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Rethinking Credit as Social Provision

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Abstract. Credit has become a significant institution within the American social safety net. Accordingly, "access to credit" talk pervades the current discourse of financial rights and equality for low-income communities. Indeed, in a rare point of convergence, both progressive and conservative accounts of optimal credit regulation for the working poor rest on the shared conviction that credit is an important tool of "social provision," the range of state policies implemented to improve general welfare.

The notion that credit is a valid form of social provision for low-income Americans, however, is deeply flawed. The difficulty with credit as a form of social provision for low-income Americans is that there is an essential mismatch between the problem and the solution. At its best, credit is a mechanism of intertemporal and intrapersonal redistribution. However, low-income Americans often struggle with persistent financial instability, and decades of data show that they can reasonably expect to be in worse economic shape as time progresses. As an essential matter, then, the problem of entrenched and enduring poverty that leaves people consistently unable to afford basic necessities cannot be addressed by a device that requires future prosperity and economic growth.

Moreover, the resulting debt burden transforms credit as social provision from a form of mere intertemporal redistribution into a form of regressive redistribution, in which wealth flows out of already economically vulnerable communities. This reality has

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broader consequences for the middle class given its own government-sanctioned, heavy reliance on credit in the broader, persistently stagnant economic environment. Thus, our increasingly unfounded dependence on a policy of access to credit as social provision must be set aside in order to begin the difficult task of surfacing and centralizing the more pressing extent of deepening economic, and thus social, inequality.

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Introduction

"The poor stay poor, the rich get rich. That's how it goes. Everybody knows."
—Leonard Cohen[1]

Credit has become an important source of American social provision.[2] Consequently, access to credit has come to rest at the center of the discourse on economic well-being, particularly with respect to low-income communities.[3]

1. LEONARD COHEN, *Everybody Knows*, *on* I'M YOUR MAN (Columbia Records 1988).

2. *See* Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 605-06 (2005) (describing the need for the Community Reinvestment Act in terms of credit access for low-income communities); Greta R. Krippner, *Democracy of Credit: Ownership and the Politics of Credit Access in Late Twentieth-Century America*, 123 AM. J. SOC. 1, 2 (2017); Gunnar Trumbull, *Credit Access and Social Welfare: The Rise of Consumer Lending in the United States and France*, 40 POL. & SOC'Y 9, 10 (2012); *see also* Community Reinvestment Act of 1977, Pub. L. No. 95-128, tit. VIII, 91 Stat. 1111, 1147-48 (codified as amended at 12 U.S.C. §§ 2901-2908 (2017)).

   In this Article, I use the term "social provision" to refer to the range of state policies implemented to improve general welfare, including "nation-spanning social insurance and public assistance programs" such as "federally required, state-run unemployment insurance; federally subsidized public assistance; and national contributory old-age insurance." *See* Theda Skocpol, *A Society Without a "State"?: Political Organization, Social Conflict, and Welfare Provision in the United States*, 7 J. PUB. POL'Y 349, 350-51 (1987); *see also* Ann Shola Orloff, *Social Provision and Regulation: Theories of States, Social Policies, and Modernity*, *in* REMAKING MODERNITY: POLITICS, HISTORY, AND SOCIOLOGY 190, 190 (Julia Adams et al. eds., 2005) ("Social provision and regulation have taken on many public and mixed public/private forms, from poor relief and publicly subsidized charity to 'workingmen's insurance' and pensions, 'social security,' 'the welfare state,' 'welfare capitalism,' 'the social state,' and '*l'etat providence*.'"). In assessing "the development of public social provision in the United States," particularly in the postwar period, Theda Skocpol and Edwin Armenta include a variety of direct and indirect government-subsidized programs within the frame of "social provision." *See* Theda Skocpol & Edwin Amenta, *Redefining the New Deal: World War II and the Development of Social Provision in the United States*, *in* THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 167, 167-81 (1995).

3. *See, e.g.*, MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 210-25 (2015) (arguing that access to regular bank loans and the revival of postal banking would benefit low-income communities that must otherwise resort to predatory fringe lenders who keep them in debt during financial emergencies); Jacob Hale Russell, *Misbehavioral Law and Economics*, 51 U. MICH. J.L. REFORM 549, 562-64 (2018) (describing the costs and benefits of payday loans, yet noting that "depriving all borrowers of payday loans would prevent some individuals who have no other access to credit from obtaining emergency financing; potentially cause them to turn to shadier sources of financing; or put financial strains on family members or friends who are willing to loan emergency funds"); *see also* Mehrsa Baradaran, Opinion, *Payday Lending Isn't Helping the Poor. Here's What Might.*, WASH. POST: IN THEORY (June 28, 2016), https://perma.cc/B4P6-7DKY; Ctr. for Responsible Lending, S. 1642 & H.R. 3299: Madden Bill Could Open the Floodgates to Predatory Lenders 1 (2017), https://perma.cc/27CS-RA78; Deyanira Del Rio & Andy Morrison, Opinion, *Here's What Happens When Payday Loans Are Banned*, WASH. POST: IN THEORY (July 5, 2016), https://perma.cc/C8GM-2SKL; Tim Worstall, Opinion, *We Can't Get Rid*

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For example, this discourse has focused on the relative risks and benefits of subprime small-dollar lending—particularly payday lending—in low-income communities.[4] Increased access to credit forms the premise on which rest varying approaches of how best to regulate this subprime credit market.[5] Although these approaches may diverge in perspective and prescription, they converge on the notion that credit is important for low-income Americans,[6] whether as a viable mechanism of smoothing consumption[7] or as a catalyst for social mobility.[8]

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of Payday Loans Just Because We Don't Like Them, WASH. POST: IN THEORY (June 30, 2016), https://perma.cc/3DVR-TB4P.

4. *See, e.g.*, Neil Bhutta et al., *Consumer Borrowing After Payday Loan Bans*, 59 J.L. & ECON. 225, 226 (2016) ("Payday lenders, critics allege, target low-income borrowers who are so desperate for funds that they are willing to pay exorbitant interest rates. Critics also argue that the structure of the loans exploits consumers by masking the true cost of borrowing. Those on the other side of the debate defend the high interest rates by pointing to the cost of lending to high-risk borrowers and by emphasizing the value to low-income households of having of access to (even expensive) credit."); Brian T. Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Q.J. ECON. 517, 522 (2011) ("While loans provide flexibility in managing consumption over time, they can also impose a substantial debt service burden. When consumers underestimate future interest payments or are unable to commit themselves to a plan of prompt repayment, the future costs of borrowing can outweigh the initial benefits, even from an *ex ante* perspective.").

5. *Compare, e.g.*, Russell, *supra* note 3, at 564 ("Bans on payday loans could actually cause additional negative consequences, as consumers may substitute other, potentially worse forms of payday-like lending, including gray-market products."), *and* Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 3-4 (2009) ("Heightened protections for borrowers that increase the cost or risk of lending will raise the cost of lending and result in either higher interest rates for borrowers or reduced access to credit. Because of the benefits that the subprime market creates for millions of marginal homeowners, lawmakers should carefully consider ways to maintain the legitimate subprime market while restricting the ability of predatory lenders to originate high-cost loans that impose a net harm on borrowers." (footnote omitted)), *with, e.g.*, Marco Meyer, *The Right to Credit*, 26 J. POL. PHIL. 304, 318-19 (2018) (arguing that as a matter of distributive justice, all members of a capitalist society should have access to credit).

6. *See, e.g.*, Russell, *supra* note 3, at 563-64, 564 n.64.

7. *See, e.g.*, Melzer, *supra* note 4, at 518 ("[C]redit can ease financial distress by allowing individuals to better smooth income or consumption shocks.").

8. *See, e.g.*, Raphael W. Bostic et al., *Hitting the Wall: Credit as an Impediment to Homeownership*, *in* BUILDING ASSETS, BUILDING CREDIT: CREATING WEALTH IN LOW-INCOME COMMUNITIES 155, 155-56 (Nicolas P. Retsinas & Eric S. Belsky eds., 2005) (arguing that homeownership is an important social and public policy goal that brings wealth and stability, but one that is difficult for low-income communities to realize because of their limited access to quality credit).

For example, the legislative debates that have emerged in the wake of the Second Circuit's 2015 decision in *Madden v. Midland Funding, LLC*[9] and the 2017 "Payday Lending Rule" promulgated by the Consumer Financial Protection Bureau (CFPB)[10] center merely around the optimal regulation of credit for high-risk, low-income borrowers.[11] There is otherwise minimal engagement with the essential threshold question whether credit is a viable component of social provision for low-income Americans. Even the fiercest proponents of low-income financial rights and equality regard credit as a second-best playing field on which to engage questions of economic equality for the working poor.[12] Thus, even as these advocates fight for economically disenfranchised communities, they do so in inherently market-based terms.

This notion of credit as social provision for the working poor is deeply flawed. The logical problem with credit as a form of social provision for low-income Americans is that there is an essential "mismatch" between the problem and the solution.[13] At its best, credit is a form of intertemporal and intrapersonal redistribution—credit shifts an individual's future capital to facilitate present consumption.[14] This means that for credit to be "productive,"

9. 786 F.3d 246 (2d Cir. 2015). In *Madden*, the Second Circuit ruled that loans transferred to "non-national bank" entities in the secondary market are subject to state usury caps even if they were originated by a national bank that would otherwise enjoy federal preemption from such state usury caps. *See id.* at 249-51.

10. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. §§ 1041.1-.14 (2019)). The Payday Lending Rule regulates payday lending by, for example, requiring that payday lenders determine whether a prospective customer has "the ability to repay" certain types of loans before lending to the customer. *See* 12 C.F.R. § 1041.5.

11. *See infra* Part I.

12. *See, e.g.*, Press Release, Elizabeth Warren, U.S. Senator, Statement from Senator Elizabeth Warren on CFPB's New Payday Lending Rule (Oct. 6, 2017), https://perma.cc/C3JW-9EDQ.

13. *See* LISA SERVON, THE UNBANKING OF AMERICA: HOW THE NEW MIDDLE CLASS SURVIVES 81 (2017) ("Consumer advocates vehemently oppose [payday] loans; they object to what they see as a mismatch between the way loans are packaged and promoted and the way people actually use them. Though they are sold as 'quick fixes' for a duration of two to four weeks, many people end up taking out loans, then rolling them over or renewing them.").

14. *See, e.g.*, Christine L. Dobridge, *High-Cost Credit and Consumption Smoothing*, 50 J. MONEY CREDIT & BANKING 407, 419-27 (2018) (describing how consumers use high-cost credit in order to smooth consumption); *see also* MONICA PRASAD, THE LAND OF TOO MUCH: AMERICAN ABUNDANCE AND THE PARADOX OF POVERTY 239 (2012) ("The welfare state and credit may both be conceptualized as twentieth century versions of reciprocal exchange, marked not only by reciprocity between social actors but also by reciprocity with a more prosperous future."); Basak Kus, *Sociology of Debt: States, Credit Markets, and Indebted Citizens*, 9 SOC. COMPASS 212, 213 (2015) ("Credit is a financial resource that makes it possible to pay for necessities or conveniences today, but at the same time, it is a liability that might curb consumption tomorrow.").

the resulting debt must be "repaid by a much richer borrower to whom that amount of debt is worth less."[15] Put another way, for credit to work as social provision, it must be extended on terms that are likely to result in an overall improvement in welfare. Consequently, credit as meaningful social provision for low-income borrowers implies an expectation that notwithstanding their present condition, low-income borrowers will be better off in the future and able to repay their debts without hardship. This is an unduly optimistic expectation given both the high interest rates that low-income borrowers tend to pay and the fact that decades of data suggest that low-income Americans can consistently expect to be in worse economic shape as time passes.[16] Credit is fundamentally incompatible with the entrenched intergenerational poverty that plagues low-income Americans.

How then did credit come to enjoy such seemingly universal support as a source of meaningful social provision for the working poor? One answer is that credit has been a tool of social provision since at least the Progressive Era, deployed at the margins by poverty advocates and policymakers to address the needs of newly urbanized and vulnerable Americans.[17] Successful New Deal innovations transformed credit from a marginal welfare device into a central means of broad social provision. The National Housing Act ushered in advances in state-backed, private credit subsidies, which worked to smooth unpopular distributional dilemmas during the recovery from the Great Depression.[18] Thus, by one account: "The real innovation of New Deal policy was neither direct state investment nor planning . . . but more the practical harnessing of private capital for social ends."[19]

President Franklin D. Roosevelt's embrace of this credit-based mortgage Keynesianism established government-subsidized consumer credit (specifically to facilitate the consumption of homes) as central to broader economic well-

15. *See* PRASAD, *supra* note 14, at 238-39.

16. *See, e.g.*, LAWRENCE MISHEL ET AL., ECON. POLICY INST., WAGE STAGNATION IN NINE CHARTS 6 (2015), https://perma.cc/JY87-4J8B (showing income stagnation for low- and middle-wage workers). Moreover, the Bureau of Labor Statistics reports that most low-income workers consistently experience "periods of unemployment, involuntary part-time employment, and low earnings" that "hinder [their] ability to earn an income above the poverty threshold." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 1074, A PROFILE OF THE WORKING POOR, 2016, at 5 (2018), https://perma.cc/Y325-GQ6M.

17. *See infra* Part II.A.

18. *See* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 53-54, 57-58 (2011); *see also* National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended in scattered sections of 12 and 18 U.S.C.).

19. HYMAN, *supra* note 18, at 47; *see also* PRASAD, *supra* note 14, at 200 (describing the "affordable home mortgage" as one of the New Deal's "credit innovations" and noting that "the mortgage is one of the central institutions of American political economy").

being.[20] The United States was on the cusp of the "Golden Age of Capitalism"—the approximately thirty-year period of unmatched economic growth after World War II.[21] Accordingly, the Americans (largely white) who took advantage of government-sponsored credit were able simultaneously to borrow and save because their real wages were rising each year and their property values were ever increasing.[22] Hence, government-subsidized, private credit became a catalyst for building the white middle class, engendering in this new cohort a level of personal wealth not previously experienced in American history.[23]

Credit during the New Deal and at midcentury was successful as social provision because it coexisted with consistent economic growth and opportunity. This view reflects the notion that credit and debt often amplify the underlying set of circumstances into which they are introduced.[24] Thus, where credit and its amplifying qualities are concerned, what is good gets better, and what is bad gets worse.[25] Decades of credit policy in the midst of decades of economic stagnation and decline for low- and middle-income Americans underscores this notion.[26]

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20. *See* HYMAN, *supra* note 18, at 46.

21. *See, e.g.*, David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 THEORETICAL INQUIRIES L. 61, 64-67 (2017) (describing the "'thirty glorious years' following World War II, when high rates of growth, effective national controls on the international movement of capital, and a strong political role for organized labor resulted in widely shared prosperity" (footnote omitted)).

22. *See* HYMAN, *supra* note 18, at 72 ("The [Federal Housing Administration (FHA)] had redefined what middle-class, predominately white Americans believed was possible for owning their own home—and this 'ownership' was predicated on twenty years of indebtedness."); *id.* at 132 ("The rate of savings continued to rise even as Americans borrowed. Seventy percent of households with debt continued to save.").

23. *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 181-83 (2017) ("The advantage that FHA . . . loans gave the white lower-middle class in the 1940s and '50s has become permanent.").

24. *See, e.g.*, ATIF MIAN & AMIR SUFI, HOUSE OF DEBT: HOW THEY (AND YOU) CAUSED THE GREAT RECESSION, AND HOW WE CAN PREVENT IT FROM HAPPENING AGAIN 22-23 (2014) (noting that in the Great Recession, "[t]he fact that low net-worth households had very high debt burdens amplified the destruction of their net worth," and opining that "a fundamental feature of debt [is that] it imposes enormous losses on exactly the households that have the least"); Ricardo J. Caballero & Arvind Krishnamurthy, *Global Imbalances and Financial Fragility*, AM. ECON. REV., May 2009, at 584, 584 ("The [financial] crisis was triggered by the crash in the real estate 'bubble' and amplified by the extreme concentration of risk in a highly leveraged financial sector.").

25. *See, e.g.*, MIAN & SUFI, *supra* note 24, at 22-23; Caballero & Krishnamurthy, *supra* note 24, at 584.

26. *See* Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR.: FACT TANK (Aug. 7, 2018), https://perma.cc/Y99B-XZAK.

Because persistent privation is common among the working poor,[27] even credit extended on good terms is unlikely to have positive welfare effects.[28] Indeed, against the backdrop of decades of entrenched and vice-like poverty that leaves low-income Americans consistently in economic distress without reasonable hope for improvement, the notion that low-income people can borrow their way to economic stability or even out of poverty is "passing strange."[29] As an essential matter, their problems cannot be productively addressed by a device that requires future growth. If anything, such a device is likely to make their economic existence appreciably worse.

Without expressly acknowledging this essential mismatch between problem and solution, the access to credit discourse at best evinces a form of optimism bias normally attributed to low-income borrowers themselves.[30] At worst, the discourse is a politically convenient way to avoid difficult and unpopular conversations about economic inequality.[31]

In either case, policymakers have left low-income Americans in a terrible position by decimating public-assistance forms of social provision—for example, by limiting direct assistance to just sixty months' worth of benefits over an individual's lifetime[32]—yet failing to solve the threshold problems of persistent wage stagnation and other entrenched social pathologies. Thus, high-risk, low-income borrowers must provide for their own welfare in the credit marketplace,[33] where lenders build their business models on the

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27. *See, e.g.*, BUREAU OF LABOR STATISTICS, *supra* note 16, at 5; Adam Levitin, *OCC Payday Lending Bulletin*, CREDIT SLIPS (May 24, 2018, 9:20 PM), https://perma.cc/TB49-49FA.

28. *See* PRASAD, *supra* note 14, at 238-39 (observing that the "logic of credit" is tied to economic growth); Melzer, *supra* note 4, at 520, 550 (observing that "low- to moderate-income households . . . represent the vast majority of payday borrowers" and finding that payday borrowing "increases households' difficulty in paying mortgage, rent and utilities bills"); Levitin, *supra* note 27 ("[I]f the policy issue is that borrowers can't afford to repay the loans irrespective of fees, then cost-reduction proposals look like Titanic deck-chair reshuffles.").

29. *See* GARY S. BECKER & RICHARD A. POSNER, UNCOMMON SENSE: ECONOMIC INSIGHTS, FROM MARRIAGE TO TERRORISM 352 (2009) (expressing skepticism, in the context of the international microfinance movement, at the possibility of any country being able to "climb[] out of poverty on the backs of small entrepreneurs financed by credit").

30. *See* Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUP. CT. ECON. REV. 105, 107 (2013) ("[E]xcessive optimism causes users to believe they will pay off their loans rapidly, when in fact they usually will not.").

31. *See* Krippner, *supra* note 2, at 2 ("[P]olicy makers . . . have relied on credit to ease distributional conflicts and supplant the welfare state.").

32. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, sec. 103(a)(1), § 408(a)(7)(A), 110 Stat. 2105, 2137 (codified as amended at 42 U.S.C. § 608(a)(7)(A) (2017)).

33. *See* Chrystin Ondersma, *A Human Rights Approach to Consumer Credit*, 90 TUL. L. REV. 373, 379 (2015) ("Due to flat or declining wages and reductions in the welfare state, more individuals than ever turn to credit to meet their basic needs. In other words,

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expected transfer of wealth out of economically vulnerable communities.[34] In this light, credit does not make sense as a form of social provision where economic growth is intractably arrested.[35]

Moreover, the limited value of credit as social provision has implications beyond low-income Americans. Credit as social provision is a similarly delimited device for the middle class who, although continuing to struggle through decades of stagnant real wages,[36] are currently fed a steady diet of more and more credit to ease the reality of a bleak financial future.[37] Against these persistently poor economic prospects for the middle class, the regressively redistributive consequences of credit are likely to be similar.

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individuals or families face income shortfalls and must rely on credit to fill the gap, which, in turn, often increases that gap.").

34. *See* Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 577 (2010) ("[T]he business plan of short-term lenders appears to include setting up convenient and ubiquitous storefronts, hiring extremely friendly clerks, building a base of loyal customers, maximizing the frequency and amount of lending while maintaining repayment at the minimum amount required by law, and encouraging late payments to maximize fees."); *see also* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 55-56 (2008).

    Oren Bar-Gill and Elizabeth Warren have opined that payday loans are "designed to maximize profits from consumer decision-making errors." *See* Bar-Gill & Warren, *supra*, at 55. Because "[m]any payday borrowers do not pay back the loan on the next payday" as originally planned, they end up paying exorbitant fees just to roll over the original loan. *Id.* at 55-56. This results in costs "far higher than the consumer initially assessed." *Id.* at 56. Thus, the "payday loan product is arguably designed to take advantage of consumers' optimism bias and their consistent underestimation of the risk of nonpayment." *Id.* This business model *survives* on stripping wealth from communities that cannot afford to lose it. *See* Kate Berry, *CFPB to Scrap Key Underwriting Portion of Payday Rule*, AM. BANKER (Jan. 14, 2019, 12:38 PM EST), https://perma.cc/LCM7-KA9K ("[T]he CFPB's data shows that payday lenders rely on reborrowings as a major source of revenue.").

35. I pause here to note that this argument is focused specifically on low-income Americans who repeatedly use credit to smooth consumption.

36. *See* SERVON, *supra* note 13, at 59 ("Families with incomes less than $75,000 have been hit the hardest, and not just at the very low end: more than half of families with incomes between $30,000 and $75,000 say they are falling behind, as their cost of living increases faster than their income.").

37. For example, economist Raghuram Rajan has criticized the use of housing credit as a Band-Aid for deeper economic problems plaguing the lower class. *See* RAGHURAM G. RAJAN, FAULT LINES: HOW HIDDEN FRACTURES STILL THREATEN THE WORLD ECONOMY 43-44 (2010). He suggests that "[i]nstead of looking for ways to resuscitate spending by those who can ill afford it, and creating unsustainable bubbles in the process, we need to think creatively about how Americans can acquire the skills they need to enhance their incomes." Raghuram G. Rajan, *Let Them Eat Credit*, NEW REPUBLIC (Aug. 26, 2010), https://perma.cc/E6MR-SW2A.

Accordingly, this Article makes two contributions. First, it situates credit squarely within the frame of social provision and welfare, a perspective that is largely missing from the legal literature.[38] Second, it reframes the current legal discourse of access to credit against this construction of credit as an institution of social provision for low-income Americans. In so doing, it aims to unsettle the premise that credit, as an essential matter, can function as a mechanism of meaningful social provision.[39] Thus, it proposes that it is time to grasp the nettle and critically rethink whether credit should continue to be shoehorned into the discourse of social provision for low-income Americans.

This Article proceeds in three Parts. Part I describes recent legislative debates about access to credit that have followed the CFPB's 2017 Payday Lending Rule and *Madden v. Midland Funding, LLC*.[40] What is most surprising about this access to credit talk is that the same fundamental premise, namely, that credit is a functional means of social provision, underpins the otherwise divergent motivations and approaches of both progressive and conservative voices in addressing the needs of low-income Americans. Part II provides historical context for this surprising convergence. It marshals existing, largely multidisciplinary accounts of credit at work in the American economy to show how credit as social provision not only has deep roots in the Progressive Era, but has also persisted as a well-kept device in the toolbox of social welfare provision.

Credit reached a high point in the New Deal and postwar eras, during which policymakers gambled on centralized credit as social provision by pinning national economic recovery and social welfare to innovations in government-subsidized mortgage lending. These policies proved to be successful—in light of, importantly, a sustained period of national economic prosperity. By comparison, later social provision policies that relied on access to credit as a means of addressing a range of social issues—including civil rights, the economic downturn of the 1970s, social mobility, and the public assistance retrenchment during the 1980s and 1990s—failed to make meaningful change

38. Some bankruptcy scholars have written about the Bankruptcy Code as a part of the social safety net insofar as it alleviates debilitating debt. *See, e.g.*, Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 129-32 (2005); Melissa B. Jacoby et al., *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377-78 (2001). Sara Sternberg Greene has similarly described how recipients of the Earned Income Tax Credit use credit cards to smooth gaps in income. *See* Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 547-52 (2013) (referring to this use of credit cards as "the new 'private safety net'" (capitalization altered)). But there is little on the notion that the regulation of credit, including subsidized access to credit, itself functions as a mechanism of social provision.

39. *Cf.* Rajan, *Let Them Eat Credit*, *supra* note 37.

40. *See supra* notes 9-10 and accompanying text.

in light of the persistent economic stagnation and decline that has plagued low- and middle-class Americans since the 1970s. Thus, Part II highlights that economic progress and growth are essential elements of credit as productive social policy.

Against this backdrop, Part III argues that the access to credit debate is flawed insofar as it is premised on the idea that credit can function as social provision for low-income Americans. In other words, credit is beneficial only to the extent that a borrower can expect to have future cash flow to service the resulting debt. The economic condition of low-income Americans, however, is persistently impaired, and they can only expect their economic position to worsen as time passes. As a result, even credit that is extended at a low, or even zero, rate of interest is unlikely to be a meaningful form of social provision. This mismatch has broader implications because debt—even borne of credit terms that are deemed safe and fair—is particularly dangerous for low-income borrowers. The debt burden becomes a means of reverse interpersonal redistribution in which wealth is funneled out of already vulnerable economic spaces and into the coffers of lenders, their investors, and the various other third parties in the secondary debt market whose fortunes rest on the misfortune of these borrowers.[41]

Because the benefit of credit is contingent on the underlying circumstances of its user, credit is not suited to animate policies of social provision for the working poor who, for structural reasons, can scarcely hope for a brighter economic future. If anything, they are likely to pass on their problems to their children.[42] Moreover, this concern implicates the welfare of the middle class in light of its own persistently grim economic prognosis.[43]

This Article then concludes by suggesting that in light of the significant limits of credit as social provision, policymakers, legislators, scholars, and advocates of all stripes should carefully and critically rethink their collective acceptance of credit as a viable form of social provision. To the extent that policymakers, legislators, and scholars continue to consider accessible credit as a means of social provision in the face of broader and intractable economic

41. *See, e.g.*, Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 384 ("Debt-based [credit card] issuers . . . focus on debt servicing revenues. Thus, they attempt to maximize the number of customers who do not repay their account balances in full each month. That strategy would not seem unusual, but for the fact that the most profitable customers are sometimes the least likely to ever repay their debts in full.").

42. *See* Raj Chetty et al., *Is the United States Still a Land of Opportunity?: Recent Trends in Intergenerational Mobility* 10 (Nat'l Bureau of Econ. Research Working Paper Series, Working Paper No. 19,844, 2014), https://perma.cc/ZYQ6-77S9 ("[R]ank-based measures of social mobility have remained remarkably stable over the second half of the twentieth century in the United States.").

43. *See* DeSilver, *supra* note 26.

pathologies, they either fall prey to their own optimism or else indirectly endorse continued regressive redistribution. Credit, as currently conceived, cannot work for everyone, and as broader economic circumstances remain in decline, the range of individuals for whom it can function as productive social provision will shrink. Thus, it is time to redirect our energies toward the more important issues of worsening economic instability and inequality that plague not only low-income families but middle-class families as well.

I. Access to Credit Debates

Both proponents and opponents of increased regulation of consumer credit for high-risk, low-income borrowers often base their arguments on a shared ambition of making credit available to individuals across the socioeconomic spectrum.[44] These two groups share a common baseline for their arguments, notwithstanding any differences in motivation or methodology. They each take the position that credit can benefit the working poor, thus implicitly framing credit as a valid device of social provision. Recent debates involving the CFPB's Payday Lending Rule[45] and the Second Circuit's ruling in *Madden v. Midland Funding, LLC*[46] provide greater context for this curious alignment. Arguments on each side of these ongoing debates implicitly normalize the idea that credit should be a significant component of government policies directed toward social provision for the working poor.

44. *Compare, e.g.*, Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 548 (2013) ("Providing credit to the underprivileged can help them escape poverty in a way that rewards self-reliance. Although banking is not a right, it is a social good—not just for the low-income, but for the entire society."), *and* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 868-69 (2013) (noting that the deregulation of state-based usury limits in the early 1980s "enabled the rapid growth of the credit card industry, setting in motion a robust competitive structure that resulted in the spread of credit cards throughout the economy," while arguing that increased regulation under the CFPB would resurrect the "destructive regulatory philosophies of the past, with disastrous results for both the economy and consumers, especially those low-income and other vulnerable consumers who have the fewest credit choices"), *with, e.g.*, Bar-Gill & Warren, *supra* note 34, at 55-58, 69 ("[T]he important point is that aggregate harm from unsafe credit products is sufficiently large to justify a systematic examination of possible regulatory fixes."), *and* Ctr. for Responsible Lending, Payday Loan Quick Facts: Debt Trap by Design 2 (2014), https://perma.cc/KRV7-PEFM ("Congress and the states should enact the strongest protection possible against payday lending . . . .").

45. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. §§ 1041.1-.14 (2019)).

46. 786 F.3d 246 (2d Cir. 2015).

A. The CFPB's Payday Lending Rule: Regulating Fringe Credit

The debates over how best to provide credit to high-risk, low-income borrowers and, relatedly, how best to regulate the fringe lenders who are most likely to lend to such borrowers, have been particularly vociferous with regard to payday lending.[47] Nevertheless, underpinning both sides of these debates is a shared assumption that high-risk, low-income borrowers *need* credit to survive, and, consequently, that the state must act (or not act) in order to facilitate and preserve access.

1. A primer on payday lending

As defined by the CFPB, a payday loan is "a short-term, high cost loan, generally for $500 or less, that is typically due on [the borrower's] next payday."[48] Most payday loans are due within two weeks.[49] Generally, the borrower must have a job and a bank account in order to qualify for a loan.[50] The borrower writes a postdated check to the lender in the amount of the principal loan plus an associated fixed fee of approximately 15%.[51] The lender holds the check until the borrower's next payday, at which time the lender will deposit the check.[52] However, borrowers who do not have the capital to repay the loan on the due date can "roll[] over" the loan by paying an additional fee.[53] The lender will then hold the check until the next payday.[54] Approximately half of payday loan borrowers roll over their loans multiple times, causing the relatively benign 15% interest rate to balloon into a triple-digit or even

47. *See* SERVON, *supra* note 13, at 81 ("Payday loans are perhaps the most hotly debated topic in the area of consumer financial services."); Bhutta et al., *supra* note 4, at 225-26.

48. *What Is a Payday Loan?*, CONSUMER FIN. PROTECTION BUREAU, https://perma.cc/TH4C-DURN (last updated June 2, 2017); *see also* Neil Bhutta, *Payday Loans and Consumer Financial Health*, 47 J. BANKING & FIN. 230, 233 (2014).

49. *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 10 (2002); Nick Bourke, *Meaningful Payday Loan Reform Is Within Reach*, PEW CHARITABLE TR. (July 21, 2015), https://perma.cc/UX2R-A9ZB.

50. *See* Robin A. Prager, *Determinants of the Locations of Alternative Financial Service Providers*, 45 REV. INDUS. ORG. 21, 25 (2014).

51. *See* Mann, *supra* note 30, at 106; Prager, *supra* note 50, at 24-25.

52. *See* Prager, *supra* note 50, at 24-25.

53. *See id.* at 25.

54. *See id.*

quadruple-digit annual percentage rate.[55] For instance, based on one study, the average payday loan customer borrower "takes out eight loans of $375 each per year," spends an additional $520 on interest per year, and "is indebted about five months of the year."[56]

Nevertheless, payday loans are often branded as important short-term options that meet the urgent needs of borrowers who otherwise do not have access to emergency capital.[57] In other words, they are limited solutions to "unexpected expenses, like a car repair or emergency medical need."[58] Usage statistics tell a different story about payday loan use, however, or at least require a different conception of the nature of emergencies that low-income borrowers experience. For these borrowers, daily life is replete with chronic, financial emergencies like past-due rent and utility bills.[59] Accordingly, research shows that "[m]ost borrowers use payday loans to cover ordinary living expenses over the course of months, not unexpected emergencies over the course of weeks."[60] Moreover, this study found that 69% of first-time borrowers used a payday loan "to cover a recurring expense, such as utilities, credit card bills, rent or mortgage payments, or food."[61] Thus, high-risk, low-income (and often minority) borrowers disproportionately use payday loans to fill in the gaps left by the difference between their cost of living and income,

55. *See* Russell, *supra* note 3, at 550.

56. PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 4 (2012), https://perma.cc/X3MD-2PBQ; *see also* Susan Payne Carter, *Payday Loan and Pawnshop Usage: The Impact of Allowing Payday Loan Rollovers*, 49 J. CONSUMER AFF. 436, 436 n.2 (2015) ("Over 50% of respondents in a national payday loan sample renewed payday loans three or more times.").

57. *See, e.g.*, Adair Morse, *Payday Lenders: Heroes or Villains?*, 102 J. FIN. ECON. 28, 29 (2011) (studying the welfare effects of payday lenders on distressed borrowers following a natural disaster and concluding that "payday lenders provid[e] a valuable service to individuals facing unexpected financial distress").

58. *See* PEW CHARITABLE TRS., *supra* note 56, at 4-5.

59. *See id.* at 13-14; Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 458 (2008) ("Chronic poverty dramatically increases a family's chances of acute material crisis, and very low-income families are subject to frequent, unpredictable financial catastrophes.").

60. PEW CHARITABLE TRS., *supra* note 56, at 13.

61. *Id.* at 5; *see also* Martin, *supra* note 34, at 608 (studying payday loan borrowers and observing that 63% of participants "reported using payday loans for regular, recurring monthly bills and expenses . . . [such as] rent, utilities, gas bills, cell phone bills, and so on").

and consistently roll over these loans.[62] This phenomenon makes payday lending profitable to lenders and lethal to borrowers.[63]

2. Debating the Payday Lending Rule

It is this "mismatch" between the "packag[ing] and promot[ion]" of payday loans as short-term emergency products and the reality that low-income people regularly use payday loans to fill in the gaps left by insufficient and uncertain income that underpins much of the debate about how to regulate payday loans.[64] In other words, the problem is not providing for one-time, unexpected shocks; the problem is that low-income Americans cannot make ends meet as a general rule. A payday loan can address the former, helping the borrower recover from the one-time emergency, but it can do little to address the latter.

Opponents of increased regulation of payday lenders focus their views on the emergency scenario. They argue that payday loans are not inherently harmful products when used correctly—that is, to address a short-term shortage of capital.[65] For example, noting a drop in overdraft revenue where there is an increase in payday credit, researchers argue that "[a]t $50 per returned check ($25 to the merchant and $25 to the bank), a $100 payday loan

62. It is unsurprising, then, that storefront lenders concentrate themselves in the geographical spaces where these borrowers live. *See, e.g.*, Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 187 (2010) ("[P]ayday-lending stores [are] concentrated in minority neighborhoods and more heavily concentrated in lower-income African American communities than in white neighborhoods with similar income levels." (footnote omitted)); *see also* Robert DeYoung et al., *Reframing the Debate About Payday Lending*, FED. RES. BANK N.Y.: LIBERTY STREET ECON. (Oct. 19, 2015), https://perma.cc/6N8S-BDBP (observing that although "[i]t's well documented that payday lenders tend to locate in lower income, minority communities," "[t]he fact is that only people who are having financial problems and can't borrow from mainstream lenders demand payday credit, so payday lenders locate where such people live or work"). *But see* Prager, *supra* note 50, at 36-37 (finding that fringe lenders "are more prevalent in areas where a large percentage of the population is black" or "poorly educated," but "generally less prevalent in the poorest counties and, in the case of rural areas, in counties with high concentrations of Hispanics").

63. *See* Bar-Gill & Warren, *supra* note 34, at 55-56; *see also* Thomas B. Edsall, Opinion, *Making Money off the Poor*, N.Y. TIMES: OPINIONATOR (Sept. 17, 2013, 10:48 PM), https://perma.cc/987H-Q5GQ.

64. *See* SERVON, *supra* note 13, at 81; *see also* Neil Bhutta et al., *Payday Loan Choices and Consequences*, 47 J. MONEY CREDIT & BANKING 223, 224-25 (2015) (noting that payday loan "borrowers often owe more than half of their next paycheck to the lender" and "are persistently short on cash").

65. *See, e.g.*, Christopher K. Odinet, *Payday Lenders, Vehicle Title Loans, and Small-Value Financing: The CFPB's Proposal to Regulate the Fringe Economy*, 132 BANKING L.J. 263, 285 (2015); DeYoung et al., *supra* note 62.

for $15 is cheaper than overdrafting, so using payday loans to avoid overdrafts could save households money."[66] In that sense, payday loans are an important resource to cash-strapped individuals, especially in times of emergency.[67] Without a legislative environment that encourages competitive and profitable payday lending, payday loans would dry up.[68] With fewer choices, low-income borrowers would then be forced to seek credit in from unseemly credit providers.[69] Meanwhile, proponents of increased regulation of payday loans argue that the unduly high interest rates that accompany payday loans push already vulnerable borrowers into a constant cycle of debt as they try to pay back their loans.[70]

Amid a vacuum of federal attention to fringe lenders, the CFPB proposed a rule in July 2016 that would address concerns about the harmful effects of unrestricted payday lending, along with other forms of fringe lending.[71] The final "Payday Lending Rule" was issued in October 2017.[72] According to then-CFPB Director Richard Cordray, the Rule was intended to "stop[] debt traps on payday and auto title loans" and "bring needed reform to a market where far

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66. Donald P. Morgan et al., *How Payday Credit Access Affects Overdrafts and Other Outcomes*, 44 J. MONEY CREDIT & BANKING 519, 521 (2012).

67. *See* Morse, *supra* note 57, at 29.

68. *Cf.* Julia Merton, *Payday Lending and Its Regulation*, 36 REV. BANKING & FIN. L. 52, 53 (2016) ("Advocates of payday loans emphasize the importance of preserving the availability of credit options for credit-impaired consumers through limited regulation.").

69. *See, e.g.*, Bhutta et al., *supra* note 4, at 256 ("[T]he adoption of payday loan restrictions does not appear to meaningfully reduce the fraction of the population that utilizes alternative financial services . . . ."); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 886-95 (2007) (describing typical arguments in favor of less payday loan regulation); Morgan et al., *supra* note 66, at 521 ("[A]fter payday loan bans financially troubled households that might have sought formal bankruptcy protection from their creditors instead opt for (or remain in) 'informal bankruptcy' where they are exposed to debt collectors."); Todd J. Zywicki, *The Consumer Financial Protection Bureau and the Return of Paternalistic Command-and-Control Regulation*, ENGAGE, July 2015, at 48, 50 ("For products such as payday loans, concern about vulnerable consumers with limited options are understandable, but regulatory solutions that further deprive these consumers of choices often harm those consumers that the regulations are purportedly intended to help.").

70. *See* Bar-Gill & Warren, *supra* note 34, at 56-57 (cataloging the harm to consumers of various credit products); Ctr. for Responsible Lending, *supra* note 44, at 1.

71. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864 (proposed July 22, 2016); *see also* David Silberman, *We've Proposed a Rule to Protect Consumers from Payday Debt Traps*, CONSUMER FIN. PROTECTION BUREAU (June 2, 2016), https://perma.cc/7CVP-YQM6.

72. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. §§ 1041.1-.14 (2019)); Consumer Fin. Prot. Bureau, Executive Summary of the Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule 2 (2017), https://perma.cc/ME9F-XEEL.

too often lenders have succeeded by setting up borrowers to fail."[73] The Rule applies principally to short-term loans under forty-five days and longer-term loans that require a balloon payment.[74] Significant to payday loans, the Rule requires lenders of covered loans to determine whether a prospective customer has the "ability to repay" before making a loan.[75] Proponents of consumer protection, rights, and equality as facilitated by increased regulation have lauded the Rule. For example, Senator Elizabeth Warren commented:

> Payday lenders don't make their high profits on ordinary small-dollar loans. The big bucks come from trapping a portion of the borrowers in a cycle of debt that crushes families and sucks money out of communities that can least afford it. The CFPB's new rule will stop these abuses and, once again, help level the playing field for all families.[76]

Nevertheless, in January 2018, after Richard Cordray resigned as CFPB Director, then-Acting Director Mick Mulvaney indefinitely suspended the Rule.[77] Mulvaney announced that the Bureau would be reconsidering the Rule and that entities who would otherwise have been subject to the April 2018 effective date of certain provisions of the Rule could seek a waiver from the CFPB.[78] In response to these reconsideration efforts, forty-three Democratic senators signed and sent a letter to Mulvaney in March 2018, urging the CFPB to end the reconsideration process.[79] In doing so, the group of senators displayed their focus on access to safe credit for families in need. The senators opined that "[w]hile short-term loans may help families facing unexpected

73. Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Richard Cordray on the Payday Rule Press Call (Oct. 5, 2017), https://perma.cc/D8CC-B3BN.

74. *See* 12 C.F.R. § 1041.3; Consumer Fin. Prot. Bureau, *supra* note 72, at 2. A "balloon payment" is a large payment due at the end of a loan repayment period. *See Balloon Payment*, INVESTOPEDIA, https://perma.cc/R3EN-MSQM (last updated Apr. 19, 2019).

75. *See* Consumer Fin. Prot. Bureau, *supra* note 72, at 3.

76. *See* Press Release, Elizabeth Warren, *supra* note 12; *see also* Cordray, *supra* note 73 ("Ultimately, we believe this rule will allow for responsible lending while ensuring that people are not saddled with unaffordable loans that undermine their financial lives.").

77. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Statement on Payday Rule (Jan. 16, 2018), https://perma.cc/L8UJ-EWJY.

78. *See id.*; Pete Schroeder, *U.S. Consumer Bureau to Reconsider Payday Lending Rule*, REUTERS (Jan. 16, 2018, 12:56 PM), https://perma.cc/GF2D-SCKS. In October 2018, the CFPB indicated that it would issue proposed rules that "will reconsider" the Payday Lending Rule in January 2019. *See* Press Release, Consumer Fin. Prot. Bureau, Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date (Oct. 26, 2018), https://perma.cc/DQ9C-YU6J.

79. *See* Letter from Richard J. Durbin, U.S. Senator, et al. to Leandra English, Acting Dir., Consumer Fin. Prot. Bureau, and Mick Mulvaney, Dir., Office of Mgmt. & Budget (Mar. 27, 2018), https://perma.cc/PM4P-BEMY.

expenses, predatory short-term loans with interest rates exceeding 300 percent often leave consumers with a difficult decision: defaulting on the loan or repeated borrowing."[80]

Consumer advocates similarly expressed their concern about the Rule's suspension. For example, the National Consumer Law Center praised the Rule as a significant advancement in consumer protection, observing:

> At the heart of the rule is the common sense principle of ability to repay based on a borrower's income and expenses . . . . An affordable loan is one a borrower can reasonably be expected to pay back without re-borrowing or going without the basic necessities of life—like food or rent money.[81]

Opponents of the Rule lauded Mulvaney's action in market-focused tones.[82] For example, Jeb Hensarling, then-Chairman of the U.S. House Committee on Financial Services, opined:

> The CFPB's rule on payday loans was yet another example of powerful Washington elites using the guise of "consumer protection" to actually harm consumers and make life harder for lower and moderate income Americans. Americans should be able to choose . . . the short-term loan they want and no unelected Washington bureaucrat should be able to take that away from them.[83]

Other opponents of the Rule have also registered their objections to the Rule's purported negative consequences on credit access for low-income Americans in terms of market independence and consumer choice. The Community Financial Services Association of America (CFSA), "the leading national association representing nonbank lenders that offer small-dollar credit products and other financial services,"[84] filed a complaint in the U.S. District Court for the Western District of Texas asking the court to set the Rule aside on various grounds, including that it violates the Administrative Procedure Act.[85] The CFSA challenged the CFPB's conclusions about the nature

80. *Id.*

81. Press Release, Nat'l Consumer Law Ctr., CFPB Payday Rule Survives Legislative Threat, Remains Intact for Now (May 17, 2018), https://perma.cc/U36S-UMK2.

82. This praise was similar to that which was expressed by the proponents of the "*Madden*-fix" legislation. *See infra* Part I.B.

83. Press Release, Jeb Hensarling, Chairman, U.S. House Comm. on Fin. Servs., Hensarling Applauds Mulvaney's Call for Review of CFPB Practices, Payday Lending Rule (Jan. 17, 2018), https://perma.cc/XY98-Q2TW. In addition, Representative Dennis Ross and Senator Lindsay Graham introduced into the House and Senate, respectively, a joint resolution disapproving of the Rule. *See* S.J. Res. 56, 115th Cong. (2018); H.R.J. Res. 122, 115th Cong. (2017).

84. COMMUNITY FIN. SERVICES ASS'N AM., https://perma.cc/S9KH-7LMN (archived Apr. 9, 2019).

85. *See* Complaint ¶ 17, Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, No. 1:18-cv-295 (W.D. Tex. Apr. 9, 2018); *see also* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

of payday credit in low-income communities, arguing that "[b]y effectively eliminating a critical form of credit for millions of borrowers who are in dire need of it, the . . . Rule severely injures the very consumers the Bureau is charged with protecting."[86]

In line with the CFSA's critique, in February 2019, the CFPB—under newly confirmed Director Kathy Kraninger—proposed to rescind in their entirety the Rule's mandatory underwriting provisions including, for example, the requirement that lenders analyze borrowers' ability to repay before issuing certain loans.[87] Unsurprisingly, the CFPB's rationale for its proposed changes centers on continued credit access for those "[c]onsumers living paycheck to paycheck," who "with little to no savings to fall back on face challenging financial lives."[88] Thus, the CFPB opined that the underwriting provisions included in the original Rule were faulty because they unnecessarily "would have the effect of restricting access to credit and reducing competition."[89] In response to the CFPB's proposal, Representative Maxine Waters stated that it "essentially sends a message to predatory payday lenders that they may continue to harm vulnerable communities without penalty."[90]

Ultimately, the views of each side of the Payday Lending Rule debate begin at the same point of origin. They start with the premise that credit is essential, whether normatively or positively, for low-income borrowers. Accordingly, both sides appear to agree that the state must regulate (or not regulate) credit so that people can use it to meet their basic needs.

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86. *See* Complaint, *supra* note 85, ¶ 3 ("The Final Rule rests on unfounded presumptions of harm and misperceptions about consumer behavior, and was motivated by a deeply paternalistic view that consumers cannot be trusted with the freedom to make their own financial decisions. In fact, the [CFPB] ignored and attempted to discount the available research showing that short-term, small-dollar loans result in *improved* financial conditions, not harm, because in many cases they are better than the alternative options available to consumers.").

87. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252, 4252-53 (proposed Feb. 14, 2019) (to be codified at 12 C.F.R. pt. 1041); Berry, *supra* note 34 (noting that the CFPB "is expected to eliminate underwriting requirements in a highly anticipated revamp of its payday lending rule"); *see also supra* note 78 and accompanying text.

88. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. at 4261.

89. *Id.* at 4262.

90. Yuka Hayashi & Lalita Clozel, *CFPB Unveils Plan to Revise Obama-Era Payday Loan Regulation*, WALL ST. J. (updated Feb. 6, 2019, 6:26 PM ET), https://perma.cc/8F4R-6QD4.

B. *Madden v. Midland Funding, LLC*

The Second Circuit's 2015 decision in *Madden v. Midland Funding, LLC*[91] exemplifies the ongoing debate about the optimal balance between strict state interest rate caps and federal regulation that preempts the application of these state laws. Proponents of strict regulation support the application of state usury laws, while proponents of relaxed regulation support preemption. Nevertheless, both sides begin with the premise that access to credit is vital for high-risk, low-income borrowers.

According to the debt buyer, Midland Funding, New York resident Saliha Madden owed it approximately $5,000 on a credit card with a 27% interest rate.[92] She had opened the account with Bank of America in 2005, and shortly thereafter, in 2006, Bank of America sold her account to another national bank entity, FIA Card Services.[93] Madden stopped making her payments, and FIA decided to cut its losses by selling the debt to Midland.[94] As "one of the nation's largest buyers of unpaid debt," Midland buys "accounts with an unpaid balance when: [a]n account has gone at least 180 days without making a payment, or [s]omeone paid less than the minimum monthly payment for at least 180 days, and [t]he original creditor wishes to sell the right to collect on the account balance."[95]

The transfer from FIA to Midland vested Midland "with full authority to perform all acts necessary for collection, settlement, adjustment, compromise, or satisfaction of the claim."[96] So Midland sued Madden in New York for the unpaid balance which was still accruing interest at the original 27% interest rate. Madden countersued under the Fair Debt Collection Practices Act, arguing that the 27% interest violated New York State's civil and criminal usury laws, which cap interest rates at 16% and 25% respectively.[97]

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91. 786 F.3d 246 (2d Cir. 2015).

92. *See id.* at 247-48; *see also* Andrew Silvia, Note, Madden v. Midland Funding LLC*: Uprooting the National Bank Act's Power of Preemption*, 92 CHI.-KENT L. REV. 653, 660-62 (2017).

93. *See* Madden v. Midland Funding, LLC, 237 F. Supp. 3d 130, 138 (S.D.N.Y. 2017).

94. *See id.*

95. *Frequently Asked Questions*, MIDLAND FUNDING, https://perma.cc/E2BY-6YXQ (archived Apr. 9, 2019).

96. *Madden*, 237 F. Supp. 3d at 138.

97. *See* Madden v. Midland Funding, LLC, 786 F.3d 243, 248 (2d Cir. 2015); *see also* N.Y. BANKING LAW § 14-a (McKinney 2019) (providing that the maximum rate of interest is 16% per annum); N.Y. PENAL LAW § 190.40 (McKinney 2019) (providing that a person who charges a rate of interest exceeding 25% per annum is guilty of criminal usury in the second degree). For the Fair Debt Collection Practices Act, see Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692-1692p (2017)).

When Madden first received the card from Bank of America and when Bank of America sold her account to FIA, Madden could make no legal claim based in usury as to the 27% interest rate. The National Bank Act (NBA) preempts any state's attempts to legislate usury.[98] Thus, New York's usury rate did not apply to Bank of America or FIA because they are national banks.[99] But because neither Bank of America nor FIA held any rights to Madden's account once it was transferred to Midland, Madden sued under the theory that once a "non-national bank" entity held her debt, she would be subject to New York State's usury protections.[100] Ultimately, the Second Circuit agreed with Madden.[101] The court ruled that NBA preemption of state usury laws did not apply to Midland because, rather than acting on behalf of a national bank, Midland was merely a state-sanctioned, "third-party debt buyer[,] distinct from agents or subsidiaries of a national bank," acting on its own behalf to collect Madden's debt.[102]

Although only binding within the Second Circuit, "*Madden* stunned markets" more generally by unsettling the practice of third-party debt purchasing in the secondary market.[103] Up to that point, this practice had largely relied on the presumption that "there is 'no such thing as a state-law claim of usury against a national bank,'"[104] which in turn meant that debt buyers could rest assured that original interest rates would stick to the debts they purchased in the secondary market.[105]

In 1978, attendant to the deregulation of credit markets more generally, the U.S. Supreme Court decided in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.* that a national bank regulated by the NBA is "'located' for purposes of the [statute] in the state named in its organization certificate."[106] Thus, the "plain language" of the NBA permitted banks located within a given state to "charge 'on any loan' the rate 'allowed'" by that state.[107] The Court's decision functionally deregulated interest rates across the country,

98. *See* Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 301 (1978); *see also* National Bank Act, ch. 106, § 30, 13 Stat. 99, 108 (1864) (codified as amended at 12 U.S.C. §§ 85-86 (2017)).

99. *See Madden*, 786 F.3d at 250.

100. *See id.* at 249-50.

101. *See id.* at 250.

102. *See id.*

103. *See* Colleen Honigsberg et al., *How Does Legal Enforceability Affect Consumer Lending?: Evidence from a Natural Experiment*, 60 J.L. & ECON. 673, 678 (2017).

104. *See Madden*, 786 F.3d at 250 (quoting Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11 (2003)).

105. *See* Honigsberg et al., *supra* note 103, at 678.

106. *See* 439 U.S. 299, 310 (1978) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2123-27 (1864)).

107. *Id.* at 313 (quoting 12 U.S.C. § 85).

because under the protection of the NBA, a national bank could charge all of its customers the interest rate authorized by the state in which the bank is located, regardless of the state in which any given customer lived.[108] Congress further extended NBA preemption to federally insured, state-chartered banks, extending the range of lenders who could export favorable state usury limits (if any) to other states.[109] Thus, many major banks moved their headquarters to states like South Dakota in order to take advantage of favorable state usury laws.[110] As a consequence, state usury laws have had limited effect on mainstream lending markets.[111]

Madden has since created uncertainty in the secondary debt market.[112] Following *Marquette National Bank*, courts had applied the "valid-when-made" doctrine to loans sold to third-party buyers if those loans were originated by entities covered by the NBA.[113] Under this doctrine, buyers in the secondary market could continue to charge the interest rate on loans as originated, even if the buyer would not usually enjoy the protections of federal preemption.[114] *Madden*, however, introduced the notion that third-party loan buyers can find themselves subject to state usury law. Thus, *Madden* has "cast[] a shadow on debt markets in which originators do not hold loans to maturity but rather follow an originate-to-distribute business model," and it has raised significant concern about the effects it will have on access to credit for high-risk borrowers.[115]

Colleen Honigsberg and colleagues' research in New York and Connecticut suggests that this uncertainty in the secondary market had the consequence of "restrict[ing] credit availability[,] measured by loan size and volume . . . , with

108. *See* Adam J. Levitin, Foreword, *The Crisis Without a Face: Emerging Narratives of the Financial Crisis*, 63 U. MIAMI L. REV. 999, 1004 (2009) ("[T]he Supreme Court's notorious ruling in *Marquette National Bank* . . . had the effect of eviscerating state usury laws . . . .").

109. *See* Michael Marvin, Note, *Interest Exportation and Preemption:* Madden*'s Impact on National Banks, the Secondary Credit Market, and P2P Lending*, 116 COLUM. L. REV. 1807, 1819 (2016).

110. *See* Honigsberg et al., *supra* note 103, at 678 ("That is why many banks, and particularly those that engage in significant consumer lending, are located in states such as South Dakota and Utah, which have no usury limit.").

111. *See id.* Instead, state usury laws often govern a range of fringe lending conducted by nonbank entities like payday lenders. *See, e.g.*, *What Is a Payday Loan?*, *supra* note 48.

112. *See* Honigsberg et al., *supra* note 103, at 674.

113. *See id.* at 678.

114. *But see* Adam J. Levitin, *"Madden Fix" Bills Are a Recipe for Predatory Lending*, AM. BANKER: BANKTHINK (Aug. 28, 2017, 10:24 AM EDT), https://perma.cc/7P85-RLQ5 (arguing that the valid-when-made doctrine has been misapplied in this context).

115. *See* Honigsberg et al., *supra* note 103, at 681, 694.

the largest impact being on higher-risk borrowers."[116] In the wake of *Madden*, Honigsberg and colleagues studied "marketplace lending," in which online platforms such as LendingTree[117] and SoFi[118] connect borrowers with investors willing to lend.[119] "[U]s[ing] a proprietary algorithm to assign a risk grade to the proposed loan," these platforms match prospective borrowers with investors who are willing to lend at the level of risk assigned to any given borrower.[120] Importantly, however, the investors do not originate the loan. Instead, "[w]hen one investor or more has offered to fund a proposed loan in full, the loan is issued by an affiliated bank pursuant to an agreement between that bank and the marketplace platform."[121] Many marketplace platforms use WebBank, a Utah-based national banking entity, to originate the loans.[122] As Utah has no usury cap, WebBank is able to assign any interest rate to a given loan that reflects the borrower's relative risk of default; WebBank then assigns the loan to those investors who have agreed to fund it.[123]

In the pre-*Madden* legal landscape, these investors could comfortably expect that state usury law would not apply to any loan originated by WebBank and transferred to them, since the valid-when-made doctrine would bring such loans within the ambit of NBA preemption. Hence, a state with relatively restrictive state usury laws—like New York—could not have imposed its laws on such a loan even if the borrowers or investors were otherwise subject to New York law. After *Madden*, however, marketplace

116. *Id.* at 709.

117. LendingTree describes its purpose as follows: "We help you get the best deal possible on your loans, period. By giving consumers multiple offers from several lenders in a matter of minutes, we make comparison shopping easy. And we all know—when lenders compete for your business, you win!" LENDINGTREE, https://perma.cc/7MUM-QE2Z (archived Apr. 9, 2019).

118. SoFi describes itself as follows:

> SoFi helps people achieve financial independence to realize their ambitions. Our products for borrowing, saving, spending, investing, and protecting give our more than half a million members fast access to tools to get their money right. SoFi membership comes with the key essentials for getting ahead, including career advisors and connection to a thriving community of like-minded, ambitious people. Whether they're looking to buy a home, save money on student loans, grow in their careers, or invest in the future, the SoFi community works to empower our members to accomplish the goals they set and achieve financial independence as a result.

Our Story, SOFI, https://perma.cc/G9ES-728R (archived Apr. 9, 2019).

119. *See* Consumer Fin. Prot. Bureau, Understanding Online Marketplace Lending 1 (n.d.), https://perma.cc/8V42-AMHA.

120. *See* Honigsberg et al., *supra* note 103, at 681.

121. *Id.*

122. *See id.*

123. *See id.*

lending investors must now contend with the uncertainty as to whether state usury caps will interfere with their business models.[124]

Honigsberg and colleagues found that *Madden* in fact had the effect of reducing access to credit to "higher-risk borrowers whom lenders normally charge above-usury rates."[125] Their study revealed that debt buyers in Connecticut and New York responded to *Madden* by paying less for loans made to high-risk borrowers.[126] Moreover, marketplace lenders offered these borrowers fewer loans and less money per loan.[127] These findings are consistent with the standard neoclassical account of the effects of usury restrictions on credit availability, in which "usury laws are inefficient, resulting in high-risk borrowers being cut off from credit."[128] In other words, in order to provide credit to high-risk borrowers, lenders—as a matter of economic survival—need to charge higher interest rates to account for the relative increase in risk.

For opponents of consumer credit regulation, a market-based ideal has motivated support of access to credit in this context. From this perspective, the *Madden* decision was terrible for high-risk borrowers because it would push lenders out of the high-risk, subprime market, which is disproportionally populated by low-income Americans and racial minorities.[129] For example, according to the CFPB, 45 million Americans have limited credit histories as recorded by the three major credit reporting agencies.[130] For this reason, the potential borrowers—who tend to live in low-income neighborhoods, and are disproportionately African American and Hispanic—are deemed "credit invisible."[131] Lenders consider credit-invisible borrowers to be high-risk

124. *See id.*

125. *See id.* at 694.

126. *See id.* at 709.

127. *See id.*

128. *See* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1639-40 (2014).

129. *See, e.g.*, Honigsberg et al., *supra* note 103, at 675 ("[L]enders responded to the decision by extending relatively less credit to borrowers in Connecticut and New York. Not only did lenders make smaller loans in these states after *Madden*, but they also declined to issue loans to the higher-risk borrowers most likely to borrow above usury rates.").

130. *See* KENNETH P. BREVOORT ET AL., CFPB OFFICE OF RESEARCH, CONSUMER FIN. PROT. BUREAU, DATA POINT: CREDIT INVISIBLES 4, 6, 15 (2015), https://perma.cc/NT5Y-MVYA.

131. *See id.* at 6 (observing that 30% of Americans in low-income neighborhoods and 15% of African Americans and Hispanics—as compared to 9% of whites and Asian Americans—are credit invisible).

because there is not enough information to assess their true credit risk.[132] *Madden* thus causes third-party debt buyers, who are integral to the business model of high-risk lending, to balk at buying any loan with an interest rate that is above the usury limit of the applicable state. But if the lenders could account for the increased default risk associated with purportedly high-risk borrowers by charging a commensurately high interest rate, high-risk borrowers would gain access to and choice in the credit they purportedly need.

Thus, arguments in favor of a legislative "*Madden* fix" have rested on the notion that the principal folly of *Madden* is that it will cause credit for high-risk borrowers to dry up. Accordingly, *Madden* inspired Congress to contemplate "bills that would 'fix' the 2015 appellate court decision."[133] The House of Representatives recently passed the Protecting Consumers' Access to Credit Act of 2017.[134] This bill aimed to protect "households in the United States with the fewest resources" by allowing the high interest rates attached to loans originating from national banks to remain attached to those loans as they move through the secondary market.[135] Accordingly, the legislation predicted that if Congress did not correct the Second Circuit's interpretation of federal law, the ensuing "lack of access to safe and affordable financial services will force households in the United States with the fewest resources to seek financial products that are nontransparent, fail to inform consumers about the terms of credit available, and do not comply with State and Federal laws (including regulations)."[136]

The *Madden*-fix legislation's proponents, on both sides of the aisle, explicitly expressed their support for the legislation in terms of the benefits of credit to high-risk, low-income borrowers. For example, Representative Jeb Hensarling, then Chairman of the House Financial Services Committee, invoked the study by Honigsberg and colleagues, arguing on the House floor that "[b]orrowers with less than stellar credit scores have seen their credit cut in half" and that it was "just vital" that "families who are trying to make ends meet . . . be able to access credit."[137] Similarly, Representative Robert Pittenger opined: "[I]t is the low-income, minority people who have suffered the most in the last decade as a result of the misguided regulations that were put upon the American people."[138]

132. *See id.* at 4. Research shows that payday lending storefronts tend to be concentrated in neighborhoods with significant numbers of credit-invisible people. *See supra* note 62 and accompanying text.

133. *See* Levitin, *supra* note 114.

134. H.R. 3299, 115th Cong. (2018).

135. *See id.* § 2(6).

136. *Id.*

137. 164 CONG. REC. H1148 (daily ed. Feb. 14, 2018) (statement of Rep. Hensarling).

138. *Id.* at H1151 (statement of Rep. Pittenger).

Supporters of consumer rights and economic equality also embraced the *Madden*-fix legislation. For instance, Representative Patrick McHenry argued that "[b]y codifying long-standing legal precedent with the valid-when-made doctrine, we ensure that low and middle-income Americans can access our financial markets."[139] Senator Mark Warner introduced the Senate version of the *Madden*-fix legislation which, like the House version, relied on the study by Honigsberg and colleagues for the proposition that *Madden* "has already disproportionately affected low- and moderate-income individuals."[140]

Curiously enough, opponents of the legislation have argued in a similar register against any federal legislative correction of the Second Circuit's decision, with consumer protection motivating their discourse. Access to *safe* credit is implicitly their end game, and thus they have cautioned that the legislation would cause safe credit to dry up. For example, Representative Waters endorsed the *Madden* decision, arguing that state usury laws—with their capacity to regulate payday lenders and other state-sanctioned lending entities that commonly lend to high-risk, low-income borrowers—are important shields against lending abuses.[141] In her view, the *Madden*-fix legislation would permit state-regulated nonbanks, like payday lenders, to "rent-a-bank" in order to circumvent state usury laws.[142] Similarly, Representative Carolyn Maloney argued that the legislation would be tantamount to authorizing state-regulated lenders to "goug[e] low-income consumers with outrageous interest rates."[143]

139. *See* Press Release, Patrick McHenry, U.S. Congressman, McHenry, Meeks Introduce Fintech Bill to Encourage Greater Financial Inclusion (July 19, 2017), https://perma.cc/2WUB-9KHC.

140. S. 1642, § 2.

141. *See* Press Release, Maxine Waters, Ranking Member, U.S. House Comm. on Fin. Servs., Waters Floor Statement in Opposition to Bill That Allows Payday Lenders to Evade State Interest Rate Caps (Feb. 14, 2018) [hereinafter Waters Floor Statement], https://perma.cc/UNY6-49U2. Waters's arguments are consistent with Adam Levitin's argument during the height of the Great Recession that states could regulate national banking behavior indirectly. Levitin argued that although "states cannot directly regulate federally chartered financial institutions in any meaningful way," states can still "regulate federally chartered financial institutions indirectly, by channeling market forces to incentivize changes in bank behavior." Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 189 (2009).

142. Waters Floor Statement, *supra* note 141; *see also* Ctr. for Responsible Lending, *supra* note 3, at 1 ("The so-called Madden bill would make it easier for predatory payday lenders and other non-banks using rent-a-bank arrangements or partnerships to override state interest rate caps and make loans of 300% annual interest or higher. Unaffordable payday loans and other triple-digit interest predatory loans have devastating consequences for already financially distressed borrowers—trapping them in a cycle of debt and increasing the likelihood of delinquency on other bills, delayed medical care, bankruptcy, and eviction.").

143. 164 CONG. REC. H1151 (daily ed. Feb. 14, 2018) (statement of Rep. Maloney).

Some academics and state attorneys general who are strong advocates for consumer rights and equality have also adopted this view of the *Madden*-fix legislation. For example, Adam Levitin has counseled that "the Madden fix bills are actually facilitating predatory lending through . . . schemes that have no purpose other than the evasion of state usury laws and other consumer protections."[144] Similarly, in June 2018, a group including nineteen state attorneys general wrote to Senate leaders to register their own opposition to the *Madden*-fix legislation.[145] They argued that "[t]he states have long held primary responsibility for protecting American consumers from abuse in the marketplace," and admonished Congress not to permit predatory, state-authorized lenders to avoid state usury limits by "cloak[ing] themselves with the banks' rights to preempt state usury limits."[146]

Ultimately, these opposing viewpoints about the *Madden* decision converge in their assumption that low-income people need access to credit for their own well-being. Although agreement on any point is rare in this time of extreme political polarization, the broad agreement on credit as a mechanism of social provision may best be understood through historical context. The unlikely convergence of views on credit is less surprising in light of the significant role that credit has consistently played in American social provision.

II. The Rise of Credit as Social Provision

Within the sphere of the American public-private welfare state, policymakers and legislators have repeatedly invoked credit as a viable form of social provision.[147] The beginnings of credit as social provision for the poor were a piecemeal and ultimately unsuccessful attempt to address meaningfully the perpetual lack of economic stability that, even then, marked the existence of low-income families. The New Deal, however, brought nationalized social provision to the mainstream. A central part of

144. Levitin, *supra* note 114.

145. *See* Letter from Cynthia H. Coffman, Attorney Gen., State of Colo., et al. to Mitch McConnell, Majority Leader, U.S. Senate, et al. (June 27, 2018), https://perma.cc/KU9Z-LLFE.

146. *Id.*

147. *See* Krippner, *supra* note 2, at 2; Trumbull, *supra* note 2, at 10. Raghuram Rajan has observed that "the government's response to rising inequality—whether carefully planned or the path of least resistance—has been to encourage lending to households, especially but not exclusively low-income ones." Rajan, *Let Them Eat Credit*, *supra* note 37. He suggests that this move is politically expedient because access to credit may obscure deeper economic problems such as income stagnation. *See id.* Accordingly, Rajan quips that "'let them eat credit' could well summarize the mantra of the political establishment in the go-go years before the crisis." *Id.*

President Roosevelt's New Deal plan was to harness the power of private capital to work in favor of the public good.[148] Thus, the New Deal ushered in significant innovations in government-subsidized credit.[149] As social provision policy, credit worked well because the innovations were followed by an extended period of economic prosperity in which white Americans, who were the main beneficiaries of government-subsidized credit, could expect that their future selves would be much richer than their present selves. This expectation proved more than reasonable as white wealth ballooned with the unmatched economic growth that characterized the so-called "Golden Age of Capitalism."[150]

A. The Beginnings of Credit as American Social Provision

The view that credit is necessary to the well-being of low-income Americans implicitly places credit within the realm of social provision, a position it has occupied in varying degrees since the Progressive Era. This reflects the United States's enduring policy of engaging market forces and private actors to provide for social need,[151] a feature that continues to distinguish the American welfare regime from those in other developed nations.[152] Accordingly, social scientists have described the United States as a liberal welfare state.[153] Its

148. *See* HYMAN, *supra* note 18, at 47.

149. *See infra* Part II.B.

150. *See* Grewal & Purdy, *supra* note 21, at 64.

151. *See* JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES 7 (2002); *see also* MARIE GOTTSCHALK, THE SHADOW WELFARE STATE: LABOR, BUSINESS, AND THE POLITICS OF HEALTH CARE IN THE UNITED STATES 2-3 (2000).

152. *Cf.* HACKER, *supra* note 151, at 7. Every modern developed state maintains an institutionalized welfare apparatus that is geared toward sustaining the general well-being of its citizenry. In capitalist societies, the burden of social provision is largely distributed between three "institutional nuclei": the state, the market, and the family. *See* John Myles, *How to Design a "Liberal" Welfare State: A Comparison of Canada and the United States*, 32 SOC. POL'Y & ADMIN. 341, 342 (1998). This relative distribution of direct and indirect responsibility is often the defining feature of a welfare state, as modern states must make important policy decisions about how best to attend to the overall well-being of the populace. *See id.* at 342-43.

153. *See* GØSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM 26-27 (1990). In his seminal typology of capitalist "welfare-state regimes," sociologist Gøsta Esping-Andersen identifies three predominant types: the corporatist welfare state, the social democratic welfare state, and the liberal welfare state. *See id.* (capitalization altered); *see also* Gurminder K. Bhambra & John Holmwood, *Colonialism, Postcolonialism and the Liberal Welfare State*, 23 NEW POL. ECON. 574, 575 (2018) ("Esping-Andersen's typology of welfare state regimes has perhaps been the most influential treatment of differences among welfare states." (citation omitted)). *But see* Bhambra & Holmwood, *supra*, at 575-76 (noting critiques of Esping-Andersen's typology as based on too narrow

footnote continued on next page

welfare apparatus is characteristically dominated by market-based solutions and pervasive administration of social provision by private institutions and individuals.[154] Accordingly, "citizens are constituted primarily as individual market actors" who must generally "seek their [own] welfare in the market."[155] It is in this context that credit has developed as a means of social provision.

The implicit assumption that credit is a useful form of social provision for low-income Americans reflects the evolution of credit as an instrument of privatized social welfare, as "an alternative form of redistribution," and even as a source of social and civil rights.[156] Indeed, the American welfare apparatus has consistently deployed credit, to some degree, as a device "to ease distributional conflicts and supplant the welfare state."[157] What has changed over time, however, is the centrality and significance of credit as social

a range of factors, but concluding that "[w]hat is significant is that the critique of Esping-Andersen leads back to his default type of the (neo-) liberal welfare state").

Each typology is largely defined by how a given state distributes responsibility for social provision between the state, the market, and the family. The corporatist welfare state is "decidedly anti-liberal in origin." *See* Myles, *supra* note 152, at 344. It is focused on preserving "post-industrial," status-based social order, such that rights tend to be "attached to class and status." *See* ESPING-ANDERSEN, *supra*, at 27. Traditional Catholic principles reflecting the primacy of "traditional familyhood" and "subsidiarity" also predominate, meaning that "the state will only interfere when the family's capacity to service its members is exhausted." *See id.* Thus, the family is a dominant focus of social provision. Moreover, the market as locus of social provision holds no special appeal, and the "state edifice [is] perfectly ready to displace the market as a provider of welfare," albeit with a focus on preserving the existing social hierarchy. *See id.*

The social democratic welfare state embraces universalism and the "decommodification of social rights." *See* ESPING-ANDERSEN, *supra*, at 27. Accordingly, this regime focuses on providing a basic standard of living for all citizens, irrespective of class status, that "promote[s] an equality of the highest standards, not an equality of minimal needs." *See id.* Direct government engagement in social provision "crowds out" market-based interventions and preempts family-driven social provision. *See id.* at 28. Instead, the state "socialize[s] the costs of familyhood" and provides direct transfers to those in need of social assistance. *See id.* Given the high cost of social provision, however, this type of welfare regime prioritizes a high rate of employment, marrying welfare and work, in order to minimize the number of people who must rely on social transfers to live. *See id.*

154. *See* HACKER, *supra* note 151, at 7 (noting that the state encourages private actors to engage in social provision through "a diverse assortment of subsidies and regulations"). *But see* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA, at x (10th anniversary ed. 1996) (criticizing this "franchise state" because it "encourages the confusion of service with profit making and removes important public tasks—and a lot of money—from public oversight and scrutiny").

155. *See* Myles, *supra* note 152, at 344, 350 ("In liberal welfare states, the average worker is expected to rely much more on the market than elsewhere.").

156. *See* PRASAD, *supra* note 14, at 239.

157. *See* Krippner, *supra* note 2, at 2; *see also* Trumbull, *supra* note 2, at 10.

provision policy. Thus, while credit as privatized social provision enjoyed some support from poverty advocates as early as the Progressive Era, it moved into the mainstream of centralized social provision beginning with New Deal innovations in government-insured private mortgage credit.

Credit as social provision in the United States was inspired by French institutions. The idea of privately funded credit as welfare mechanism developed in seventeenth-century France in the form of charitable pawnshops called *monts-de-piété*.[158] Their guiding principle was that "[s]mall loans provided at a reasonable price could help to serve the welfare needs of the poor while also pushing loan sharks out of the market."[159] Accordingly, the charitable pawnshops lent small sums "on collateral at reasonable interest rates."[160] Although they raised some capital to lend through charging interest, selling unclaimed collateral, and borrowing directly from banks, they experienced persistent challenges with adequate capitalization, particularly during periods of financial crisis when their lending services were most in demand.[161] They were also criticized because they did not serve the neediest who, because they did not own disposable property to pawn, had to relinquish "household necessities" in order to borrow.[162] These charitable pawnshops persisted well into the twentieth century. Starting after World War I, the French government began directly funding them, and following World War II, it mandated that the pawnshops "provide low-cost loans to welfare recipients" and "salary loans to public employees."[163]

Although it was ultimately absorbed into the French welfare state,[164] France's credit-as-welfare innovation inspired American welfare advocates at the turn of the twentieth century to build similar private institutions that could provide credit to poor people.[165] Their goal was to "help the poor carry themselves through periods of financial distress," with credit functioning as "a form of self-help that avoided the dependency trap inherent in charity."[166] The Provident Loan Society began making pawn loans in 1894.[167] These small loans

158. *See* Trumbull, *supra* note 2, at 17-18 ("The first *mont-de-piété* was opened in 1637 . . . , then closed seven years later out of concern over its impact on the economic morality of the people. The institution was reopened in 1777 . . . ." (footnote omitted)).

159. *Id.* at 17.

160. *See id.* at 17-18.

161. *See id.* at 18.

162. *See id.*

163. *See id.* at 19.

164. *See id.*

165. *See id.*

166. *See id.*

167. *See* GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICA: CREDIT AND WELFARE 24 (2014).

ranged in amount from $1 to $50 and carried a 1% per month interest rate.[168] By 1915, the National Federation of Remedial Loan Associations, founded in 1909 "to promote the idea of credit as a basis for welfare,"[169] had forty member organizations operating in many urban areas.[170] By 1917, these institutions had made $205 million worth of small loans, averaging roughly $35 per loan.[171]

The relative success of Provident and its sister societies helped to shape the view that credit extended "on a business-like basis"[172] could function as "a legitimate tool for social justice."[173] Yet, like their French predecessors, these charitable entities did not have the capital necessary to meet the full demand for low-cost, small-dollar loans to the poor.[174] Moreover, they competed in the market with loan sharks who made usurious "chattel and salary" loans to the urban working class.[175] Many of these lenders operated illegally since state usury caps rendered small-dollar loans unprofitable.[176] Given the relatively high risk of default, as well as the lack of legal recourse upon default, loan sharks charged exorbitant interest rates in order to ensure a return on their investment.[177] Nevertheless, loan sharks "were an active and important part of working-class life in early twentieth-century cities" because there was no other alternative for cash-strapped borrowers "without access to other working-class credit sources."[178]

In 1910, Virginia lawyer Arthur Morris and the Russell Sage Foundation (RSF) separately entered the credit space to carry on the work of making credit available for the needy.[179] Morris and the RSF each sought to harness the power and capital of legitimate private lenders as a source of credit for needy workers and the poor.[180] Each believed that credit was an important tool for helping workers and poor people, and set about to usher in a regime that would

168. *See id.* at 24-25.

169. *See* Trumbull, *supra* note 2, at 19.

170. *See* TRUMBULL, *supra* note 167, at 25.

171. *See id.*

172. *See id.*

173. *See* Trumbull, *supra* note 2, at 20.

174. *See* HYMAN, *supra* note 18, at 13; TRUMBULL, *supra* note 167, at 25.

175. *See* ANNE FLEMING, CITY OF DEBTORS: A CENTURY OF FRINGE FINANCE 12-13 (2018).

176. *See, e.g.*, HYMAN, *supra* note 18, at 13-16 (describing John Mackey's loan shark empire in Chicago in the early twentieth century).

177. *See id.* at 13-14.

178. *Id.* at 14-15; *see id.* (listing as alternative credit sources "a benevolent bartender, an ethnic credit circle, or friends and family").

179. *See* BARADARAN, *supra* note 3, at 94-99 (describing Morris's support of private bank loans); FLEMING, *supra* note 175, at 36-37 (describing the RSF's support of private small loans).

180. *See* BARADARAN, *supra* note 3, at 95-97; FLEMING, *supra* note 175, at 37.

attract legitimate private lenders by making small-dollar lending legal and profitable.[181] This, in turn, would drive out the criminal and destructive loan sharks as well as other fringe lenders.[182]

The widow of railroad baron Russell Sage founded the eponymous foundation to improve social and living conditions.[183] After receiving accounts of the practices of loan sharks in New York, the RSF commissioned a study of the incidence and consequences of illegal lending.[184] The study concluded that "the uncertain risk of workers' lives demanded that they have access to small loans to deal with their unexpected misfortune, and a legal form of small loan lending needed to be created."[185] Thus, the foundation cast state usury laws as the problem insofar as interest rate caps precluded the development of a private market for legitimate small-dollar loans.[186] The RSF set about remedying these statutory obstacles, and by 1916 produced the Uniform Small Loan Law.[187] The model law applied to loans under $300; authorized a monthly interest rate ceiling of 3.5% that was applied only to the outstanding debt rather than to the original amount borrowed; limited hidden fees and charges; and created a hierarchy of state oversight of the burgeoning industry.[188] The model law gained traction, and by 1928, twenty-five states had adopted some version of it.[189] By mitigating the risk to legitimate private lenders, state support of small-dollar lending to the working poor took hold, and so-called "industrial banks, personal finance companies, [and] licensed lenders" flourished.[190] This support also worked to normalize profitable lending, "dilut[ing] the traditionally sparing American perspective on usury law."[191]

Morris similarly wanted to make credit available for "low- to moderate-level income earners lacking the necessary collateral but with a consistent history of income."[192] Morris thus developed the "Morris Plan," under which

181. *See* TRUMBULL, *supra* note 167, at 25.

182. *See* FLEMING, *supra* note 175, at 37 (describing the RSF's "anti-loan shark campaign").

183. *See id.* at 36.

184. *See* HYMAN, *supra* note 18, at 16-17.

185. *Id.*

186. *See id.* at 17; PRASAD, *supra* note 14, at 200.

187. *See* DAVID J. GALLERT ET AL., SMALL LOAN LEGISLATION: A HISTORY OF THE REGULATION OF THE BUSINESS OF LENDING SMALL SUMS 90-94 (1932); HYMAN, *supra* note 18, at 17.

188. *See* HYMAN, *supra* note 18, at 17.

189. *See id.* at 18.

190. *See id.*

191. *See* Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1120-21 (2008).

192. Baradaran, *supra* note 44, at 520.

"[c]haracter, plus earning power" and the "constructive and useful purpose" of the loan guided the proper extension of credit to the poor.[193] His plan also included an extended repayment term that was keyed to the borrower's expected future income and eschewed collateral in favor of "the signatures of two cosigners, both of whom agreed to pay the loan should the borrower default."[194] Like the RSF, Morris campaigned to change state law to accommodate his innovation.[195] By 1930, thirty-one states had authorized the operation of Morris Plan banks within their jurisdictions, both through the passage of special authorizing legislation and through existing corporate law.[196]

Thus, credit played a significant, if not central, part of Progressive Era social reform. Moreover, credit was particularly attractive as a welfare mechanism because it appealed to the tenets of "scientific charity,"[197] which purported to administer charitable relief in order "to restore the very poor to independence."[198] Scientific charity, whose popularity in the Progressive Era as a theory of social provision similarly influenced the charitable pawn lending societies, promoted organized and privatized relief that would assist the poor in lifting themselves out of poverty rather than reinforcing their economic condition.[199]

These early state-authorized, credit-based, private moves into social provision fit with the ethos of self-help and independence that characterized welfare provision during this time.[200] Credit made perfect sense to organized charity because "[l]ending to the poor avoided the pauperizing effects of charity in favor of a [more beneficial] contractual bargain between market participants."[201]

193. *Id.* at 521 (alteration in original) (quoting PETER W. HERZOG, THE MORRIS PLAN OF INDUSTRIAL BANKING 17 (1928)).

194. *See id.*

195. *See id.* at 522.

196. *See id.*

197. *See* KATZ, *supra* note 154, at 60-61 (emphasis omitted) (describing the emergence of the theory of scientific charity with its "concerted drive to make relief primarily private").

198. *See id.* at 70.

199. *See id.* at 60 (describing scientific charity theory as focused on "cut[ting] expenses and purg[ing] the able-bodied from relief"). Katz notes, however, that "[f]rom its inception, contradictions plagued scientific charity." *Id.* at 70. Although "[d]ependence on private or public charity was [its] great enemy," its "very method taught dependence, because only an outward show of deference merited relief." *Id.*

200. *See id.* at 69-70.

201. *See* FLEMING, *supra* note 175, at 33.

B. Success in the Halcyon Days of Economic Prosperity

Credit as a privatized form of social provision moved to the main stage of social welfare policy beginning in the New Deal era. The New Deal transformed the American social welfare landscape, introducing a combination of centralized, state-administered social provision, like Social Security,[202] and public-private social provision, like government support for private mortgages.[203] Accordingly, many white American families, the primary beneficiaries of government-subsidized private credit, enjoyed access to housing credit while also saving money.[204] Importantly, this was a time when these beneficiaries could reasonably expect an increasingly bright economic future from which their present selves could successfully borrow.[205] For this reason, credit as social policy in the decades following the New Deal was successful.

Centralized social welfare arrived late to the United States compared to other developed nations.[206] Forced by the massive economic crisis borne of the 1929 stock market crash and a severely wounded private sector, President Roosevelt ushered in the New Deal, which initiated a more widespread, state-driven approach to institutionalized social welfare.[207] New Deal programs "embodied competing visions between the relationship of the state and the market in American capitalism."[208] They encompassed both direct, state-

202. *See* HACKER, *supra* note 151, at 95-97.

203. *See* CHLOE N. THURSTON, AT THE BOUNDARIES OF HOMEOWNERSHIP: CREDIT, DISCRIMINATION, AND THE AMERICAN STATE 53-59 (2018).

204. *See* HYMAN, *supra* note 18, at 72, 132.

205. This Golden Age of Capitalism—from roughly 1950 to 1973—saw a sustained rise in real wages and family income "particularly among white, male workers." *See* JONATHAN SCHLEFER, THE ASSUMPTIONS ECONOMISTS MAKE 215 (2012); Grewal & Purdy, *supra* note 21, at 64 ("It was not a golden age for those who were excluded from its rewards on the basis of race, sex, or otherwise. It was not a golden age for much of the colonial and postcolonial world. And, of course, the sense in which it was a golden age is ambivalent: it was a golden age *for* capitalism in the sense that perplexities and conflicts long thought endemic to market economies appeared to many observers to have resolved themselves.").

206. *See* GOTTSCHALK, *supra* note 151, at 1; *see also* HACKER, *supra* note 151, at 278 (noting the particular public-private divide within the American welfare state). In the words of Jacob Hacker:

> No one set out to design the American welfare regime. It does not reflect a single philosophy or the interests of any particular group. It fully pleases neither the left nor the right. Like all multifaceted systems built up over decades, the American welfare regime represents the accumulation of myriad historical episodes, political actors, and policy changes and the complex and sometimes unexpected interaction of these elements over time.

HACKER, *supra* note 151, at 278.

207. *See* HYMAN, *supra* note 18, at 45.

208. *Id.*

administered programs, like Social Security,[209] and indirectly subsidized forms of privatized social provision, like credit.[210] Specifically, New Deal reforms directed toward rehabilitating the housing market exemplified how the American welfare state deployed private credit as a device of social welfare.[211]

The Great Depression brought a collapse of the housing industry.[212] Before the New Deal, homeowners largely financed their homes with three-to-five-year balloon mortgages.[213] Because these mortgage loans were not fully amortized, borrowers rarely paid off the full amount—both principal and interest due—within the pendency of the mortgage.[214] Borrowers who could not afford the balloon payment due at the close of the finance period would regularly refinance these short-term mortgages in order to extend the time for repayment.[215]

When the market crashed, capital for this type of refinancing dried up and many of these mortgages went into default, causing a widespread foreclosure crisis.[216] The foreclosure crisis affected other connected industries, leading to further economic hardship. For example, the lack of capital for housing led to the collapse of the construction industry, which in turn affected the manufacture of products used to build homes, including wood and metal, and the variety of service industries related to manufacturing.[217] For these and other reasons, correcting the housing market became a focus of New Deal reform.[218] Specifically, addressing the mortgage crisis and encouraging building became priorities.[219]

The first line of attack involved direct, state-funded credit. In June 1933, Congress passed the Home Owners' Loan Act, which created the Home Owners' Loan Corporation (HOLC).[220] The HOLC was meant to "provid[e] much needed liquidity" to troubled American mortgage markets.[221] In essence, the HOLC

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209. *See* HACKER, *supra* note 151, at 95-97.

210. *See* THURSTON, *supra* note 203, at 53-59.

211. *See infra* text accompanying notes 227-33.

212. *See* HYMAN, *supra* note 18, at 48.

213. *See id.* at 47.

214. *See id.*

215. *See id.*

216. *See id.* at 48 ("Foreclosures during the Depression resulted as much from the drop in [homeowners'] income as from the withdrawal of short-term mortgage funds from the market, making refinance impossible.").

217. *See id.* at 48-49.

218. *See id.* at 49, 53.

219. *See id.* at 48-49, 53.

220. *See* Pub. L. No. 73-43, § 4(a), 48 Stat. 128, 129 (1933).

221. *See* HYMAN, *supra* note 18, at 49.

purchased distressed mortgages and refinanced them with extended payment terms of up to fifteen years.[222] As recounted by historian Louis Hyman, "[i]n total, about 1.9 million home owners applied for $6.2 billion in refinancing, of which half was approved."[223] Moreover, "[t]he HOLC refinanced about 40 percent of all qualifying property and about one-fifth of the total U.S. owner-occupied, non-farm homes."[224] The HOLC was largely successful in its mission, but it was intended as merely a short-term solution to the existing foreclosure crisis.[225] Once the market was largely stabilized, there remained the longer-term problem of economic distress in the housing construction industry.[226]

Credit became a focus of New Deal policymakers' approach to broader economic recovery. The Federal Housing Administration (FHA), created by the National Housing Act of 1934,[227] was a centerpiece of policymakers' plans to harness the power of private capital for the benefit of national economic recovery by "creatively induc[ing] business toward new housing initiatives to restart the economy."[228] The FHA ushered in a variety of financing innovations that had the effect of creating and then stabilizing a robust private mortgage lending market.[229] In turn, no initial significant outlay of federal funds was necessary, as it had been with the HOLC.[230] Prospective homebuyers now had access to private, low-interest credit in the form of extended, fully amortized loans that lasted from fifteen to twenty years.[231] By spreading out the full payment of the loan over such a long period of time, the FHA made homes much more affordable to average Americans.[232] Amortization over a

222. *See id.*

223. *Id.* at 49-50.

224. *Id.*

225. *See id.*

226. *See id.* at 50.

227. National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended in scattered sections of 12 and 18 U.S.C.).

228. *See* HYMAN, *supra* note 18, at 53.

229. *See* LOUIS HYMAN, BORROW: THE AMERICAN WAY OF DEBT; HOW PERSONAL CREDIT CREATED THE AMERICAN MIDDLE CLASS AND ALMOST BANKRUPTED THE NATION 89 (2012).

230. *See id.* ("The most imaginative part of the FHA plan was that, unlike for the HOLC, the government would not pay for any of it. Lenders would chip into an insurance pool, organized by but not paid for by the federal government, and if there was a default on a mortgage, the lender would be paid out of the pool."); *see also* HYMAN, *supra* note 18, at 54.

231. *See* HYMAN, *supra* note 18, at 54 (noting that the FHA mandated interest rates to be below 5%).

232. *See id.* at 57.

long period also had the effect of increasing borrowers' ability to withstand short-term economic fluctuations, relieving borrowers of having to deal with refinancing in vulnerable moments.[233]

In essence, through the FHA, prospective homeowners (mostly white) could now afford to buy a house, and private lenders could count on significantly reduced default risk to turn handsome profits on home mortgages.[234] Moreover, by standardizing mortgages and ensuring the quality of homes that secured those mortgages, the FHA also had the added effect of creating a viable secondary market for home mortgages.[235] With the birth of the Federal National Mortgage Association (Fannie Mae), the FHA helped to restart the flow of capital throughout the ailing economy, as lenders could originate a loan, sell it to Fannie Mae, and use those funds to originate additional loans.[236] By 1954, Fannie Mae began bundling up those mortgages into securities to be purchased by investors, further helping to move capital throughout the economy.[237]

Credit innovations became social provision policy insofar as the state sought to support economic recovery for struggling Americans by subsidizing private credit. For example, given its public subsidization of private risk, the FHA only insured loans made on homes that passed government inspection.[238] This policy helped to reignite the home construction industry, as the market for FHA-approved homes expanded.[239] Increased activity in the manufacturing sector followed, resulting in the creation of jobs for construction workers and factory workers.[240] It also helped to bolster capitalism at a moment when the country was vulnerable to the spread of socialism.[241]

233. *See* HYMAN, *supra* note 229, at 89 ("A long period made the mortgages independent of short-term fluctuations in the economy. Borrowers would not have to weather unemployment and refinancing at the same time."); *see also* HYMAN, *supra* note 18, at 57.

234. *See* HYMAN, *supra* note 18, at 54; Krippner, *supra* note 2, at 27.

235. *See* HYMAN, *supra* note 229, at 91; HYMAN, *supra* note 18, at 54 ("Like any other standardized commodity, mortgages then could be resold nationally, which would enable the money of the capital-rich east to flow south and west.").

236. *See* HYMAN, *supra* note 229, at 91-92; Theresa R. DiVenti, Policy Brief, *Fannie Mae and Freddie Mac: Past, Present, and Future*, 11 CITYSCAPE, no. 3, 2009, at 231, 233.

237. *See* DiVenti, *supra* note 236, at 233.

238. *See* HYMAN, *supra* note 18, at 54-57.

239. *See id.*

240. *See id.*

241. *See* PRASAD, *supra* note 14, at 205-06.

Thus, credit became the lever for important market-based social policies initiated during the Great Depression.[242] The government's role was to create and subsidize the mortgage market itself, providing indirect social support for the welfare of Americans. Indeed, many white World War II veterans returned from the European and Pacific fronts to a nation that subsidized their reintegration into society with credit. For example, the G.I. Bill offered returning veterans government-backed home loans.[243] Through its deployment of credit, the U.S. government revealed a significant national commitment to credit as a primary force in national welfare policy. Indeed, the FHA and the Department of Veterans Affairs insured mortgages for $120 billion in new housing, including approximately half of all new suburban houses in the 1950s and 1960s.[244] Thus, by the 1950s, credit was cemented as the great facilitator of the American dream of suburban homeownership and of white, middle-class wealth. A future replete with legitimate expectations of economic growth and opportunity made it so.

Credit as social provision policy worked for the vast numbers of white families who benefited from FHA-backed credit (sometimes even with no money down), because the broader economic environment for them was bright. Following World War II, Americans experienced two decades of unprecedented economic growth that guaranteed future cash flows and improved economic status for a wide swath of white borrowers. For example, by one account:

> Real per capita income grew in those years at 2.25 percent a year, and prosperity was democratized as huge numbers of Americans entered the middle class. Indeed, a new working-middle class was created, as blue-collar workers came to enjoy the benefits of homeownership, and rising wages allowed them to buy household appliances and new cars and to take vacations.[245]

Rising real wages permitted borrowers to save at an increasing rate, allowing them to keep the growth rate of their outstanding debt relatively flat.[246] Thus, default rates were low, and through their access to government-

242. *See id.* at 221 ("The United States developed a form of 'mortgage Keynesianism' in which credit-financed consumption of homes became a central element of the functioning of the economy as well as of the organization of people's lives.").

243. *See* Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, §§ 500-501, 58 Stat. 284, 291-92.

244. *See* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 77 (2003).

245. Thomas I. Palley, *The Forces Making for an Economic Collapse*, ATLANTIC (July 1996), https://perma.cc/QN9M-MLJ9; *see also* ROTHSTEIN, *supra* note 23, at 180 ("From the end of World War II until about 1973, the real wages and family incomes of all working- and middle-class Americans grew rapidly, nearly doubling.").

246. *See* HYMAN, *supra* note 18, at 132-33, 133 fig.5.1.

subsidized credit in a broader environment of economic growth and opportunity, white Americans were able to "construct a financial cushion that would enable them to ride out bad times and pass on the savings to their children."[247]

Notably, credit as social provision reached this apex during the expansive economic growth of the postwar Golden Age. Thus, New Deal-era innovations in government-insured, private mortgage credit shaped not only economic recovery following the Great Depression, but also built a relatively wealthy white middle class.[248] The Roosevelt Administration's "mortgage Keynesianism" double-down on "credit-financed consumption of homes"[249] as a central tool of economic recovery and broader social provision paid off for those Americans who were lucky enough to benefit not only from more credit, as facilitated by government largesse, but also from the spoils of postwar economic boom.

Credit-based social provision worked tremendously well for "newly minted white middle-class Americans."[250] However, during this same historical moment, credit as social provision did not work for socially marginalized communities, who could not benefit from the magical combination of economic opportunity and government-subsidized credit. Not everyone had equal access to this homeownership dream of economic and social well-being set in motion by FHA policymakers. The FHA's de jure and de facto

247. *See* BROWN ET AL., *supra* note 244, at 79. History has borne out the idea that a broader environment of economic opportunity and growth is necessary in order to animate credit as productive social provision. For example, this notion lived at the center of Alexander Hamilton's well-known arguments that the United States's ability to access well-priced credit was essential to its overall economic and social prosperity. *See* Alexander Hamilton, First Report on the Public Credit (1790), *in* AMERICAN CAPITALISM: A READER 100, 101 (Edward E. Baptist & Louis Hyman eds., 2014). Accordingly, Hamilton made a series of arguments that Congress should arrange for full payment of the various war debts the Constitutional Congress and the individual states incurred in seeking independence from England. *See id.* at 110 (noting that it was "a fundamental maxim, in the system of public credit of the United States, that the creation of debt should always be accompanied with the means of extinguishment"). Credit had made independence possible, and per Hamilton, it would make economic recovery and future American economic and social prosperity possible, but only if there was a reasonable means to pay in the future. *See id.* Hamilton drew some of these insights from observing how credit had similarly facilitated European conquest of the New World by financing the transformation of raw materials into great wealth. *See* RICHARD SYLLA & DAVID J. COWEN, ALEXANDER HAMILTON ON FINANCE, CREDIT, AND DEBT 3 (2018).

248. *See* Grewal & Purdy, *supra* note 21, at 64-66 ("[I]t is nonetheless true that [the Golden Age of Capitalism] was also a period in which many working people enjoyed a degree of security, social standing, and leisure that was unprecedented in human history, and has since receded.").

249. *See* PRASAD, *supra* note 14, at 221.

250. *See* BROWN ET AL., *supra* note 244, at 79.

discriminatory policies, both in direct lending and in the secondary debt market, caused minority groups to miss out on the benefits of government-subsidized housing credit during the Golden Age of Capitalism.[251] This meant that racial minorities and other socially marginalized groups were not invited to bask in the economic largesse.[252] Rather, they were relegated to a veritable Wild West of lending that only further entrenched their status as second-class citizens.[253]

For example, African Americans who, like their fairer brethren, dreamt of fully amortized, low-interest mortgages had to resort to alternative forms of credit, like "the dreaded contract sale," to purchase homes.[254] These contract sales were often marketed by "opportunistic, white sellers [who] inflated initial housing prices, misled buyers about the extent of repairs the homes needed in order to be up to code, and offered interest rates on the contract that were higher than mortgage interest rates."[255] However, unlike borrowers who bought homes with an FHA-backed conventional mortgage, contract loan borrowers did not receive title to the property until the full debt was paid.[256] These glorified rent-to-own agreements meant that marginalized borrowers lost years' worth of payments and were subject to quick eviction based on just one month's default.[257] "Sellers then sold to another family on contract, continuing the cycle of profit-seeking made possible by exploiting working poor minorities."[258]

C. The Essential Decline of Credit as Productive Policy

The experience of midcentury African American homebuyers reveals a fatal crack in the veneer of credit as social provision. Namely, because the

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251. *See* HYMAN, *supra* note 18, at 140-43.

252. *See, e.g.*, THURSTON, *supra* note 203, at 99-101 ("[O]nly 2 percent of FHA loans went to nonwhites, even as the FHA backed nearly two-thirds of all newly purchased houses.").

253. *See* ROTHSTEIN, *supra* note 23, at 97 (noting that FHA-sanctioned redlining pushed prospective black homeowners to rely instead on the contract sale system instead).

254. *See* Krippner, *supra* note 2, at 27 (noting that the passage of the Fair Housing Act in 1968, which prohibited discrimination in lending, "liberated blacks" from having to rely on contract sales for the purchase of real estate, but nevertheless did not "substantially improv[e] their position in real estate markets"); *see also* Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3533, 3535, 3601-3619 (2017)).

255. Megan S. Wright, *Installment Housing Contracts: Presumptively Unconscionable*, 18 BERKELEY J. AFR.-AM. L. & POL'Y 97, 98 (2016); *see also* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://perma.cc/4LMU-K3KR.

256. *See* Wright, *supra* note 255, at 98; Coates, *supra* note 255.

257. *See* Wright, *supra* note 255, at 98-99; Coates, *supra* note 255.

258. Wright, *supra* note 255, at 99.

prospects for socially and economically marginalized communities were relatively dim, credit, as an essential matter, could not function as a way to make meaningful economic gains.[259] Moreover, the limit of credit as social provision became more apparent once the global economy faltered amid the geopolitical and economic upheaval of the mid-1970s. Credit as productive social provision, even for the white middle class beneficiaries, became a shadow of its former, postwar self. Nevertheless, policymakers—to little avail—continued to rely on credit as "an alternative form of [expedient] redistribution."[260] Credit became a placebo for addressing deeply embedded inequities in civil rights; the "distributional conflicts" attendant to wage stagnation and the broader economic decline of the 1970s;[261] the need for supplements to public assistance in the wake of bipartisan dismantling of social provision for the most needy in the 1980s and 1990s, and the ever-widening racial wealth gap in the 2000s. As described in greater detail in the next Subpart, these attempts to replicate the successes of credit did little in light of the broader environment of persistent economic inertia for some and persistent economic decline for others.

1. Credit and civil rights

Credit took on grander, more significant social implications in the Civil Rights era in light of the inequities in credit availability and quality experienced by racial minorities, women, and the poor.[262] Given the "two-tier credit system" that emerged as a result of de jure and de facto discrimination,[263] credit became a focal point of both gender-based and race-based civil rights social policy, as well as of the emergent poverty rights movement.[264]

As with the purchase of homes and the expansion of the American suburban landscape, credit had become the primary facilitator of expanded American consumption, which complemented the lifestyles of a burgeoning

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259. *See* Grewal & Purdy, *supra* note 21, at 65-66 (noting that with regard to the Golden Age of Capitalism, "[t]here were important exceptions to the trend of economic inclusion, notably African-Americans in the United States").

260. *See* PRASAD, *supra* note 14, at 239.

261. *See* Krippner, *supra* note 2, at 2.

262. *See* Felicia Kornbluh, *To Fulfill Their "Rightly Needs": Consumerism and the National Welfare Rights Movement*, RADICAL HIST. REV., Fall 1997, at 76, 82 ("In the 1960s and early 1970s, a new middle-class consumer movement converged with the women's and civil rights movements, and the poverty programs, to make consumer issues politically central. . . . A major consumer concern of the 1960s era was access to consumer credit for women and racial minorities.").

263. *See* HYMAN, *supra* note 18, at 173.

264. *See, e.g.*, Kornbluh, *supra* note 262, at 82.

ownership society.[265] Other twentieth-century innovations in consumer credit, such as installment financing and revolving credit, allowed Americans easily to fill their newly mortgaged homes and attached garages with expensive, durable goods such as cars, televisions, and appliances, and consequently to enjoy the "postwar dream of suburban living."[266] This was consistent with the notion that "spending [was] a form of citizenship, an important ritual of national identity in daily life."[267] Yet, as was the case with FHA-insured mortgages, disenfranchised groups like racial minorities, women, and the poor—individually and intersectionally—were largely excluded from the bounty or required to pay inflated prices for inferior goods.[268]

As the second-class status of African Americans, women, and other marginalized groups became untenable in the 1950s and 1960s, access to fair credit emerged as an important platform from which to address persistent social and economic inequality. In this sense, credit took on even greater social significance in American society, as it "moved to the center of American life."[269]

Ora Lee Williams's case against the Walker-Thomas Furniture Company serves as an example of how during this time, marginalized communities struggled to access credit extended on beneficial terms.[270] In 1962, Williams bought a stereo on credit from Walker-Thomas.[271] This credit-based installment purchase, one among many she made from Walker-Thomas, began the unraveling of a debtor-creditor relationship that had developed over the course of five years.[272] A single mother of seven living on $218 per month in public assistance, Williams could not make the payments of $36 per month and defaulted.[273] Walker-Thomas then attempted to repossess some twenty-two of the items she had bought on installment credit over the years.[274]

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265. *See* HYMAN, *supra* note 229, at 96.

266. *See id.* at 95-97; *see also* HYMAN, *supra* note 18, at 171-72.

267. *See* CHARLES F. MCGOVERN, SOLD AMERICAN: CONSUMPTION AND CITIZENSHIP, 1890-1945, at 2-3 (2006) ("Americans have long recognized that being consumers is central to their shared experiences as Americans. Getting and spending to acquire more, newer, and better things has become lived ideology, a deeply held common sense that shapes the ways we understand culture and social difference.").

268. *See* HYMAN, *supra* note 18, at 173-74.

269. *See id.* at 132, 173; Kornbluh, *supra* note 262, at 82.

270. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

271. *See id.* at 447.

272. *See* Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1395-96 (2014).

273. *See id.* at 1385, 1397 & n.64.

274. *See id.* at 1397.

Williams discovered that contractually, Walker-Thomas had every right to repossess these items because each time she purchased an item on installment credit, she had agreed to a payment pro rata term across all of her installment contracts.[275] This meant that she would receive title to *none* of the items she bought until she had paid her debt on *all* of them. Accordingly, when she defaulted on the stereo payments, Walker-Thomas came and took the stereo, the bed, the chest of drawers, and the washing machine, even though Williams had by then paid the principal and interest due on the latter three items.[276]

Williams fought back with the assistance of the local poverty law bar.[277] She ultimately argued that the cross-collateralization term was unconscionable because she did not realize that it was a part of her agreement and because the term was unduly biased in favor of Walker-Thomas.[278] Her case worked its way up to the D.C. Circuit, which, in an opinion by Judge J. Skelly Wright, held in Williams's favor, remanding the case to the district court for consideration of the credit agreement in light of then-recent changes in unconscionability doctrine.[279] In *Williams v. Walker-Thomas Furniture Co.*, Judge Wright recognized that shifting the relative balance of power in terms of debtor-creditor relationships in poor communities held great potential for vindicating the rights of the poor and improving their lives.[280]

Thus, access to credit took its place among the various fronts of social change synonymous with the 1960s United States. For example, among President Johnson's Great Society reforms in the "battle to give every citizen an escape from the crushing weight of poverty"[281] were programs directed at credit access as a form of social and economic equality and justice. Specifically, the acronym "FHA," once a poster child for state-sponsored credit discrimination, was repurposed to stand for the Fair Housing Act of 1968, which

275. *See Williams*, 350 F.2d at 447.

276. *See* Fleming, *supra* note 272, at 1397-98 ("At that time, Williams owed $444.40 in total, less than the cost of her last purchase, an Admiral stereo. Without the fine print in the Walker-Thomas Furniture contract, only the stereo could have been repossessed.").

277. *See id.* at 1408-09.

278. *See Williams*, 350 F.2d at 449 ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.").

279. *See id.* at 448-50. The court's decision rested on the then-recent resurgence of the unconscionability doctrine in the Uniform Commercial Code as adopted by Congress to apply to commercial transactions in the District of Columbia. *See id.* at 448-49; *see also* Act of Dec. 30, 1963, Pub. L. No. 88-243, 77 Stat. 630.

280. *See* Fleming, *supra* note 272, at 1416-19.

281. *See* Remarks at the University of Michigan (May 22, 1964), 1 PUB. PAPERS 704, 706 (May 22, 1964).

prohibited discrimination in mortgage lending.[282] The year 1968 also brought the passage of the Truth in Lending Act (TILA), which was conceived in the wake of *Williams*-style concerns about power asymmetries that tended to favor lenders against unsophisticated borrowers.[283] Accordingly, TILA required lenders to disclose information about loan terms and cost to prospective borrowers.[284] Later, credit would also occupy an important place in the women's rights movement. The Equal Credit Opportunity Act, passed in 1974, initially prohibited lenders from basing their credit decisions on gender, with race and other categories added to the statute in later amendments.[285] Social reformers focused on credit because "credit had become a necessity in American life," and policymakers "follow[ed] the lead of social groups who saw access to credit as a social goal."[286]

Consequently, credit remained in the thick of national social provision policy as the country struggled through a variety of civil rights reforms. It was deployed to provide an answer to deeply entrenched and persistent inequities like racial and gender discrimination. Yet, despite the numerous policies and legislation enacted since World War II that have made credit more accessible to low-income communities, recent data show the relative failure of these attempts to deploy credit to improve social welfare, at least for African Americans.[287]

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282. *See* Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3533, 3535, 3601-3619 (2017)).

283. *See* Pub. L. No. 90-321, tit. I, 82 Stat. 146, 146-59 (1968) (codified as amended at 15 U.S.C. §§ 1601-1667f (2017)); Zywicki, *supra* note 44, at 868 (opining that the reform "was philosophical [in nature] as well [as economic], reflecting an abandonment of the paternalistic philosophy of political elitists who felt that most consumers could not be trusted with access to credit").

284. *See* Truth in Lending Act § 102 (codified as amended at 15 U.S.C. § 1601(a)).

285. For the original Equal Credit Opportunity Act, see Pub. L. No. 93-495, tit. V, 88 Stat. 1500, 1521-25 (1974) (codified as amended at 15 U.S.C. §§ 1691, 1691a-1691c, 1691d-1691e). For the amendments adding race and other categories, see Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (codified as amended at 15 U.S.C. §§ 1691, 1691b-1691c, 1691d-1691f).

286. *See* PRASAD, *supra* note 14, at 225.

287. *See* JANELLE JONES ET AL., ECON. POLICY INST., 50 YEARS AFTER THE KERNER COMMISSION 2 (2018), https://perma.cc/Q3S8-93MZ ("With respect to homeownership, . . . America has failed to deliver any progress for African Americans over the last five decades. In th[is] area[], their situation has either failed to improve relative to whites or has worsened.").

2. Credit deregulation as social provision

With the onset of economic crisis in the 1970s, credit took on even greater significance as a political tool of "statecraft."[288] It became a means of "eas[ing] distributional conflicts and supplant[ing] the welfare state,"[289] even as rising inflation and wage stagnation tarnished its shine. Following World War II, policymakers in the United States relied on credit heavily to improve the well-being of the American populace. Credit had generally been able to shoulder this burden because the future cash flow of the average American remained relatively certain. Credit could continue to be a feasible tool of social provision because a booming postwar economy meant that the resulting consumer indebtedness could largely be serviced.[290]

Nevertheless, the good times came to an end with the economic uncertainty of the 1970s, by which time, for many Americans, "it was no longer possible to be without credit and live in mainstream American society."[291] Economic uncertainty and stagnant wages meant that Americans increasingly began to use credit as a wage supplement in order to maintain the standard of living to which they had become accustomed during the halcyon days of a booming economy and rising real wages.[292] This was a political problem insofar as "[i]n the context of a regulated financial system, inflation distorted the flow of credit across the economy, providing ample credit to business but draining capital from the cities and from suburban homeowners."[293] Thus policymakers had to decide how best "to redirect capital to social priorities."[294]

The deregulation of credit became a viable means of addressing the attendant "distributional conflicts"[295] head on.[296] By creating the illusion of present capital and "revolutioniz[ing] the way consumers pay for goods and services,"[297] credit could address the socioeconomic woes borne of ongoing inflation and stagnant wages. More significantly, it could also place the burden of accounting for the economic crisis in the hands of private individuals—who would provide for their own present welfare by placing the burden on their

288. *See* Krippner, *supra* note 2, at 2, 5-6.

289. *See id.* at 2.

290. *See* ROTHSTEIN, *supra* note 23, at 180; *supra* Part II.B.

291. *See* HYMAN, *supra* note 18, at 282.

292. *See id.* at 218-19.

293. GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 59 (2011).

294. *See id.*

295. Krippner, *supra* note 2, at 2.

296. *See* KRIPPNER, *supra* note 293, at 72, 140-41; PRASAD, *supra* note 14, at 235.

297. William F. Baxter, *Section 85 of the National Bank Act and Consumer Welfare*, 1995 UTAH L. REV. 1009, 1009.

future selves.[298] In other words, rather than devising a national public policy to address the ongoing economic crisis, deregulation of credit became the de facto social policy solution.[299]

In the face of ever-increasing demand, the existing regulatory framework, including state usury caps on interest rates, limited the supply of credit.[300] Government action would solve that problem by relieving lenders from the burdens of state usury caps. A combination of congressional action and judicial action served to deregulate U.S. consumer credit markets. The U.S. Supreme Court's 1978 decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*[301] was a major step forward for credit deregulation. The Marquette National Bank of Minneapolis, a Minnesota-chartered bank, sued First of Omaha Service Corporation (Omaha Service), a subsidiary of the Nebraska-chartered First National Bank of Omaha (Omaha Bank), to stop Omaha Service from soliciting Minnesota residents as customers for Omaha Bank credit cards.[302] In essence, Marquette (which, as a bank located in Minnesota, was subject to Minnesota's 12% usury cap on its loans) asked the Court to rule that Omaha Bank (which, as a Nebraska bank, could charge 18% on the first $1,000 of card balances, per Nebraska law) was required to adhere to Minnesota's usury cap in order to solicit and serve customers in Minnesota.[303]

Omaha Services argued in response that because Omaha Bank was a national banking association, the National Bank Act (NBA), which authorized national banks to charge interest as permissible in their home state, preempted the application of Minnesota's state usury limit to Omaha Bank's loans.[304] The Court agreed, holding that even though Omaha Bank provided credit cards to customers outside of its home state of Nebraska, the NBA permitted Omaha Bank to charge interest as permitted under Nebraska's usury cap.[305]

Thus, national banks could thereafter export favorable interest rates into states with onerous usury caps.[306] The ruling began a race to the bottom between states to attract banks by creating a business-friendly environment for

298. *See, e.g.*, Trumbull, *supra* note 2, at 20 (describing "social credit" as "a private-sector alternative to government-financed social policy").

299. *See id.* at 13-15.

300. *See* KRIPPNER, *supra* note 293, at 59.

301. 439 U.S. 299 (1978).

302. *See id.* at 301-02.

303. *See id.* at 302, 304.

304. *See id.* at 306, 308; *see also* National Bank Act, ch. 106, § 30, 13 Stat. 99, 108 (1864) (codified as amended at 12 U.S.C. §§ 85-86 (2017)).

305. *See Marquette Nat'l Bank*, 439 U.S. at 318-19.

306. *See id.* ("[T]he protection of state usury laws is an issue of legislative policy, and any plea to alter [the NBA] to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.").

interest rates. South Dakota led the charge by eliminating its usury cap, prompting major national banking institutions, like Citibank, Wells Fargo, and Capital One, to move their credit card operations there.[307] Shortly after the Court's ruling in *Marquette National Bank*, Congress followed with legislation that further deregulated credit markets.[308] The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA)[309] "expanded federal preemption under the NBA to all federally insured banks, insured savings and loan associations, and insured credit unions."[310] This brought federally insured, state-chartered banks within the ambit of NBA preemption, and allowed many more lending institutions to compete for customers.[311] Accordingly, credit became an option for a broader range of Americans,[312] and the mounting socioeconomic problems, exacerbated by unrelenting wage stagnation, could be deferred to another day.[313] Credit thus served a social function by creating the illusion that "the grim [socioeconomic] certainties of the 1970s had been somehow suspended."[314]

Credit deregulation policy also served the welfare retrenchment policies promoted by the Reagan and Clinton Administrations in the 1980s and 1990s.[315] Easily accessible credit was a politically convenient alternative for needy families who, following welfare retrenchment, increasingly had to fend

307. *See* Amy Sullivan, *How Citibank Made South Dakota the Top State in the U.S. for Business*, ATLANTIC (July 10, 2013), https://perma.cc/5WAL-TZNQ.

308. *See* Patricia A. McCoy et al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 1327, 1333 (2009).

309. Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of 12 and 15 U.S.C.).

310. Marvin, *supra* note 109, at 1819.

311. *See id.*

312. *See* McCoy et al., *supra* note 308, at 1333-66 (arguing that DIDMCA, in part, cleared a path for the rise of the subprime housing market, and that this development along with the rise of securitization of mortgages helped to cause the financial crisis); *see also* Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 631 (2010) ("Before the 1980s, lenders avoided inner-city minority neighborhoods through a combination of fear, prejudice, and institutional discrimination. The invention of securitized mortgages, however, changed the calculus of mortgage lending and made minority households very desirable as clients." (citation omitted)).

313. *See* KRIPPNER, *supra* note 293, at 84.

314. *See id.*

315. *See* PRASAD, *supra* note 14, at 232-34 (observing a "relationship between credit and the welfare state" since the 1980s, "such that where we see greater growth in credit we see less growth in the welfare state").

for themselves in the marketplace.[316] For example, the Reagan Administration sought to dial back a variety of welfare programs aimed at helping the poor, in light of the view that public welfare assistance programs "had become a significant source of social and economic problems instead of a solution."[317] Rather than provide direct subsidies to the poor, President Reagan instead wanted to incentivize poor people to become economically self-sufficient.[318] Thus, in the early 1980s, Congress passed legislation cutting the budgets of Aid to Families with Dependent Children (AFDC)[319] and the Supplemental Nutrition Assistance Program (SNAP),[320] the primary national public assistance programs.[321]

One consequence of Reagan-era welfare retrenchment was the rise in the proportion of people living below the poverty line.[322] Poor people now had to look elsewhere to supplement their lack of living income, and "[b]y the 1990s,

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316. *See id.* at 196.

317. *See* Peter Starke, *The Politics of Welfare State Retrenchment: A Literature Review*, 40 SOC. POL'Y & ADMIN. 104, 105 (2006) (emphasis omitted); *see also* Paul Pierson, *The New Politics of the Welfare State*, 48 WORLD POL. 143, 164-66 (1996).

318. *See, e.g.*, Message to the Congress Transmitting Proposed Low-Income Opportunity Legislation, 1 PUB. PAPERS 182, 182-83 (Feb. 26, 1987).

319. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XXIII, subtitle A, 95 Stat. 357, 843-65 (codified as amended in scattered sections of the U.S. Code). For the original enactment of AFDC, see Child Support Enforcement Act, Pub. L. No. 74-271, tit. IV, 49 Stat. 620, 627-29 (codified as amended at 42 U.S.C. §§ 601-619 (2017)).

320. *See* Omnibus Budget Reconciliation Act of 1981 tit. I, subtitle A, pt. 1, 95 Stat. at 358-66 (codified as amended in scattered sections of 7 U.S.C.). For the original enactment of SNAP, see Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. §§ 2011-2036c (2017)).

321. *See* R. Shep Melnick, *Federalism and the New Rights*, 14 YALE L. & POL'Y REV. (SYMP. ISSUE) 325, 351 (1996) (describing these cuts but noting that "public sentiment shifted toward doing more to help the needy, and Democrats in Congress took advantage of this opportunity to criticize the Reagan Administration and to expand benefits").

322. *See* Robert Pear, *Reagan's Social Impact: News Analysis*, N.Y. TIMES (Aug. 25, 1982), https://perma.cc/Y9VL-J7JP ("The Census Bureau reported this summer that the number of people living below the official poverty line had increased by 2.2 million, to a total of 31.8 million, meaning that one person in seven now lives in poverty. Many sociologists and demographers say they expect the number to rise further as a result of high unemployment and the budget cuts of the last two years."); Spencer Rich, *Reagan Welfare Cuts Found to Worsen Families' Poverty*, WASH. POST (July 29, 1984), https://perma.cc/V8UU-K4NU ("President Reagan's welfare cuts for working mothers forced many poor families deeper into poverty, according to a study of 207 Georgia welfare families funded by the Ford Foundation and released yesterday by the Center for the Study of Social Policy.").

household credit was viewed on both the left and the right of the political spectrum as an effective tool for improving poor households' access to economic prosperity."[323]

Clinton-era welfare reform also pulled the rug out from under poor families who relied on AFDC and other direct subsidies.[324] President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[325] which "marked a dramatic shift in American welfare policy, and in public discourse about poverty, work and 'self-sufficiency.'"[326] These reforms were premised on the notion that poor people could simply work their way out of poverty and thus "demand[ed] personal responsibility" from any person seeking public assistance.[327] Significantly, under the PRWORA, Temporary Aid for Needy Families (TANF) replaced AFDC.[328] Whereas AFDC provided direct cash assistance to low-income and single-parent households, TANF required that work be the basis for welfare eligibility and placed a sixty-month lifetime maximum on direct grant benefits.[329] The PWRORA also gave states greater latitude in administering federal funding for public assistance. This created an incentive for states to assume harsher positions in distributing the PWRORA block

323. *See* TRUMBULL, *supra* note 167, at 209.

324. *See* Vann R. Newkirk II, *The Real Lessons from Bill Clinton's Welfare Reform*, ATLANTIC (Feb. 5, 2018), https://perma.cc/U7ZZ-58JA ("'Welfare reform' didn't fix welfare so much as destroy it, and if similar changes were applied to Medicaid and food stamps, they would likely do the same.").

325. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code).

326. Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL'Y 201, 203 (2006).

327. *See* Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 2 PUB. PAPERS 1328, 1328 (Aug. 22, 1996); *see also* Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, 2 PUB. PAPERS 1325, 1327 (Aug. 22, 1996) ("Today we are ending welfare as we know it. But I hope this day will be remembered . . . for what it began: a new day that offers hope, honors responsibility, [and] rewards work . . . .").

328. Brodie, *supra* note 326, at 202-03.

329. *See id.* at 212-14 ("For purposes of AFDC and TANF, the most salient 'non-working poor person' was the single mother, whose prevalence on the AFDC rolls was the problem to be solved. . . . [Welfare] [r]eform proponents . . . prevailed with the argument that it was the availability of welfare itself that kept these women and their children in poverty by creating a dependency on public support that squelched their abilities to become self-supporting through work (or supported by a husband, through marriage).").

grant money to needy families in order to redirect those funds elsewhere.[330] Thus, at both the federal and the state levels, "workfare" took hold as national social provision policy.

This narrative of personal responsibility and the "anoint[ing] [of work] as the national 'welfare' . . . policy"[331] coincided with the exponential rise in state-sponsored payday lending in the early 1990s.[332] Payday loans grew out of the check-cashing business.[333] Quick credit became widely available to anyone with the inclination to apply, including low-income borrowers, notwithstanding their uncertain future cash flow.[334] Low-income borrowers could now access credit to temporarily fill in the gaps left by inadequate income. Credit had become "a mechanism for addressing poverty,"[335] and credit as self-subsidy dovetailed with the "workfare" policies initiated by the PWRORA.[336] Social provision policy embraced the notion that the neediest welfare recipients (and specifically single mothers, who were most significantly affected by the demise of AFDC)[337] could work *and* borrow their way to a more stable economic reality.[338] Lenders would compensate for any

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330. *See* Liz Schott et al., Ctr. on Budget & Policy Priorities, How States Use Federal and State Funds Under the TANF Block Grant 1 (2015), https://perma.cc/94W7-C6NV ("But over time, states redirected a substantial portion of their state and federal TANF funds to other purposes, to fill state budget holes, and in some cases to substitute for existing state spending."); *see also* Alexa Ura, *How Texas Curtailed Traditional Welfare Without Ending Poverty*, TEX. TRIB. (Nov. 30, 2017, 5:00 AM), https://perma.cc/SLK7-Q94Z (describing how the State of Texas uses "its federal anti-poverty dollars toward funding core state services, plugging budget holes or funding other programs that provide services to residents with higher incomes than those who qualify for cash welfare").

331. *See* Brodie, *supra* note 326, at 214.

332. *See* Mann & Hawkins, *supra* note 69, at 861 (noting that the number of payday lending stores increased from about 200 in the early 1990s to approximately 22,000 by 2004); *A Short History of Payday Lending Law*, PEW CHARITABLE TR. (July 18, 2012), https://perma.cc/7S2Q-8S3D.

333. *See* Johnson, *supra* note 49, at 12.

334. *See* Steven Mercatante, *The Deregulation of Usury Ceilings, Rise of Easy Credit, and Increasing Consumer Debt*, 53 S.D. L. REV. 37, 42-43 (2008) ("[T]he rapid expansion in credit availability . . . has meant that low-income borrowers who were previously unable to secure any credit have acquired access to seemingly limitless credit. Included in these consumer ranks are the high-risk individuals who were previously denied any credit extensions. With profits and income rising, lenders no longer feared loaning to these individuals." (footnotes omitted)).

335. *See* PRASAD, *supra* note 14, at 241.

336. *See* Rajan, *Let Them Eat Credit*, *supra* note 37 ("[T]he government's response to rising inequality—whether carefully planned or the path of least resistance—has been to encourage lending to households, especially but not exclusively low-income ones (the government push for housing credit was just the most egregious example).").

337. *See* Brodie, *supra* note 326, at 214.

338. *See* Rajan, *Let Them Eat Credit*, *supra* note 37.

increased risk of default, in light of these circumstances, by simply adjusting deregulated interest rates upward.[339] As with the small loan laws that ushered in profitable consumer and installment lending in the early twentieth century,[340] the regulatory subsidy worked in favor of lenders, who would presumptively pass the benefits of decreased risk down by broadening the range of individuals to whom they would lend.

3. Credit as social mobility

Credit also became the principal mechanism of social mobility, alongside education policies that pushed credit as a pathway to economic opportunity.[341] To that end, credit has been a tool of education-based statecraft since at least the 1960s.[342] Concerned that college was becoming prohibitively expensive and troubled that middle-class families would not be able to get credit from private sources, Congress authorized the Higher Education Act of 1965, which created a student loan program in which the federal government would guarantee privately issued loans.[343] Moreover:

> During the [Higher Education Act] debate, lawmakers supported a federal guarantee of student loans because they saw it as a way of leveraging federal money to harness private sector capital. Without a government guarantee of repayment, lenders might not extend credit to students and families, because such loans carried an unacceptable level of risk.[344]

This logic was consistent with that of the FHA's New Deal mortgage innovations, except that rather than being based on expected growth in property values, the program was premised on the idea that a graduate would be a wealthier version of her previous, borrower self.

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339. *See* Mercatante, *supra* note 334, at 42-43.

340. *See supra* text accompanying notes 187-91.

341. *See, e.g.*, Jonathan D. Glater, *To the Rich Go the Spoils: Merit, Money, and Access to Higher Education*, 42 J.C. & U.L. 195, 214-15 (2017) ("In the decades after the enactment of the [Higher Education Act of 1965], popular and legislative attention shifted increasingly . . . to the goal of keeping college affordable for the middle class. This meant making student loans available to middle-income families, as well as providing loans and grants to poorer students."); Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 556-57 (2013) ("Higher education in the United States . . . is unusual because of heavy reliance on private funding rather than public funding. In much of the rest of the developed world, governments primarily finance higher education through general tax revenues." (footnote omitted)).

342. *See* Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 36 (2011).

343. *See* Glater, *supra* note 342, at 36-37; *see also* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001-1141, 1161a to 1161aa-1 (2017)).

344. Glater, *supra* note 342, at 37.

In 1993, President Clinton ushered in the William D. Ford Federal Direct Loan Program[345] to "promote equality of opportunity and a better living standard and a rising living standard among people who have absolutely no way other than an education to achieve it."[346] In essence, the government would support social mobility by cutting out the middlemen and directly supplying credit to prospective students.[347] The Department of Education would oversee the program, and the government would hold ownership of the loans.[348] This permitted the government to turn a profit "when the interest rate spread above Treasuries exceeds losses from defaults and administrative costs."[349] The Direct Loan Program has been "a moneymaker for the federal government."[350] Moreover, although President Clinton had initially hoped that the Direct Loan Program would replace the loan guarantee program, Congress did not authorize the shutdown of federal subsidization of private lending until 2010.[351] It did so pursuant to the

> widespread perception that the guarantees and subsidies—which reduced the riskiness of the loans to only slightly higher than U.S. government Treasuries, but enabled private lenders to profit by charging far higher interest rates—represented a subsidy to private financial institutions and their investors rather than a benefit to students or taxpayers.[352]

Credit also became the principal mechanism of social mobility through federal policies of mortgage deregulation and other federal subsidies of homeownership.[353] Following credit deregulation in the 1980s, subprime lending began to flourish in the early 1990s, helped along by federal policies.[354] For example, in 1996, the Office of Thrift Supervision—the federal agency

345. *See* Student Loan Reform Act of 1993, Pub. L. No. 103-66, tit. IV, subtitle A, § 4021, 107 Stat. 312, 341-54 (codified as amended at 20 U.S.C. §§ 1087a-1087j).

346. *See* Remarks in a Roundtable Discussion on the Direct Student Loan Program at the University of Michigan in Dearborn, Michigan, 2 PUB. PAPERS 2211, 2213 (Nov. 1, 1994).

347. *See id.*

348. *See* Simkovic, *supra* note 341, at 561.

349. *See id.*

350. *See id.*; *see also* Letter from Elizabeth Warren, U.S. Senator, et al. to Arne Duncan, Sec'y, U.S. Dep't of Educ. (Feb. 25, 2015), https://perma.cc/TQ2V-WFJ7 (noting the Congressional Budget Office's estimation that over the next ten years, the federal government is expected to make $110 billion of profit from student loans while "[s]tudent loan borrowers are buried in debt").

351. *See* SAFRA Act, Pub. L. No. 111-152, § 2201, 124 Stat. 1029, 1074 (2010) (codified at 20 U.S.C. § 1071 (2017)).

352. Simkovic, *supra* note 341, at 560-61.

353. *See, e.g.*, A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 196-206 (2009).

354. *See* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 149, 151 (2011).

which regulates "all federal and state-chartered savings institutions across the nation that belong to the Savings Association Insurance Fund"[355]—preempted the application of state mortgage laws to federal thrifts and their subsidiaries, including nonbank mortgage lenders.[356] In 2004, the Office of the Comptroller of the Currency (OCC)—the federal agency which "charters, regulates, and supervises all national banks and federal savings associations as well as federal branches and agencies of foreign banks"[357]—followed suit by issuing a rule that preempted the application of state mortgage lending safety protection laws to national banks and their subsidiaries.[358] Consequently, "[a] downward spiral in lending standards quickly resulted," even as the range of exotic mortgages populating the subprime lending market ballooned.[359]

These policies intended to make credit broadly accessible, which provided a foundation for President George W. Bush's promotion of an "ownership society."[360] Included in President Bush's vision of market-based, individualistic social welfare provision was the notion that minorities could rely on credit as a vehicle to make gains in wealth accumulation.[361] Thus, in 2002, he "issued *America's Homeownership Challenge* to the real estate and mortgage finance industries to encourage them to join the effort to close the gap that exists between the homeownership rates of minorities and non-minorities."[362] In part, the goal was to incentivize private lenders to lend in minority neighborhoods and to "dismantl[e] and eliminat[e] the barriers faced by

355. *About: Office of Thrift Supervision*, U.S. DEP'T TREASURY, https://perma.cc/WP6Q-XCH7 (last updated Oct. 3, 2010).

356. *See* ENGEL & MCCOY, *supra* note 354, at 157-58.

357. *About the OCC*, U.S. DEP'T TREASURY, https://perma.cc/553G-EFCC (archived Apr. 12, 2019).

358. *See* ENGEL & MCCOY, *supra* note 354, at 158.

359. *See id.* at 162, 166; *see also* PRASAD, *supra* note 14, at 239-40.

360. The "ownership society" encompasses "the idea of promoting widespread property ownership in the United States by means of public policy." *See* Michael Lind, *The Smallholder Society*, 1 HARV. L. & POL'Y REV. 143, 143 (2007) (noting that the idea "has enjoyed a renaissance across the political spectrum" in recent years).

361. *See* Remarks at the White House Conference on Minority Homeownership, 2 PUB. PAPERS 1807, 1808 (Oct. 15, 2002) [hereinafter Bush Remarks on Minority Homeownership]; *see also* Jo Becker et al., *Bush Drive for Home Ownership Fueled Housing Bubble*, N.Y. TIMES (Dec. 21, 2008), https://perma.cc/3Q3H-CHHJ ("[B]oth [Treasury Secretary Henry] Paulson[, Jr.] and his predecessor, John Snow, say the housing push went too far. 'The Bush administration took a lot of pride that home ownership had reached historic highs,' Snow said during an interview. 'But what we forgot in the process was that it has to be done in the context of people being able to afford their house. We now realize there was a high cost.'").

362. Office of the Press Sec'y, The White House, *Fact Sheet: America's Ownership Society; Expanding Opportunities*, WHITE HOUSE (Aug. 9, 2004), https://perma.cc/U59K-NFGS.

minority families" in homeownership.[363] For the borrowers themselves, access to credit, backed by the federal government, would be the answer to solving entrenched and intractable wealth inequality. So, as a policy matter, those individuals were encouraged to borrow. Thus, President Bush stated:

> [O]ne of the larger obstacles to minority homeownership is financing, is the ability to have their dream financed. Right now we have a program that all of you all are familiar with—maybe our fellow Americans aren't—and that's what they call a Section 8 housing program, that provides billions of dollars in vouchers to help low-income Americans with their rent. It encourages leasing. We think it's important that we use those vouchers, that Federal money, to help low-income Americans go from being somebody who leases to somebody who owns; that we use the Section 8 program to not only help with downpayment but to help with continuing monthly mortgage payments after they're into their new home.[364]

Of course, massive mortgage defaults, largely concentrated in the very communities President Bush targeted, helped to crash the global economy just a few years later.[365] Credit as social provision policy for economically disenfranchised communities had come home to roost, and the most vulnerable, who had been cast out by government fiat into the marketplace to self-subsidize and work their way out of financial disenfranchisement, suffered the most.[366]

III. The Limits of Credit as Intertemporal Redistribution

Credit is a form of intertemporal and intrapersonal redistribution. A fundamental assumption of credit as a productive lever is that "[t]he borrower is borrowing from her much richer future self—a future self who is

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363. *See Chapter 2: Mobilizing the Private Sector; America's Homeownership Challenge*, WHITE HOUSE, https://perma.cc/3KCK-34UH (archived Apr. 12, 2019). For example, one of the stated goals of the program was to "provide[] down payment assistance to approximately 40,000 low-income families." *See* Office of the Press Sec'y, *supra* note 362.

364. *See* Bush Remarks on Minority Homeownership, *supra* note 361.

365. *See* Atif Mian & Amir Sufi, *The Consequences of Mortgage Credit Expansion: Evidence from the U.S. Mortgage Default Crisis*, 124 Q.J. ECON. 1449, 1492 (2009) (observing a "sharp relative growth in mortgage credit followed by a sharp relative increase in defaults in high subprime share ZIP codes").

366. As economists Atif Mian and Amir Sufi have observed about the period following the Great Recession:

> High debt in combination with the dramatic decline in house prices increased the already large gap between the rich and poor in the United States. Yes, the poor were poor to begin with, but they lost everything because debt concentrated overall house-price declines directly on their net worth. This is a fundamental feature of debt: it imposes enormous losses on exactly the households that have the least.

MIAN & SUFI, *supra* note 24, at 23; *see also id.* ("The net worth of poor home owners was absolutely hammered during the Great Recession. From 2007 to 2010, their net worth collapsed from $30,000 to almost zero.").

made much richer precisely because of the borrowed money."[367] Hence, the broader economic circumstances are significant in determining whether a borrower can reasonably expect to be in better economic condition in the future.[368] Put differently, in positive circumstances, high leverage amplifies gains, and in negative circumstances, it amplifies losses.[369] Because credit often amplifies the underlying circumstances into which it is introduced, in times of economic opportunity and expected growth, credit can be a powerful instrument for capturing value and exploiting existing opportunity that might otherwise be lost due to illiquidity.[370]

Extrapolated to credit as social provision, welfare policies that sanction consumer borrowing make sense during times of reasonably expected economic growth and prosperity. Thus, credit as a means of social provision reached its zenith in postwar white America because of the broader environment of consistent economic growth and prosperity. However, it has failed as a mechanism of meaningful social provision across a range of social circumstances over the last forty-five years. Essentially, credit of any quality and at any price is of limited benefit to low-income Americans, and the ongoing access to credit talk completely misses or obscures this point.

A. The Limits of Intertemporal Redistribution for the Working Poor

It is unreasonable to view credit as intertemporal and intrapersonal redistribution for low-income Americans in light of wage stagnation and persistent insecurity with respect to employment, income, and expenses. Indeed, this disconnect means that at best, credit can provide only short-term, quasi-palliative relief.

According to the Bureau of Labor Statistics, "[t]he working poor are people who spent at least 27 weeks in the labor force (that is, working or looking for work) but whose incomes still fell below the official poverty level."[371] Women are more likely to be among the working poor than men, and African Americans and Latinx Americans are more likely than are whites and Asian Americans.[372] Moreover, "[f]amilies maintained by women were twice as likely

367. *See* PRASAD, *supra* note 14, at 238.

368. *See* MIAN & SUFI, *supra* note 24, at 22-23.

369. *See id.*

370. *See, e.g.*, BARADARAN, *supra* note 3, at 135-36 (noting that some poor individuals "teeter on the ledge of insolvency and illiquidity," and that those who might be "pushed into insolvency by very common life events" could benefit from a low-cost loan that "can help these people avoid insolvency while they slowly work their way back to financial health").

371. BUREAU OF LABOR STATISTICS, *supra* note 16, at 23.

372. *See id.* at 3.

as families maintained by men to be living below the poverty level."[373] While full-time workers are less likely to be living below the poverty line, in 2016, there were 3.4 million such full-time workers among the working poor.[374]

Employment tends to be persistently uncertain and unpredictable for low-income Americans, and this job insecurity engenders significant negative consequences.[375] For example, "laid off workers commonly experience long stretches of unemployment," and once they find new work, they can expect to earn "17 percent less than if they had been continuously employed."[376] Consequently, low earnings is the most common labor market problem that the working poor experience, with 77% of the working poor (who reported experiencing only one labor market problem) experiencing low earnings in 2016.[377]

In addition, "stagnation of wages at the bottom of the U.S. wage distribution over the past several decades and continuing low rates of full-time work, especially in single-parent households, often leave families below the official poverty threshold."[378] What is more, these families can expect to bequeath their dismal economic status to their children, who are unlikely to rise through the socioeconomic ranks. Work by economist Raj Chetty and colleagues has shown that among the birth cohorts of 1971 to 1993, percentile "rank-based measures of intergenerational mobility have not changed significantly."[379] Children born in 1971 to parents within the lowest quintile of the income distribution had just an 8.4% chance of moving up to the highest quintile.[380] Children born in 1986 had a 9.0% chance.[381] The economists found that "a child's income depends more heavily on her parents' position in the income distribution today than in the past."[382] They also observed that income inequality has increased, meaning that "the consequences of the 'birth lottery'—

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373. *Id.* at 1; *see also* Barbara Ehrenreich, *It Is Expensive to Be Poor*, ATLANTIC (Jan. 13, 2014), https://perma.cc/4DUZ-TASJ ("For most women in poverty, in both good times and bad, the shortage of money arises largely from inadequate wages.").
374. *See* BUREAU OF LABOR STATISTICS, *supra* note 16, at 5.
375. *See* Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC. PROBS. 46, 46-47 (2016) (describing some of the consequences of job loss, including poor health and increased mortality rates).
376. *See id.* at 47.
377. *See* BUREAU OF LABOR STATISTICS, *supra* note 16, at 5.
378. *Who Are the Working Poor in America?*, CTR. FOR POVERTY RES., https://perma.cc/N2V4-R6MM (archived Apr. 12, 2019).
379. *See* Chetty et al., *supra* note 42, at 1.
380. *See id.*
381. *See id.*
382. *Id.* at 3.

the parents to whom a child is born—are larger today than in the past."[383] While approximately 95% of children born in 1940 earned more than their parents earned, just 41% of children born in 1984 realized the same absolute mobility.[384]

In addition to the expectation that they will not be better off financially in the future, low-income Americans can also expect their relative cost of living to be disproportionately high.[385] Given the perpetually fragile and unstable nature of their financial condition, low-income Americans feel acutely the brunt of the mundane costs of living: "No amount is small if you cannot afford it."[386]

For example, housing and transportation are disproportionately expensive costs for low-income Americans.[387] With respect to housing, low-income families experience significant uncertainty and instability, particularly as the welfare state has fallen down around their ears.[388] Even as the number of new households receiving federal housing subsidies has fallen, "[h]ousing insecurity has risen in relative lockstep with employment insecurity."[389] Indeed, "[i]n the private rental market, where most low-income families live, affordable housing has shrunk dramatically."[390] Moreover, "[m]any low-income workers dedicate most of their paychecks to rent and utilities."[391]

Housing insecurity and instability also make transportation a particularly fraught and expensive challenge for low-income Americans.[392] Indeed,

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383. *Id.* at 1.

384. *See* Raj Chetty et al., The Fading American Dream: Trends in Absolute Income Mobility Since 1940, at 1 (2016), https://perma.cc/555W-KHN9.

385. *See* Ehrenreich, *supra* note 373.

386. Karen Weese, Perspective, *Why It Costs So Much to Be Poor in America*, WASH. POST: POSTEVERYTHING (Jan. 25, 2018), https://perma.cc/3YR6-55NE; *see* Ehrenreich, *supra* note 373 ("To be poor—especially with children to support and care for—is a perpetual high-wire act.").

387. *See* Desmond & Gershenson, *supra* note 375, at 47-50 (discussing housing costs); *see also* Fed. Highway Admin., Mobility Challenges for Households in Poverty 1 (2014), https://perma.cc/322Q-XKBH ("[R]ising transportation costs have a disproportionate negative impact on lower income households.").

388. *See* Desmond & Gershenson, *supra* note 375, at 48 ("[T]he number of new households receiving federal subsidies plummeted to fewer than 3,000 in an average year between 1995 and 2007, compared to 161,000 in an average year between 1981 and 1986. . . . As a result of these changes, rent burden among low-income households has surged." (citation omitted)).

389. *See id.*

390. *Id.*

391. *Id.*

392. *See* ELIZABETH ROBERTO, METRO. POLICY PROGRAM, BROOKINGS INST., COMMUTING TO OPPORTUNITY: THE WORKING POOR AND COMMUTING IN THE UNITED STATES 1, 3-4, 13 (2008), https://perma.cc/5VJN-NGYT ("Among the key factors that contribute to the
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"[t]ransportation presents a difficult and underreported challenge to low-income workers trying to find jobs and manage daily life . . . without a car."[393] For example, one study reports that "[a]bout one-quarter of jobs in low- and middle-skill industries are accessible via transit within 90 minutes for the typical metropolitan commuter, compared to one-third of jobs in high-skill industries."[394]

Given the relative lack of jobs and difficulty of public transportation, cars are often a necessity for the working poor.[395] Since the Great Recession, low-income Americans are buying more cars than ever, which, at first blush, may seem like a positive outcome given that research shows a positive link between car ownership and steady employment.[396] Yet, cars are expensive to maintain for a variety of reasons, including the cost of car insurance;[397] routine and unexpected repairs; licensure requirements; and the inevitable pitfalls of car ownership, like tickets for parking and other minor infractions.[398] For example, "[a] nonfunctioning car can also mean lost pay and sudden expenses," and something as simple as a broken headlight "invites a ticket, plus a fine greater than the cost of a new headlight, and possible court costs."[399] Indeed, recent research on bankruptcy filings in Chicago shows just how much car-

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housing and transportation burdens of working-class households are limited affordable housing, few transit options, and few employment centers near or in residential neighborhoods.").

393. Pedro Nicolaci da Costa, *There's a Major Hurdle to Employment That Many Americans Don't Even Think About—and It's Holding the Economy Back*, BUS. INSIDER (Jan. 27, 2018, 8:00 AM), https://perma.cc/2CFS-PQGW.

394. ADIE TOMER ET AL., METRO. POLICY PROGRAM, BROOKINGS INST., MISSED OPPORTUNITY: TRANSIT AND JOBS IN METROPOLITAN AMERICA 17-18 (2011), https://perma.cc/CW43-C4JH.

395. I am grateful to Sharon Djemal, Director of the Consumer Justice Clinic at the East Bay Community Law Center, for pointing out how important cars are in the lives of her predominantly low-income clients and how the cost of upkeep and other consequences of car ownership can set off an avalanche of catastrophic financial problems.

396. *See* ROLF PENDALL ET AL., THE URBAN INST., DRIVING TO OPPORTUNITY: UNDERSTANDING THE LINKS AMONG TRANSPORTATION ACCESS, RESIDENTIAL OUTCOMES, AND ECONOMIC OPPORTUNITY FOR HOUSING VOUCHER RECIPIENTS 3 (2014), https://perma.cc/5EHX-FEEQ; Daniel C. Vock, *More Poorer Residents Are Driving Cars, Presenting New Issues for Transit Agencies*, GOVERNING (Apr. 9, 2018), https://perma.cc/GAP7-YWN8.

397. *See* Bradford Plumer, *Car Ownership and Poverty*, MOTHER JONES (Jan. 5, 2006, 11:15 PM), https://perma.cc/7496-R9F3.

398. *See* Sophie Quinton, *How Car Ownership Helps the Working Poor Get Ahead*, ATLANTIC (July 24, 2014), https://perma.cc/88QH-Z9XQ ("It's unclear to what extent economic benefits outweigh the costs of car ownership—paying for the car, plus insurance, gas, car repairs, and so on."); Angie Schmitt, *Car Dependence Is a Poverty Trap That States Exploit to Raise Money*, STREETSBLOG USA (Sept. 29, 2017), https://perma.cc/5TU6-ZQ23.

399. Ehrenreich, *supra* note 373.

related sanctions push low-income people into financial distress.[400] Moreover, even basic gas costs can wreak havoc on the monthly budgets of low-income Americans, especially for those whose housing limitations mean that they must travel a significant distance between home and work, which research suggests is increasingly true for low-income individuals.[401]

In a nutshell, low-income Americans have an exceedingly difficult time making ends meet, and that is often the reason they are likely to use credit.[402] Indeed, data show that low-income borrowers often use credit to pay for recurrent expenses like rent and utilities, and "rarely for frivolous or discretionary expenditures."[403] For these individuals, "expensive credit is better than no credit at all" because credit is their safety net,[404] albeit one with gaping holes ready to strangle. This economic uncertainty is constant in the lives of low-income Americans, and it has been exacerbated by workfare retrenchment policies reflecting the view that all working poor people need to do to solve their poverty is pull themselves up by their own bootstraps.[405] Private credit fits this description because it requires low-income borrowers to fully bear the risks inherent in borrowing.[406] The risk may be reduced, but it is still squarely borne by those borrowers.

Because lack of future income, perpetual shortfalls in present income, and expense instability are stark and daily realities for low-income Americans, the access to credit discourse that universally centers itself on regulating credit

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400. *See* Melissa Sanchez & Sandhya Kambhampati, *Driven into Debt: How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA (Feb. 27, 2018), https://perma.cc/44KX-RBJE.

401. *See* The Urban Inst., Impact of Rising Gas Prices on Below-Poverty Commuters 1 (2008), https://perma.cc/MP9K-AHAN (noting that "[l]ow-income commuters on average have slightly shorter commutes (19.5 minutes) than those with incomes above the poverty level (23 minutes)," but "because their incomes are much lower, poor commuters spend a much higher proportion of their wages on gas (8.6 versus 2.1 percent at $4/gal)").

402. *See supra* Part I.A.1. This shift is true of middle-class borrowers as well. *See* Robert L. Clarke & Todd J. Zywicki, *Payday Lending, Bank Overdraft Protection, and Fair Competition at the Consumer Financial Protection Bureau*, 33 REV. BANKING & FIN. L. 235, 245 n.50 (2013).

403. *See* Clarke & Zywicki, *supra* note 402, at 251.

404. *See* SERVON, *supra* note 13, at 77-83. Sociologist Lisa Servon complicates the narrative of payday loans and victimization of low-income borrowers, describing the ways in which the working poor use fringe credit with full knowledge of the precariousness of their circumstances and the consequences of their decisions to borrow. *See id.*

405. *See* JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM 51-54 (rev. expanded ed. 2008).

406. *See* Atif Mian & Amir Sufi, *The Macroeconomic Advantages of Softening Debt Contracts*, 11 HARV. L. & POL'Y REV. 11, 11 (2017) ("Debt is a financial contract that places a disproportionate amount of the underlying economic risk on the debtor. Mortgages illustrate this characteristic.").

merely camouflages the deeper and pervasive set of issues related to persistent and intractable poverty. In this sense, the discourse sanctions credit dependency as a substitute for purported welfare dependency. Because of the nature of credit, credit dependency is especially treacherous for the working poor, as it opens a channel for regressive interpersonal redistribution.

Williams v. Walker-Thomas Furniture Co.[407] is again instructive. It serves as an example of how limited future economic opportunity undermines the notion that credit is meaningful—even credit extended on fair terms. The case was about access to fair and safe credit, and the court, in remanding the matter, left room for the conclusion that the credit terms offered by the Walker-Thomas Furniture Company, including the cross-collateralization provision, were in fact unconscionable.[408] Nevertheless, the underlying facts suggest that credit of any quality was dangerous for Ora Lee Williams in light of her entrenched and depressed economic and social position.[409] Beyond just parsing the visible and invisible terms of Williams's contract, the facts of this case might cause us to consider why she bought a stereo worth approximately $4,000 (in today's dollars) on credit to begin with when she and her children were limited to $1,830.43 per month.[410] This is not an attempt to cast judgment on Williams for buying the stereo, given her limited means. This was an especially steep price for her to pay, particularly when there was a good chance that the stereo was a recycled commodity, previously repossessed from some other poor family in the neighborhood who couldn't pay on time, and then peddled as new to Williams by the Walker-Thomas salesmen who preyed on all of them. Indeed, this practice was apparently part of Walker-Thomas's business plan.[411]

Yet, it would be reasonable to conclude that even if Walker-Thomas had offered Williams and her neighbors fair credit terms, her risk of defaulting on the purchases remained high because of her place in the existing social hierarchy. She was a single mother, living on public assistance, confined by discrimination of various forms to shop in the ghetto, with little future economic opportunity.[412] If anything, credit and debt played an integral role in trapping her and her neighbors in these circumstances, permitting Walker-Thomas to profit from their misfortune.[413]

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407. 350 F.2d 445 (D.C. Cir. 1965).

408. *See id.* at 447-50. *See generally* Fleming, *supra* note 272 (giving a historical account of the role of unconscionability in *Williams*).

409. *See, e.g.*, BARADARAN, *supra* note 3, at 110-11, 131-37 (noting that credit is beneficial for the illiquid and not the insolvent).

410. *See supra* text accompanying notes 271-76 and accompanying text.

411. *See* Fleming, *supra* note 272, at 1391.

412. *See id.* at 1385, 1387, 1393-94, 1417-18, 1425-28.

413. *See id.* at 1392-95.

B. Credit Dependency as Regressive Redistribution

The current discourse of low-income Americans' access to credit continues to rest on the assumption that credit extended on good terms is beneficial.[414] Moreover, now that credit is accessible to low-income borrowers, effectively filling the void left by welfare retrenchment, legislators and policymakers currently confine themselves to debating the cost of credit as low-income social provision rather than exploring the essential qualities of credit that make it a poor substitute for a robust, public safety net.[415]

Regardless of their view on how best to operationalize greater access to credit for low-income borrowers, proponents of credit as social provision seem to discount the degree to which credit provides a channel for wealth to leave economically vulnerable communities and travel upward toward the more affluent.[416] This interpersonal, regressive redistribution has grave consequences for low-income borrowers and, more broadly, for other communities whose economic prospects are consistently dim. As noted by political scientist Gunnar Trumbull, "there's a feature of consumer credit that makes it fundamentally regressive" because "the poorest people who take out loans pay the highest interest rates."[417] Those payments made in the credit "sweat box" move wealth out of distressed communities and into more affluent ones.[418]

For example, this regressive mechanism is visible in pension plans' investment in securitized consumer credit.[419] Pension plans have enjoyed significant returns at the hands of financially distressed borrowers mired in high interest rates.[420] Indeed, the prevalence of pension casualties following the

414. *See, e.g.*, Marek Hudon, *Should Access to Credit Be a Right?*, 84 J. BUS. ETHICS 17, 17 (2009) ("Credit is central to the welfare of many citizens and the effective management of the economy in high- and low-income countries."). This focus is not surprising given our enduring national devotion to credit. Alexander Hamilton famously argued that the future of the newly formed United States was dependent on its access to public credit, but that "the creation of debt should always be accompanied with the means of extinguishment." *See* HAMILTON, *supra* note 247, at 104-06, 110; *see also supra* note 247.

415. *See, e.g.*, Krippner, *supra* note 2, at 2; Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 983 (2012); Trumbull, *supra* note 2, at 10; Nathan Fiala, Opinion, *The Problem Is Bigger than Payday Loans*, WASH. POST: IN THEORY (July 1, 2016), https://perma.cc/7YEB-7ZT8 ("What the U.S. truly needs are policies that ensure that low-income people don't need payday loans to begin with."); Rajan, *Let Them Eat Credit*, *supra* note 37.

416. *See* Ctr. for Competition Policy, *Gunnar Trumbull at CCP Annual Conference 2011*, YOUTUBE (Jan. 20, 2012), https://perma.cc/8X3R-98C7 [hereinafter *Trumbull Comments*].

417. *Id.* at 1:32-:46.

418. *See* Mann, *supra* note 41, at 384; *Trumbull Comments*, *supra* note 416, at 1:32-2:28.

419. *See Trumbull Comments*, *supra* note 416, at 1:32-2:28.

420. *See id.*

Great Recession indicates just how common it had become for institutional investors and "arrangers"[421] to feed middle-class pension holders a diet rich in wealth drawn from communities in which high interest rates and subprime credit flourished.[422]

The continued focus on direct federal educational loans also shows how this regressive redistribution is manifested through credit in light of broader social and economic inequality. Federal educational loans are often viewed as positive credit innovations.[423] Direct loans, which are held by the Department of Education, have made education more accessible to a broader range of students along the socioeconomic spectrum by, among other strategies, minimizing eligibility criteria and relying on statutory pricing rather than risk-based pricing.[424] They also include a range of repayment options meant to ease the burden of debt and "reduce the chance of default."[425] Nevertheless, increased direct federal loan funding, by some accounts, has triggered soaring tuition rates and increased default rates.[426] Indeed, as of June 2017, federal student loan borrowers had missed payments on $144 billion, marking a 12% increase from June 2016.[427] Moreover, borrowers from economically vulnerable groups, including the children of low-income parents and African Americans, are more likely to default.[428]

421. *See* ENGEL & MCCOY, *supra* note 354, at 44-45 ("When a lender made a subprime loan with an eye to securitization, typically it sold the loan to an investment bank, whose function was described as the arranger, sponsor, or underwriter. . . . The job of the arranger was to convert loans into securities.").

422. *See id.* at 101-02.

423. *See* Simkovic, *supra* note 341, at 550 (describing Congress's view that federal student loans address "equality of opportunity and social mobility as well as the need for a skilled labor force").

424. *See id.* at 560-61, 565-66.

425. *See* U.S. Dep't of Educ., What Is the William D. Ford Federal Direct Loan Program? 5 (n.d.), https://perma.cc/8BVA-A5PT; *see also* DAVID P. SMOLE, CONG. RESEARCH SERV., R40122, FEDERAL STUDENT LOANS MADE UNDER THE FEDERAL FAMILY EDUCATION LOAN PROGRAM AND THE WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM: TERMS AND CONDITIONS FOR BORROWERS 21-28 (2015).

426. *See, e.g.*, Jack Salmon, Opinion, *Federal Aid an Overlooked Culprit of the College Debt Trap*, HILL (Jan. 24, 2018, 4:45 PM EST), https://perma.cc/8SWZ-ZJ23.

427. *See* Danielle Douglas-Gabriel, *The Number of People Defaulting on Federal Student Loans Is Climbing*, WASH. POST: GRADE POINT (Sept. 28, 2017), https://perma.cc/5V2J-4JSR.

428. *See* Judith Scott-Clayton, *What Accounts for Gaps in Student Loan Default, and What Happens After*, EVIDENCE SPEAKS REP. 2 (June 21, 2018), https://perma.cc/VFZ5-GRDK (noting that 38% of non-Hispanic African American student borrowers are likely to default, compared to 12% of non-Hispanic white student borrowers); Simkovic, *supra* note 341, at 624-25 ("Parental financial resources are strong predictors of the likelihood of default, but students do not get to choose their parents."); *see also* Abbye Atkinson, *Race, Educational Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 3-4 (2010) (reporting

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Notwithstanding relatively good terms and pricing, many predict that the United States is on the cusp of a student loan-driven default crisis, with over \$1.3 trillion in outstanding debt and an 11% default rate.[429] As with the subprime crisis, it is likely to be borne by those most leveraged, draining wealth where it is already scarce. Thus, the problem is less the quality of the credit and more the essential limits of credit where the broader economic environment is difficult for whatever set of persistent structural and historical reasons.[430]

Moreover, the mismatch between persistent and worsening financial insecurity and credit as social provision has negative implications beyond the working poor. The Payday Lending Rule and *Madden* fix debates[431] represent the broader space that credit has come to occupy in social provision for the middle class as well, and the degree to which the discourse has accepted credit as a foregone conclusion. Stagnant wages and the increasing cost of living have also left the middle class economically vulnerable over the last several decades.[432] Yet, state policies like credit deregulation and securitization have similarly encouraged middle-class borrowers to look to credit to finance their well-being.[433] Indeed, bankruptcy filings have revealed the degree to which the

bankruptcy data suggesting that a college degree does not provide the same level of financial stability for African American borrowers as it does for white borrowers).

429. *See* John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1290 (2018); *see also* Kevin Carey, *Student Debt Is Worse Than You Think*, N.Y. TIMES: UPSHOT (Oct. 7, 2015), https://perma.cc/7S63-9MP2; John M. DeMaggio, Opinion, *There's No Denying It—a Student Loan Crisis Is Coming*, HILL (May 15, 2018, 6:30 PM EDT), https://perma.cc/33A8-VJPR; Tom Lindsay, *New Report: The U.S. Student-Loan Debt Crisis Is Even Worse Than We Thought*, FORBES (May 24, 2018, 11:07 AM), https://perma.cc/4G9C-S5GZ; Noah Smith, Opinion, *The Financial Crisis Isn't Over for Students*, BLOOMBERG (updated Mar. 28, 2018, 1:40 PM PDT), https://perma.cc/RV5H-E3G2.

430. *See, e.g.*, Carey, *supra* note 429 (discussing low-income borrowers); Sophie Quinton, *The Disproportionate Burden of Student-Loan Debt on Minorities*, ATLANTIC (May 5, 2015), https://perma.cc/FD69-84PS (discussing minority borrowers).

431. *See supra* Part I.B.

432. *See* PEW SOC. & DEMOGRAPHIC TRENDS, PEW RESEARCH CTR., FEWER, POORER, GLOOMIER: THE LOST DECADE OF THE MIDDLE CLASS 20-22 (2012), https://perma.cc/9LTE-LMH9; *see also* DeSilver, *supra* note 26 ("For most U.S. workers, real wages—that is, after inflation is taken into account—have been flat or even falling for decades, regardless of whether the economy has been adding or subtracting jobs.").

433. *See, e.g.*, Clarke & Zywicki, *supra* note 402, at 245 n.50.

middle class has come to rely on credit to meet daily needs and as a means of filling in the gaps left by the lack of satisfactory social insurance.[434] They also reveal the relative failure of credit as a reliable source of social provision for the middle class as well.[435] Thus, the essential limitation of credit as social provision should worry the middle class, too.

Conclusion

Credit has clear limits for the working poor, yet the discourse of access to credit for high-risk, low-income Americans crowds out those limits. Perhaps it does so in service of what may be the greater evil: the reality that credit is not for everyone. This is a challenging conclusion given the democratic and participatory ideals we have attached to credit. More than just an economic tool, credit has taken on significant social consequence as a source of democratic participation and belonging.[436] Thus, to conclude that credit is not for everyone is to invoke social divisions that we tend to gloss over with talk of credit as self-reliance and improvement.[437] Nevertheless, we must grasp the nettle and internalize the notion that credit does not work for everyone as a productive leveraging device. For the working poor, credit as social provision is not a substitute for a robust welfare regime that addresses the broader structural forces that result in entrenched, intractable poverty.[438]

434. *See* TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 2-3 (2000).

435. *See id.* Accordingly, bankruptcy law scholars have explicitly characterized federal consumer bankruptcy laws as an important piece of the American social safety net, including as partial wage and health insurance, given the rise of credit and consumption as institutions of American well-being. *See, e.g.*, PRASAD, *supra* note 14, at 224-26; Barry Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 587 (2000); Feibelman, *supra* note 38, at 129-32; Jacoby et al., *supra* note 38, at 377-78.

436. *See, e.g.*, MCGOVERN, *supra* note 267, at 2-4 (describing the cultural and social significance of consumerism). This conclusion is uncomfortable because it invokes social divisions that arguably exist for a set of unfair historical and social reasons.

437. What is more, these divisions align with both historical and present observations about who can access credit with relative ease and who cannot. *See, e.g.*, Grewal & Purdy, *supra* note 21, at 64. These considerations are beyond the scope of this Article, but they bear mentioning here as a subject of further inquiry and exploration toward understanding what work credit (and debt) should and should not be doing in our society.

438. *Cf.* Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15, 16 (2015).

Accordingly, it is time to shift the conversation about feasible social provision firmly away from credit, particularly in our time of persistent and concentrated economic decline and inequality.[439] First, this requires a recognition of credit as not just a market feature, but as a mechanism of current policy on poverty and welfare. This Article builds on sociological work that specifically situates credit as social provision policy, by arguing that in this characterization, credit is neither unassailable nor a found object.

One implication of this reorientation is that the persistence of talk about low-income Americans' access to credit indicates that the balance in the public-private American welfare regime has shifted too far toward individualism and private provision.[440] This shift implicates the pervasive reputational divide between forms of government subsidy in the welfare system that tend to favor hidden forms of government subsidy—namely, privatized social provision—over more patent forms such as public assistance.[441] By invoking the market, advocates of more privatized, individualized welfare measures, like credit, seek to reduce, at least nominally, the primacy of the government in direct social provision.[442] Breaking through the facade of credit as meaningful social provision would serve to chip away at the false hierarchy in the public consciousness that presently marks welfare provision.

Credit fits comfortably within the larger individualistic narrative that insists the market is the most efficient locus of social provision and that low-income Americans can lift themselves out of poverty through regulated engagement with private actors.[443] This notion has consistently marked the steady bipartisan dismantling of public investment and direct public assistance

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439. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014) (describing the rise of wealth and income inequality in the developed world since the 1970s).

440. *See, e.g.*, Derek Thompson, *Busting the Myth of "Welfare Makes People Lazy,"* ATLANTIC (Mar. 8, 2018), https://perma.cc/UT6N-XB3T ("'Welfare makes people lazy.' . . . [This notion] is an intellectual pillar of conservative economic theory, which recommends slashing programs like Medicaid and cash assistance, partly out of a fear that self-reliance atrophies in the face of government assistance.").

441. *See, e.g.*, SUZANNE METTLER, THE GOVERNMENT-CITIZEN DISCONNECT 6-7, 9-13 (2018).

442. *See* THURSTON, *supra* note 203, at 221-22.

443. *See* GOTTSCHALK, *supra* note 151, at 1-2; HACKER, *supra* note 405, at 51-54. Indeed, American social provision has always been marked by a "public-private" divide that has consistently erred on the side of privatization and self-subsidy. *See* THURSTON, *supra* note 203, at 221-22.

over the last several decades in favor of market-focused, work-based private social provision.[444] Yet, even privatized forms of social provision are themselves constituted and reproduced through the aegis of, and regulation by, the state.[445] In this sense, even though the prevailing rhetoric of the American liberal welfare regime popularly sounds in the register of limited government, market-based welfare provision, like credit, actually requires significant and consistent government intention and intervention.[446]

Nevertheless, like other market-based forms of social provision, credit conveniently cloaks the significant role of government in its inner workings by presenting a private facade.[447] In this sense, it preserves the largely "obscured" two-track, hierarchical arrangement in American social provision that has bifurcated social welfare along class lines.[448] This two-track division recognizes a class-based, ranked relationship between various forms of social welfare.[449] For example, the mortgage interest tax deduction, an "extravagant" subsidy that rewards private homeowners, is less offensive to the American

444. *See* GOTTSCHALK, *supra* note 151, at 1-2; THURSTON, *supra* note 203, at 221-22.

445. *See* METTLER, *supra* note 441, at 9 (characterizing "much of the activity financed by the federal government" as taking the form of a "submerged state" in which private actors are the principle implementers of government policies); PRASAD, *supra* note 14, at 6-10; *see also* Michael B. Katz, Book Review, 34 J. INTERDISC. HIST. 487, 487 (2004) (reviewing HACKER, *supra* note 151).

446. *See* PRASAD, *supra* note 14, at 6-10; Grewal & Purdy, *supra* note 21, at 78 ("[Neoliberalism] tends to conceal the distributive choices inherent in market-making policy, including deciding who will be subjected to market discipline, and in what manner . . . . On this view, ambitious political projects will undermine liberty, equality, fairness, and welfare together. A market regime is the least-worst for all of these values."); *see also* Martha Minow, *Seeing, Bearing, and Sharing Risk: Social Policy Challenges for Our Time*, *in* SHARED RESPONSIBILITY, SHARED RISK: GOVERNMENT, MARKETS, AND SOCIAL POLICY IN THE TWENTY-FIRST CENTURY 253, 253-56 (Jacob S. Hacker & Ann O'Leary eds., 2012) ("[L]egal and political structures support economic markets. . . . [P]olicy debates today reflect lines laid down during the twentieth century when political and rhetorical pressures elevated private markets and restricted government social provision and regulation—despite the realities of massive government engagement with markets . . . .").

447. *See* THURSTON, *supra* note 203, at 221-22.

448. *See* KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972, at 9-10 (2016).

449. *See, e.g.*, *id.*; Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES MAG. (May 9, 2017), https://perma.cc/CUN8-XBDQ (describing the mortgage interest tax deduction as "[a]n enormous entitlement in the tax code [that] props up home prices—and overwhelmingly benefits the wealthy and the upper middle class").

ethos of individualistic bootstrap pulling than is a direct subsidy like housing credits for low-income Americans, yet a subsidy by any other name is still a subsidy.[450]

This hierarchical division also exists between social insurance and public assistance. It blesses as duly entitled those largely middle-class individuals who benefit from "upper track" social insurance programs, like Social Security, and it brands as deceitful and undeserving those largely low-income individuals who benefit from "lower track" public assistance programs, themselves ripe for reform.[451] Indeed, the latter, like TANF and SNAP, are likely to be means tested and, as "what we usually think of as welfare," are much maligned.[452]

Secondly, proponents of social and economic well-being for low-income people should actively question credit in the first instance, given its very clear limitations and dangers.[453] Although one might expect that advocates of the market will continue to view credit as a viable tool of intertemporal redistribution, advocates of economic rights, poverty rights, and economic equality must begin to examine closely the ideal of safe or low-interest credit as valid, universal social policy. This means that even sympathetic calls to take profit out of lending—for example, through postal lending or community-based lending—feed into this validation, and must move beyond credit as a viable solution for the masses.[454] For example, in July 2017, Representative Cedric Richmond introduced the Providing Opportunities for Savings, Transactions, and Lending Act of 2017, which would have authorized the U.S.

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450. *See, e.g.*, GOTTSCHALK, *supra* note 151, at 1-2; Desmond, *supra* note 449.

451. *See* KATZ, *supra* note 154, at ix-x; TANI, *supra* note 448, at 9-10.

452. *See* KATZ, *supra* note 154, at ix-x.

453. As perhaps most dramatically exemplified by the Great Recession, credit as welfare policy is not a universal substitute for robust public provision. *See* MIAN & SUFI, *supra* note 24, at 12 ("A financial system that thrives on the massive use of debt by households does exactly what we don't want it to do—it concentrates risk squarely on the debtor.").

454. For example, the OCC recently urged banks to "offer [short-term, small-dollar] lending products in a manner that ensures fair access to financial services and fair treatment." OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF THE TREASURY, OCC BULL. 2018-14, CORE LENDING PRINCIPLES FOR SHORT-TERM, SMALL-DOLLAR INSTALLMENT LENDING (2018), https://perma.cc/PD5V-D8VT. With respect to the OCC's call, Adam Levitin has noted that "[i]f . . . one sees the policy issue as being about payday borrower's inability to repay even the principal on their loans, then bank payday lending (or postal payday lending) isn't a solution at all, but a whitewash." Levitin, *supra* note 27.

Postal Service to offer small-dollar loans among other financial services.[455] In April 2018, Senator Kirsten Gillibrand proposed similar legislation that would revive banking services, including loans, through the Postal Service.[456]

Although these proposals are well intentioned insofar as they aim to help economically marginalized people,[457] their focus on access to credit aligns them with the market-based, self-help narrative that characterized late-twentieth-century welfare reform. And by continuing to focus on credit as an avenue of social provision, these proposals continue to situate credit within the larger individualistic narrative of welfare reform for low-income Americans. Even though the aim is to provide a purportedly safe alternative to high-interest payday loans and credit offered by other fringe lenders, the solution is still market based and dangerous. Moreover, this focus on credit simply provides an expedient diversion from the more difficult and intractable political questions concerning persistent, intergenerational poverty and why low-income Americans continue to fail in the marketplace at ever-increasing rates.[458] Thus, even well-intentioned credit essentially places the burden on the low-income borrower to borrow her way out of a structurally determined fate and, if unsuccessful, to bear the consequences of the resulting debt. Simply put, credit of any quality will strip wealth from poorer communities when even repaying the principal alone is difficult, much less the interest. Given the relative economic despair of low-income borrowers, credit presents more interpersonal redistributive danger than it does intertemporal, intrapersonal relief.

Ultimately, what is needed is conversation that refocuses our collective lens squarely on the causes of persistent economic shortfalls.[459] The current

455. *See* H.R. 3617, 115th Cong.

456. *See* Postal Banking Act, S. 2755, 115th Cong. § 2(a)(1)(C) (2018) (proposing that post offices offer "low-cost, small-dollar loans, not to exceed $500 at a time, or $1,000 from 1 year of the issuance of the initial loan, as adjusted annually by the Postmaster General to reflect any change in the Consumer Price Index for All Urban Consumers of the Department of Labor"). Representative Yvette Clarke introduced a version of the Postal Banking Act in the House in May 2018. *See* Postal Banking Act, H.R. 5816, 115th Cong. (2018).

457. *See, e.g.*, BARADARAN, *supra* note 3, at 110-11.

458. *See, e.g.*, Porter, *supra* note 415, at 999-1000 ("[T]he problem with poverty is the way in which it constrains individuals from pursuing or achieving fundamental capabilities."); Fiala, *supra* note 415 ("What the U.S. truly needs are policies that ensure that low-income people don't need payday loans to begin with.").

459. *See* Desmond & Bell, *supra* note 438, at 16 (calling for "a renewed focus on housing, law, and poverty, with particular attention to the housing sector where most low-income families live, unassisted: the private rental market").

access to credit discourse, regardless of the intentions of the discussants, keeps credit at the heart of how we deal with persistent poverty. This is a place in which credit has little, if any, purchase. Credit is built on expectation of economic progress, something that many low-income (and middle-income) borrowers have not seen in their lifetimes. Perhaps then, it is time for credit to leave the conversation around social provision for low-income Americans. This is inherently difficult work because it requires that we strip away many of the constructed ideals of participation and citizenship that accompany credit in American society. Nevertheless, rather than simply making adjustments at the margins of credit policy, it is time to redirect our collective focus toward the fundamental, persistent, and underlying challenge of ever-increasing economic, and consequently social, inequality.