin F. Fonté, *Mobile Payments in the United States: How Disintermediation May Affect Delivery of Payment Functions, Financial Inclusion and anti-Money Laundering Issues*, 8 WASH. J.L. TECH. & ARTS 419, 450 (2013) (quoting MARIANNE CROW ET AL., THE U.S. REGULATORY LANDSCAPE FOR MOBILE PAYMENTS 8 (2012))("The goal of financial inclusion is to help low and moderate income (LMI) and underserved consumers enter the financial mainstream.").

3. *See, e.g.*, Amanda Bloch Kernan, *Sustaining the Growth of Mobile Money Services in Developing Nations: Lessons from Overregulation in the United States*, 51 VAND. J. TRANSNAT'L L. 1109, 1116 (2018) (describing "financial inclusion" generally as an "essential facet of economic development").

4. *See, e.g.*, Thomas Clarke & Martijn Boersma, *Sustainable Finance? A Critical Analysis of the Regulation, Policies, Strategies, Implementation and Reporting on Sustainability in International Finance* 4–5 (U.N. Env't Programme, Working Paper 16/03, 2016) (using the term "sustainable finance" to discuss a variety of environmental, social, and governance aspirations).

International institutions view these terms as describing components of larger targets, such as the United Nations' Sustainable Development Goals,[5] rather than independent goals for the existing financial system. Without articulating a clear sense of purpose for the financial system, this opaque terminology will threaten to replicate business jargon's "sheer weight of euphemism, grammatical infelicity, disingenuity and downright ugliness."[6]

Because these terms purport to describe how the financial system should be fundamentally changed, they should be well defined in a manner that is informed by an understanding of the financial system's functions. The United Kingdom's Independent Commission on Banking, chaired by Sir John Vickers, identifies "three broad functions: to facilitate payments; to intermediate funds between savers and borrowers; and to help manage financial risks."[7] Those functions should underpin the meanings of financial inclusion, access to credit, and sustainable finance, respectively.

From that functional perspective, this Article scopes and defines financial inclusion, access to credit, and sustainable finance to clarify and organize this muddled vocabulary into a clear and pragmatic taxonomy[8] that lawyers and policymakers can use to express regulatory goals.[9] Within a taxonomy, each concept's "normative definition should strive to achieve an optimal regulatory or other clarifying purpose, otherwise the definition is merely an academic exercise."[10] Setting the breadth and boundaries for these buzzwords can

5. *See, e.g.*, UN GLOB. COMPACT, SCALING FINANCE FOR THE SUSTAINABLE DEVELOPMENT GOALS: FOREIGN DIRECT INVESTMENT, FINANCIAL INTERMEDIATION AND PUBLIC-PRIVATE PARTNERSHIPS 3 (2019), https://www.unglobalcompact.org/library/5721 [HTTPS://PERMA.CC/2XAS-EG6N] (proposing a "conceptual framework" for sustainable finance to meet the UN's Sustainable Development Goals in accord with the UN Global Compact's human rights, labor, environmental, and anti-corruption principles).

6. Lucy Kellaway, *Lucy Kellaway's Jargon Awards: Corporate Guff Scales New Heights*, FIN. TIMES (Jan. 8, 2017), https://www.ft.com/content/d118ce7a-d325-11e6-9341-7393bb2e1b51 [https://perma.cc/FQ42-NM4L]. In her journalistic campaign against executives parroting meaningless mission statements, Kellaway reserved rare praise for executives who clearly expressed their corporate aims, such as a Chinese meatpacker who proclaimed, "What I do is kill pigs and sell meat," and a railroad executive who explained, "We move stuff from one place to another."

7. INDEP. COMM'N ON BANKING, FINAL REPORT RECOMMENDATIONS 270 (2011) [hereinafter VICKERS REPORT].

8. The Oxford English Dictionary defines "taxonomy" as, in part, "[a] classification of something; a particular system of classification." *Taxonomy* (n.), OXFORD ENGLISH DICTIONARY (3d ed. 2013), https://www-oed-com.proxy.lib.duke.edu/view/Entry/198305?redirectedFrom=taxonomy#eid [https://perma.cc/R65J-WV27]. This systematic conception of taxonomy owes its modern origins to the Swedish naturalist Carl Linnaeus (1707–78), whose binomial nomenclature for identifying organisms by genus and species persists to the present. *See generally* Staffan Müller-Wille, *Carolus Linnaeus*, ENCYCLOPÆDIA BRITANNICA (Jan. 6, 2020).

9. *See* Steven L. Schwarcz, *What Is Securitization? And for What Purpose?*, 85 S. CAL. L. REV. 1283, 1294 (2012) (describing the "need [for] definitional clarity in order to know how to apply and enforce the law"). *Cf.* Deborah Burand & Anne Tucker, *Legal Literature Review of Social Entrepreneurship and Impact Investing (2007-2017): Doing Good by Doing Business*, 11 WM. & MARY BUS. L. REV. 1, 27 (2019) (describing how the "lack of agreed terminology muddles and impedes growth within [the] body of academic literature" on impact investing).

10. Schwarcz, *supra* note 9, at 1289–90.

transform mere monikers into useful terms that are "rooted pragmatically, taking into account how, functionally, the concept is used in the real world."[11]

For each term, we follow a sequential methodology of scoping and defining. Scoping means setting a concept's boundaries.[12] An appropriate conceptual scope is neither too broad nor too narrow.[13] Overly broad definitions are problematic because they may cause uncertainty about the applicability of a concept or law to a given party.[14] Conversely, overly narrow definitions may truncate important normative and regulatory debates.[15] The "confusion and misunderstanding created by an exclusionary or underinclusive definition" can also cause inadequate regulatory responses to market changes.[16] When markets change, narrow definitions quickly become obsolete.[17]

After scoping, we define each term based on three criteria. First, each definition must be accurate—it should "reasonably identif[y] what is described."[18] Accuracy is important, because "[u]nclear definitions can lead to hard-fought court battles over seemingly minor semantic issues."[19] Second, "the definition ideally should be consistent with market expectations . . . ."[20] This principle channels legal realism, as exemplified by Karl Llewellyn's functional development of the Uniform Commercial Code,[21] which expressly incorporates the market's "course of performance," "course of dealing," and "usage of trade."[22] Consistency with market expectations means that a taxonomy is accessible to academics and practitioners—including lawyers, legislators, regulators, and policymakers—as well as consumers. After all, "[d]efinitions provide value to the extent they enable audience members to focus on

11. Steven L. Schwarcz, *Ring-Fencing*, 87 S. CAL. L. REV. 69, 73 (2013).

12. The Oxford English Dictionary defines "scope," in part, as "[t]o calculate the scope or range of." *Scope* (v.2), OXFORD ENGLISH DICTIONARY (2d ed. 1989), https://www-oed-com.proxy.lib.duke.edu/view/Entry/172977?rskey=SxY73F&result=2&isAdvanced=false#eid [https://perma.cc/75HX-UWNR].

13. *Cf.* Schwarcz, *supra* note 9, at 1289–92 (discussing the risks of both overly broad and exclusionary definitions of securitization).

14. *Id.* at 1292.

15. *Cf. id.* at 1289 (proposing that a definition of "securitization" should include securitization's weaknesses to promote debates and invite regulation).

16. *Id.* at 1297 n.19, 1291.

17. *See id.* at 1295 ("[T]he greater its precision, the less likely a definition will continue over time to describe a financial concept.").

18. U.C.C. § 9-108(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

19. Schwarcz, *supra* note 9, at 1294 (citing Mammoth Cave Prod. Credit Ass'n v. York, 429 S.W.2d 26, 29 (Ky. Ct. App. 1968) (interpreting U.C.C. § 9-108(a))).

20. *Id.* at 1292.

21. *Id.* at 1288–89. *See also* Steven L. Schwarcz, *Changing Law to Address Changing Markets: A Consequence-Based Inquiry*, 80 LAW & CONTEMP. PROBS., no. 1, 2017, at 163, 177 (citing KARL N. LLEWELLYN, THE THEORY OF RULES (Frederick Schauer ed., 2011)).

22. *See, e.g.*, U.C.C. § 1-303(d) ("A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to the specific terms of the agreement, and may supplement and qualify the terms of the agreement.").

characteristics relevant to them."[23] Finally, "[a]ny definition . . . should strive to minimize definitional obsolescence."[24] As Llewellyn recognized, conceptual definitions and markets must evolve together.[25]

By this methodology, we propose defining financial inclusion, access to credit, and sustainable finance as follows. Financial inclusion means broad-based deposit-account ownership and access to payments services.[26] Access to credit means access to loan funding on reasonable terms, especially for underserved demographics of potential entrepreneurs.[27] Sustainable finance describes a system that continuously provides financial inclusion and access to credit.[28] These definitions correspond to the Vickers Report's "broad functions" of facilitating payments, intermediating funds, and managing financial risks.[29]

After scoping and defining each of these terms in Parts II through IV of this Article, we use our taxonomy in Part V to discuss possible policy proposals for addressing economic dislocations caused by the COVID-19 pandemic.[30] Immediately, we hope that our taxonomy can offer an analytical lens for reading the contributions to this symposium, which we will reference throughout this Article. More ambitiously, we hope that our taxonomy can provide a common set of terms for rigorous debates on how commercial law and financial regulation can contribute to alleviating economic inequality, political instability, and fragility in the financial system.

II
FINANCIAL INCLUSION

Current definitions of financial inclusion are overly broad. The International Monetary Fund (IMF) inconclusively surveyed definitions of financial inclusion, only to settle for the vague and verbose proposition that "financial inclusion is a multifaceted concept, encompassing various dimensions, including access to and use of financial services as well as other aspects such as affordability, usefulness, quality, and awareness of financial services and products."[31] Another

23. Schwarcz, *supra* note 9, at 1291.

24. *Id.* at 1297.

25. *Id.*; *see supra* note 21 and accompanying text; *see also* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 133–34 (2019) ("Static laws that fail to reflect preferences of social norms, or do not respond to a changing environment, remain black letters on the books with little impact on social ordering.").

26. *See infra* text accompanying notes 31–56.

27. *See infra* text accompanying notes 57–87.

28. *See infra* text accompanying notes 88–128.

29. *See supra* text accompanying note 7.

30. Particularly, we draw on Nassim Nicholas Taleb's concept of "antifragility" as the "antidote" to unexpected yet highly-damaging "black swan" events like the pandemic. *See* NASSIM NICHOLAS TALEB, ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER 6–7, 20 (2012) (proposing a "spectrum" of fragility, resilience, and antifragility to describe, respectively, systems' negative, neutral, or positive reactions to volatility).

31. MARCO ESPINOSA-VEGA ET AL., INT'L MONETARY FUND, MEASURING FINANCIAL ACCESS: 10 YEARS OF THE IMF FINANCIAL ACCESS SURVEY 3 (2020).

policymaker, speaking at the founding of the Cato Institute's Initiative for Financial Inclusion, emphasized the availability of choices among financial products.[32] While that definition of financial inclusion advances free-market aspirations, it ignores the millions who lack even basic bank accounts[33] and is insufficiently concrete for a legal and financial taxonomy.[34] As discussed, other definitions are conclusory and circular,[35] sometimes altogether omitting any explanatory meaning for financial inclusion.[36] We believe the scope of this term should be narrower and more precise, focusing on access to essential banking services.

To that end, we define financial inclusion as expanding account ownership to provide basic banking services,[37] namely, deposit accounts and funds transfers. This definition is accurate: it "reasonably identifies" the problem of inadequate account ownership that global institutions and governments have described and measured.[38] Despite decades of progress, the World Bank reports that nearly one-third of adults worldwide still lack a deposit account.[39] Likewise, the U.S. Federal Deposit Insurance Corporation (FDIC) reports that, in 2017, 6.5% of American households were "unbanked."[40]

Our focus on account ownership is "consistent with market expectations."[41] Market realities show that financial inclusion is simple: "Foremost, poor people want a safe space to store their money."[42] They also want an easy day-to-day means to use their money to make payments, such as paying rent or buying groceries. In considering "where customers are dependent on a service to meet their day-to-day need for money," Britain's Independent Commission on Banking concluded that "the key services are . . . deposits and overdrafts."[43] Like

32. Brian Johnson, *Consumer Protection and Financial Inclusion*, 39 CATO J. 489, 490 (2019) ("[F]inancial inclusion is 'the availability and equality of opportunities to access financial services' . . . [which] implies the absence of conditions that impede the ability of consumers to make . . . choices.").

33. *See infra* note 40 and accompanying text.

34. *See supra* note 8 and accompanying text (defining "taxonomy").

35. *See supra* notes 2–3 and accompanying text.

36. *See* Eleanor Lumsden, *The Future Is Mobile: Financial Inclusion and Technological Innovation in the Emerging World*, 23 STAN. J.L. BUS. & FIN. 1, 4 (2018) (calling for technological solutions to promote "financial inclusion" without defining the term).

37. *See* VICKERS REPORT, *supra* note 7, at 7 (describing "basic banking services").

38. *Cf. supra* note 18 and accompanying text (describing U.C.C. § 9-108(a)'s requirement for a description of collateral that "reasonably identifies what is described").

39. A. DEMIRGÜÇ-KUNT, LEORA KLAPPER, DOROTHE SINGER, SANIYA ANSAR & JAKE HESS, WORLD BANK GRP., THE GLOBAL FINDEX DATABASE 2017: MEASURING FINANCIAL INCLUSION AND THE FINTECH REVOLUTION 3, 35 (2017), https://globalfindex. worldbank.org/ [https://perma.cc/43MB-LBWD] [hereinafter FINDEX DATABASE] ("Globally, about 1.7 billion adults remain unbanked").

40. FED. DEPOSIT INS. CORP., 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 1–2 (2017), https://www.fdic.gov/householdsurvey/2017/2017report.pdf [https://perma.cc/U3WR-MGWW] [hereinafter 2017 FDIC NATIONAL SURVEY] (defining unbanked as lacking a federally-insured bank account).

41. *See supra* note 20 and accompanying text.

42. Anita Bernstein, *The Trouble with Regulating Microfinance*, 35 U. HAW. L. REV. 1, 25 (2013).

43. VICKERS REPORT, *supra* note 7, at 36–37.

electric power or running water,[44] account owners expect these services to be available when they "flip the switch."[45]

Expectations for ubiquitous, secure, and stable depository and payments services date back centuries. In the eighteenth century, Adam Smith identified the public interest in banking and compared banks to public utilities.[46] For this symposium, Professor Federico Lupo-Pasini shows that debates about banking as a public good have continued from Smith's time to the present.[47] Account ownership forms a basis for those debates, because payments systems and lending often depend upon ownership of a bank account.[48]

The long history of viewing account ownership as a public good ensures that our basic banking definition of financial inclusion will not become obsolete.[49] Echoing Lupo-Pasini, Professor TT Arvind shows in his article that the historical perspective on financial inclusion and sustainability remains apposite for improving the financial system, especially during crises.[50] Depository and payment services are not new, but technology has promoted financial inclusion by improving the means of delivering these services. Already, "mobile money" technology, which allows "users to store and transfer funds through a mobile phone," has reduced the costs of operating and using payments networks.[51] For instance, mobile phone technology has expanded access to financial services in places like sub-Saharan Africa.[52]

Our definition also encourages debate on the costs and benefits of new technology for basic banking services.[53] Professor Iris Chiu shows in her article that cryptocurrencies and other distributed ledger technologies could enhance financial inclusion, but also risk replicating the current system's financialization.[54] Likewise, Professor Emily Lee exposes how technology creates a tension between financial inclusion and financial consumerism through her study of Hong Kong-licensed virtual banks.[55] To avoid obsolescence, our definition of

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44. *See infra* text accompanying note 99.

45. *Cf.* VICKERS REPORT, *supra* note 7, at 11 (describing consumers' lack of alternatives for deposit and payments systems).

46. Sankar Muthu, *Adam Smith's Critique of International Trading Companies: Theorizing "Globalization" in the Age of Enlightenment*, 36 POL. THEORY 185, 195 (2008).

47. *See generally* Federico Lupo-Passini, *Financial Inclusion and the "War* for *Cash"*, 84 LAW & CONTEMP. PROBS., no. 1, 2021, at 17.

48. Schwarcz, *supra* note 11, at 87 n.127.

49. *See supra* note 24 and accompanying text.

50. *See generally* TT Arvind, *Too Big to Care?: Financial Contracts and the Problem of Transactional Asymmetry*, 84 LAW & CONTEMP. PROBS., no. 1, 2021, at 35.

51. FINDEX DATABASE, *supra* note 39, at 1, 12.

52. *Id.* at 11.

53. *See supra* note 15 and accompanying text (discussing how a taxonomy should engender debate on regulatory concepts' strengths and weaknesses).

54. *See generally* Iris H-Y Chiu, *Regulating Sustainable Finance in Capital Markets: A Perspective from Socially Embedded Decentralized Regulation*, 84 LAW & CONTEMP. PROBS., no. 1, 2021, at 75.

55. *See generally*, Emily Lee, *Digital Financial Inclusion: Observations and Insights from Hong Kong's Virtual Banks*, 84 LAW & CONTEMP. PROBS., no. 1, 2021, at 93.

financial inclusion encapsulates both improving technologies and the historical public interest in deposit-account ownership.[56]

III
ACCESS TO CREDIT

The scope of access to credit has also been unclear and, often, too expansive. As discussed, the World Bank has defined access to credit as a component of financial inclusion.[57] Functionally, these terms are related: "The core functions of banks—taking deposits and making loans—are to some extent complementary, in that they are produced more efficiently together than separately."[58] However, the Vickers Report distinguishes access to credit from the deposit services that we identify with financial inclusion. Consumers worldwide must have immediate access to deposits for living expenses.[59] Unlike deposits, "credit supply should be stable and resilient to shocks but it need not all be continuously provided."[60] For example, most U.S. consumer debt arises from episodic life events, such as buying a home or attending college.[61]

This reliance on borrowed funds raises normative questions about the scope of access to credit.[62] Who should have access to credit? In what amounts? For what purposes? Discussing student loans in her contribution to this symposium, Professor Victoria Haneman considers how to provide the critical social good of education by sustainably managing student debt as a "common pool resource" in order to avoid the exhaustion of that resource from a tragedy of the commons.[63] Adapting her emphasis on equal opportunity and intergenerational sustainability,[64] we especially focus our definition of access to credit on funding entrepreneurs from underserved groups, who can create jobs and lift communities from poverty.

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56. *Cf.* Steven L. Schwarcz, *Changing Law to Address Changing Markets: A Consequence-Based Inquiry*, 80 LAW & CONTEMP. PROBS., no. 1, 2017, at 163, 163 (discussing "when the law should 'follow' changes in financial markets").

57. *See* WORLD BANK, *supra* note 1 (including access to credit in its "financial inclusion" definition).

58. VICKERS REPORT, *supra* note 7, at 271.

59. *See id.* at 36–37. *See also* FINDEX DATABASE, *supra* note 39, at 10 (describing how citizens in both high-income countries and the developing world rely on their own savings or the savings of friends and family during emergencies).

60. VICKERS REPORT, *supra* note 7, at 37.

61. *See* Harriet Torry, *Mortgage Debt Hits Record, Eclipsing 2008 Peak*, WALL ST. J., Aug. 13, 2019, at A3 (describing mortgage loans as accounting for the greatest share of U.S. household debt, despite auto loans' increasing share).

62. *Compare* Marco Meyer, *The Right to Credit*, 26 J. POL. PHIL. 304, 306 (2018) (proposing a "right to credit" to address the problem that "[l]ack of access to credit can prevent individuals from starting businesses, going to university, or buying homes"), *with* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1157 (2019) ("[C]redit as social provision is not a substitute for a robust welfare regime that addresses the broader structural forces that result in entrenched, intractable poverty.").

63. Victoria J. Haneman, *(Re)Framing Student Loan Debt as a Commons*, 84 LAW & CONTEMP. PROBS., no. 1, 2021, at 153.

64. *Id.*

Yet expanding access to credit presents a classic chicken-and-egg problem. The poor lack assets because they cannot access credit, but cannot access credit because they lack assets to pledge as collateral.[65] Mortgage finance is especially inadequate in the developing world and disadvantaged communities,[66] as nonexistent or confusing titles to real property hinder would-be entrepreneurs who cannot obtain collateralized credit from their homes.[67] Inadequate mortgage finance is problematic because, as Professor John Linarelli observes in his contribution to this symposium, government-subsidized mortgage loans have long been a primary means of encouraging social mobility and intergenerational wealth creation in the United States.[68] Professor Linarelli contends that regulations have too often oscillated between promoting access to credit and protecting the system from excessive leverage, without due regard for principles of equality.[69]

Conflicting mortgage finance policies demonstrate the conundrum of scoping the appropriate amount of credit: leverage can enhance growth, but excessive debt can endanger both the financial system and political stability.[70] Indeed, "[i]t has been known for centuries that more leverage leads to more risk."[71] Accordingly, the scope of access to credit should focus on simple lending; access to credit need not mean access to highly-complex and highly-leveraged instruments. As the first author of this Article has explained, "[t]he key is that the loans be sufficiently overcollateralized—that their collateral value exceed the amount of the loan by a reasonable margin, enabling repayment in the event of a default."[72] Overcollateralization is especially important for consumer lending, because certain disadvantaged borrowers may have nothing to lose by

65. *Cf.* Steven L. Schwarcz, *Empowering the Poor: Turning De Facto Rights into Collateralized Credit*, 95 NOTRE DAME L. REV. 1, 23 (2019) (explaining that prudent bank lending traditionally required "two ways out" for repayment: collateral and cash flows).

66. *See* FINDEX DATABASE, *supra* note 39, at 9. According to the World Bank, "27 percent of adults in high income economies reported having an outstanding housing loan from a bank or another type of financial institution . . . [but] that share was typically less than 10 percent in developing economies." *Id.*

67. Schwarcz, *supra* note 65, at 2–3 (citing HERNANDO DE SOTO, THE MYSTERY OF CAPITAL 18–22 (2000)).

68. John Linarelli, *Equality and Access to Credit: A Social Contract Framework*, 84 LAW & CONTEMP. PROBS., no. 1, 2021, at 165.

69. *Id.* at 177–80.

70. *See* PISTOR, *supra* note 25, at 78 (describing how debt causes "expansion from one unprecedented height to another— to be followed only too often by equally steep downturns, safe only for the successful intervention of states"); Steven L. Schwarcz, *Keynote Address: Understanding the Subprime Financial Crisis*, 60 S.C. L. REV. 549, 568 (2009) ("High leverage fosters systemic risk and hence externalities by making it more likely that a firm will fail, thereby triggering failures of other highly-leveraged counterparty firms.").

71. John Geanakoplos, *Leverage Caused the 2007-2009 Crisis*, *in* SYSTEMIC RISK IN THE FINANCIAL SECTOR: TEN YEARS AFTER THE GLOBAL FINANCIAL CRISIS 236 (Douglas Arner, Emilios Avgouleas, Danny Busch & Steven L. Schwarcz, eds., Centre for International Governance Innovation, 2019).

72. Schwarcz, *supra* note 65, at 23.

defaulting.[73] Loans with conservative loan-to-value ratios can still enhance credit access while reducing the amount of leverage and risk.[74] Defining access to credit based on simple, overcollateralized lending may also expand borrowing by helping lenders overcome their fear of international secured lending to small and medium-sized businesses, which Professor N. Orkun Akseli details in his contribution.[75] Professor Linarelli adds that a Rawlsian approach, predicated upon equal opportunity, can inform mortgage lending policies that provide the social good of housing without excessive leverage and financial engineering.[76]

From that scope, we define access to credit as follows: to make prudent lending available to all, including heretofore underserved borrowers, for beneficial purposes like starting a business. By our criteria, this definition is accurate because it addresses would-be borrowers' inability to obtain simple loans.[77] It reflects market realities by distinguishing access to credit from financial inclusion, because account ownership alone does not guarantee access to credit.[78] Our emphasis on prudent lending also incorporates the market's lessons about excessive leverage from the 2008 financial crisis.[79] Finally, prudent secured lending is timeless, so this definition will not become obsolete.[80]

IV
SUSTAINABLE FINANCE

Prior definitions of sustainable finance are also overly broad. They conflate sustainable finance and the "environmental, social and governance (ESG)" movement in corporate law.[81] Corporations often oppose ESG proposals from

73. *See* Geanakoplos, *supra* note 71, at 250 ("Subprime borrowers have low ratings, and so the credit score loss of defaulting is not as high."). *Cf.* Bob Dylan, Like a Rolling Stone, *on* Highway 61 Revisited (Columbia Records 1965) ("When you [ain't] got nothing, you got nothing to lose").

74. *Cf.* Schwarcz, *supra* note 65, at 25 ("The prudent lending standard thus will restrict the relative amount an economically disadvantaged person could borrow against his de facto rights. Nonetheless, that amount may well be sufficient to start a viable small business.").

75. N. Orkun Akseli, *Financial Inclusion, Access to Credit, and Sustainable Finance: What role for the UNCITRAL Model Law on Secured Transactions?*, 84 LAW & CONTEMP. PROBS., no. 1, 2021, at 181.

76. *See* Linarelli, *supra* note 68, at 177–80.

77. *See supra* notes 65–67 and accompanying text.

78. Currently, many so-called "underbanked" Americans with federally-insured bank accounts rely on nonbank lenders for highly expensive payday loans, title loans, and other credit products. 2017 FDIC NATIONAL SURVEY, *supra* note 40, at 39. In developing economies, consumers and businesses continue to depend on their friends and families for credit, even as account ownership expands. FINDEX DATABASE, *supra* note 39, at 9.

79. Schwarcz, *supra* note 65, at 24 (describing how subprime mortgage loans were not sufficiently overcollateralized before the 2008 crisis).

80. *See* Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425, 428 (1997) (citing Deuteronomy 24:10–13) (relating the story of a poor man pledging his cloak as security for a loan).

81. *See* Clarke and Boersma, *supra* note 4 (describing definitions of "sustainable finance" that discuss financial, social, and environmental aims); *see also* Martin Lipton, William Savitt & Karessa L. Cain, *On the Purpose of the Corporation*, HARV. L. SCHOOL F. ON CORP. GOVERNANCE (May 27, 2020), https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation/ [https://perma.cc/S8FW-RJN4] (describing the "view that corporations should take into account environmental, social and

shareholders, viewing the proposals as distracting impositions on directors' business judgment.[82] Muddling sustainable finance and ESG may risk politicizing proposals for a broad-based financial system. A more logical way to define this term's scope should start with its noun, finance, and then examine the meaning of its adjective.

Given that scope, what should it mean for finance to be sustainable? Sustainability means "meeting our own needs without compromising the ability of future generations to meet their own needs."[83] Sustainable finance thus should mean finance that meets existing needs without compromising the ability to meet future needs. The other two terms on which this article focuses—financial inclusion and access to credit—describe finance that meets human needs. Accordingly, sustainable finance should mean the ability to provide financial inclusion and access to credit, today and in the future.[84]

This definition is consistent with market expectations. The Vickers Report, for example, calls for a resilient financial system that continuously safeguards deposits and provides payments services.[85] It regards the continuous provision of these financial services as "critical to the economy."[86] This definition also should prove durable because financial inclusion and access to credit are concerned with the fundamental needs for protecting, transferring, and lending money.[87]

V
THE COVID-19 PANDEMIC AND AN ANTIFRAGILE REGULATORY APPROACH

The COVID-19 pandemic and ensuing social distancing policies have caused economic dislocations and hardship globally. In the United States, the unemployment rate reached 14.7% in April 2020, with 20.5 million Americans

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governance (ESG) issues in running their businesses, and resistance from those who believe that companies should be managed solely to maximize share price").

82. Patrick Temple-West, *Record Year for Environmental, Social Investor Petitions*, FIN. TIMES (June 9, 2020), https://www.ft.com/content/6dceb82a-1084-40bf-91cb-7cb6100f3992 [https://perma.cc/7SBJ-UU4L].

83. MCGILL UNIV. & UNIV. OF ALTA., WHAT IS SUSTAINABILITY?, https://www.mcgill.ca/sustainability/files/sustainability/what-is-sustainability.pdf [https://perma.cc/U6WN-58GN]. *Cf.* REPORT OF THE UN WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 41 (2000), https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf [https://perma.cc/3G5P-QC7J] (similarly defining sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs").

84. In that sense, the term implicitly takes into account systemic risk, which can threaten these continuous financial services. *Cf.* VICKERS REPORT, *supra* note 7, at 76 ("Problems are liable to spread quickly from one part of the financial system to another and the authorities face the unacceptable choice between supporting bank creditors or allowing vital services to the economy to be interrupted."); Steven L. Schwarcz, *Conclusion: Closing Perspectives on Regulating Systemic Risk*, *in* SYSTEMIC RISK IN THE FIN. SECTOR: TEN YEARS AFTER THE GREAT CRASH 263 (Douglas Arner, Emilios Avgouleas, Danny Busch & Steven L. Schwarcz, eds., Centre for International Governance Innovation, 2019) (suggesting a more systematic framework of macroprudential regulation to protect financial stability).

85. VICKERS REPORT, *supra* note 7, at 7.

86. *Id.* at 36.

87. *See supra* note 7 and accompanying text.

losing jobs.[88] The pandemic ended the longest bull market in American history.[89] In this Part, we use our taxonomy to discuss possible policy proposals for the financial system's recovery from the pandemic.

The pandemic may be described as a "black swan" occurrence, defined by the author Nassim Nicholas Taleb as "a very low-probability but very high-risk event."[90] Despite black swan events like the pandemic, sustainable finance (as we define it) requires continuously providing financial inclusion and access to credit, which encompass widespread access to such basic banking services as deposit-account ownership, payments services, and adequate loan funding on reasonable terms. To protect these services—especially if black swan events are becoming more common[91]—a sustainable financial system might need to "ring-fence" vulnerable deposit-taking institutions from the commercial calamities that complexity can cause.[92] "Ring-fencing" means "legally deconstructing a firm . . . to reallocate and reduce risk more optimally, such as by protecting the firm's assets and operations and minimizing its internal and affiliate risks."[93] Historically, the 1933 Glass-Steagall legislation separated American commercial and investment banks.[94] After the 2008 crisis, Sir John Vickers and others reinvigorated ring-fencing,[95] and as Professor A Karim Aldhoni details for this symposium, the United Kingdom extensively implemented the Vickers Report's proposals.[96]

Ring-fencing is consistent with the Vickers Report's view of the financial system's functions. That Report envisioned "a banking system that is effective and efficient at providing the basic banking services of safeguarding retail deposits, operating secure payments systems, efficiently channeling savings to productive investments, and managing financial risk."[97] As such, it recommended

88. Sarah Chaney and Eric Morath, *April Unemployment Rate Rose to 14.7%; Unprecedented 20.5 million jobs shed as coronavirus pandemic hit the economy*, WALL ST. J., May 8, 2020, at A1.

89. Jeanna Smialek, *The U.S. Entered a Recession in February*, N.Y. TIMES, June 8, 2020.

90. Howell E. Jackson & Steven L. Schwarcz, *Protecting Financial Stability: Lessons from the Coronavirus Pandemic*, HARV. BUS. L. REV. (forthcoming 2021), available at https://ssrn.com/abstract=3644417 [https://perma.cc/FU9G-QMZG] (citing NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2nd ed. 2010)).

91. As the financial system is becoming more complex, the increasing frequency of failures would seem to follow from chaos theory's concept of deterministic chaos in dynamic systems, "which recognizes that the more complex the system, the more likely it is that failures will occur." Steven L. Schwarcz, *Controlling Financial Chaos: The Power and Limits of Law*, 2012 WIS. L. REV. 815, 827 n.44 (2012).

92. *Cf.* Schwarcz, *supra* note 11, at 97 (proposing that ring-fencing can protect depositors).

93. *Id.* at 82.

94. Banking Act of 1933, Pub. L. No. 106-102, 48 Stat. 162 §§ 16, 20, 21, and 32. *See also* VICKERS REPORT, *supra* note 7, at 36.

95. *See generally* VICKERS REPORT, *supra* note 7 (establishing a commission in 2010 to assess recommendations for increasing structural financial stability in the U.K. banking sector, including ring-fencing); *see also* Schwarcz, *supra* note 11, at 97 (supporting retail ring-fencing).

96. A Karim Aldohni, *The Accessibility of Credit and the Protection of Consumers in the High-Cost Credit Sector: A Multifaceted Challenge*, 84 LAW & CONTEMP. PROBS., no. 1, 2021, at 197. *See also* Financial Services (Banking Reform) Act 2013, c. 33 (U.K.) (requiring that consumers' deposits be held by ring-fenced entities).

97. VICKERS REPORT, *supra* note 7, at 7.

implementing "structural separation" by requiring the United Kingdom's retail banks to operate as distinct, independently-governed legal entities.[98] Like public utilities with a duty to serve,[99] ring-fenced U.K. retail banks must provide certain "mandated services," such as taking deposits, transferring payments, and offering overdrafts.[100] They may not engage in potentially risky "prohibited services," like investment banking or proprietary trading, which are "not integral to the provision of payments services to customers."[101]

The Vickers Report's proffered rationale for ring-fencing matches our proposed definition of financial inclusion:

> The purpose of the retail ring-fence is to isolate those banking activities where continuous provision of service is vital to the economy and to a bank's customers in order to ensure, first, that this provision is not threatened as a result of activities which are incidental to it and, second, that such provision can be maintained in the event of the bank's failure without government solvency support.[102]

This rationale addresses the financial fragility of consumers and banks, respectively. The Vickers Report found that most retail bank customers "are not well equipped to plan for [a depository or payment service] interruption," like a disruption from a black swan event.[103] Major reforms, like ring-fencing, can redesign banks to provide basic services through crises while reducing fragility by disabusing banks of their expectations for government bail-outs.[104]

The pandemic also has demonstrated the importance of widespread deposit-account ownership, which is part of our proposed definition of financial inclusion. The Coronavirus Aid, Relief, and Economic Security (CARES) Act provided direct economic impact payments to Americans earning up to $99,000 annually.[105] Yet low-income individuals often lack a bank account to receive a stimulus

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98. *Id.* at 9.

99. *See, e.g.,* Tripp v. Frank, 100 Eng. Rep. 1234 (1792) (identifying a ferry's duty to serve a section of the River Humber).

100. VICKERS REPORT, *supra* note 7, at 11.

101. *Id.*

102. *Id.* at 35.

103. *Id.* at 38.

104. *See id.* at 147 ("[A]n important objective of the reforms is to reduce the probability that the Government has to make [bail-out] investments again in the future."). The Vickers Report observed that "[h]istorical evidence suggests that the costs of making investments to bail out banks are generally very large, but much smaller than the wider costs of financial crises." *Id.* Nonetheless, the Report acknowledged the hidden costs of expected bail-outs. *Id.* at 76 ("An expectation of government bail-outs means the price of bank funding does not reflect the risks that banks run."). Taleb and other commentators are more trenchant about the perceived moral hazard of bail-outs. *See* TALEB, *supra* note 30, at 68 ("If nature ran the economy, it would not continuously bail out its living members to make them live forever."); Lawrence H. White, *Antifragile Banking and Monetary Systems*, 33 CATO J. 471, 475 (2013) ("A key challenge that faces us in developing an antifragile banking system is to find the best way to credibly tie the government to the mast to eliminate bailouts.").

105. Surekha Carpenter and Emily Wavering Corcoran, *COVID-19 Financial Support: Who's Covered and Who's Not?*, FED. RSRV. BANK OF RICHMOND (May 6, 2020), https://www.richmondfed.org/research/regional_economy/regional_matters/2020/rm_05_06_2020_covid19_financial_support [https://perma.cc/AB4N-SD8W].

payment by direct deposit.[106] The homeless cannot even receive checks by mail.[107] Although the Consumer Financial Protection Bureau, in theory, allows stimulus fund transfers to prepaid cards and prepaid bank accounts,[108] the poor often incur high transaction costs in cashing stimulus checks or obtaining money orders.[109] Conceivably, broadening account ownership could encourage saving for shocks like the pandemic.[110] Some commentators see the pandemic as an opportunity to implement low-cost banking through the U.S. Postal Service, which provided account services through the 1960s.[111] Others argue that expanding bank chartering to ubiquitous corporations like supermarket chains could better broaden account ownership.[112] These new entrants also could make the financial system more robust by introducing variability among business models.[113]

Similarly, the pandemic has highlighted Americans' financial fragility. One Federal Reserve study observes that nearly a majority of Americans lack $400 to pay for a surprise expense.[114] Many Americans, and millions globally, require access to credit—which under our proposed definition includes adequate loan funding on reasonable terms—to pay for the pandemic's unanticipated costs. Our definition also focuses on the importance of providing access to credit to aspiring entrepreneurs, especially those from underserved groups. Small businesses have struggled to obtain loans for continuing operations during social distancing

106. *Id.*

107. *Id.*

108. *Id.*

109. Gillian Tett, Billy Nauman, Patrick Temple-West, Andrew Edgecliffe-Johson & Eileen Rodrigues, *Coronavirus Profiteers Warned; Richard Curtis's Plan to Build Back Better; The Rise of 'S' in ESG*, FIN. TIMES: MORAL MONEY (Mar. 27, 2020), https://www.ft.com/content/457fc6d2-4f94-4a1f-bfb7-4142a45480c4 [https://perma.cc/33FZ-TND2].

110. *See supra* note 42 and accompanying text.

111. Tett, *supra* note 109 (citing Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165 (Feb. 24, 2014), https://harvardlawreview.org/2014/02/its-time-for-postal-banking/#_ftn7 [https://perma.cc/2UJ5-85NP]).

112. Diego Zuluaga, *To Help the Unbanked, Break the Industrial Bank Taboo*, CATO AT LIBERTY (June 9, 2020), https://www.cato.org/blog/help-unbanked-break-industrial-bank-taboo [https://perma.cc/C7S5-78JY].

113. *Cf.* Roberta Romano, *For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture*, 31 YALE J. ON REG. 1, 5 n.9 (2014) ("[F]inancial institutions operating under different regulatory regimes will be incentivized to follow different business strategies, which will reduce financial network interconnections and contagion . . . in the spirit of . . . Nassim Taleb's advocacy of fostering 'antifragile' systems, which are as robust to catastrophic failure as possible because there is variability in their parts . . . ."). Imposing stakeholder governance on new entrants also could make the financial system more robust. *Cf.* Steven L. Schwarcz, *Misalignment: Corporate Risk-Taking and Public Duty*, 92 NOTRE DAME L. REV. 1, 21 (2016) (arguing for imposition of a public governance duty).

114. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, 1–56, 2 (May 2018), https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf [https://perma.cc/WY97-7V8P] (four in ten adults self-reported that, if faced with an unexpected expense of $400, they either would be unable, or else would have to borrow money or sell something, to pay it).

measures,[115] with minority-owned businesses disproportionately impacted.[116] Credit unavailability may have caused the 2008 crisis,[117] and insufficient access to credit could exacerbate the current downturn.[118]

How can law and regulation expand access to credit to encourage an inclusive economic recovery from the pandemic? The first author of this Article proposes adapting reality-based commercial law concepts, such as the Uniform Commercial Code's "holder in due course" doctrine and incorporation of "course of dealing," to recognize and allow collateralization of the de facto rights of land occupants who lack legal title.[119] The realities of commercial law should supersede formalistic property law to enable underserved groups, especially the poor, to pledge their de facto property rights as de jure collateral.[120] The author shows how that could address inequality without unfairly impacting traditional property ownership.[121]

Securitization can also help to generate funding to expand access to credit. Banks are unlikely to fill the funding gap for underserved demographics, because their business models rely on "marked-up interest rates," just like retailers that purchase at wholesale and sell to consumers at higher prices.[122] Securitization has the potential to generate funding and reduce borrowers' cost of credit by accessing effectively endless capital market funds.[123] Critics may be wary of securitizing loans to underserved borrowing demographics that might sometimes resemble pre-2008 subprime mortgage obligors.[124] Nonetheless, basic asset-

115. Tiffany Hsu & Emily Flitter, *Businesses Face a New Coronavirus Threat: Shrinking Access to Credit*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/business/economy/coronavirus-business-credit-access.html [https://perma.cc/X69Q-FRUA].

116. *See, e.g.*, U.S. Chamber of Commerce, *Coronavirus Pandemic Hits Minority-Owned Small Businesses Disproportionately Hard, New Poll Shows*, (Aug. 4, 2020), https://www.uschamber.com/press-release/coronavirus-pandemic-hits-minority-owned-small-businesses-disproportionately-hard-new [https://perma.cc/DYR9-E7D6].

117. Steven L. Schwarcz, *The Financial Crisis and Credit Unavailability: Cause or Effect*, 72 BUS. LAW. 409, 411 (2017).

118. *Cf.* Jackson & Schwarcz, *supra* note 90 (observing that whereas the widespread lack of adequate household emergency savings has traditionally been understood to represent a problem of consumer financial protection, the pandemic is revealing that it can also "pose systemic risks," and that "many current interventions can be understood as serving to mitigate the consequences of limited financial resiliency at the household level").

119. Schwarcz, *supra* note 65, at 14.

120. *Id.* at 29.

121. *Cf.* PISTOR, *supra* note 25, at 229 (proposing "incrementalism" in democratic legal reforms).

122. Steven L. Schwarcz, *Disintermediating Avarice: A Legal Framework for Commercially Sustainable Microfinance*, 2011 U. ILL. L. REV. 1165, 1169 (2011).

123. *Id.* Typically, securitization entails an originator transferring rights to payment (often called "financial assets") into a special-purpose vehicle ("SPV"), which pays for the financial assets by issuing securities. Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133, 135 (1994). The SPV repays the capital market investors who own the securities as it receives payments on the underlying financial assets. Schwarcz, *supra* note 122, at 1171. Professor Schwarcz has previously argued that securitization can allow microfinance lenders to draw cheaper and more abundant capital market funding while promoting access to credit for microfinance borrowers. *Id.* at 1169–70.

124. *Cf.* Schwarcz, *supra* note 65, at 24–25 (explaining why those subprime mortgage loans were risky).

backed securitization structures, like the collateralized debt obligation, could help expand access to credit while avoiding the high leverage and complexity that exacerbated the 2008 crisis.[125] As in scoping access to credit, overcollateralization is critical for securitization.[126] By providing two ways for a lender to recover,[127] overcollateralized lending offers the "[l]ayers of redundancy" that Taleb identifies as "the central risk management property of natural systems."[128]

VI
CONCLUSION

In this Article, we have proposed a taxonomy to advance and clarify understanding of this symposium's goals. To that end, we have explained why "financial inclusion" should encompass widespread deposit-account ownership and access to payments services. Further, "access to credit" should require adequate loan funding on reasonable terms, especially for aspiring entrepreneurs from underserved groups, and "sustainable finance" should mean continuously providing financial inclusion and access to credit.

These are normative views about how these terms should be accurately defined. We recognize that actual usage sometimes is broader, reflecting a common trend of trying to combine private returns with public goods. We acknowledge, for example, that "sustainable finance" sometimes is used more broadly, to include using finance to try to achieve goals of the ESG movement.[129] Professor Chiu's contribution focuses on investments and capital markets' roles—including new EU legislation regarding those roles—in funding sustainable environmental outcomes, such as climate-change mitigation.[130] Because that broader usage describes using finance to help sustain *non-financial* public goods, perhaps it should be defined differently—such as financing public-goods preservation. We hope that our taxonomy can provide a helpful starting point for those future definitional debates.

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125. *See* Schwarcz, *supra* note 122, at 1176 ("[T]he best model for transformative securitization is the so-called collateralized debt obligation (CDO) transaction. Although CDO transactions have sometimes been demonized in the popular media, that results from a conflation of the time-tested and proved basic CDO structure . . . with highly leveraged and esoteric structures . . . .").

126. *See supra* note 72 and accompanying text.

127. *Cf.* Schwarcz, *supra* note 65, at 23 (explaining that prudent bank lending traditionally requires "two ways out" for repayment: assets and cash flows).

128. TALEB, *supra* note 30, at 44.

129. *See supra* note 4 and accompanying text.

130. *See* Chiu, *supra* note 54.