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ARTICLES

BORROWING EQUALITY

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For the last fifty years, Congress has valorized the act of borrowing money as a catalyst for equality, embracing the proposition that equality can be bought with a loan. In a series of bedrock statutes aimed at democratizing access to loans and purchase money for marginalized groups, Congress has evinced a "borrowing-as-equality" policy that has largely focused on the capacity of "credit," while acoustically separating its treatment of "debt" as though one can meaningfully exist without the other. In taking this approach, Congress has proffered credit as a means of equality without expressly accounting for the countervailing force of debt relative to social subordination. Yet, debt has itself functioned as a mechanism of the very subordination that Congress's invocation of "credit" aspires to address.

This Article argues that because in articulating a borrowing-as-equality policy Congress is implicitly encouraging debt among marginalized communities, Congress should develop policies that recognize both the potential upside value of borrowing and the particular vulnerabilities that debt creates for socioeconomically marginalized groups. More broadly, any policy that invokes borrowing as a social good must engage more deeply with how credit and debt work in a social context. In other words, credit cannot meaningfully function as a social good without due attention to and a solution for the work of debt as a social ill.

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INTRODUCTION

Can equality be bought with a loan? Congress seems to believe so. For at least the last fifty years, Congress has articulated a legislative policy premised on the conviction that by democratizing access to borrowed money, including conventional loans and purchase money, marginalized groups, like women and African Americans, can buy their way to increased socioeconomic inclusion, better relative economic health, and even first-class citizenship.[1] In this regard, Congress has valorized the act of borrowing money, embracing the proposition that equality can be bought with a loan.[2] It has treated the ability to borrow money as an unqualified public good, duly capable of and appropriate for mitigating socioeconomic inequality for marginalized groups.

This "borrowing-as-equality" policy, as I call it, is undermined by data suggesting that women and African Americans, among other marginalized groups, continue to struggle at a group level when it comes to socioeconomic parity notwithstanding greater access to credit.[3] More than that, the disproportionate burden and corrosive work of overwhelming debt is a significant factor in this outcome, even as markers of equality like income remain significantly gendered and raced.[4] Thus, the increased ability to

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1. E.g., Monica Prasad, The Land of Too Much 221–26 (2012) [hereinafter Prasad, Land of Too Much] (describing the "movement for access to credit" for women and African Americans that resulted in the passage of several key federal statutes aimed at democratizing credit and noting how "the democratization of credit at mid-century had created support for credit access from *across* the political spectrum by the 1970s").

2. See Michael S. Barr, Credit Where It Counts: The Community Reinvestment Act and Its Critics, 80 N.Y.U. L. Rev. 513, 544 (2005) [hereinafter Barr, Credit Where It Counts] (describing the Community Reinvestment Act of 1977 as "part of the federal government's response to the long history of private sector and official discrimination in housing and credit markets").

3. E.g., Rachel E. Dwyer, Credit, Debt, and Inequality, 44 Ann. Rev. Socio. 237, 245–46 (2016) (noting that "[t]he role of debt in heightening economic insecurity" among marginalized groups is "likely a key reason for the heterogeneity in [the] effects [of student loan borrowing] in socioeconomic attainment"); see also Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, Race and Economic Opportunity in the United States: An Intergenerational Perspective, 135 Q.J. Econ. 711, 712–18 (2020) (studying intergenerational wealth, observing a persistent wealth gap between African Americans and white Americans, and noting that "reducing the black-white income gap will require policies whose effects cross neighborhood and class lines and increase intergenerational mobility"); Keeanga-Yamahtta Taylor, Against Black Homeownership, Bos. Rev. (Nov. 18, 2019), http://bostonreview.net/race/keeanga-yamahtta-taylor-against-black-homeownership (on file with the *Columbia Law Review*) [hereinafter Taylor, Against Black Homeownership] ("The assumption that a mere reversal of exclusion to inclusion would upend decades of institutional discrimination underestimated the investments in the economy organized around race and property."). Some scholars have viewed this policy as intentional. For example, Professor Greta Krippner has argued that the democratization of credit to include marginalized borrowers is best understood as a part of broader political strategy to address the overall economic upheaval of the 1970s. Greta R. Krippner, Democracy of Credit: Ownership and the Politics of Credit Access in Late Twentieth-Century America, 123 Am. J. Socio. 1, 32 (2017) [hereinafter Krippner, Democracy of Credit]. Professor Monica Prasad has argued that the democratization of credit for marginalized groups is best understood as the result of the historical American commitment to consumption as the driver of economic policy. Monica Prasad, The American Way of Welfare: Political-Economic Consequences of a Consumer-Oriented Growth Model 3 (2013), https://www.demos.org/sites/default/files/publications/Prasad.pdf [https://perma.cc/B5PH-NMWM].

4. See, e.g., Am. Ass'n of Univ. Women, Deeper in Debt: Women and Student Loans 1–2 (2017), https://www.aauw.org/app/uploads/2020/03/DeeperinDebt-nsa.pdf [https://perma.cc/3WQV-3JVV] [hereinafter AAUW Report] (noting that women earn less than

borrow money, cast as a mechanism of positive social change, may function in some ways as a Trojan horse, wheeling in the unique dangers of indebtedness to the front gates of marginalized communities and threatening their already tenuous socioeconomic existence.[5]

Although the mechanisms that result in this state of affairs are undoubtedly complex, a key, underrecognized aspect of the problem is Congress's disjointed approach to its borrowing-as-equality policy. Specifically, Congress has largely bifurcated its regulation of "credit" from its regulation of "debt."[6] As an essential matter, however, credit and debt are quantumly entangled, given that a loan is comprised of both credit and debt.[7] Nevertheless, Congress has curiously disconnected its regulation of credit and debt, acoustically separating them—to borrow Professor Meir Dan-Cohen's classic phrasing[8]—in ways that assume credit can meaningfully function as a mechanism of enhanced socioeconomic capacity

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men and therefore pay back their loans more slowly, and that "[t]he pace of repayment was particularly slow for black and Hispanic women, as well as for men in those groups").

5. For example, Professor Rachel E. Dwyer observes that:

> Loans may help Black students gain access to college education, but Black debtors also experience higher default rates and slower wealth accumulation over the longer term. The risks of the student loan system thus appear to fall on the populations who most struggle to gain access to higher education in the first place, a perverse outcome for a system purportedly intended to facilitate access to postsecondary education.

Dwyer, supra note 3, at 244 (internal citations omitted); see also Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership 187 (2019) [hereinafter Taylor, Race for Profit] (observing, in the context of the Fair Housing Act's low-income homeownership program, that "[i]nstead of independence, security, and investment, homeownership for poor Black women was an invitation to greater state surveillance, continued economic marginality, and the inheritance of a debt burden"); Taylor, Against Black Homeownership, supra note 3 (questioning, in the context of the federally sanctioned expansion of mortgage lending for low-income African Americans, "the advisability of suturing economic well-being to a privately owned asset in a society where the value of that asset will be weighed by the race or ethnicity of whoever possesses it"); cf. Elizabeth Warren, The Economics of Race: When Making It to the Middle Is Not Enough, 61 Wash. & Lee L. Rev. 1777, 1779 (2004) [hereinafter Warren, Economics of Race] (observing that "bankruptcy data reveal a disturbing story of Hispanic and black middle classes that are at greater risk for economic collapse than their white counterparts").

6. See infra Part II.

7. E.g., Gustav Peebles, The Anthropology of Credit and Debt, 39 Ann. Rev. Anthropology 225, 226 (2010).

8. Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984). In this seminal work, Professor Dan-Cohen critiqued the conflation of "decision rules" (directed to officials) and "conduct rules" (directed to the public) that was prevalent in criminal law at the time he wrote the article. Id. at 627. He argued that because each set of rules concerns different "norm-subjects" engaged in distinct "norm-act[s]," it is necessary (specifically in the context of criminal law) to maintain a distinction between the two types of rules in order to preserve their specific normative goals. Id. at 628–30. In making these arguments, Professor Dan-Cohen offered the analogy of "acoustic separation . . . as an heuristic device for distinguishing conduct rules from decision rules and for diagnosing possible tensions in the law that are caused by policies best served when decision rules differ from conduct rules." Id. at 634. The benefit

separately from its complement, debt. Moreover, this bifurcated approach exhibits tension in its relatively optimistic and expansive posture in the treatment of credit as compared to its relatively negative and restrictive treatment of debt.[9]

Specifically, beginning in the mid to late 1960s and continuing throughout the 1970s, Congress passed a suite of laws aimed at addressing inequality more broadly by improving the ability of marginalized groups to borrow money in the conventional consumer capital markets.[10] Significant among these interventions were the Higher Education Act of 1965 (HEA), which made it easier for financially constrained students to borrow money for higher education;[11] the Consumer Credit Protection Act of 1968 (CCPA), which implemented a regime to make lending fairer through heightened transparency; [12] the Equal Credit Opportunity Act of 1974 (ECOA), which prohibited lending discrimination on the basis of sex and race, among other protected categories;[13] and the Community Reinvestment Act of 1977 (CRA), which encouraged conventional lenders to make loans in marginalized communities that had been historically excluded from mainstream consumer capital markets.[14] In passing these statutes, Congress acted in part to address the demands of marginalized groups who, in a world in which access to borrowed capital was increasingly

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of acoustically separating decision rules from conduct rules, then, was to limit transmission of confounding norms not meant to inform the behavior of either distinct group. Id. at 631–32. In other words, strict acoustic separation in the criminal law context would "ensure[] that conduct rules cannot, as such, affect decisions; similarly, decision rules cannot, as such, influence conduct." Id. at 631. As applied in the context of credit and debt, the principle of acoustic separation supports the notion that "credit" and "debt" should be treated separately as a legislative matter.

9. See infra Part II; see also, e.g., Abbye Atkinson, Race, Educational Loans, & Bankruptcy, 16 Mich. J. Race & L. 1, 11 (2010) [hereinafter Atkinson, Race and Bankruptcy] (reporting bankruptcy data suggesting that "attaining a higher level of education does not appear to shield African Americans against financial ruin").

10. E.g., Michael S. Barr, Modes of Credit Market Regulation, *in* Building Assets, Building Credit: Creating Wealth in Low-Income Communities 205, 206 (Nicolas P. Retsinas & Eric S. Belsky eds., 2005) ("In response to these . . . concerns [that predatory or abusive lending practices are targeted at minorities], Congress has enacted a wide range of federal laws and subsidy programs that affect the provision of credit."); Sara Sternberg Greene, The Bootstrap Trap, 67 Duke L.J. 233, 257 (2017) ("Congress eventually responded, and beginning in 1974, it passed legislation and a series of targeted amendments that sought to end discrimination in credit evaluations and lending.").

11. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001–1107 (2018)).

12. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1616 (2018)).

13. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f).

14. Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1117 (codified as amended at 12 U.S.C. §§ 2901–2908 (2018)).

synonymous with belonging, came to believe that equal access to conventional loans[15] and purchase money[16] was integral to their broader quest for equality and first-class citizenship.[17]

Consequently, the HEA, CCPA, ECOA, and CRA are steeped in the notion that borrowing money is a social good, capable of addressing, at least in part, deeply embedded social pathologies like racialized and gendered socioeconomic exclusion and, more broadly, entrenched social subordination.[18] In embracing the notion that borrowing money is a universal social good, however, these statutes focus mainly on "credit" as a means of capacity, with little attention to "debt" and its consequences.[19] Instead, even while recognizing that increasing access to credit raised the specter of unmanageable debt, Congress addressed "debt" separately and without a complementary veneer of capacity in a set of contemporaneous laws: principally in the Bankruptcy Reform Act of 1978 (Bankruptcy Code), regulating the discharge of distressed debt,[20] and, to a lesser extent, the Fair Debt Collection Practices Act of 1977 (FDCPA), regulating the practices of third-party debt collectors.[21]

More than just isolated in substance, the Bankruptcy Code and the FDCPA also evince a more cynical and suspicious approach toward borrowing, and more specifically *borrowers*, than the credit optimism implicit in the HEA, CCPA, ECOA, and CRA. For example, in its specific focus on debt, the Bankruptcy Code, as amended over time, has become increasingly restrictive and distrustful toward debtors,[22] while the FDCPA, by

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15. A conventional loan is a privately originated loan not backed by government insurance. Conventional Mortgage, Black's Law Dictionary (11th ed. 2019).

16. Giuliano G. Castellano & Marek Dubovec, Credit Creation: Reconciling Legal and Regulatory Incentives, 81 L. & Contemp. Probs. 63, 68 (2018) (defining purchase money as "credit to finance the acquisition of specific assets"); see also U.C.C. § 9-103(a)(1) (Am. L. Inst. & Unif. L. Comm'n 2012) (defining "purchase-money collateral" as "goods or software that secures a purchase-money obligation incurred with respect to that collateral").

17. Prasad, Land of Too Much, supra note 1, at 221 (observing that by the 1970s, credit was "a central feature of American life" that "remained constrained for many Americans"); Greene, supra note 10, at 254–55 ("In the mid-twentieth century, . . . civil rights and women's rights groups were behind the push to mandate uniform standards of credit.").

18. See Barr, Credit Where It Counts, supra note 2, at 552 ("In addition to addressing discrimination by helping to overcome market failures that affect minority households, [the] CRA helps to reinforce [the] ECOA's antidiscrimination norms directly.").

19. See infra Part II; see also Abbye Atkinson, Rethinking Credit as Social Provision, 71 Stan. L. Rev. 1093, 1134 (2019) [hereinafter Atkinson, Rethinking Credit] (describing the social significance of credit "in the Civil Rights era in light of the inequities in credit availability and quality experienced by racial minorities, women, and the poor").

20. Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101–1532 (2018)).

21. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692 (2018)).

22. See, e.g., Karen Gross, Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments, 135 U. Pa. L. Rev. 59, 76–82 (1986) (describing the anti-debtor shifts in bankruptcy policy that resulted in the restrictive Consumer Credit Amendments of 1984); see also Elizabeth Warren, The

regulating only third-party debt collectors, allows loan originators to pursue otherwise restricted practices to collect debt.[23] Thus, in the context of these two debt-focused laws, Congress's progressive views and optimism about the value and capacity of borrowing seem to fade away.

The existing legal literature has recognized the socioeconomic consequences of indebtedness on marginalized communities but has done so primarily in the context of the existing bifurcation of credit and debt.[24] These accounts and their suggestions for reform are important and vital, yet scholars have not addressed the tension that exists between Congress's embrace of the reverie of credit as capacity and its separate and opposite treatment of debt. This Article fills this gap by surfacing Congress's bifurcated approach—namely, treating borrowing money as a social good and owing money as a personal failure. It further demonstrates how this approach is in deep tension with itself if, first, one assumes that borrowing as equality is not meant to be a deliberately ineffective policy implemented to maintain the social status quo under the guise of credit opportunism and, second, one accepts that "credit and debt stand as an inseparable, dyadic unit,"[25] both invoking a singular relationship that in our market society is satisfied only by complete equivalence.[26] It argues that because

Changing Politics of American Bankruptcy Reform, 37 Osgoode Hall L.J. 189, 192–96 (1999) (describing the influence of political lobbying by creditors for Congress to limit discharge rights).

23. 15 U.S.C. § 1692a ("'[D]ebt collector' means any person who . . . regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another. . . . The term does not include . . . any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.").

24. E.g., Abbye Atkinson, Modifying Mortgage Discrimination in Consumer Bankruptcy, 57 Ariz. L. Rev. 1041, 1061–69 (2015) (arguing that existing limits on the discharge of mortgage debt in bankruptcy disproportionately affect marginalized borrowers); Kristin Brandser Kalsem, Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters, 71 Brook. L. Rev. 1181, 1202 (2006) (endorsing the view that bankruptcy, and thus debt specifically, is "a 'women's issue' . . . in the same way that it is a 'societal issue'—for myriad, interrelated, and complex reasons"); Chrystin Ondersma, Small Debts, Big Burdens, 103 Minn. L. Rev. 2211, 2211–13 (2019) (noting the harms of even small debts on impoverished people and arguing for a more efficient system of debt relief for those who disproportionately carry these small debts); Katherine Porter, The Damage of Debt, 69 Wash. & Lee L. Rev. 979, 986 (2012) [hereinafter Porter, Damage of Debt] (arguing that calls to limit discharge rights in bankruptcy have been misguided insofar as they have failed to meaningfully consider the "generosity of debt relief against the harms of debt"); Elizabeth Warren, What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics, 25 Harv. Women's L.J. 19, 52 (2002) (describing bankruptcy as a "women's issue" in light of "[t]he sheer number of middle-class women who are in such economically desperate circumstances that they must file for bankruptcy"); see also Deborah Thorne, Women's Work, Women's Worry?: Debt Management in Financially Distressed Families, *in* Broke: How Debt Bankrupts the Middle Class 136, 141–46 (Katherine Porter ed., 2012) (describing the disproportionate incidence of stress, depression, and insomnia among women in bankruptcy).

25. Peebles, supra note 7, at 226.

26. David Graeber, Debt: The First 5000 Years 121 (2011); Michael D. Sousa, Debt Stigma and Social Class, 41 Seattle U. L. Rev. 965, 966 (2018).

credit and debt are "two sides of the same coin,"[27] the regulation of one necessarily implicates the regulation of the other. Accordingly, Congress's bifurcated approach imperils its borrowing-as-equality policy because for marginalized groups, the optimism of credit as capacity seems to yield readily to the corrosive impact of debt.[28]

Because debt affects marginalized groups disproportionately and more severely, its invocation as a source of equality and mobility may simply further entrench the very inequality it is offered to ameliorate. For example, the disproportionate incidence of educational debt among, and the particular burden of educational debt on, women and African Americans is instructive. Congress has long advanced the position that bor-rowing money for education can function well as a catalyst for equality, but the facts undermine this position: At the start of the 2020s, women and African Americans are drowning in student loan debt but have not made significant relative inroads in terms of income or wealth equality.[29]

This Article argues that the bifurcation and lack of complementarity in Congress's treatment of credit and debt undermine the potential of borrowing money to function as a tool of equality and mobility for reasons related to the deeper inequity that socially marginalized groups continue to experience.[30] Specifically, debt is not the universal catalyst of mobility and equality that marks Congress's approach to its credit-specific borrowing-as-equality policy. Instead, debt itself often functions as a force of subordination rather than liberation, "justifying [collection] behavior that would otherwise seem utterly immoral," undermining the social good ascribed to credit, and reproducing relationships marked by hierarchy.[31]

27. Keith Hart, The Anthropology of Debt, 22 J. Royal Anthropological Inst. 415, 416 (2012).

28. Dwyer, supra note 3, at 245–46, 253 (describing negative consequences of debt and noting that "[t]he experience of debt and financial fragility is thus different across . . . social groups defined by class, race/ethnicity, and other social status").

29. A recent study of college students shows that while the numbers of women and African Americans who attend college have significantly increased over the last fifty years, their debt has similarly increased in ways that are disproportionately detrimental to their overall wellbeing. AAUW Report, supra note 4, at 3, 9, 14 (observing that "women—especially low-income women and women of color—are disproportionately endangered by student debt"); see also Dwyer, supra note 3, at 244 (observing that although "[l]oans may help Black students gain access to college education," Black student borrowers "experience higher default rates and slower wealth accumulation over the longer term"). Dwyer concludes that "[t]he risks of the student loan system thus appear to fall on the populations who most struggle to gain access to higher education in the first place, a perverse outcome for a system purportedly intended to facilitate access to postsecondary education." Dwyer, supra note 3, at 24.

30. E.g., A. Mechele Dickerson, Sorting the Neighborhood, 23 J. Affordable Hous. & Cmty. Dev. L. 311, 321 (2015) [hereinafter Dickerson, Sorting the Neighborhood] (noting continued effects of redlining in both persistent harmful stereotypes that Black neighborhoods are less safe and in home values themselves).

31. Graeber, supra note 26, at 158; cf. Angela P. Harris, Theorizing Class, Gender, and the Law: Three Approaches, 72 L. & Contemp. Probs. 37, 53 (2009) ("Another example of

Accordingly, because in articulating a borrowing-as-equality policy Congress is implicitly encouraging debt among marginalized communities, this policy should incorporate a complementary view of credit *and* debt that recognizes both the potential upside value of borrowing and the particular vulnerabilities debt creates for marginalized groups.[32] In other words, a progressive credit policy is necessarily limited when combined with a restrictive debt policy that does not account for how structural inequality meaningfully inhibits future cash flow and reinforces and exacerbates existing social inequality.[33]

This Article proceeds in four Parts. Part I lays the groundwork for understanding both how Civil Rights and Women's Rights activists came to view access to conventional loans and purchase money as a platform for equality and how, as a consequence, Congress turned to borrowing as equality in the 1960s and 1970s. Part II then maps the contours of Congress's bifurcated legislative response, presenting its borrowing-as-equality policy, as evinced by the HEA, CCPA, ECOA, and CRA, on the one hand, and the Bankruptcy Code and FDCPA on the other hand. It uses the text and legislative histories of these statutes to demonstrate how, in turning to the democratization of conventional lending as a mechanism of increased equality, Congress merely invoked the capacity of "credit" without significant reference to debt. Meanwhile, Congress bifurcated its contemporaneous treatment of debt as though it is possible to invoke "credit" without its constant companion. Moreover, even as Congress treated credit optimistically in the HEA, CCPA, ECOA, and CRA, it took a relatively restrictive and regressive approach to its treatment of debt in the Bankruptcy Code and the FDCPA.

Part III offers an account of how this bifurcation is relevant to the socioeconomic status of marginalized groups, particularly with regard to their fraught economic and noneconomic experiences with debt. Considering women and African Americans as examples,[34] it first shows how,

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how capitalism and gender converge in ways that produce injustice at the level of subjection has to do with economic marginalization and the social powerlessness it produces.").

32. Laura M. Tach & Sara Sternberg Greene, "Robbing Peter to Pay Paul": Economic and Cultural Explanations for How Lower-Income Families Manage Debt, 61 Soc. Probs. 1, 16 (2014) (noting that "[d]ebt plays a key role in the reproduction of social inequalities"); see also Mehrsa Baradaran, Jim Crow Credit, 9 U.C. Irvine L. Rev. 887, 937 (2019) [hereinafter Baradaran, Jim Crow Credit] (noting, in reference to the CRA, that "[o]nce the Supreme Court decided that past injustice could not be rectified through the law, the nation appeared to erase its memory . . . and allow for . . . shortsighted arguments in opposition to any program designed to address a historic wrong").

33. Baradaran, Jim Crow Credit, supra note 32, at 937 (observing that "[a] history of segregation explains why the ghetto does not yield profitable loans" and that "segregation was enacted through lending discrimination perpetuated by the very firms now being asked to close the gap").

34. A word about intersectionality: This Article often discusses women and African Americans as separate groups, which undoubtedly detracts from and minimizes the unique and important experiences of African American women with debt. Cf. Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of

notwithstanding expanded access to loans and purchase money, in current times these groups remain among the most vulnerable when it comes to debt and have not realized meaningful relative advances in certain metrics of equality like income. It then marshals a burgeoning social science literature on debt to show how, more than just a purely economic menace, debt is especially dangerous for these groups in its capacity as an institution of social subordination that actively engages in hierarchy making and reproduction.

Part IV makes a set of prescriptive suggestions for meaningful change to borrowing as a formal policy for equality. First, it argues that in its proffer of subsidized borrowing as a means of equality, Congress should use unified terminology to better capture and convey a more realistic picture of the relative positive and negative aspects of borrowing. This means eschewing, both in discourse and legislation, the selective semantic use of "credit" to refer to borrowing money as a social good in favor of a more realistic representation of the future liability inherent in borrowing.

Second, to the extent that Congress intends the existing borrowing-as-equality statutes to promote both the economic and noneconomic welfare of marginalized groups, Congress should amend its procredit statutes to expressly account for the countervailing force of debt on the communities for whom the benefits of those statutes are intended. For example, Congress might add intrastatutory modification or discharge of violative loans rather than subjecting distressed borrowers to the collateral damage of a global bankruptcy filing. This type of statutory change would recognize that marginalized groups are going to struggle and fail disproportionately in the consumer credit market for reasons that have more to do with entrenched racism, sexism, and the like, and less to do with profligacy or lack of personal responsibility.

Finally, and most broadly, Part IV argues that any policy that invokes market-based borrowing as a social good must account for the embeddedness of credit and debt in the broader social context—a context that Congress's current borrowing-as-equality policy seems to ignore.[35] All of

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Color, 43 Stan. L. Rev. 1241, 1244 (1991) ("[T]he experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination . . . and [] the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at . . . race or gender . . . separately."). This is a shortcoming that bears explicit and duly self-conscious recognition. Nevertheless, this Article points to intersectional accounts of the effects of debt where the data is available and, in the later discussion of feminist activism around access to credit, circumscribes that activism in terms of its intended beneficiaries—namely, white women. See infra section I.C.2.

35. See Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis, 129 Yale L.J. 1784, 1794 (2020) (defining the "Twentieth Century Synthesis" in which commitments to economic efficiency in private law have eclipsed the salience of "distribution, power, and democracy" in the regulation of the economy). The authors observe that "[b]y centering efficiency as a value and making key assumptions about markets and how they work, the Twentieth-Century Synthesis [has] marginalized questions of power that

the borrowing-as-equality statutes presented above are meant to work within the familiar public–private sphere that increasingly defines American social provision.[36] This approach, with its reliance on private actors to implement government policy, must acknowledge and wrestle with the ways in which private actors often contaminate attempts to engage in market-focused social change with their own biases and prior commitments to the status quo. Moreover, the profit motive similarly corrupts the appropriation of federal dollars to subsidize market-based social change by prioritizing shareholder value and profit margins over communitarian interests in meaningful social change. Thus, by essentially privatizing equality and social mobility through the subsidy of borrowing, Congress is encouraging the most vulnerable groups to invest in their own mobility and to fend for themselves in an imperfect capitalist society plagued by discrimination, raced and gendered hierarchy, and other socioeconomic pathologies that essentially limit the expected return on that investment. In attempting to harness the power of borrowed capital for social aims, Congress has an obligation to address the broader consequences of predictable failure in this context.

I. PLACING "BORROWING AS EQUALITY" IN CONTEXT

In order to understand how the ability to borrow money came to be a viable platform for equality, it is important to begin with the growth of "credit" and consumerism into the core of American society.[37] Consumer borrowing evolved in the early to mid-twentieth century, creating a nation of "consumer-citizen[s]"[38] whose ability to access the conventional consumer capital markets became a marker of status and belonging.[39] Yet marginalized groups like women and African Americans were intentionally left out, unable to borrow money in the developing, government-subsidized conventional consumer capital markets because lenders freely

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had been central to legal analysis since at least the time of legal realism." Id. at 1818; accord Emma Coleman Jordan, The Hidden Structures of Inequality: The Federal Reserve and a Cascade of Failures, 2 U. Pa. J.L. & Pub. Affs. 107, 180 (2017) (arguing that, in the context of macroeconomic reform, "the Fed must identify and incorporate social and political financial patterns of exploitation in models of systemic risk").

36. Jacob S. Hacker, The Divided Welfare State 9 (2002) (noting the "peculiar public-private character of American social welfare practice").

37. E.g., Greene, supra note 10, at 256 ("After World War II, the growth of credit markets for middle-class white Americans exploded . . . [and] [c]redit access [became] the road to the American Dream.").

38. David Singh Grewal & Jedidiah Purdy, Introduction: Law and Neoliberalism, 77 J.L. & Contemp. Probs. 1, 13 (2014).

39. Lizabeth Cohen, A Consumers' Republic: The Politics of Mass Consumption in Postwar America 10–11 (2004) (noting that by midcentury, credit-fueled consumption had come to define what it means to be American); see also Marion Fourcade & Kieran Healy, Classification Situations: Life-Chances in the Neoliberal Era, 38 Acct. Orgs. & Soc'y 559, 565 (2013) ("In the United States, credit has long been seen as a 'welfare-enhancing right.'").

discriminated against them.[40] Consequently, amidst the many other markers of second-class socioeconomic status, exclusion from mainstream credit markets branded these marginalized groups as ineligible to participate in the American idyll of financed social mobility.[41] By the time equality-motivated movements, like the Civil Rights and Women's Rights Movements, developed in the second half of the twentieth century, activists viewed access to conventional loans and prime purchase money as an important platform on which to agitate for greater democratic inclusion and rights.[42]

A. *The (Unequal) Development of "Credit" as a Social Good*

Borrowing money to facilitate increased consumption of goods became normalized in the early twentieth century when contemporaneous advances in private installment lending and changes in the regulation of small loans made borrowing money a viable means of quotidian accumulation.[43] Evolving practices in the manufacture and sale of the automobile were central to the development of widespread installment lending.[44] Because neither the dealers nor working-class buyers could afford to pay cash to keep a consistent stock of new cars or afford to buy new cars, respectively, car manufacturers developed auto financing to assist both

40. For example, women were generally excluded from access to loans on account of rampant stereotypes about their earning capacity relative to their reproductive capacity, while African Americans were generally excluded as a part of the broader social atmosphere of persistent exclusion from mainstream society across a variety of dimensions. Louis Hyman, Debtor Nation: The History of America in Red Ink 173–74 (2011) (describing this exclusion and the resulting "toxically stagn[ant]" experiences of African Americans in the "[u]rban ghetto" credit market); see also Prasad, Land of Too Much, supra note 1, at 223 (describing the exclusion of women from the credit market).

41. E.g., Prasad, Land of Too Much, supra note 1, at 221–25 (describing "access to credit as an issue of justice" and as "a straightforward means of improving the lives of those who had been excluded from credit-financed consumption"); Greene, supra note 10, at 256–57 ("Credit access was the road to the American Dream. Poor and minority Americans, however, were relegated to fringe lending and paid much more than they would have otherwise.").

42. Greene, supra note 10, at 257; see also Felicia Kornbluh, To Fulfill Their "Rightly Needs": Consumerism and the National Welfare Rights Movement, 69 Radical Hist. Rev. 76, 83–84 (1997) (describing how poverty-rights activists also focused on the ability to borrow as a platform for poverty rights).

43. Hyman, supra note 40, at 10 ("Modern debt after World War I was defined through two new debt practices, installment credit and legalized personal loans, which reflected the social and economic order that emerged out of the new industrial economy."); see also Cohen, supra note 39, at 21 ("The Progressive Era of the late nineteenth and early twentieth centuries marked a significant shift toward recognizing the centrality of consumers to the nation's economy and polity . . . .").

44. Hyman, supra note 40, at 26.

groups.[45] Thus, "Installment credit allowed consumers to buy more, retailers to sell more, and manufacturers to make more, all at lower prices."[46]

Meanwhile, personal lending similarly made inroads into respectability and profitability thanks to regulatory changes to usury laws. At the turn of the century, existing usury laws rendered personal loans unprofitable for lenders who could neither charge profit-making interest rates nor sell unprofitable loans on a secondary market.[47] In the 1920s, however, several states passed small-loan laws that permitted lenders to extend small dollar loans at relatively low, yet profitable, interest rates.[48] Together, installment lending and personal loans "inaugurated a new relationship between credit and capitalism, connecting personal lending to the larger circulation of investment capital in the American economy," normalizing the business and culture of daily reliance on borrowed money.[49]

Following World War II, as most middle-class Americans could not afford to buy in cash the increasing variety of mass-produced goods coming on the market,[50] innovations in revolving store credit and credit cards bridged the gap, allowing working-class Americans to enjoy a heightened material living standard.[51] Credit use "explo[ded]," becoming "an admission ticket that granted purchasers as citizens full entry into postwar mass consumer prosperity."[52] And by midcentury, access to conventional loans was central in the pursuit of a better life, wealth acquisition, and social inclusion.[53]

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45. Id.; see also Prasad, Land of Too Much, supra note 1, at 199 (describing how installment financing also facilitated the sale of "big-ticket items like reapers, sewing machines, pianos, phonographs, furniture, and eventually the expensive new appliances of twentieth century life, such as the refrigerator").

46. Hyman, supra note 40, at 10.

47. Gunnar Trumbull, Consumer Lending in France and America: Credit and Welfare 23 (2014). Consequently, only loan sharks, who notoriously operated outside of the law, lent money to regular people in need, contributing to the taint associated with personal lending. Hyman, supra note 40, at 13–15.

48. See Prasad, Land of Too Much, supra note 1, at 200 (describing the reform of usury laws that was eventually adopted in most states).

49. Hyman, supra note 40, at 10.

50. Cohen, supra note 39, at 123–24. Professor Lizabeth Cohen describes how postwar economic prosperity coupled with federal subsidization of privately constructed housing and homebuying helped to foster a national economic boom. Id. at 123. Homebuying, in turn, "motivated consumers to purchase things to put in them, . . . stok[ing] the crucial consumer durables market." Id. Yet, economic growth notwithstanding, Americans lacked the capital to engage in this type of mass consumption without impunity, and revolving credit accounts and independent credit cards developed to meet the demand. Id.; see also Hyman, supra note 40, at 116–19 (describing the evolution of the modern credit card from consumer credit practices of the 1940s).

51. See Hyman, supra note 40, at 116–19.

52. Cohen, supra note 39, at 123–24.

53. See, e.g., Prasad, Land of Too Much, supra note 1, at 221 ("The innovations of the Depression era had established credit access as a central feature of American life at the same

This credit-fueled mass consumption functioned as no less than "a defense of American capitalist democracy" insofar as consumption became synonymous with the "American way of life."[54] Borrowed funds served both a democratizing and political function, tempering class distinctions by permitting working-class Americans to obtain the same creature comforts as professional and wealthy Americans.[55] Moreover, it lent the impression of widespread American prosperity that worked to counteract the contemporaneous "Soviet charge[] that capitalism created extremes of wealth and poverty."[56] Thus, borrowing money for consumption helped fuel the view that capitalism meant greater choice and greater freedom, cementing its status in the heart of the American Dream.[57]

Unsurprisingly, however, these developments failed to reach socially marginalized communities. For example, neither African Americans nor white women were able to enjoy the benefits of these advances in credit-based consumption, as each group faced significant and legally sanctioned barriers to conventional borrowing.[58] Lenders freely discriminated against both women and African Americans in their lending decisions, leaving them without the purported democratic and political benefits of access to conventional loans and purchase money.[59]

B. *Exclusion from "Credit"*

Consumer lending and borrowing as a highly sought-after public good matured in the aftermath of the Great Depression, largely as the result of government advances in private mortgage credit market-making.[60] As a part of its broader effort to staunch the bleeding of the economic disaster, the Roosevelt Administration first turned to subsidized borrowing as a source of stopgap recovery with its creation of the Home

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time that credit access remained constrained for many Americans."); Taylor, Race for Profit, supra note 5, at 2 ("The widespread access to homeownership across the United States in the aftermath of World War II cemented it as a fundamental feature of the cultural conceptions of citizenship and belonging.").

54. Cohen, supra note 39, at 124–25.

55. Id.

56. Id. at 125.

57. Id. at 13 (observing that a "Consumer's Republic [developed] that entrusted the private mass consumption marketplace, supported by government resources, with delivering not only economic prosperity but also loftier social and political ambitions for a more equal, free, and democratic nation"); see also Grewal & Purdy, supra note 38, at 13 (observing that "in the picture of economic life that neoliberalism celebrates, the touchstone act of personal choice is . . . the consumer purchase").

58. Cohen, supra note 39, at 124–25.

59. Id.

60. See Sarah L. Quinn, American Bonds: How Credit Markets Shaped a Nation 10–13 (Meagan Levinson & Jacqueline Delaney eds., 2019) (identifying the government's role in the development of credit policy).

Owners' Loan Corporation (HOLC) in 1933.[61] The HOLC lent money to distressed mortgagors in order to stabilize the mortgage market, which was then in a "free fall,"[62] relying on color-coded maps to determine which areas were worthy of government subsidization.[63] The most desirable areas, representing the perception of the lowest risk of default, were decorated green, their residents "homogenous and white."[64] Meanwhile, the most undesirable areas, representing the perception of high risk of default, were stained red.[65] Race played a central role in the latter, sanctioning widespread discrimination.[66]

The HOLC maps established the practice of "redlining"—the systematic and raced exclusion of people living in certain geographical spaces from access to conventional loans in the consumer capital markets.[67] More importantly, the maps established de jure discrimination in lending policy, which the HOLC bequeathed to its successor, the Federal Housing Administration (FHA), as authorized by the National Housing Act of 1934.[68] Much like the HOLC, the FHA centered itself on the notion that mortgage loans could have significant rehabilitative effects for the struggling national economy.[69] Unlike the HOLC's reliance on public funds for its operating capital, however, the FHA sought to coax private capital into

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61. See Hyman, supra note 40, at 49–50 (explaining the government's development of the HOLC as a way to "arrest [the] free fall" of the housing market by providing the mortgage market with "much needed liquidity").

62. Id. at 49 ("The HOLC . . . allow[ed] creditors to opt for long-term bonds in exchange for mortgages in danger of foreclosure. Then the HOLC refinanced the mortgages on longer terms, up to fifteen years.").

63. Mehrsa Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 105 (2017) [hereinafter Baradaran, Color of Money]; Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 64–65 (2017) ("HOLC . . . had to exercise prudence about its borrowers' abilities to avoid default . . . [and] in gauging risk HOLC considered the racial composition of neighborhoods. The HOLC created color-coded maps of every metropolitan area in the nation . . . .").

64. Baradaran, Color of Money, supra note 63, at 105.

65. Rothstein, supra note 63, at 64.

66. A. Mechele Dickerson, Public Interest, Public Choice, and the Cult of Homeownership, 2 U.C. Irvine L. Rev. 843, 854 (2012) [hereinafter Dickerson, Cult of Homeownership] ("Federal housing policies made it easier for lenders to discriminate against blacks and Latinos by creating 'redlined' areas, encompassing properties in racially mixed areas deemed to be high-risk and uninsurable."); see also Rothstein, supra note 63, at 64–65 ("[A] neighborhood earned a red color if African Americans lived in it, even if it was a solid middle-class neighborhood of single family homes.").

67. Rothstein, supra note 63, at 64. Meant as a short-term fix, the HOLC performed most of its rehabilitative work within a year of its institution, bringing short-term stability to the existing mortgage market before fading into the ether. Hyman, supra note 40, at 49–50.

68. National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701–1735(h) (2018)).

69. See Hyman, supra note 40, at 46 (suggesting that Roosevelt's housing and mortgage loan policies aimed primarily to grow the struggling economy).

investing in social policy so as to foster a largely self-funded and self-sustained public–private means of social provision.[70]

Even though the FHA's private–public approach was "novel" at the time,[71] it also merely replicated the institutional racism sanctioned by the HOLC.[72] Because the FHA operative mechanism was to insure private lenders against the risk of borrower default, the FHA's own risk was centered on the perceived quality of those loans it subsidized.[73] Consequently, the FHA limited participation in its scheme to those lenders that originated risk-appropriate loans, as determined by the FHA's criteria.[74] The HOLC maps—infected as they were with socioeconomic and geo-racial bias—came in handy as a predetermined source for relative risk on which the FHA could rest its own raced limits on lending.[75] In this regard, the FHA readily embraced the notion that geography, race, and mortgage risk went hand in hand in hand.[76] Because the inner city and those neighborhoods with significant nonwhite residents were deemed categorically undesirable,[77] these groups could not get the government-subsidized loans that their white peers enjoyed.[78] Instead, marginalized borrowers were relegated to borrow in the loan grey market where they paid exorbitant interest on loans that did not carry many of the safety precautions enjoyed by the FHA-subsidized conventional loans.[79]

The FHA's embrace of de jure discrimination had catastrophic effects on so-called "undesirable" communities and their residents, even as it

70. Id. at 46–47.

71. Id. at 47–55.

72. E.g., Jordan, supra note 35, at 116 (describing how the HOLC's system "would later influence the 'underwriting practices of the Federal Housing Administration (FHA) and the Veteran's Administration (VA)'").

73. Hyman, supra note 40, at 47–55.

74. Id. at 56–58.

75. Baradaran, Color of Money, supra note 63, at 105–06.

76. See Fed. Hous. Admin., Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act pt. 2, § 6, para. 605 (1938), https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf [https://perma.cc/YSN2-C4FS] ("A most important group of factors which affect mortgage risk is the one which embraces the relationship between the physical property and the neighborhood in which it is located. This relationship directly affects marketability of the property. Marketability is a basically important characteristic of good mortgage loan security."); Taylor, Race for Profit, supra note 5, at 34.

77. See Dickerson, Cult of Homeownership, supra note 66, at 854 ("Federal housing policies made it easier for lenders to discriminate against blacks and Latinos by creating 'redlined' areas, encompassing properties in racially mixed areas deemed to be high-risk and uninsurable.").

78. Baradaran, Color of Money, supra note 63, at 104–05.

79. Id. at 110 ("Blacks were paying much more than anyone else in the country on a mortgage, and they were not even getting an actual mortgage. As soon as they missed a payment, they lost everything . . . .").

spawned a relatively wealthy, white middle class.[80] To be sure, the FHA was successful in its goal of significantly reinvigorating the struggling economy by creating an accessible market for relatively inexpensive home loans[81] and by cultivating a thriving private mortgage market.[82] Nevertheless, African Americans and other socially subordinated groups were systematically excluded from the bounty of this government-subsidized borrowing, left behind as their white peers indulged in the most American of all pursuits: trading on the expectation of increased future cash flows in order to accelerate present access to the material trappings of the American Dream.

C. *Access to "Credit" as Inclusion*

As a result of both the movement of borrowed money into the very core of American citizenship and the simultaneous exclusion of marginalized communities from that new credit-fueled dream, "access to credit" became a significant platform for the race and gender rights activism of the mid-to-late twentieth century.[83] Indeed, for women, African Americans, and other socioeconomically marginalized groups, the ability to borrow in the conventional consumer market represented "a central feature of American life" that was beyond their reach because of their relatively subordinate positions.[84] As a consequence, gaining increased access to private loans and purchase money became an important platform in the fight for racial and gender equality in the Civil Rights and Women's Rights movements of the 1960s and 1970s. Believing that "access to credit [was both] an issue of justice" and "a straightforward means of improving the lives of those who had been excluded from credit-financed consumption,"[85] Women's Rights and Civil Rights groups began to advocate and

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80. See Dickerson, Sorting the Neighborhood, supra note 30, at 320 ("Well into the 2000s, realtors continued to steer blacks and Latinos away from white and higher appreciating neighborhoods . . . . [M]ortgage lenders continued to discriminate against black and Latino borrowers, and banks continued to view black and Latino neighborhoods less favorably than white neighborhoods.").

81. See Hyman, supra note 40, at 53 (describing how the FHA leveraged new housing initiatives to restart the economy).

82. See, e.g., Lauren E. Willis, Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price, 65 Md. L. Rev. 707, 715–17 (2006) (describing how FHA policies offered relatively cheaper loans and standardized terms). Indeed, many of its innovations and procedures, including long-term amortization and relatively low down payments, became standard practice in the conventional mortgage lending market. Id.

83. See, e.g., Frederick F. Wherry, Kristin S. Seefeldt & Anthony S. Alvarez, Credit Where It's Due: Rethinking Financial Citizenship 41 (2019) (describing Dr. Martin Luther King, Jr.'s recognition that "[t]he freedoms that would come with citizenship . . . would be made manifest by the opportunity to participate meaningfully in the economy").

84. Prasad, Land of Too Much, supra note 1, at 221–25; Baradaran, Jim Crow Credit, supra note 32, at 901 (describing how "activists and community groups were protesting against exploitative credit and exclusionary lending transactions").

85. Prasad, Land of Too Much, supra note 1, at 225.

agitate for reforms, legislative and otherwise, that would increase their access to conventional forms of credit.[86]

1. *Access to Conventional Loans as Civil Rights.* — By the 1960s, confined to red-tinted city-center "ghettos" and hemmed in on all sides by racism, African Americans, along with other similarly marginalized groups, across many American cities, rose up in protest of the increasingly unbearable conditions of daily life.[87] For example, in 1965, the Watts neighborhood of Los Angeles erupted in six days of civil unrest following the arrest and police beating of an African American man accused of speeding.[88] Nearly 4,000 members of the National Guard were needed to supplement the Los Angeles Police Department's efforts to subdue the unrest.[89] When all was said and done, there were thirty-four people dead and forty million dollars in property damage.[90]

In the following years, uprisings large and small exploded in more than 150 cities across America, including in the summer of 1968 in the wake of the assassination of Martin Luther King, Jr.[91] The toll was "enormous" both in terms of the number of lives lost and the financial consequence, including "more than 250 deaths, 10,000 serious injuries, 60,000 arrests, and a cost in police, troops, and losses to business in the billions of dollars."[92] Unsurprisingly, these uprisings ushered in a period of "shock, fear and bewilderment to the Nation."[93]

In the wake of these destabilizing and destructive effects, both President Johnson and Congress moved to develop a set of policies aimed at mitigating "the dangerous climate of tension and apprehension that pervade[d] our cities" during this time.[94] In 1967, President Johnson established the National Advisory Commission on Civil Disorders (Kerner Commission) and appointed then-Illinois Governor Otto Kerner to spearhead the Commission's inquiry into: "What happened? Why did it

86. See Atkinson, Rethinking Credit, supra note 19, at 1135.

87. See Lance Freeman, A Haven and a Hell: The Ghetto in Black America 165 (2019) ("[T]he ghetto shackled black progress and served as a font of black anger."); Charles R. Lawrence III, The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law, 65 J. Legal Educ. 381, 393–94 (2015).

88. Melany De La Cruz-Viesca, Paul M. Ong, Andre Comandon, William A. Darity Jr. & Darrick Hamilton, Fifty Years After the Kerner Commission Report: Place, Housing, and Racial Wealth Inequality in Los Angeles, 4 Russell Sage Found. J. Soc. Sci. 160, 161 (2018).

89. Id.

90. Id.

91. Lawrence, supra note 87, at 393–94.

92. Id.

93. Nat'l Advisory Comm'n on Civ. Disorders, Report of the National Advisory Commission on Civil Disorders 1 (1968) [hereinafter Kerner Commission Report].

94. Id. at 15; Susan T. Gooden & Samuel L. Myers Jr., The Kerner Commission Report Fifty Years Later: Revisiting the American Dream, 4 Russell Sage Found. J. Soc. Sci. 1, 1 (2018).

happen? What [could] be done to prevent it from happening again?"[95] The Kerner Commission proceeded with a deep "sense of urgency" in light of the imminent threat that urban discontent posed to the nation and Johnson's consequent desire "to guide the country through [the] thicket of tension, conflicting evidence and extreme opinions."[96]

The Kerner Commission focused in significant part on economic barriers to equality, including access to credit, as causes of race-related domestic unrest.[97] The Commission reported that most of the unrest was caused by a "reservoir of grievances," many of which were rooted in the pervasive socioeconomic inequality common within and among all of the cities in which uprisings occurred.[98] In particular, the Kerner Commission Report discussed unequal access to conventional loans and purchase money—including the long shadow of redlining and, more generally, exclusion from mainstream consumer capital markets—as significant targets of grievances. For example, the Report described the implicit mechanisms of redlining, observing that African Americans were "discourage[d] . . . from purchasing or renting homes in all-white neighborhoods."[99] Moreover, although the observed grievances ranged from "police practices" to "poor recreation facilities and programs," the Commission reported that "[m]uch of the violence . . . ha[d] been directed at stores and other commercial establishments in disadvantaged [African American] areas."[100]

The Commission inferred that sharp commercial practices in these spaces, including disparities in the pricing of goods, the dearth of mainstream consumer loans, and the consequent pervasiveness of high-priced loans and purchase money resulted in "the conclusion among

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95. Kerner Commission Report, supra note 93, at 1–4; Gooden & Myers, supra note 94, at 4 (describing how "[t]he Kerner Commission was formed rather hastily out of Johnson's desperation to do something in response to the riots").

96. Kerner Commission Report, supra note 93, at 15 (quoting President Lyndon B. Johnson). The Kerner Commission primarily studied "the condition of [African Americans] . . . and . . . the social and economic environment in which they live[d]." Id. at 16. The Commission, however, was careful to explain that "in focusing on the Negro, we do not mean to imply any priority of need." Rather, its "first priority [was] order and justice for all Americans." Id.

97. Id. at 4; see also Baradaran, Jim Crow Credit, supra note 32, at 916 ("One path toward equality was to integrate the credit market, which is what the Kerner Commission report had suggested as the only solution to the problem of inequality.").

98. Kerner Commission Report, supra note 93, at 68 ("Our examination of the background of the surveyed disorders revealed a typical pattern of deeply held grievances which were widely shared by many members of the [African American] community."). Specifically, the Kerner Commission Report revealed "social and economic conditions" that "constituted a clear pattern of severe disadvantage for [African Americans] as compared with whites." Id. at 4.

99. Id. at 119.

100. Id. at 81, 139.

[African Americans] that they [were] exploited by white society."[101] Discriminatory lending practices lay "at the heart of" this mistrust and frustration.[102] Consequently, the Kerner Report and other "[r]esearch into the sources of black urban violence led policymakers to conclude that the urban poor should be given greater economic access. In part, that meant access to credit."[103]

Civil Rights activists also developed strategies to increase access to conventional credit markets. These included the development of "greenlining" campaigns by the mid-1970s, in which organizers would encourage members to take their money out of institutions that would not lend in marginalized communities and move that money to institutions who did lend in those spaces.[104] This advocacy led to the development of the "reinvestment" movement that culminated in the passage of the CRA.[105]

2. *Access to Conventional Loans as Women's Rights.* — Just as the Kerner Report linked racial justice to increased access to conventional credit, the "second-wave" feminist movement of the 1960s likewise targeted "economic individualism," including the financial independence that came with access to credit, as the "centerpiece" of its reform efforts.[106] While the focus of the women's movement on economic independence predated the 1960s, early efforts were quelled, ironically, by the victory of women's suffrage.[107] The first wave of feminism came ashore amidst the "rapid industrialization and urbanization" between the mid-nineteenth century

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101. Id. at 139–40. Nevertheless, the Commission seemed to undermine its finding by emphasizing that "[d]ifferences in prices and credit practices between white middle-income areas and [African American] low-income areas to some extent reflect differences in the real costs of serving these two markets." Id. at 139.

102. Hyman, supra note 40, at 175 (observing that "for black leaders, as well as white intellectuals and politicians long involved in credit reform, the reasons behind the riots were more complicated and tied not only to the difficulties of ownership, but to the credit system poor Americans faced in a society defined by consumption"). For example, Hyman describes how "low-income consumers only had credit references with low-income retailers" who charged much more for goods than retailers in the conventional market. Id. at 176. Because low-income purchasers "could not get credit outside their neighborhood[,] [c]redit tied lower-income consumers to neighborhood merchants, who enabled them to buy more, but at higher prices." Id.

103. Andrea Ryan, Gunnar Trumbull & Peter Tufano, A Brief Postwar History of U.S. Consumer Finance, 85 Bus. Hist. Rev. 461, 483 (2011); see also Greta R. Krippner, Capitalizing on Crisis: The Political Origins of the Rise of Finance 27, 59–60 (2011) [hereinafter Krippner, Capitalizing on Crisis] ("In the wake of urban riots . . . and growing middle-class frustration with credit shortages, . . . policymakers sought to redirect capital to social priorities.").

104. Krippner, Democracy of Credit, supra note 3, at 32.

105. Id. at 33–34.

106. Rachel F. Moran, How Second-Wave Feminism Forgot the Single Woman, 33 Hofstra L. Rev. 223, 261 (2004); see also Courtney G. Joslin, Discrimination In and Out of Marriage, 98 B.U. L. Rev. 1, 34 (2018) ("By the 1960s, activists began a more concerted and organized push to address the legal rights and claims of women.").

107. Moran, supra note 106, at 225.

and early twentieth century.[108] During this time, as marriage began its slow drift away from the center of accepted notions of a woman's purpose, white middle-class women made "newfound demands for political, economic, and emotional independence."[109] Yet these demands eventually became largely focused on women's suffrage.[110] Indeed, notwithstanding that advancement in other domains—such as access to education and employment—also populated the agenda of this early feminism,[111] feminist activists "[e]ventually . . . came to believe that their future depended on obtaining the franchise."[112] After a seventy-five-year battle, first-wave feminist activists prevailed in this regard with the passage of the Nineteenth Amendment in 1920.[113] Having won this significant battle, the fires of women's social, political, and economic activism dimmed significantly, and "American women once again immersed themselves in marriage and motherhood."[114]

A second wave of feminism emerged in the early 1960s, bringing to the fore disparities in economic rights, at least as experienced principally by upper-middle-class white women.[115] Second-wave feminists focused on economic equality across various dimensions, including "comparable access . . . to private credit."[116] These women understood credit as "an indispensable foundation of their economic and social lives," but creditors routinely refused to extend loans or other purchase money without reference to "a man's creditworthiness or even his permission."[117] Thus, "[i]n a consumer society dependent on credit," women felt the deep pain of exclusion from borrowing, "which curtailed their choices and insulted their sense of self-worth rooted in the consumer privileges of their class."[118]

Like advocates focused on addressing racial discrimination in private lending, second-wave feminist activists came to understand equal access to

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108. Id. at 242.

109. Id. at 243; see also JoEllen Lind, Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right, 5 UCLA Women's L.J. 103, 111–14 (1994) (explaining that women sought to escape the domestic spheres of motherhood and marriage that defined them by demanding political rights).

110. Moran, supra note 106, at 259.

111. Id. at 243, 256–59 (noting that women pursued postsecondary schooling in unprecedented numbers and attempted to build coalitions with the labor movement).

112. Id. at 259.

113. Id. at 257–60.

114. Id. at 261; see also Cohen, supra note 39, at 36.

115. Hyman, supra note 40, at 191; Moran, supra note 106, at 261 (noting how, compared to first-wave feminists, second-wave feminists focused their reform efforts on achieving economic individualism).

116. Moran, supra note 106, at 261; see also Wherry et al., supra note 83, at 44 (observing that "[a]s people of color demanded credit justice, so too did women's groups").

117. Hyman, supra note 40, at 191; see also id. at 173 ("Objective credit standards were geared toward affluent, white men.").

118. Id. at 173, 191–201.

private loans and purchase money as central to their cause.[119] For example, the National Organization of Women (NOW), among other advocacy and policy groups, began to organize around the issue of sex discrimination in credit.[120] Of primary focus was the degree to which a woman's marital status and reproductive history negatively influenced private lenders' decisions to deny credit to women applicants.[121] For example, single women who had previously received credit found that lenders would summarily close those accounts upon marriage and require the newly married women to reapply for the same credit under her husband's name.[122] Moreover, women of childbearing age were also regularly denied credit on the assumption that these women would inevitably become pregnant and pose a heightened risk of default, because they would either experience some income interruption during and immediately following pregnancy or simply stop working altogether.[123]

The continuous socioeconomic exclusion of African Americans and women alike, along with its attendant deprivations, exploded as the apparent advances in rights failed to put a significant dent in the lived experiences of daily economic exclusion.[124] The intensification of gender and racial activism around access to channels of conventional borrowing, combined with urban uprising stemming in part from socioeconomic inequality, raised the stakes for policymakers to act quickly and effectively to relieve the increasing pressure.[125]

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119. E.g., Prasad, Land of Too Much, supra note 1, at 224–27 (observing that "because the democratization of credit had already become an important part of American political economy at mid-century, grassroots activists pushed for easier credit access for women and African Americans in the 1970s"); Trumbull, supra note 47, at 179 (observing that "the plight of women in credit markets became the focus of a social and political campaign in 1972"); Greene, supra note 10, at 257 (describing NOW's advocacy for credit reform); see also Trumbull, supra note 47, at 185 ("[W]omen clearly perceived the connection between their credit plight and that of urban blacks.").

120. Trumbull, supra note 47, at 179 (describing NOW's creation of a credit task force in 1972); Krippner, Democracy of Credit, supra note 3, at 14–15 (same).

121. Trumbull, supra note 47, at 180; Krippner, Democracy of Credit, supra note 3, at 14–15; see also Susan Smith Blakely, Credit Opportunity for Women: The ECOA and Its Effects, 1981 Wis. L. Rev. 655, 657 ("To creditors, it was axiomatic that, because women were not traditional breadwinners, they were bad credit risks.").

122. Trumbull, supra note 47, at 180 ("For women, the practice often meant that they lost their own good credit rating to less-creditworthy husbands.").

123. Id. at 182.

124. See, e.g., Joslin, supra note 106, at 24 (observing that "in 1964, Congress prohibited sex discrimination in the workplace," but "[n]otwithstanding those legal developments, the long-standing and deeply-held belief that the 'paramount destiny and mission of woman [sic] [was] to fulfil [sic] the noble and benign offices of wife and mother,' continued to shape the practice of credit" (quoting Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring))).

125. See, e.g., Prasad, Land of Too Much, supra note 1, at 198 (observing that "policymakers were following the lead of a widespread campaign at the grassroots for greater credit access"); Taylor, Race for Profit, supra note 5, at 3 ("After years . . . the social upheaval and urban rebellions of the 1960s finally forced the federal government to relent.").

II. BIFURCATING DEBT FROM CREDIT

The civil and political unrest developing at a time of deep social change captured the attention of Congress, sparking a new urgency to develop a federal response to the problem of apparently increasing inequality-fueled civil instability. Borrowing as equality took shape in this context, revealing Congress's interest in touting the potential net present value of increased access to loans, without considering expressly both economic and noneconomic debt-related risk.[126] Yet, in regulating for greater access, Congress passed a set of statutes that trumpeted access to loans and purchase money as a valid form of self-help, market-based mobility for marginalized groups.[127]

A. *Legislating Borrowing as Equality*

From the mid-1960s through the 1970s, Congress passed a suite of laws designed to address exclusion in the consumer capital markets. Most significant with respect to lending discrimination were the Equal Credit Opportunity Act of 1974 (ECOA),[128] passed as an amendment to the Consumer Credit Protection Act of 1968 (CCPA),[129] and the Community Reinvestment Act of 1977 (CRA).[130] The Higher Education Act of 1965 (HEA) also focused, in part, on making loans available to marginalized students who could not otherwise afford to go college.[131] As this Part shows, each of these laws took a favorable and progressive approach to lending and borrowing, i.e., "credit," as a mechanism of increased capacity and as a catalyst for equality for marginalized groups. At the same time, however, neither their statutory language nor their legislative history acknowledged in even a minimal way the fact that credit necessarily involves debt. Consequently, none account for the potential subordinating effects of debt on the very communities the laws were ostensibly passed to serve.

1. *The Consumer Credit Protection Act.* — In 1968, Congress intervened in the relationship, or the lack thereof, between private lenders and

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126. See Quinn, supra note 60, at 14 (observing that "government officials use credit to navigate the rocky terrain of American politics").

127. Cf. Grewal & Purdy, supra note 38, at 3 (describing the American turn to neoliberal policies and observing neoliberalism's association with "a kind of ideological expansionism, in which market-modeled concepts of efficiency and autonomy shape policy, doctrine, and other discourses of legitimacy outside of traditionally 'economic' areas").

128. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f (2018)).

129. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1601–1616).

130. Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1117 (codified as amended at 12 U.S.C. §§ 2901–2908 (2018)).

131. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001–1107 (2018)).

certain socially and economically disenfranchised borrowers.[132] Congress passed the CCPA, which ushered in a new era in federal consumer borrowing policy and regulation. This regulation was borne of the view that increasing access to private loans could be an effective tool in addressing social discontent in and among marginalized communities.[133] Congress was guided to this conclusion, in part, by the revelation that rampant predatory lending practices—which had flourished under the red tint of discrimination in mainstream consumer capital markets—had significantly provoked the civil unrest and activism that plagued the country throughout the 1960s.[134]

As initially passed, the CCPA focused mostly on mandating lender disclosures to borrowers of the true cost of a loan.[135] Congress believed that this type of disclosure would improve consumer decisionmaking, which in turn would foster more competition and choice in those areas (and among those disenfranchised consumers) that were excluded from the mainstream consumer capital markets.[136] Moreover, its ostensible purpose was "[t]o safeguard the consumer in connection with the utilization of credit by requiring full disclosure of the terms and conditions of finance charges in credit transactions or in offers to extend credit."[137] In this regard, the CCPA proceeded expressly in terms of the capacity of credit, even though implicitly, the essence of its strategy was to solve the problem of burdensome debt by fostering purportedly better consumer decisions about taking on debt.[138]

132. See Hyman, supra note 40, at 175 (noting that the Kerner Commission "pointed to the 'exploitation of disadvantaged consumers' as one of the causes of the riots"); Kornbluh, supra note 42, at 82.

133. See Truth in Lending: Hearing on S. 5 Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking & Currency, 90th Cong. 1–3 (1967) [hereinafter Hearing on Truth in Lending] (statement of Sen. Proxmire) (arguing that lack of information could lead borrowers to pay too much for a loan); Hyman, supra note 40, at 182 ("[Senator] Proxmire believed that to restore the political and economic stability of the American city required resolving the inequities of finance in the urban economy.").

134. See Hyman, supra note 40, at 180 (describing "the anger of consumers rioting in the streets that alarmed Congress and the nation").

135. 15 U.S.C. § 1601 (2018); see also Lauren E. Willis, Against Financial-Literacy Education, 94 Iowa L. Rev. 197, 200–01 (2008) ("Largely unfettered consumer choice paired with seller disclosure has been the dominant model of credit, insurance, and investment-product regulation for decades in the United States.").

136. See Hearing on Truth in Lending, supra note 133, at 1–3 (statement of Sen. Proxmire); Hyman, supra note 40, at 190. For example, as initially passed, the CCPA proclaimed, "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit." Consumer Credit Protection Act, Pub. L. No. 90-321, § 102, 82 Stat. 146, 146 (1968) (codified as amended at 15 U.S.C. § 1601).

137. Consumer Credit Protection Act § 102.

138. See Hyman, supra note 40, at 191 (noting that the CCPA did not address the root causes of urban uprisings).

The CCPA also authorized the creation of the National Commission on Consumer Finance.[139] The nine-member Commission was tasked with studying and reporting on the state of then-existing "arrangements to provide consumer credit at reasonable rates . . . [and] supervisory and regulatory mechanisms to protect the public from unfair practices[] and insure the informed use of consumer credit," and on "[t]he desirability of Federal chartering of consumer finance companies, or other Federal regulatory measures."[140] The Commission convened in 1969 and issued a report of its findings and recommendations in 1972.[141] With respect to general discrimination in conventional lending, the Commission found: "Because credit is so important to American consumers, . . . it should be available to every creditworthy applicant on a nondiscriminatory basis."[142] Nevertheless, "The Commission view[ed] credit not as a universal right, but as a privilege for the deserving."[143] While the Commission was equivocal in its findings on the extent of racial discrimination in consumer lending,[144] it placed greater emphasis on gender discrimination in consumer lending.[145] The Commission made a series of recommendations aimed at deregulating the credit industry in order to expand access through increased competition and choice.[146]

2. *The Equal Credit Opportunity Act.* — In 1974, Congress amended the CCPA to include the ECOA, which was initially focused on gender equality through fair access to loans.[147] As initially passed in the wake of women's rights activism that pushed for economic reforms, the ECOA, like the

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139. Consumer Credit Protection Act § 401.

140. Id. § 404.

141. Nat'l Comm'n on Consumer Fin., Consumer Credit in the United States (1972).

142. Id. at 151.

143. Id.

144. Id. at 155, 160 ("The Commission did not find sufficient evidence to prove the hypothesis that there is racial discrimination in the granting of consumer credit.").

145. Id. at 153.

146. Id. at iii. For example, the Commission recommended that government should: eliminate restrictive barriers to entry in consumer credit markets by permitting all creditors open access to all areas of consumer credit; permit savings and loan associations and mutual savings banks to enter into the consumer credit market; prohibit acquisitions that would eliminate potential competition or that would substantially increase concentration in state or local credit markets; and prohibit rate ceilings that constrain the development of workably competitive markets in the states in order to increase credit availability at reasonable rates. Id.; Blakely, supra note 121, at 659 ("[T]he Commission was of the opinion that, in most cases, competition among credit sources would be adequate to solve problems of credit allocation and therefore did not recommend the enactment of a statute like the ECOA.").

147. See Kornbluh, supra note 42, at 81 (noting that in the postwar period, "consumerism generally, and its association with women and the feminine, achieved an apotheosis in the twenty years after the war"); Winnie F. Taylor, The ECOA and Disparate Impact Theory: A Historical Perspective, 26 J.L. & Pol'y 575, 601 (2018) [hereinafter Taylor, The ECOA and Disparate Impact Theory] ("The ECOA's enactment in the 1970's undoubtedly provided a gateway for women to gain better access to credit.").

CCPA, focused on the regulation of "credit" relative to women and "[e]conomic stabilization," revealing its deployment of credit as socioeconomic capacity for women.[148]

The express language of the ECOA similarly sounds in the register of access to credit as a social good. In its current form, the Act employs the term "credit" and its derivations over 140 times, while "debt" and its derivations are confined to a mere four references. Curiously, three of these four references to "debt" arrive in the ECOA's initial definition of "credit," which the Act defines as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor."[149] This definition of credit by express reference to debt shows that Congress understood well the inseparable relationship between credit and debt. Nevertheless, Congress paid no further explicit attention to "debt," except in a final singular instance to mandate that, in the ECOA's preemption of state law that "prohibits the separate extension of consumer credit to each party to a marriage[,] . . . each party to the marriage shall be solely responsible for the debt so contracted."[150]

The legislative history is replete with confirmation of this bias toward "credit" and its aspirational qualities for women.[151] For example, Senator Charles Mathias of Massachusetts argued that:

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148. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f (2018)). Specifically, in its findings and statement of purpose, Congress wrote:

> [T]here is a need to insure [sic] that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status.

Id.

149. 15 U.S.C. § 1691a(d); see also Adam Levitin, What Is "Credit"? AfterPay, Earnin', and ISAs, Credit Slips Blog (Jul. 16, 2019), https://www.creditslips.org/creditslips/2019/07/what-is-credit-afterpay-earnin-and-isas.html#more [https://perma.cc/BM4L-SEW7] (giving the ECOA's definition of "credit" and noting that the "ECOA . . . do[es] not define 'debt'").

150. 15 U.S.C. § 1691d(c).

151. See generally, e.g., Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affs. of the H. Comm. on Banking & Currency, 93d Cong. (1974). For example, Arthur S. Flemming, then Chairman of the U.S. Commission on Civil Rights and Commissioner of the Administration on Aging testified:

> Sex discrimination in credit is totally at odds with the reality of modern-day America in which more than 33 million women work and make up more than 40

> We are living in a credit society. The vast majority of our population must secure a loan to finance a new car, a new home, and most other major purchases—11.5 percent of the heads of families in this country are women. To discriminate against women in applications for retail credit, mortgages, bank loans, is not only unfair, but harmful to our economy and our family life.[152]

Likewise, Senator Ted Stevens of Alaska noted that "[w]hile credit is not a right and may be refused for cause, the equality of access to credit and housing should not be denied on the basis of sex and should be guaranteed by the Federal Government."[153] Moreover, Stevens opined that "by enacting [the ECOA], the United States will take an important step forward as a leader in this area of civil rights. [The ECOA] will serve as an example for other nations. Women everywhere will be able to turn to this legislation . . . in their fight for equal rights."[154] Thus, as originally passed, the ECOA attempted to solve the problem of gender-based inequality by requiring lenders to extend "credit . . . without regard to sex or marital status."[155]

Similarly, in a hearing on the Economic Problems of Women, Representative Martha Wright Griffiths of Michigan, the "[m]other of the [Equal Rights Amendment],"[156] also argued expressly in terms of "credit" when advocating for expanded women's rights:

> Women, married, divorced, or widowed, encounter repeated discrimination in applying for consumer credit. Upon marriage, many credit companies require a woman to reapply for credit under her husband's name, even when she earns adequate income. Under the Married Women's Property Acts, a woman may acquire and transfer property, sue and be sued. Why shouldn't she also have credit in her name? The irony of these credit practices is that when a woman is divorced, separated, or widowed she often is denied credit by these same credit companies on the grounds that she has no established credit record. Many of these women could easily present a credit record

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> percent of the labor force. Yet lending institutions in many instances cling to images of women as unstable, unreliable, and in need of male protection.

Id. at 133. Flemming similarly pointed out the intersectional aspects of this limited access to private loans, by arguing that African American women were experiencing a greater "impact of discrimination," because they are penalized twice, once "because of sex and then again because of race or national origin." Id. at 132.

152. 119 Cong. Rec. 25,420 (1973) (statement of Sen. Mathias).

153. Id. at 25,421 (statement of Sen. Stevens).

154. Id.

155. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f).

156. Griffiths, Martha Wright, Hist., Art & Archives: U.S. House of Rrepresentatives, https://history.house.gov/People/Listing/G/GRIFFITHS,-Martha-Wright-(G000471)/ [https://perma.cc/8D2K-YBET] (last visited Sept. 21, 2020).

> had they not been forced to give up their economic identity by creditors.[157]

Griffiths also noted the importance of education to women's advancement, characterizing "women's access to student loans [a]s a crucial issue."[158]

The predominantly white women who spearheaded the efforts to persuade Congress to act on access to credit were, of course, not the only ones reawakened to their relative subordinate socioeconomic position circa mid-twentieth-century America.[159] The Kerner Commission Report had underscored how the persistence of redlining and its irrationally exclusive posture had helped to ignite civil unrest in predominantly African American inner-city communities.[160] Consequently, proponents for the passage of the ECOA had initially lobbied to expand the statute's prohibitions to include discrimination on the basis of race.[161] As a political matter, however, it was easier to address the concerns of white women first before moving on to address the concerns of people of color. Although the ECOA, as initially passed in 1974, seemed to leave race in the figurative hopper, in 1976, Congress amended the statute to prohibit discrimination on the basis of a prospective borrower's "race, color, age, religion, national origin, status as a public benefit recipient, or victim of creditor retaliation for suing under the [CCPA]."[162]

As reflected in the prepassage debates, the discussion centered significantly on access to "credit" as a mechanism of capacity and equality. For example, in recommending that the amendments pass in to law, the Senate Committee on Banking, Housing, and Urban Affairs emphasized the need to "recognize[] the utility and desirability of 'affirmative action' type credit programs whether offered under governmental auspices or by private credit grantors."[163] In describing the need for the amendments, the Committee reasoned that because "[c]redit has ceased to be a luxury . . . either for consumers or for business entrepreneurs . . . it must be established as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with . . . creditworthiness."[164] The amendments, then, would "redound to the benefit of both creditors and applicants, by producing a more informed and competitive marketplace, where credit applicants can be assured of evenhanded treatment in their quest for what

157. Economic Problems of Women, Part 1: Hearing Before the Joint Econ. Comm., 93d Cong. 152 (1973) (statement of Rep. Griffiths).

158. Id. at 216.

159. Taylor, The ECOA and Disparate Impact Theory, supra note 147, at 599–600.

160. Kerner Commission Report, supra note 93, at 259–60.

161. Taylor, The ECOA and Disparate Impact Theory, supra note 147, at 598–99.

162. Id. at 598–600.

163. S. Rep. No. 94-589, at 2 (1976).

164. Id. at 3.

has become a virtual necessity of life."[165] Nowhere in these passages is a mention of debt or its potential and highly relevant consequences to the communities targeted by the Act.[166]

3. *The Community Reinvestment Act.* — As with the ECOA, Congress passed the CRA in the 1970s as a direct response to community activism focused on the problem of discrimination in private lending,[167] as well as its own blossoming recognition of the issue.[168] Congress intended to bring economically marginalized communities within the fold of conventional banking, including by encouraging (but not mandating) banks to make loans and purchase money available in those geographic spaces.[169] In this regard, the CRA reinforces the notion that "credit" is a mechanism of capacity, opportunity, and inclusion.

The CRA requires federally regulated lenders "to help meet the credit needs of the local communities in which they are chartered consistent with

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165. Id. at 4. Indeed, in hearings on the amendments, Representative Leonor Kretzer Sullivan of Missouri argued that "[t]here was absolutely no reason to exclude [racial] categories" from the original statute insofar as the statute was focused making credit available to those who wanted it. To Amend the Equal Credit Opportunity Act of 1974: Hearings on H.R. 3386 Before the Subcomm. on Consumer Affs. of the H. Comm. on Banking, Currency & Hous., 94th Cong. 13 (1975).

166. See S. Rep. No. 94-589, at 1–4.

167. See John Taylor & Josh Silver, The Essential Role of Activism in Community Reinvestment, *in* Organizing Access to Capital: Advocacy and the Democratization of Financial Institutions 169, 169–170 (Gregory D. Squires ed., 2003) (noting the importance of activism in the passage of the CRA).

168. See, e.g., S. Rep. No. 95-175, at 33 (1977) ("The need for new legislation arises because regulating agencies lack systematic, affirmative programs to encourage lenders to give priority to the credit needs of their home areas. [Consequently], the Committee is aware of amply documented cases of red-lining, in which local lenders export savings despite sound local lending opportunities."); Baradaran, Jim Crow Credit, supra note 32, at 935 (describing how "banks were deliberately avoiding making loans in black communities" and explaining that the CRA's sponsor, Senator William Proxmire of Wisconsin, "reasoned that banks had a duty to remedy the problem because they had created it to begin with"); Barr, Credit Where It Counts, supra note 2, at 544 (observing that although the "CRA was not enacted to address racial discrimination against particular borrowers," it "had its origins in claims that banks were 'redlining,' that is, refusing to lend to potential borrowers living in low-income, minority communities"); Ryan et al., supra note 103, at 484 (explaining how "[m]obilization around credit" discrimination garnered Congressional attention, spurring several new pieces of legislation including the CRA).

169. See 12 U.S.C § 2901(a) (2018) ("Congress finds that (1) regulated financial institutions . . . [must] demonstrate that their deposit facilities serve the convenience and needs of [their] communities . . . ; (2) [which] include the need for credit services . . . ; and (3) regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the[ir] local communities . . . ."); Baradaran, Jim Crow Credit, supra note 32, at 935 ("To ensure that banks lent a fair portion of their loans to the ghetto, the bill required banks to prepare annual reports describing whether they were meeting the credit needs of low- to moderate-income residents."); Dickerson, Sorting the Neighborhood, supra note 30, at 322 ("While the CRA makes banks' lending decisions more transparent and regulators publicly rate the banks' performance, it does not establish minimum standards banks must satisfy.").

the safe and sound operation of such institutions."[170] In this regard, the statute premises its interventions on the conviction that, for the communities on whom the CRA focuses its energies, credit is the promise of better things to come; credit is hope and aspiration. By contrast, it does not expressly bother itself with the consequences of the actual financial relationships that may be created as a result of its valorization of credit. The word "debt" appears nowhere in the CRA's text or in its implementing regulations.[171] Moreover, its proponents have remained adamant that the CRA does not mandate that actual loans be made, further distancing its purpose from the natural commitment to debt engendered by a loan.[172] At congressional hearings on the bill, the Senate heard testimony describing the unmet needs "for credit in communities of color and working class neighborhoods," which militated in favor of legislative intervention "to remedy market imperfections and impediments to access to credit."[173] Senator William Proxmire of Wisconsin, who introduced the CRA in the Senate, stressed the law's ambition to redress "the denial of credit" that "undoubtedly aggravate[d] urban decline."[174] To that end, in drafting the original bill, Proxmire was explicitly concerned with "the credit and community development needs of [low- to middle-class] consumers and communities,"[175] yet he showed little concern about the operation of any resulting debt burdens in those same communities. His assumption was that fair access to borrowed money could work as an advantage for all.[176]

4. *The Higher Education Act.* — Congress's passage of the HEA in 1965 cemented its commitment to borrowing as a means of advancing higher

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170. 12 U.S.C. § 2901(b).

171. See id. §§ 2901–2908; 12 C.F.R. §§ 25, 195, 228, 345 (2020).

172. See Josh Silver, The Purpose and Design of the Community Reinvestment Act (CRA): An Examination of the 1977 Hearings and Passage of the CRA, Nat'l Cmty. Reinvestment Coal. (June 24, 2019), https://ncrc.org/the-purpose-and-design-of-the-community-reinvestment-act-cra-an-examination-of-the-1977-hearings-and-passage-of-the-cra [https://perma.cc/PF2Q-WRMF] (noting that Senator Proxmire, who introduced the bill, insisted that the bill "would not allocate credit, nor would it provide any fixed ratio of deposits to loans").

173. Id.

174. Id. (citing 123 Cong. Rec. 17,630 (1977) (statement of Sen. Proxmire)).

175. Id.

176. Opponents of the CRA expressed their concerns using similar language that stressed improving the borrowing capacity of underserved communities. For example, during prepassage debate on the CRA, Senator Robert B. Morgan of North Carolina, who opposed the CRA outright, argued: "Although I support the intent of the bill to insure greater credit availability for the inner cities, I feel that the bill . . . will also have the adverse effect of causing a reduction in credit availability in these areas which we are trying so desperately to revitalize." 123 Cong. Rec. 14,564 (1977) (statement of Sen. Morgan). For Senator Morgan, credit was unquestionably the pathway to the revitalization, even though debt could also be said to account for the desolation in the areas deemed to be served by the CRA.

education as a social good.[177] In 1958, deep in Cold War concern about the need to "expan[d] and improve[] . . . educational programs to meet critical national needs,"[178] Congress passed the National Defense Education Act, which authorized the National Defense Student Loan, a relatively limited program to encourage and facilitate greater American educational attainment through greater access to borrowing.[179] The HEA followed in 1965 to "simplif[y] educational borrowing through the introduction of additional federal debt-based programs."[180] To that end, the HEA first authorized Stafford Loans, "a low-interest post-secondary educational loan made available to 'only the most needy of students' and without regard to traditional standards of creditworthiness."[181] In so doing, Congress hoped to "extend the benefits of college education to increasing numbers of students."[182]

The HEA's focus on borrowing as an integral part of its overall scheme to encourage higher education was rooted in concern for the prohibitive effects of rising college costs on both low-income families and middle-income prospective students.[183] As the HEA came of age amidst the promise of President Johnson's Great Society, its support of loans reflected a

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177. E.g., Rowe v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1030 (9th Cir. 2009) ("Congress passed the Higher Education Act of 1965 ('HEA'), 20 U.S.C. § 1071, *et seq.*, to '"keep the college door open to all students of ability," regardless of socioeconomic background.'" (quoting Pelfrey v. Educ. Credit Mgmt. Corp., 71 F. Supp. 2d 1161, 1162–63 (N.D. Ala. 1999))); Atkinson, Race and Bankruptcy, supra note 9, at 13–14 (outlining Congress's attempts at making higher education more financially viable and "accessible to the masses"); Kamille Wolff Dean, Foreclosures and Financial Aid: Mind over Mortgages in Closing the PLUS Loan Gap, 4 Colum. J. Race & L. 129, 138 (2014) (describing "the HEA as landmark legislation on college access and affordability").

178. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended at 20 U.S.C. §§ 401–602 (2018)).

179. Atkinson, Race and Bankruptcy, supra note 9, at 13–14 (describing how the NDEA was established as a result of Congress recognizing accessible education as a national priority); Jonathan D. Glater, Student Debt and the Siren Song of Systemic Risk, 53 Harv. J. on Legis. 99, 142–43 (2016) [hereinafter Glater, Student Debt and Systemic Risk] ("The [NDEA] passed in response to the Soviet Union's launch of the Sputnik satellite, sought to identify those promising students who were most capable of assisting in the advance of the nation and who otherwise might not seek higher education at all . . . .").

180. Atkinson, Race and Bankruptcy, supra note 9, at 14; see also Glater, Student Debt and Systemic Risk, supra note 179, at 142 (noting that "under the HEA, federal resources became available to all college students, not just those who were veterans as was the case immediately after World War II, and not just those studying in particular fields of national need, as during the Cold War").

181. Atkinson, Race and Bankruptcy, supra note 9, at 14. The Stafford Loan program was followed by the Middle Income Student Assistance Act in 1978, which broadened the scope of federal intervention to make loans accessible for middle-income students who did not qualify as needy under the Stafford Loan. Pub. L. No. 95-566, 92. Stat. 2402 (1978) (codified as amended at 20 U.S.C. § 1070a). The Student Loan Reform Act of 1993 followed, authorizing direct, government-originated educational loans. Pub. L. No. 103-66, 107 Stat. 341 (codified as amended in scattered titles of the U.S.C.).

182. H.R. Rep. No. 89-621, at 2 (1965).

183. Id. at 20–22.

view that poverty and inequality could be meaningfully, if indirectly, redressed through borrowing as a catalyst to greater rights.[184] By promoting "widespread post-secondary access to education"[185] as facilitated through a loan, Congress valorized indebtedness as a viable means to a generative end. Moreover, to the extent that education was a means of social mobility and equality,[186] Congress presented loans as a viable mechanism of capacity. For example, the legislative history reveals a desire to "extend the benefits of college education . . . by establishing an interim program of federally guaranteed reduced-interest student loans[] [and] by stimulating and assisting State guaranteed student loan programs."[187]

B. *The "Acoustic Separation" of Debt*

As the previous section demonstrates, Congress took a deliberate and progressive approach in the HEA, CCPA, ECOA, and CRA to addressing racial and gender inequality by newly facilitating the borrowing of money. Each statute is steeped in the notion that by regulating increased access to conventional loans, Congress could address, at least in part, deeply embedded social pathologies like the socioeconomic exclusion of marginalized groups. Importantly, however, "debt" is acoustically separated[188]—none of these statutes explicitly attends to "debt" as an essential component of this progressive policy approach. That is to say, each assumed a calculus of net present value that didn't expressly account for debt.

Instead, Congress expressly addressed debt in a separate pair of contemporaneous laws: the FDCPA, which placed some restrictions on a limited set of debt collectors, and the Bankruptcy Code, which revamped the bankruptcy system to improve its ability to handle increased consumer financial failure. Moreover, in stark contrast to the overtone of capacity, opportunity, and liberation that marked each of the HEA, CCPA, ECOA, and the CRA, the Bankruptcy Code and the FDCPA were marked, in both their language and legislative history, by a deep suspicion of borrowers who found themselves unable to pay their financial obligations. To that

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184. See Twinette L. Johnson, Going Back to the Drawing Board: Re-Entrenching the Higher Education Act to Restore Its Historical Policy of Access, 45 U. Tol. L. Rev. 545, 559 (2014) (observing that "the HEA, then, at its inception was expected to, if not devised to be, that legislation that would again and again reinforce the power of education to set the country on the path to addressing systemic inequities amongst its citizens").

185. Id. at 552.

186. See., e.g., Amaka Okechukwu, To Fulfill These Rights: Political Struggle over Affirmative Action and Open Admissions 29–30, 40 (2019) (describing increased access to higher education as a primary goal of the civil rights movement); Johnson, supra note 184, at 557–59 (identifying efforts to create "post-secondary access that would lift the population out of poverty and keep them uplifted out of poverty").

187. H.R. Rep. No. 89-621, at 2 (describing the purpose of the HEA); see also AAUW Report, supra note 4, at 11 (noting that after the HEA, federal student loans "enabl[ed] students from a variety of backgrounds to finance their higher education with loans").

188. See supra note 8 and accompanying text.

end, the Bankruptcy Code and the FDCPA were relatively restrictive and austere in their bearing, and, as such, directly contrary to the rhetoric of borrowing as equality. In this regard, Congress bifurcated its treatment of "credit" and "debt," acoustically separating them as though they are not intimately entangled complements.

1. *The Fair Debt Collection Practices Act.* — Like the CRA, the FDCPA was passed in 1977, but it bore none of the idealism of borrowing money as a panacea. Its express purpose was to address "the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."[189] Consequently, it expressly defines the terms "creditor,"[190] "debt,"[191] and "debt collector,"[192] without reference to any purported benefit that may have accompanied the loan in rosier times. Moreover, its focus on "debt collectors" merely addressed the underbelly of debt collection, namely third-party debt collectors who openly preyed on those with distressed debt, all the while affirming by omission similar collection activity among loan originators.[193] Indeed, the FDCPA was not meant to interfere with purportedly legitimate debt collection.[194] Rather, its aim was to regulate

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189. 15 U.S.C. §§ 1692(a), (e) (2018). The Act prohibits a range of "unfair" collection practices, including threats of violence and the misrepresentation of the amount due. Id. §§ 1692d(1), 1692e(2)(A).

190. Creditor is defined as "any person who offers or extends credit creating a debt or to whom a debt is owed, but . . . not . . . any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." Id. § 1692a(4).

191. Debt is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." Id. § 1692a(5).

192. Debt collector is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Id. § 1692a(6).

193. See id. § 1692a(6)(A) (excepting from its reach "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor"); see also Logan Kraus, A Forgotten Past Creates a Fractured Present: Why Courts Should Utilize Historical Context when Interpreting Ambiguous Provisions of the 1977 Fair Debt Collection Practices Act, 102 Iowa L. Rev. 1789, 1796–800 (2017) (describing as motivation for the FDCPA's passage "the increase in both debt and failing businesses in the 1960s and 1970s [that] led to an increase in debt collection agency activity"). The FDCPA further carved out several other collection behavior exceptions, including debt collection by "any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control"; "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties"; and "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . is incidental to a bona fide fiduciary obligation." 15 U.S.C. § 1692a(6)(B)–(F).

194. See Zimmerman v. HBO Affiliate Grp., 834 F.2d 1163, 1168 (3d Cir. 1987) (noting the "numerous exceptions to the definition of 'debt collector'" and observing that "[t]he statute does not even attempt to restrain all who might be in a position to engage in the egregious practices with respect to collection of a debt").

debt collection, facilitating the "effective[]" and "honest collect[ion]" of debt while "protect[ing] consumers from collection abuses."[195] In other words, Congress meant to protect innocent "consumers," while leaving "deadbeat" borrowers to fend for themselves in the face of debt collection as long as it was not performed by third-party collectors.[196]

For example, Senator Donald Riegle of Michigan, who introduced the FDCPA in Congress, stated: "The purpose of the legislation . . . is not to put debt collectors out of business or to so mire them in restrictions that professional debt evaders can escape their responsibilities with impunity."[197] Moreover, in authoring the Senate Committee on Banking, Housing, and Urban Affairs' recommendation of the FDCPA's passage, Riegle opined: "While this legislation strongly protects the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons, the committee also recognizes the debt collector's legitimate need to seek the whereabouts of missing debtors."[198]

Similarly, opponents of the bill worried about the legislation's potential effects on the "availability of credit to the consumer,"[199] who, quite clearly, was not to be confused with the deadbeat debtor and "professional debt evader[]," who deserved no such protections.[200] These views suggest that the "consumers" at issue were the folks who could justifiably attain credit under the ECOA and the CRA to improve their lives, while the deadbeat debtors grew out of an entirely separate environment of odious opportunism.[201] The FDCPA to this day, however, offers no meaningful guidance as to how to distinguish between the innocent debt-distressed consumer and the deadbeat debtor.

2. *The Bankruptcy Code*. — Passed in 1978, the Bankruptcy Code reflects Congress's focus on "debt" and distress as a separate creature from the "credit" as capacity addressed in the HEA, CCPA, ECOA, and CRA. In this regard, if, under the latter, credit was consistent with equality, capacity, and opportunity, the Bankruptcy Code demonstrates a view of debt that is "at odds with the widely accepted American cultural ideals of individualism, self-reliance, and independence."[202] Indeed, the Bankruptcy

195. Fair Debt Collection Practices Act: Hearings Before the Subcomm. on Consumer Affs. of the S. Comm. on Banking, Hous., & Urb. Affs. on S. 656, S. 918, S. 1130, and H.R. 5294, 95th Cong. 1–2 (1977) [hereinafter Hearings on FDCPA] (statement of Sen. Riegle).

196. See S. Rep. No. 95-382, at 3 (1977).

197. Hearings on FDCPA, supra note 195, at 2 (statement of Sen. Riegle).

198. S. Rep. No. 95-382, at 4.

199. Id. at 10.

200. Hearings on FDCPA, supra note 195, at 2 (statement of Sen. Riegle).

201. See Higgins v. Capitol Credit Servs., Inc., 762 F. Supp. 1128, 1135 (D. Del. 1991) (noting that the FDCPA was "not intended to shield . . . consumers from the embarrassment and inconvenience which are the natural consequences of debt collection").

202. Michael D. Sousa, Bankruptcy Stigma: A Socio-Legal Study, 87 Am. Bankr. L.J. 435, 450 (2013) [hereinafter Sousa, Bankruptcy Socio-Legal Study].

Code, as originally passed, represented a "political balance between debtors' and creditors' interests,"[203] revealing a need to balance the power of the creditor against the vulnerability of a distressed debtor who bore little resemblance to the liberated borrower envisioned in the HEA, CCPA, ECOA, and CRA. The Code replaced the Chandler Act, which had done "little . . . to counteract bankruptcy's faintly unsavory reputation" in a world in which individual consumer bankruptcy filings were relatively low.[204] The 1960s, however, saw a spike in bankruptcy petitions[205] that in turn revealed the inability of the existing bankruptcy regime to handle the increase.[206] Thus, in 1970, Congress convened the National Bankruptcy Review Commission to study the existing state of bankruptcy law and to suggest improvements.[207] The Commission issued its report in 1973.[208]

The Commission concluded that even though there had been a significant rise in consumer bankruptcy filings since 1946, there was no "reason to believe that the number [was] too high or ought to be reduced."[209] Instead, the Commission concluded that the increase was "a natural if not inevitable result of the increased availability of consumer credit in this country."[210] Accordingly, the Commission recommended a suite of changes to the existing bankruptcy laws that would streamline the administration of bankruptcy proceedings in both the business and consumer contexts, while expressly rejecting any inference that any new bankruptcy law should, as a general matter, serve to address problems related to excessive debt.[211]

Overall, the Commission evinced a "generally prodebtor leaning[],"[212] a view that held "several political advantages" against the backdrop of the economic turmoil of the 1970s.[213] But any prodebtor zeal was tempered by a powerful creditors lobby that pushed back against the idea that more

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203. David A. Skeel, Debt's Dominion: A History of Bankruptcy Law in America 159 (2001).

204. Id. at 131.

205. Joint Resolution to Create a Commission to Study the Bankruptcy Laws of the United States, Pub. L. No. 91-354, pmbl., 84 Stat. 468, 468 (1970) [hereinafter Joint Resolution] (noting that by 1970 "the number of bankruptcies in the United States ha[d] increased more than 1,000 per centum annually" over the previous twenty years).

206. Skeel, supra note 203, at 131–32. Congress was concerned that "the number of bankruptcies in the United States ha[d] [by 1970] increased more than 1,000 per centum annually" over the previous twenty years, and that the "rapid expansion of credit . . . ha[d] reached proportions far beyond anything previously experienced by the citizens of the United States." Joint Resolution, pmbl., 84 Stat. at 468.

207. Skeel, supra note 203, at 139.

208. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. 1 (1973).

209. Id. at 9.

210. Id.

211. Id. at 5–31; Skeel, supra note 203, at 139.

212. Skeel, supra note 203, at 154.

213. Id. at 157.

credit should mean a concomitant ability to discharge contractual debt.[214] Lawmakers then settled on a compromise that afforded "modest gains for debtors" in the final law.[215] Under the new Bankruptcy Code, debtors would receive a more substantial discharge if they filed in Chapter 13, which required them to pay back a portion of their debt before receiving a discharge.[216] By contrast, debtors who filed in Chapter 7, which provided for a relatively immediate discharge without any future repayment obligation, would not be able to escape from the burdens of certain types of debt.[217]

The language of the Bankruptcy Code reflects its principal concern with debt and distress. It defines the terms "consumer debt,"[218] "creditor,"[219] "debt,"[220] and "debtor,"[221] but doesn't concern itself nominally with "credit." In this regard, while the word debt is passim in the statute, "credit" appears largely in derivation to reference those who hold rights as against the unfortunate borrowers, no longer bearing its patina of capacity for borrowers.[222]

Over time, the Bankruptcy Code has become harsher and more punitive in its treatment of debt and debtors. As amended over the years, it has cut down on the rights of distressed debtors to receive a full discharge. Most significantly, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) whittled down consumer debtor discharge rights for fear that too many Americans were acting opportunistically to discharge their debts,[223] even as bankruptcy data revealed that filers were disproportionately middle-class individuals suffering from the aftereffects of exogenous shock, were disproportionately women, and were disproportionately African American.[224] Nevertheless, the BAPCPA's

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214. See id. at 154–57 (detailing examples of creditor pushback).

215. Id. at 157.

216. Id. at 154–56.

217. Id.

218. Consumer debt is defined as a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (2018).

219. Creditor is defined as "(A) [an] entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; (B) [an] entity that has a claim against the estate . . . ; or (C) [an] entity that has a community claim." Id. § 101(10).

220. Debt is defined as "[a] liability on a claim." Id. § 101(12).

221. Debtor is defined as a "person or municipality concerning which a case under this title has been commenced." Id. § 101(13).

222. See, e.g., id. § 506(a)(1) (describing the extent of a creditor's "secured status" in a debtor's property).

223. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31, pt. 1, at 5 (2005) ("A third factor motivating comprehensive [bankruptcy] reform is that the present bankruptcy system has loopholes and incentives that allow and—sometimes even encourage—opportunistic personal filings and abuse.").

224. See Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, The Fragile Middle Class: Americans in Debt 37, 46, 239 (2000). See generally id. (reporting results of study of bankruptcy filings in 1991).

proponents in Congress revealed their distaste for those struggling to manage their debts. For example, the House Report recommending the BAPCPA's passage noted the purpose of sweeping amendments was "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."[225] Indeed, a perceived "lack of personal financial accountability" motivated the legislative constriction of bankruptcy relief.[226] The BAPCPA's proponents in Congress were happy to accept the fact of "a growing perception that bankruptcy relief may be too readily available," even in the face of "the view of opponents of bankruptcy reform that abuse in the system is not widespread and that most bankruptcy filings result from causes beyond debtors' control, such as family illness, job loss or disruption, or divorce."[227]

III. THE CONSEQUENCE OF BIFURCATION: DEBT AND INEQUALITY

This Part makes the case that Congress's bifurcated approach to its regulation of credit and consumer debt is problematic because debt exacerbates inequality not only through economic channels but through its propensity to jeopardize the very "capacity for well-being."[228] Joining other scholars who have ably catalogued the dark side of debt specifically in the context of restrictive bankruptcy policy,[229] this Part offers a broader account of how debt further subordinates the same marginalized communities targeted by credit-valorizing laws. Indeed, the lack of complementarity in Congress's regulation of borrowing as a mechanism of equality—that is, its failure to recognize debt as the necessary companion of credit—leaves the very groups intended to be served by the democratization of credit drowning in debt and further marginalized.

A. *The Economic Wages of Borrowing*

Data revealing entrenched racial and gender-based inequality and disproportionate indebtedness deeply challenge the notion that marginalized groups can borrow their way into greater socioeconomic equality, without a meaningful accounting for, at a minimum, the varied economic and noneconomic consequences of debt in their lives.[230] The expanded ability to borrow money seems to have had mixed results for various marginalized groups that continue to struggle to find socioeconomic

225. H.R. Rep. No. 109-31, pt. 1, at 2.

226. Id.

227. Id. at 3–4.

228. See Porter, Damage of Debt, supra note 24, at 1004 (arguing that "[t]he problem of excessive debt is not that it reduces wealth per se but that it harms people's capacity for well-being").

229. Id; see generally Ondersma, supra note 24.

230. See, e.g., Chetty et al., supra note 3, at 712–18; AAUW Report, supra note 4, at 28.

parity.[231] In many cases, the subsequent increased rates of borrowing have introduced higher levels of burdensome debt among communities least able to bear this extra weight.[232] The challenges that women and African Americans face attendant to both student loans and mortgage loans are instructive.

Its support of educational loans in the HEA suggests that Congress considers borrowing money to pay for higher education as a principal catalyst for social mobility and increased equality.[233] First, women and people of color are more likely to take out student loans.[234] This casts borrowing as equality in a positive light insofar as marginalized groups have significantly improved their relative postsecondary educational attainment.[235] Yet, debt has crept in to dull some of the shine of this seeming advance, especially in light of persistent income and wealth inequality.[236]

Specifically, in the present day, student loan debt is quickly approaching a crisis of epic proportions.[237] Some forty-four million Americans currently owe approximately $1.6 trillion in outstanding educational debt,[238] and women and African Americans (both separately and at their intersection) are carrying the brunt of this burden.[239] For example, although "college degrees have been a pathway to greater economic and personal independence for decades—especially for women[—] . . . acquiring

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231. See AAUW Report, supra note 4, at 9, 28 (noting that although in the last fifty years, women and people of color have made "dramatic gains in higher education," these groups struggle to repay debt on account of disparities in pay).

232. See Atif Mian & Amir Sufi, House of Debt 30 (2014).

233. E.g., Dwyer, supra note 3, at 241 ("The federal student loan system also relies on credit to provide a key public good . . . with the stated goal of increasing access to higher education."); Jonathan Glater, Student Debt and Higher Education Risk, 103 Calif. L. Rev. 1561, 1575–76 (2015) ("The driving ambition of [HEA] . . . was to put college within reach of any student who wanted to go, regardless of that student's means.").

234. See AAUW Report, supra note 4, at 18–20.

235. See id. at 9 (comparing 1949–1950, in which "women earned only 24 percent of bachelor's degrees, 29 percent of master's degrees, and 10 percent of doctoral degrees," with 1999–2000, in which "women earned 57 percent of bachelor's degrees, 58 percent of master's degrees, and 45 percent of doctoral degrees").

236. See, e.g., William Darity Jr., Darrick Hamilton, Mark Paul, Alan Aja, Anne Price, Antonio Moore & Caterina Chiopris, What We Get Wrong About Closing the Racial Wealth Gap 7 (2018), https://socialequity.duke.edu/wp-content/uploads/2019/10/what-we-get-wrong.pdf [https://perma.cc/3HDS-D5NG] ("Black students are more likely to take on student loans and accumulate student loan debt, and they are more likely than white students to drop-out of a university because of financial concerns. Ironically, their wealth position could deteriorate because of their intense motivation to pursue higher education.").

237. See, e.g., Michelle Singletary, There Seems to Be No End to the Rise in Student Loan Debt, Wash. Post (Sept. 12, 2019), https://www.washingtonpost.com/business/2019/09/12/whos-blame-massive-amount-student-loan-debt-america (on file with the *Columbia Law Review*) (noting $1.6 trillion in outstanding student loans and sharing examples of the personal impact of debt).

238. Richard Cordray, Watchdog: How Protecting Consumers Can Save Our Families, Our Economy, and Our Democracy 6 (2020).

239. See AAUW Report, supra note 4, at 1–2.

those degrees results in more debt for women than for men."[240] Women currently hold two-thirds of educational debt (approximately $929 billion) and are more likely than men to default on these loans.[241] For some communities of color, and specifically for African American women, the reality of student debt burden is even grimmer. Student loan default rates are higher for African American and Hispanic debtors than for white and Asian debtors, and fifty-seven percent of African American women borrowers in repayment reported that "they had been unable to meet essential expenses" as compared to thirty-four percent of all women borrowers in repayment.[242]

At the same time, in the current American economy, structural inequality that tracks gender and racial distinctions results in pathological outcomes, like disparity in postgraduate incomes and racialized and gendered views that depress asset value.[243] Indeed, although "women with college degrees are paid much better than women without them, they are still paid about 25 percent less than men with college degrees."[244] Consequently, persistent inequities in gender pay are a "major factor that contributes to a substantial loan repayment gap between men and women following graduation,"[245] leaving women and African Americans to face challenges in repayment that confound the net present value of a loan (even in the absence of predatory lending) for marginalized groups.[246]

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240. Id. at 24.

241. Am. Ass'n of Univ. Women, Deeper in Debt: Women and Student Loans in the Time of COVID 1 (2020), https://www.aauw.org/app/uploads/2020/05/Deeper_In_Debt_FINAL.pdf [https://perma.cc/FM4G-C4SB]; see also AAUW Report, supra note 4, at 1–2.

242. AAUW Report, supra note 4, at 1–2.

243. E.g., Dickerson, Sorting the Neighborhood, supra note 30, at 321 ("Research shows that the racial composition of a neighborhood is capitalized into the market value of homes so that comparable homes are valued differently depending on the racial makeup of the neighbors."); Warren, Economics of Race, supra note 5, at 1788 ("The homes owned by white families are also likely to be more valuable than the homes owned by other racial groups."); Dorothy Brown, How Home Ownership Keeps Blacks Poorer than Whites, Forbes (Dec. 10, 2012), https://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites/#674b38b54cce [https://perma.cc/9ZTW-EXH4] ("[T]he market penalizes integration: The higher the percentage of blacks in the neighborhood, the less the home is worth, even when researchers control for age, social class, household structure, and geography.").

244. AAUW Report, supra note 4, at 24; see also Daniele Kurtzleben, How Coronavirus Could Widen the Gender Wage Gap, NPR (June 28, 2020), https://www.npr.org/2020/06/28/883458147/how-coronavirus-could-widen-the-gender-wage-gap [https://perma.cc/SK9Z-GH7V] (describing how the pandemic is likely to exacerbate the existing gendered wage gap).

245. AAUW Report, supra note 4, at 24.

246. See, e.g., Teresa A. Sullivan, Elizabeth Warren & Jay Westbrook, As We Forgive Our Debtors 151–52, 158 (2001) (describing the disproportionate impact of debt on women); Atkinson, Race and Bankruptcy, supra note 9, at 11–12 (describing the disproportionate impact of debt on African American college graduates). Bankruptcy filings that continue to show women and African Americans represented in disproportionate numbers confirm this

Moreover, general difficulty in repayment further suggests the ways in which debt overwhelms the capacity of credit to facilitate great socio-economic equality across gender and race, and at their intersections, to facilitate greater socioeconomic equality. For example, "Women and men of different races and ethnicities pay off their student loans at different rates."[247] In addition to borrowing more at the outset, women take longer to pay off their loans than do men, which makes the sticker price for the education much higher.[248] African American and Hispanic women spend an even greater time in repayment relative to white and Asian women. Between 2009 and 2012, African American and Hispanic women paid twelve percent and eighteen percent respectively, while white women and Asian women paid thirty-three percent and sixty percent of their debt respectively.[249] Notwithstanding greater achievements in academic attainment by women and people of color,[250] higher education has not been able to break the cycle of gender- and race-based income inequality,[251] which directly affects the viability of borrowing to begin with.

Another space that reveals the particular burden that debt has on marginalized groups is homeownership, which suggests meaningful limits on Congress's borrowing-as-equality policy as evinced in the CRA and the ECOA. As described above, access to a fully amortized loan to buy a house was one of the key outcomes of borrowing-as-equality policy,[252] particularly since homeownership is now deeply associated with status and belonging in America.[253] Yet, increased access to conventional mortgages has neither resulted in consistent overall increases in homeownership nor wealth gains among African Americans, for example.[254] One recent national housing study reported that although generally "changes in homeownership by race and ethnicity are mostly positive, black households are the one group that has made no appreciable progress" with respect to homeownership in the last 30 years.[255] Another recent study reported that as of 2017,

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reality. E.g., Paul Kiel & Hannah Fresques, Data Analysis: Bankruptcy and Race in America, Propublica (Sept. 27, 2017), https://projects.propublica.org/graphics/bankruptcy-data-analysis [https://perma.cc/7GSD-C7K5] (noting that "[t]he higher filing rates among black communities can be partly explained by greater financial stress on the population as a whole").

247. AAUW Report, supra note 4, at 27.

248. Id. at 26–27.

249. Id. at 27.

250. See id. at 7–11.

251. Id. at 28 (noting that "a college degree does not erase gender and race gaps in pay").

252. E.g., Barr, Credit Where It Counts, supra note 2, at 563 (observing that following the passage of the CRA, "[h]ome mortgage data show[ed] increased lending to minority and low-income borrowers").

253. E.g., Dickerson, Cult of Homeownership, supra note 66, at 845–48.

254. Id. at 857–60.

255. Joint Ctr. for Hous. Stud. of Harvard Univ., The State of the Nation's Housing 2018, at 3 (2018), https://www.jchs.harvard.edu/sites/default/files/Harvad_JCHS_State_

homeownership rates among African Americans "fell to 43 percent [from a high of approximately 50 percent in 2004], virtually erasing all of the gains made since the passage of the Fair Housing Act in 1968, landmark legislation outlawing housing discrimination."[256] Held alongside the persistent gap in wealth, these statistics challenge the notion that access to loans can effect some meaningful change, particularly because increased debt has meant amplified exposure to loss because of existing socioeconomic vulnerability.[257]

For example, as economists Atif Mian and Amir Sufi have observed, borrowers and lenders do not stand on equal footing when it comes to asset-based lending, like home mortgage loans.[258] Borrowers bear the risk first and foremost that the value of a home will drop, threatening the borrower with the loss of any savings that the borrower invested in the down-payment.[259] Moreover, when the home is sold at foreclosure, the lender gets paid first, and on the occasion that nothing is left, the logic of mortgage debt finds no injustice in the fact that the borrower loses everything.[260] Mian and Sufi argue that this logic of debt explains the catastrophic loss of wealth among African American and other similarly situated homebuyers in the wake of the Great Recession.[261] Moreover, their segregated communities bore the loss as well, suffering from wealth losses as their home values absorbed the weight of a nearby foreclosure.[262] Nevertheless, the lenders in these cases made no offer to share those losses because according to the logic of debt, the lenders were entitled to be paid first, notwithstanding the social consequence of such priority. Thus, post-Great Recession, borrowing as equality, relative to homeownership, walked many marginalized communities back to the same subordinated positions that they occupied fifty years ago.[263]

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of_the_Nations_Housing_2018.pdf [https://perma.cc/N3Y7-P2CS]; see also Michele Lerner, Report: Overall U.S. Homeownership Rate Rises, But Drops Among Blacks, Wash. Post (Mar. 19, 2020), https://www.washingtonpost.com/business/2020/03/19/report-overall-us-homeownership-rate-rises-drops-among-blacks (on file with the *Columbia Law Review*).

256. Troy McMullen, The 'Heartbreaking' Decrease in Black Homeownership, Wash. Post (Feb. 28, 2019), https://www.washingtonpost.com/news/business/wp/2019/02/28/feature/the-heartbreaking-decrease-in-black-homeownership/?utm_term=.24d62f21a93c (on file with the *Columbia Law Review*).

257. Mian & Sufi, supra note 232, at 21–23 (describing the debt-related catastrophic loss in wealth for poor families as a result of the Great Recession).

258. Id. at 20 ("A poor man's debt is a rich man's asset.").

259. Id. at 21–25.

260. Id.

261. Id.

262. Id. at 25–26.

263. See, e.g., Dickerson, Cult of Homeownership, supra note 66, at 856, 860 (noting that "median wealth for white households is now twenty times that of Black households and eighteen times that of Latino households" and attributing recent losses to housing); Carlos Garriga, Lowell R. Ricketts & Don E. Schlagenhauf, The Homeownership Experience of Minorities During the Great Recession, 99 Fed. Rsrv. Bank St. Louis Rev. 139, 140–41 (2017) (observing that "[t]he housing crash in 2007 and the Great Recession that followed

The fate of the relatively well-to-do middle-class African American families who lived together in the Washington, D.C. suburbs of Prince George's County, Maryland, bears out how the social consequences of debt continue to undermine the net present value of borrowing.[264] Formed in 1696 and named for then-heir to the English throne, Princess Anne's Danish husband,[265] Prince George's County, Maryland, became the poster child for the devastation wrought by the Great Recession on the wealth of communities of color.[266] Once a predominantly white suburb, Prince George's County experienced white flight in the wake of 1960s and 1970s reforms aimed at quelling discrimination in housing, including the Fair Housing Act of 1968, which made racial mortgage discrimination illegal.[267] Prince George's County transformed into a predominantly African American suburb in the 1970s as its former white residents exercised their still-legal "private choice" to avoid "living among a large proportion of African Americans."[268]

In the decades that followed, Prince George's County thrived in relative terms with its majority-African American residents enjoying a higher-than-average median household income and educational attainment.[269] By one account, "In popular lore, Prince George's [County] was proof that, while blacks still lagged behind in education, wealth and employment, the black community was finally catching up."[270] That is until

collectively erased $13 trillion of assets from household balance sheets," and "that all of the gains [in homeownership rates] among Black families were erased between 2006 and 2015").

264. Nathalie Baptiste, Staggering Loss of Black Wealth Due to Subprime Scandal Continues Unabated, Am. Prospect (Oct. 13, 2014), https://prospect.org/justice/staggering-loss-black-wealth-due-subprime-scandal-continues-unabated [https://perma.cc/5CVR-YS7Z].

265. History, Prince George's Cnty., Md., https://www.princegeorgescountymd.gov/1796/History [https://perma.cc/L2M7-QDSP] (last visited Aug. 20, 2020).

266. E.g., Kimbriell Kelly, John Sullivan & Steven Rich, Broken by the Bubble: In the Fairwood Subdivision, Dreams of Black Wealth Were Dashed by the Housing Crisis, Wash. Post (Jan. 25, 2015), https://www.washingtonpost.com/sf/investigative/2015/01/25/in-fairwood-dreams-of-black-wealth-foundered-amid-the-mortgage-meltdown [https://perma.cc/JR9E-585U].

267. April Johnson, Fair Housing Issues: A Call for Mandated Housing Integration, 50 U. Tol. L. Rev. 107, 126–27 (2018) (noting that "many of the white suburban communities that African Americans integrated into in the 1970s, following the passage of the Act, are now predominantly black as a direct result of white flight[,]" including Prince George's County); Mary Jo Wiggins, Race, Class, and Suburbia: The Modern Black Suburb as a "Race-Making Situation", 35 U. Mich. J.L. Reform 749, 760–63 (2002).

268. Brian Patrick Larkin, The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration, 107 Colum. L. Rev. 1617, 1631 (2007); see also Wiggins, supra note 267, at 763.

269. Baptiste, supra note 264 ("The County's median household income is $73,568—a full $20,000 more than the median household income of the United States . . . . A full 29.5 percent of people over the age of 25 hold bachelor's degrees—slightly higher than the 28.5 percent rate for all persons in the United States.").

270. Id.

it became "the epicenter of the foreclosure crisis in the Washington, D.C., region," and home values plummeted in the wake of the Great Recession.[271]

A conventional account of the downfall of Prince George's County (and of African American homeowners across the country more generally) was that the principal culprit was the incidence of predatory subprime loans in the majority-minority communities that populate the county.[272] For this reason, significant blame has fallen on bad-apple banks and their emissaries who engaged in discriminatory profiteering. Yet this simple account "masks the fact that borrowers and lenders are socially situated within power dynamics shaped by the discrimination of the past."[273] Indeed, lurking in between the lines of the stories of craven discrimination in lending is the deep impact of the social aspects of racism that factor into market transactions of all stripes.[274] In the case of Prince George's County, lenders' use of push-marketing, in which they shopped for customers in the county, certainly was an important factor in its ultimate demise.[275] More significantly, however, Prince George's County's majority-Black residents were just too concentrated in geographical space for credit not to succumb to the raced values embedded in debt's requirement for equivalent value. As Professor Keeanga-Yamahtta Taylor observes, "The conflation of race and risk to property value has been fully absorbed into the popular culture and real estate acumen of the United States." [276]

At the best of times then, Prince George's County's residents could not avoid the fact that their Blackness in a raced and gendered market society made it harder for them to leverage a home loan to build equity and wealth. Professor Sheryll Cashin, in her study of Prince George's

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271. Id.

272. E.g., Andrea J. Boyack, A New American Dream for Detroit, 93 U. Det. Mercy L. Rev. 573, 587 (2016) ("The disproportionate percentage of subprime loans in majority-minority neighborhoods (whether or not such loans were made with an intent to harm) meant that those neighborhoods bore the brunt of the housing crash.").

273. Amy Castro Baker, Eroding the Wealth of Women: Gender and the Subprime Foreclosure Crisis, 88 Soc. Serv. Rev. 59, 85 (2014) (critiquing "traditional economic explanations for the crisis"); see also Jordan, supra note 35, at 121 ("Racial disparities in housing finance posed systemic financial risks because pre-existing income, credit, wealth, and housing ownership disparities between blacks and whites created virtually irresistible pools for subprime mortgage transactions, with scant government oversight.").

274. See Jordan, supra note 35, at 168–69 (critiquing "[t]he post-crisis literature [for] fail[ing] to engage racial discrimination as a source of systemic risk" and arguing that "[i]t is crucial to elevate the consideration of the persistent problem of racial discrimination in economically important markets such as housing").

275. See Baptiste, supra note 264 (describing predatory subprime lending practices, including aggressive marketing tactics).

276. Taylor, Against Black Homeownership, supra note 3; see also Brentin Mock, Why Black Businesses and Homeownership Won't Close the Wealth Gap, Bloomberg CityLab (Feb. 25, 2020), https://www.bloomberg.com/news/articles/2020-02-25/how-to-actually-close-the-racial-wealth-gap [https://perma.cc/TB52-FQ5E] (describing several recent studies that "cast doubt on the idea that simply owning homes or businesses can help dissolve racial economic inequities").

County, notes this "conundrum" and ascribes the relative lack of progress in even middle-class enclaves as subject to inevitable "[e]xternalities beyond their control" such as "the race-laden private decisions of people and institutions not to invest in, locate in, or cooperate with all-black communities."[277] In the worst of times, the stunted and racialized values of their homes and their communities only worked to exacerbate the racial divide in wealth, further perpetuating inequality. And yet, the bifurcated approach to credit and debt persists, unmoved by these entrenched realities that affect the ability of borrowed money to advance equality among marginalized groups (as evinced by Congress's views around the 2005 BAPCPA reforms).[278]

B. *The Social Consequences of Indebtedness*

Indebtedness poses more than just economic consequences like financial distress. Rather, debt is itself a significant mechanism of subordination and hierarchy; it is an independently powerful social institution whose harm, particularly in marginalized communities, should be considered in more than just economic terms. In that regard, policies like borrowing as equality should meaningfully engage with the notion that market transactions are formed and calibrated within and by the broader social context in which they are formed.[279] With this in mind, Congress should worry about the ways in which inviting debt into already marginalized lives and spaces will have adverse consequences that not only counteract economic growth but also exacerbate social inequality.

1. *The "Social Embeddedness" of Borrowing.* — Economic behavior, like taking out a loan, is necessarily "embedded" within the broader social relationships and order in which it occurs, intertwined in ways that defy partitioned consideration.[280] Thus, where there is a preexisting social relationship, such as hierarchical, racialized, and gendered subordination, it

277. Sheryll D. Cashin, Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America, 86 Cornell L. Rev. 729, 733 (2001).

278. See supra section II.B.2.

279. See, e.g., Mark Granovetter, Economic Action and Social Structure: The Problem of Embeddedness, 91 Am. J. Socio. 481, 487 (1985) ("Actors do not behave or decide as atoms outside a social context, nor do they adhere slavishly to a script written for them by the particular intersection of social categories that they . . . occupy. Their attempts at purposive action are instead embedded in concrete, ongoing systems of social relations.").

280. See, e.g., Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time 74–76 (2001) ("[T]he economic order is merely a function of the social order."). Polanyi explains:

> The outstanding discovery of recent historical and anthropological research is that man's economy, as a rule, is submerged in his social relationships. He does not act so as to safeguard his individual interest in the possession of material goods; he acts so as to safeguard his social standing, his social claims, his social assets. He values material goods only in so far as they serve this end. Neither the process of production nor that of distribution is linked to specific economic interests attached to the

is neither feasible nor proper to isolate the economic transactions between individuals engaged in the social relationship, including in social relations that are defined by subordination and hierarchy.[281]

Consequently, a policy that advertises taking on debt as a catalyst to equality should expressly consider the broader social context within which the prescription is offered.[282] More than that, any consideration of the social embeddedness of creditor-debtor relationships should also account for how these market transactions are affected by specific social networks and relations, particularly to the extent that these relationships are intractably raced and gendered.[283] In other words, the "immediate social context" of any given market transaction is vital in defining and assessing its contours.[284]

> possession of goods; but every single step in that process is geared to a number of social interests which eventually ensure that the required step is taken. These interests will be very different in a small hunting or fishing community from those in a vast despotic society, but in either case the economic system will be run on noneconomic motives.

Id. at 48. This view counters the neoclassical economic view that market actors should be understood as purely self-interested and rational individuals for whom "social relations and their details" are merely "frictional matters." Granovetter, supra note 279, at 484; see also Marion Fourcade & Kieran Healy, Moral Views of Market Society, 33 Ann. Rev. Socio. 285, 287 (2007) [hereinafter Fourcade & Healy, Moral Views] ("[T]he neoclassical approach that formalized modern economic theory generally posits that individuals maximize their utility in all social relations."). But see Greta R. Krippner & Anthony S. Alvarez, Embeddedness and the Intellectual Projects of Economic Sociology, 33 Ann. Rev. Socio. 219, 221 (2007) (noting, however, that "although embeddedness forms the basis of a coherent critique of neoclassical economics, it is incoherent as an organizing principle for economic sociology").

281. For example, sociologist Viviana Zelizer has argued that we should explicitly understand the economic and social together, as "[w]e all use economic activity to create, maintain, and renegotiate important ties, especially intimate ties, to other people." Viviana A. Zelizer, Economic Lives: How Culture Shapes the Economy 178 (2011). In the context of intimate personal relationships, including sexual relationships, Zelizer writes that rather than attempting to keep commercial transactions and intimate interactions as existing in "separate spheres," "[w]e should think instead about some of the complexities into which the mingling of sexual relations and economic activity leads us." Id. at 151–52.

282. See Fourcade & Healy, Moral Views, supra note 280, at 305 ("The discourse of the market is increasingly articulated in moral and civilizational terms, rather than simply in the traditional terms of self-interest and efficiency.").

283. See Granovetter, supra note 279, at 485–86 (discussing leading sociological arguments for viewing economic actors as an extension of their social circumstance).

284. Id. at 485. Sociologist Mark Granovetter has argued that Polanyi's account is unduly "mechanical" because preexisting "internalized rules of [social] behavior" merely "set[] things in motion and ha[d] no further effects" on the economic interaction. Id. at 485–86. For Granovetter, Polanyi's oversocialized view of market transactions offered no difference from the undersocialized neoclassical economic account—which "assume[d] rational, self-interested behavior affected minimally by social relations"—insofar as both were unduly grounded in an atomistic view of behavior. Id. at 481–83. This recharacterization of "embeddedness" has come largely to form the basis of modern economic sociology,

The creditor-debtor market relationship bears significance as a part of the broader reciprocal, socially oriented interactions that characterize human relations. [285] It has structured both premarket and market societies, developed and reproduced hierarchies, and determined, preserved, and then reproduced social inequality.[286] For example, in premarket gift economies, social "hierarchy [was] established" through gifts.[287] The initial gift giver became the creditor and the recipient the debtor.[288] An "opening gift" mandated a "return gift" that had to be at least equivalent in value to the opening gift, commencing a back and forth social relationship that worked to define both the individual and broader social structures and hierarchy of these communities involved.[289] The failure to repay would break the socially normalized reciprocal flow of back and forth, which, in turn, would cause the debtor to "lose face" in the eyes of the community.[290] In this context, a recipient/debtor ceded power to the giver/creditor, particularly where the recipient/debtor accepted the gift "with no thought of return[]."[291] Moreover, to accept without returning or repaying was to accept a subordinated status; to become a "client and servant, to become small, to fall lower."[292] In other words, the social relations of obligation and exchange "greatly contribute[d] to the building of hierarchy and dominance" while also serving as a "key[] to building group solidarity."[293]

which concerns itself with describing the significance of social context on economic interactions. Greta R. Krippner, The Elusive Market: Embeddedness and the Paradigm of Economic Sociology, 30 Theory & Soc'y 775, 775–78 (2001).

285. See, e.g., Alan Kirk, Karl Polanyi, Marshall Sahlins, and the Study of Ancient Social Relations, 126 J. Biblical Literature 182, 184–85 (2007) (describing various social classifications and their impact on economic transactions).

286. In his seminal work, Marcel Mauss described gift economies in which reciprocity and obligation related to gifting were of great social significance. Marcel Mauss, The Gift: The Form and Reason for Exchange in Society 2–3, 34–35, 46 (2002) ("Now, the gift necessarily entails the notion of credit."). Thus, Mauss noted the social implications of this system where social life is a "constant 'give and take,'" id. at 45, and "a succession of rights and duties to consume and reciprocate, corresponding to rights and duties to offer and accept," id. at 17.

287. Id. at 95.

288. Graeber, supra note 26, at 35–36.

289. Mauss, supra note 286, at 33.

290. Id. at 53–54.

291. Id. at 83.

292. Id. at 95.

293. Peebles, supra note 7, at 226. Although Mauss's observations drew from indigenous communities with relatively small gift-based economies around the world, Mauss concluded that this hierarchy of creditor/giver, debtor/recipient bore broader implications about the nature and evolution of social obligation and reciprocity in modern market-based economies. Mauss, supra note 286, at 83. He wrote:

> A considerable part of our morality and our lives themselves are still permeated with this same atmosphere of the gift, where obligation and liberty intermingle. Fortunately, everything is still not wholly categorized in terms of buying and selling. Things still have sentimental as well as

In this respect the credit and debt relationship bears significant social consequence, as those who engage in commodity-based exchanges—whose own morality was defined within social contexts such as household structure, family, friendship, and neighborhood—carry on those commercial exchanges with the same underlying moral sensibilities as they did the type of social exchanges associated with gift economies.[294] Credit and debt function as a unified institution that is decidedly rooted in social significance and consequence given that debt "evok[es] passivity in the face of power" while credit symbolizes "individual empowerment."[295] Credit/debt serves a "hegemonizing function,"[296] preserving the dominant social structure by deciding "who stands inside and outside community borders or who stands above or below."[297]

Moreover, credit/debt also engenders moral hierarchy that challenges the degree to which encouraging marginalized groups to become indebted to powerful market institutions, conventional though their products may be, can truly be a catalyst for increased relative socioeconomic equality.[298] Within the sphere of social boundary, credit/debt bears an "immensely powerful capacity to construct and destroy community borders or build social hierarchy."[299] Thus, the positioning of

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> venal value, assuming values merely of this kind exist. We possess more than a tradesman morality.

Id.; see also Polanyi, supra note 280, at 47–48 (noting that "[t]he differences existing between civilized and 'uncivilized' peoples have been vastly exaggerated, especially in the economic sphere" and citing the work of social anthropologists to support "the changelessness of man as a social being"). Mauss's notion of a "gift" encompassed much more than just our current understanding of gift as a present. Per one commentator, "For Mauss, a gift [wa]s any object or service, utilitarian or superfluous, transacted as part of social, as distinct from more purely monetary or material, relations." James Carrier, Gifts, Commodities, and Social Relations, 6 Socio. Forum 119, 121–22 (1991).

294. Carrier, supra note 293, at 129.

295. Hart, supra note 27, at 416 ("Debt and credit are two sides of the same coin, the one evoking passivity in the face of power, the other individual empowerment."); see also Sousa, Bankruptcy Socio-Legal Study, supra note 202, at 448–49 ("In addition to [] various forms of punishment, debtors were historically subjected to public shaming rituals. Debtors were often hauled naked to the public square and forced to smash their backsides three times against a rock while crying out, 'I declare bankruptcy.'").

296. Miranda Joseph, Making Debt, Occasion, Nov. 2014, at 2 [hereinafter Joseph, Making Debt].

297. Peebles, supra note 7, at 228; see also Brandser Kalsem, supra note 24, at 1200–01 (citing the work of Donald Korobkin in describing "how the 'ritual' of bankruptcy negotiates [class] tensions, offering a process by which rules can be broken (i.e., promises to pay back debt), but in such a way as to reaffirm cultural norms [and to] secure[] class boundaries and class power").

298. See Dwyer, supra note 3, at 238 ("Creditor-debtor relationships are inherently unequal, and the prevalence and types of credit and debt holding in a society structures social inequality more broadly.").

299. Peebles, supra note 7, at 228. This view stands in contrast to the purely economic notion that credit/debt, as "the movement of economic resources through time and space," can be properly reduced to questions of "'economic rationality' or 'self-maximization.'" Id.

creditors and debtors "within the economic and moral spectrum of credit/debt relations" functions to create and/or maintain existing social hierarchies.[300] Part of this power stems from the degree to which the creditor is assigned the moral high ground, enjoying a significant advantage in power relative to the debtor.[301] Indeed, although "credit and debt stand as an inseparable, dyadic unit,"[302] they are not equal partners.[303] By one account, "[C]redit is . . . beneficial and liberating for the creditor [while] indebtedness is . . . burdensome and imprisoning for the debtor."[304] So while credit and debt may be said to describe the same relationship, the semantic divergence between reference to credit or debt evokes decidedly different aspects of that relationship. In this light, "[C]redit [i]s power and debt [i]s weakness,"[305] and "the extension of credit creates an obligation . . . that marks the debtor as inferior to the creditor."[306]

Borrowing as equality in a capitalist market society that is marked by the potential for commodification and quantification of all things should be cause for additional concern.[307] In premarket societies, debt functioned

300. Id.

301. See id. at 226–28; see also Todd J. Zywicki, Bankruptcy Law as Social Legislation, 5 Tex. Rev. L. & Pol. 393, 420–21 (2001). Professor Zywicki's views on limiting consumer access to debt discharge in bankruptcy reflect this account. He writes:

> When an individual decides to file bankruptcy and repudiate his debts, this is a moral decision as much as an economic decision. By filing bankruptcy, the debtor rejects his promises and repudiates the moral bonds of reciprocity created when creditors extend goods, services, and credit to her. Because of a moral condemnation of bankruptcy (as well as the negative economic consequences of widespread bankruptcy), almost all legal systems in human history have provided bankruptcy rules that strongly deter bankruptcy filings. Indeed, in many societies bankruptcy was punishable by death, dismemberment, or imprisonment. The severity of these legal sanctions indicates the degree of moral outrage that permeate these legal systems.

Id.

302. Peebles, supra note 7, at 226.

303. See Krippner, Democracy of Credit, supra note 3, at 37 ("[T]he credit relationship expresses the inequality between parties to exchange: the creditor looms over the borrower . . . .").

304. Peebles, supra note 7, at 226. An interesting contrast, however, is that in the corporate finance context, "debt" does not carry the same pejorative tone as it tends to in the consumer context. See, e.g., id. (describing scenarios where corporate debtors can wield disproportionate power).

305. Id.

306. Krippner, Democracy of Credit, supra note 3, at 37 (describing a borrower as a "supplicant" to a creditor).

307. See Graeber, supra note 26, at 13–14. In his expansive meditation on debt, anthropologist David Graeber argues that modern, impersonal market-based notions of debt have replaced the previous communitarian roots of interpersonal indebtedness and obligation. For this reason, the "moral obligations" that once characterized reciprocal relationships have now devolved into mere quantifiable money debts whose mandatory repayment "justif[ies] behavior that would otherwise seem utterly immoral." Id. at 158. Like Mauss, Graeber situates the origins of credit and debt in the context of premarket relational

within the context of ongoing human relationships in which "money act[ed] primarily as a social currency to create, maintain, or sever relations between people rather than to purchase things."[308] In our modern, contract-based society, however, debt has transformed merely into an abstract and independent "obligation to pay a certain sum of money" at a certain time.[309] In a market society, then, the "difference between a 'debt' and a mere moral obligation . . . is simply that a creditor has the means to specify, numerically, exactly how much the debtor owes," and only complete and equivalent payment can restore equilibrium.[310] Moreover, now largely stripped of any communitarian restraints that may have existed in premarket societies, everything in state-driven commercialized markets can be commodified and liquidated in order to satisfy a money debt.[311] Even people, seized through state-sanctioned violence, can be abstracted and reduced to a quantified sum of money required to satisfy the mandate of repayment.[312] Indeed, "Just as markets make material relationships between people appear as relationships between things, debt transforms ongoing reciprocal relationships between people into alien, abstract tallies in a social ledger."[313] Put differently, debt is a means of "the destruction of community by quantification and abstraction."[314]

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exchange. These "human economies," id., were characterized by an ever-swinging pendulum of obligation in which perfect equivalence of exchange was not the norm, Suresh Naidu, Review of *Debt: The First 5000 Years* by David Graeber, 7 J. Glob. Hist. 331, 332 (2012) (book review) (noting that "[d]ebt enters the world of gift relationships and concrete reciprocity by rendering it abstract and legible, transferable and enforceable"). Rather, the lack of perfect equivalence helped to maintain the social structure and bind people together through a continuous cycle of give and take; the role of creditor and debtor might just as easily reverse at any moment in time. Graeber, supra note 26, at 159 ("[I]n such economies, money . . . is a way of acknowledging . . . that the debt cannot be paid."). Thus, credit and debt functioned within a broader and more significant "discourse of community," rather than as an end unto themselves. Joseph, Making Debt, supra note 296, at 2 (explaining Graeber's theory of human economies of debt).

308. Graeber, supra note 26, at 158.

309. Id. at 13.

310. Id. at 14.

311. Id. at 159–64.

312. Id. at 14; cf. infra notes 331–344 and accompanying text (describing the centrality of debt in the logic of the overpolicing of African American men).

313. Naidu, supra note 307, at 331. In the words of Margaret Atwood, "[T]he debtor and the creditor [are] joined-at-the-hip twins balanced on the two sides of a scale, with equilibrium arriving when all debts are paid." Margaret Atwood, Payback: Debt and the Shadow Side of Wealth 124 (2008).

314. Joseph, Making Debt, supra note 296, at 5–8. Sociologist Miranda Joseph critiques Graeber's account of debt insofar as his "inscription of debt into a story of the destruction of community by quantification and abstraction" misses an opportunity to observe how debt also constructs social hierarchies. Id. at 5–6. Consequently, building on Graeber's account that "state-driven commercial economies destroy human economies" in part through the mechanism of debt, Joseph posits that debt plays an important role in both "abstract[ing] and particular[izing]" social relationships in ways that are harmful. Id. at 5, 7 (noting that Graeber's theory of debt "cannot account for the predatory attention to the particulars of

Debt, with its abstraction of obligation, not only destroys human relationships in the name of monetary equivalence and equilibrium, it also constitutes and particularizes social relationships.[315] It defines and then subordinates debtors in the social hierarchy.[316] It both destroys *and* produces social relationships, often to the detriment of the designated debtor, and it helps to "generat[e] . . . the particular differences on which the abstractions depend."[317] By single-mindedly mandating that debtors must satisfy their debt in terms of quantified equivalence, debt necessarily subordinates debtors to their creditors, notwithstanding other social considerations like fairness or community that might seek to balance the power relationship between any two members of a society or between the state and its constituents.[318] This notion is borne out by a property system that readily casts people out of their homes through foreclosure proceedings notwithstanding the catastrophic social consequences on both the immediately affected individuals and on entire communities.[319]

2. *Debt and the Reproduction of Inequality.* — In this regard, debt is itself central to the production and reproduction of social hierarchy that borrowing as equality is deployed to address.[320] Its market-based logic of mandatory, quantifiable equivalence, even as to human beings, has provided the rationale and legal basis for the subjugation of marginalized

borrowers . . . enabled by the apparently depersonalized technologies of mortgage lending").

315. See Miranda Joseph, Debt to Society: Accounting for Life Under Capitalism 18 (2014).

316. Id. For example, citing the work of Saidiya Hartman, Joseph observes: "While under slavery economic abstraction (the treatment of racialized persons as commodities) constituted the particularity of slave subjectivity, after emancipation the political abstraction of liberal citizenship—liberal freedom—constituted racialized economic subjects, always already indebted for their very freedom as well as for their economic survival . . . ." Id.

317. Id. at 19; see also Maurizio Lazzarato, The Making of the Indebted Man 32 (Joshua David Jordan trans., 2011) ("The concept of speculation only covers one aspect of how debt works and prevents us from seeing how it produces, distributes, captures, and shapes subjectivity.").

318. Graeber, supra note 26, at 158 (arguing that human obligation, as then reduced to and quantified by a line item in ledger (and consequently stripped of the moral and communitarian bounds of its forbear), tends to justify the commission of the inexcusable in the name of debt settlement).

319. See, e.g., Jeff Ostrowski, Why the Coming Foreclosure Crisis Will Look Nothing Like the Last One, Phila. Inquirer (Sept. 19, 2020), https://www.inquirer.com/real-estate/housing/home-foreclosure-coronavirus-forebearance-20200919.html [https://perma.cc/666B-2RNC] (observing that "[t]he coronavirus recession is all but certain to cause a spike in foreclosures"); see also K-Sue Park, Money, Mortgages, and the Conquest of America, 41 L. & Soc'y. Inquiry 1006, 1024–25 (2016) (describing the mortgage, a "brand-new American commodity," as it developed in the colonial period as a way to use debt to alienate native populations from their homelands).

320. Graeber, supra note 26, at 158; see also Darity et al., supra note 236, at 29 (describing mortgage debt and student debt as "good debt" yet observing that "the implication of so-called 'good debt' has different meaning, once we consider race and the prevailing framework of subjecting a marginalized racial group to inferior housing and educational products, predatory finance, and labor market discrimination").

communities, even when countervailing interests in fairness might counsel otherwise. Consequently, we should be especially wary of the introduction of any debt in vulnerable communities in light of debt's documented capacity to establish and then reproduce social hierarchy.[321]

For example, the logic of debt provided the legal basis for the Federal Housing Administration's initial postcrash racialized exclusion. Although there are searing accounts of the open-faced discriminatory exclusion that infected the FHA,[322] it was specifically the logic of collateral values, i.e., debt's mandate of repayment—in the form of the insistence on stable collateral values as central to the government's subsidization of private mortgages—that provided the explicit justification for the FHA's exclusionary policies. If the government was to subsidize these privately issued loans, the collateral securing those loans had to maintain its value in order to ensure the viability of the program.

The FHA Underwriting Manual explicitly framed discrimination as a function of the requisite stability of home values. The manual and the FHA's delegation of the administration of the program to a variety of private citizens ensured that the social consideration and context would frame the economic transactions.[323] Rather than being based on traditional economic concepts like ability to repay, value and stability were based on racial identity and the social structure of segregation. Maintenance of property values and stability became the reason to avoid the "infiltration" of white neighborhoods by people of color.[324] Moreover, city centers and already integrated neighborhoods were disfavored based on the inclinations of the private actors making the meaningful decisions. In other words, the social context became the basis for the FHA's purportedly economic decision to discriminate openly in deciding which mortgages it would insure. Exclusion was premised on the supposed risk of default because borrowers in a home with plummeting value would likely end up in foreclosure, in turn ensuring the failure of the FHA's mandate.

Once Congress determined to make such exclusion illegal, the social context in which mortgage debt underwriting had developed was already built into the economic system. Even with prime loans, African Americans can never realize the same wealth enhancement from buying a house because the fact that they are African American means that the collateral is perceived to be worth less relative to the same home owned by a white

321. See Park, supra note 319, at 1009; see also Castro Baker, supra note 273, at 62 ("Although economic policy can be interpreted as outside the purview of social work, social policy is increasingly path dependent on lending policies as the risks of the market economy are steadily shifted onto the individual.").

322. E.g., Rothstein, supra note 63, at 65–67.

323. Hyman, supra note 40, at 63 ("The casual racism, antiurbanism, and pro-development assumptions of the bureaucrats drove the planning of the [FHA] manual, and when developers adhered to it, as they had to if the mortgages on the homes were to be eligible for FHA insurance, the newly constructed world reflected this vision.").

324. See, e.g., Taylor, Race for Profit, supra note 5, at 254.

person, just as dictated by the FHA in 1936.[325] This reflects how socially constructed appraisal of property value remains cemented in the logic of private mortgage lending.[326]

The economic transactions that marked the rise of mass mortgage lending as a social good were predicated on a deeply raced and gendered understanding of value as rooted in the logic of debt repayment. The ostensibly economic concern for stable collateral value was mired in the social environment and structure in which it was born, and this imperative of repayment sanctioned racialized subordination. In other words, the FHA's discriminatory exclusion, as rooted in the mandate to secure the stability of collateral values, reflects how the logic of debt justified and reproduced racial segregation that marked prevailing conceptions of social hierarchy. Debt's penchant for abstraction and commodification of all things to serve the imperative of equivalent monetary repayment constrained integration in the wake of mass mortgages, reproducing racial segregation and further entrenching racialized poverty.[327]

In the balance, the capacity of borrowing money to redress deeply seated socioeconomic inequality is limited so long as the logic of debt implicitly sorts winners and losers and perpetuates the identification of groups that will fall into one category versus another.[328] This work of debt is unsurprising. Debt has long been explicitly used as a tool of literal and justified subordination.[329] For example, the logic of debt has driven and continues to drive the negative impact of economic sanctions on marginalized communities.

Since at least the Reconstruction Era, debt has frustrated countervailing interests in proportionality of punishment and has also provided a legal justification for the continued subordination of African American men. In the Reconstruction Era, debt obligations, as then satisfied through

325. See Dickerson, Cult of Homeownership, supra note 66, at 856–57.

326. See Taylor, Race for Profit, supra note 5, at 254. For example, in arguing that in order "for blacks to have more wealth at home, we need to start investing outside of it," Professor Dorothy Brown has observed: "Research shows that homes in majority black neighborhoods do not appreciate as much as homes in overwhelmingly white neighborhoods. This appreciation gap begins whenever a neighborhood is more than 10% black, and it increases right along with the percentage of black homeowners." Brown, supra note 243.

327. See Rothstein, supra note 63, at 64–66 (explaining how the need to ensure repayment lead the HOLC and FHA to racially discriminate).

328. See, e.g., Michael D. Sousa, The Persistence of Bankruptcy Stigma, 26 Am. Bankr. Inst. L. Rev. 217, 218 (2018).

329. See generally Graeber, supra note 26 (exploring examples throughout history where debt has functioned in this manner). For example, scholars have begun to recover the significant role that credit and debt, together, played in the expansion of slavery throughout the American Southeast and West. E.g., Edward E. Baptist, The Half Has Never Been Told: Slavery and the Making of American Capitalism 245 (2014) (describing how credit and debt built the fortunes of many individual Americans in the early nineteenth century, as well as the collective fortune of the nation, yet also served to propagate the institution of slavery by facilitating its spread across the continent).

the practice of convict leasing, "reproduced many of the immediate practical realities of slavery—a vast underclass of laborers, held to their jobs by force of law and threat of imprisonment, with few if any opportunities for escape."[330]

Convict leasing was a debt-driven legal institution. Its architects criminalized the mundanity of Black life by passing a variety of laws forbidding innocuous behavior such as vagrancy.[331] Importantly, these crimes often carried fines and costs that the convicted struggled to pay. When the condemned could not pay the fines, the state could legally hold them as prisoners long after common principles of proportionality would have sanctioned in light of the innocuity of the predicate offense. Sometimes this meant a year or more of hard labor that resulted in dismemberment and death.

Once debt entered the picture, there was no longer any requirement that the initial crime bear a proportional relationship to the punishment, like hard labor.[332] This is because the retribution was no longer geared toward the condemned's status as a vagrant. Instead, it was their status as a debtor of the state that legitimized such harsh punishment.[333] Thus,

330. Tobias Barrington Wolff, The Thirteenth Amendment and Slavery in the Global Economy, 102 Colum. L. Rev. 973, 983 (2002); see also Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II, at 53 (2008). The recent discovery of the remains of ninety-five African Americans in Sugar Land, Texas attests to the horrors of convict leasing, with its debt-sanctioned destruction of life. Preliminary analysis suggests that each of these Sugar Land Ninety-Five was likely a victim of convict leasing, in which "conditions were still so hellish that prisoners wrote songs expressing that they would rather die than spend another day toiling under the hot sun." Meagan Flynn, Bodies Believed to Be Those of 95 Black Forced-Labor Prisoners from Jim Crow Era Unearthed in Sugar Land After One Man's Quest, Wash. Post (July 18, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/07/18/bodies-of-95-black-forced-labor-prisoners-from-jim-crow-era-unearthed-in-sugar-land-after-one-mans-quest/?noredirect=on&utm_term=.97341b1802ce (on file with the *Columbia Law Review*).

331. Blackmon, supra note 330, at 53; Michele Goodwin, The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration, 104 Cornell L. Rev. 899, 937–38 (2019) ("Some penalties for minor offenses were as high as fifty dollars. For Blacks who could not afford to pay such fines, Black Codes authorized their confinement to labor."); Ahmed A. White, Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective, 38 Am. Crim. L. Rev. 111, 128 (2001) (observing that these Black Codes were "tailored to increase dramatically the number of young, able-bodied black men available for lease").

332. See, e.g., Goodwin, supra note 331, at 935–38 (describing how the penalties for minor offenses in Black Codes were used to drive Blacks into debt that would be impossible to pay off); id. at 941 ("[P]risoners [in the convict leasing system] could be leased for 'hard labor' either within the county or elsewhere." (internal quotation marks omitted) (quoting William Warren Rogers & Robert David Ward, The Convict Lease System in Alabama, *in* The Role of Convict Labor in the Industrial Development of Birmingham 1, 1 (1998))).

333. See, e.g., Tamar R. Birckhead, The New Peonage, 72 Wash. & Lee L. Rev. 1595, 1612 (2015) (describing Mississippi's "Black Code," which "imposed criminal penalties [on formerly-enslaved persons] for such malleable offenses as running away, displaying lewd behavior, and being an idle or disorderly person" and "allowed convicted blacks to be hired out at auctions to pay their fines and costs" incurred from such dubious convictions).

while traditional principles of proportionality in punishment would likely reject the notion that hard labor could be an appropriate punishment for a relatively harmless crime like vagrancy,[334] the logic of debt does not recognize similar limitations. Instead, their status as debtors relative to a creditor state legitimized and "justif[ied] [state] behavior that would otherwise seem utterly immoral," and so it was permissible within the ambit of debt's superseding logic of imperative equivalence.[335]

This unyielding imperative of equivalence functionally maintained the existing Black/white, slave/master social hierarchy, with debt providing, in part, the legal basis to keep people under control against their will.[336] In a world upended by the sudden end of legal slavery, with its aftermath of disruption to both labor arrangements and an easily cognizable Black/white social order, debt legitimized the continued subordination of African American men.[337]

This debt-driven logic continues to operate as a significant subordinating force in the persistence of economic sanctions in the present-day criminal justice system.[338] The term "'[e]conomic sanctions' broadly refer[s]

334. See Ken Levy, Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System, 66 Rutgers L. Rev. 629, 640, 646–47 (2014) (explaining the purpose of retributivism and implying that vagrancy, in its classification as a misdemeanor, is a crime warranting relatively benign punishment); Alice Ristroph, Proportionality as a Principle of Limited Government, 55 Duke L.J. 263, 266 (2005) ("[P]roportionality is better understood as an external limitation on the state's power to incarcerate . . . individuals, and this limitation applies whether the state is punishing to exact retribution, to deter, to incapacitate, or (as is most often the case) to pursue some amalgam of ill-defined and possibly conflicting purposes.").

335. Graeber, supra note 26, at 158.

336. Wolff, supra note 330, at 981–82 ("[Similar to slavery,] peonage pressed the law into service to enforce the property rights of the creditor, compelling service from the worker in payment of the debt . . . . [T]hese laws helped to restrict the movement of freed black workers and thereby keep them in a state of poverty and vulnerability."); see also Dwyer, supra note 3, at 249 (observing that, in the criminal context, "[t]he state itself contributes to the accumulation of debts" and uses debt as a means of "social control and punishment, further disadvantaging already significantly deprived populations").

337. Goodwin, supra note 331, at 942 ("The very idea of convict leasing was an innovation for the South, which was desperate to maintain life as it existed prior to the Civil War and Thirteenth Amendment's ratification. Black subordination was critical to maintaining political and social tradition as well as an ordered way of southern life."). Professor Michele Goodwin similarly describes the work of debt in relation to sharecropping, another debt-fueled mechanism of postslavery subordination. See id. at 935 ("[P]lantation owners in the South 'intended to keep "free" Negro labor under permanent control,' and they found the means to do so through coercive contracts that bound Blacks to interminable future indebtedness that they could never pay off." (quoting Herbert Hill, Black Labor and the American Legal System: Race, Work, and the Law 66 (1985))).

338. See, e.g., Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor 161 (2016) [hereinafter Harris, A Pound of Flesh] (observing that the contemporary use of monetary sanctions keeps poor and racially marginalized people under constant surveillance and perpetual punishment); Abbye Atkinson, Consumer Bankruptcy, Nondischargeability, and Penal Debt, 70 Vand. L. Rev. 917, 963 (2017) [hereinafter

to any legal financial obligations, including restitution, fines, and fees."[339] In the last few decades, there has been an "unfettered" rise in their use as an alternative to carceral punishment and as a source of funds for "cash-strapped justice systems."[340] Economic sanctions fall disproportionately on poor people of color, "result[ing] in overwhelming penal debt among those least able to pay it."[341] Moreover, while the inability to pay this debt is itself incapacitating for individuals in these communities,[342] it also changes their relationship with the state, further subordinating them in significant ways. Specifically, the failure to repay outstanding penal debt justifies exclusion from voting, restriction of other basic constitutional protections, and more.[343] Therefore, to understand current fines/fees policies that run rampant among indigent communities, one must first recognize those policies as driven in significant part by the logic of debt, rather than by principles of proportional retribution. The consequences of these policies show the subordinating impact of debt in marginalized communities.[344]

IV. TOWARD A COHERENT APPROACH TO BORROWING AS EQUALITY

If Congress is serious about subsidizing borrowing as a means of equality and mobility, then it has to align both the front- and back-end aspects—the economic and noneconomic aspects of credit *and* debt. What is needed then is a coherent and integrated federal policy that accounts for the realistic role and consequence of debt in the reverie of credit as equality. This Part offers three suggestions for change. In a more concrete sense, it argues that Congress should amend and align its borrowing-as-equality statutes to reflect meaningfully the essential connection between credit and debt. It then argues that Congress should reconsider situating solutions to deeply entrenched social pathologies within market solutions

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Atkinson, Discharging Penal Debt] ("Individuals who cannot pay penal debt also face extended loss of rights.").

339. Jessica M. Eaglin, Improving Economic Sanctions in the States, 99 Minn. L. Rev. 1837, 1844 (2015).

340. See id. at 1842–50.

341. Atkinson, Discharging Penal Debt, supra note 338, at 958.

342. E.g., Ondersma, supra note 24, at 2211. Professor Chrystin Ondersma further observes that "debt burdens can have extremely dire consequences. In addition to harassing creditor calls, threats of garnishment, repossession, and foreclosure, in many instances debtors are even threatened with arrest, and in fact jailed, in cases stemming from small amounts of private debt." Id. at 2218.

343. See Harris, A Pound of Flesh, supra note 338, at 48–51; see also Jones v. Governor of Fla., No. 20-12003, 2020 WL 5493770, at *1 (11th Cir. Sept. 11, 2020) (holding that a requirement that felons pay all fines and fees before they regain the right to vote is constitutional).

344. Harris, A Pound of Flesh, supra note 338, at 155 ("Monetary sanctions reinforce existing class inequalities by sentencing a population that is often undereducated, unemployed, homeless, and physically or mentally disabled to pay relatively large amounts of money.").

without express reference to specific downside effects, as is the case in its current borrowing-as-equality policy.

A. *Shifting the Semantics of Credit Optimism*

First, in its proffer of subsidized borrowing as a means of equality, Congress should use unified terminology in order to capture and convey a more realistic picture of the relative positive and negative aspects of borrowing. Within the currently bifurcated sphere of its consumer finance regulation, however, Congress uses the terms "credit" and "debt" to present a meaningful distinction that invokes opposing valences. Credit is valorized and ameliorative, a meaningful mechanism of positive social change; debt is demonized and pejorative, its forgiveness deemed a social ill. Consequently, as matter of nomenclature, although credit/creditor and debt/debtor describe a singular relationship, Congress and regulators tend to alternate between the use of "credit" and "debt" depending on the intended tone of the discourse.

For example, the Consumer Financial Protection Bureau (CFPB) often uses "credit" when referring to the positive effects of trading on one's future income for present advantage.[345] The agency identifies the expansion of "access to credit" as an important tenet of its mission to help the financially underserved.[346] In advising practitioners on how to support their "economically vulnerable" clients in "achiev[ing] their financial goals,"[347] the CFPB directs that "[l]ocal governments and community-based organizations have opportunities to help people build positive credit histories and expand their choices in obtaining credit."[348]

By contrast, the CFPB tends to use "debt" to refer to a mere consequence of credit gone wrong: limiting and burdensome financial obligation.[349] Indeed, nowhere in the CFPB's online presence is debt characterized in a positive light. There is no mention of building positive debt histories or obtaining debt as a mechanism of uplifting consumers or helping consumers meet their financial goals. Instead, unlike the ameliorative credit, "debt" is merely an undesirable outcome from which consumers should seek "relief" and "settlement,"[350] reflecting the general proposition that debt is a weight and an impediment.

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345. See, e.g., Expanding Access to Credit, CFPB, https://www.consumerfinance.gov/practitioner-resources/economically-vulnerable/expanding-credit-access [https://perma.cc/EN4W-B74X] (last visited Aug. 20, 2020).

346. Serving Economically Vulnerable Consumers, CFPB, https://www.consumerfinance.gov/practitioner-resources/economically-vulnerable [https://perma.cc/S6JJ-WE97] (last visited Aug. 20, 2020).

347. Id.

348. Expanding Access to Credit, supra note 345.

349. See, e.g., Serving Economically Vulnerable Consumers, supra note 346 ("Debt getting in your way?").

350. See, e.g., CFPB Secures $480 Million in Debt Relief for Current and Former Corinthian Students, CFPB (Feb. 3, 2015), https://www.consumerfinance.gov/about-

Congress's use of "credit" in its borrowing-as-equality policy arguably promotes financial obligation as a means of social mobility and equality, even though the risk is likely to be concentrated on the borrower and even amplified for marginalized borrowers.[351] Although, as an essential matter, Congress could have reasonably passed the Equal *Debt* Opportunity Act instead of the Equal *Credit* Opportunity Act, the classification of democratized financial obligation as "credit" in the first instance has at least two important consequences. First, the classification is politically expedient because it permits regulators to draw consumers' eyes to the shiny front door and away from the worrisome state of the foundation, to government officials' political benefit.[352] Second, focusing on the reverie of "credit" while keeping "debt" as a mere afterthought draws marginalized people into the dream of financed equality while conveniently situating the resulting lack of any meaningful social change on them as well.[353]

First, federally subsidized credit had consistently been "an important tool of statecraft [since] the earliest days of the nation,"[354] evincing an attractive "political lightness."[355] The regulation of increased access to credit, including the move to deregulate credit markets more generally, functioned "as both a response to market failures and a means for combating inequality," easing the political pathway for "lawmakers, who must answer to multiple audiences with conflicting agendas."[356] In this regard, "credit" has tremendous allure as a political mechanism.[357]

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us/newsroom/cfpb-secures-480-million-in-debt-relief-for-current-and-former-corinthian-students [https://perma.cc/B8TG-CK23]; What Are Debt Settlement/Debt Relief Services and Should I Use Them?, CFPB, https://www.consumerfinance.gov/ask-cfpb/what-are-debt-settlementdebt-relief-services-and-should-i-use-them-en-1457 [https://perma.cc/4LNG-U8EY] (last updated Feb. 15, 2017).

351. E.g., Mian & Sufi, supra note 232, at 23 (observing that "a fundamental feature of debt [is that] it imposes enormous losses on exactly the households that have the least").

352. See Quinn, supra note 60, at 14 (discussing the government's centrality in credit provision and how "credit" reinforces the "understanding of U.S. government officials as creative and consequential market participants").

353. See Taylor, Race for Profit, supra note 5, at 169–70 (noting that "section 235 and other low-income homeownership programs were not welfare—far from it" and describing how these policies placed any resultant "failures" at the feet of those whom they were ostensibly meant to help).

354. Quinn, supra note 60, at 18 (noting that since the Founding, federal policymakers have deployed credit to address an array of political challenges).

355. Id. at 11–13 (observing that "officials have realized that carefully orchestrated engagements with finance can please constituents, save tax dollars, and avoid political gridlock" at a relatively small cost). Professor Sarah Quinn argues that credit-based policies are "fiscally light" because when structured as an insurance scheme, they do not require direct expenditures of federal funds. Id. at 11. Moreover, even when framed in the context of a direct loan scheme like in student lending, initial outlays of federal dollars are then offset by income earned through repayment and fees or through the securitization mechanism. Id.

356. Id. at 13.

357. See id. at 1 (arguing that U.S. lawmakers "have long used . . . easy credit as [a] policy tool[]"); see also Krippner, Democracy of Credit, supra note 3, at 2 (noting that

For Congress, acting against the backdrop of increased civil unrest fomented by economic inequality, inflation, and economic strife that took hold in the 1970s,[358] credit provided a means to respond to activists already indoctrinated into the myth of access to conventional credit as a symbol of equality and social mobility. And credit allowed Congress to regulate the allocation of scarce resources while avoiding any significant political fallout from the consequent distributive choices.[359] By both promoting widened access to loans and freeing credit markets from their regulatory restraints, policymakers conveniently delegated both the responsibility and the risk of distribution of capital to private markets, with the expectation that the price mechanism would do the unseemly work of rationing.[360] But, instead of encouraging the market to constrain its allocation of credit, deregulation "[opened wide] the taps on credit," temporarily filling some of the spaces left empty by "festering social tensions."[361] In this sense, credit solved the immediate political problem, functioning as "the most seductive answer" to the ills of inequality.[362] Specifically, "Easy credit has large, positive, immediate and widely distributed benefits, whereas the costs all lie in the future. It has a payoff structure that is precisely the one desired by politicians."[363] Moreover, "Under the right conditions, credit distribution promises growth without costs, without appearing to redistribute wealth, and without the polarizing specter of government overreach."[364] With its political allure, then, democratizing access to "credit," with little to no simultaneous focus on the inherent risks of debt, conveniently aligns the corrupted demands of marginalized groups with Congress's self-serving political interests in blame-free governance.[365]

Second, the deployment of "credit" conscripts marginalized groups into the reverie of social mobility through borrowing money; it draws attention to the aspirational upside of the creditor-debtor relationship and

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policymakers "relied on credit to ease distributional conflicts and supplant the welfare state").

358. Krippner, Capitalizing on Crisis, supra note 103, at 58–59; Raghuram G. Rajan, Fault Lines: How Hidden Fractures Still Threaten the World Economy 33 (2010) (describing the economic conditions of 1970s); see also supra Part I.

359. Krippner, Capitalizing on Crisis, supra note 103, at 59 (explaining that "[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").

360. Id. at 59–60.

361. Id.

362. Rajan, supra note 358, at 31 (making a set of similar observations with respect to credit as an expedient political solution to rising inequality).

363. Id. Consequently, Professor Raghuram Rajan observes that "an important political response to inequality [i]s populist credit expansion," id. at 42, yet maintains that "[o]n net, easy credit . . . [is] an extremely costly way to redistribute," id. at 44. Rajan further notes that in the international context, lending as foreign aid "leads to dependency, indebtedness, and poor governance and rarely leads to growth." Id.

364. Quinn, supra note 60, at 13.

365. See Rajan, supra note 358, at 31 (describing credit as "the path of least resistance").

draws the curtain on the inherent economic and social risk engendered by the act of borrowing money.[366] It places the burden of solving for entrenched and intractable inequality on marginalized borrowers rather than on regulators, Congress, lenders, or other stakeholders who freely participate in the reproduction of existing inequality. Congress thus advises marginalized groups to borrow their way to a better livelihood and social position. Yet, when a marginalized borrower is unable to repay their obligation, as is required by the market logic of debt, they are to blame for the inability to repay the obligation that itself reproduces the subordination and hierarchy from which they hope to escape in part by borrowing.[367] In other words, they bear the blame of not being able to lift themselves out of social subordination.[368]

In other words, Congress's rhetorical deployment of "credit" promotes financial obligation as a social good and downplays the significant risks of financial obligation. It further suppresses any meaningful inquiry into whether financial obligation is a stable platform on which to base the welfare of the most vulnerable communities, much less anyone else. We can see this sleight of hand at work in the push for "access to credit" in the Civil Rights and Women's Rights Movements of the 1960s and 1970s,[369] and we can see it in modern times as well. For example, Jesse Jackson formed the Rainbow Push Wall Street Project in part to "provide more business opportunities" and "capital" for minority groups.[370] That Jackson, a Civil Rights icon, has come to embrace private lending as an important mechanism of social equality in the twenty-first century is indicative of how deeply this notion of credit as capacity, with little express consideration of debt, now runs in the discourse of inequality. A unified terminology that presents a more realistic picture of the relative positive and negative aspects of borrowing might temper the optimism bias inherent in Jackson's account.

B. *Incorporating Debt Forgiveness into Federal Borrowing Legislation*

Second, to the extent that the existing borrowing-as-equality statutes are intended to promote both the economic and noneconomic welfare of marginalized groups, Congress should amend those statutes to specifically account for the countervailing force of debt on these communities. This move would recognize that marginalized groups are going to struggle and

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366. See, e.g., Mian & Sufi, supra note 232, at 19–24 (describing the economic consequences of debt on low-wealth households in the Great Recession).

367. E.g., Taylor, Race for Profit, supra note 5, at 169–70.

368. See, e.g., Baradaran, Jim Crow Credit, supra note 32, at 943 (observing that "the state has repeatedly placed the burden to close the wealth gap on the black community itself").

369. See supra section I.C.

370. About the Wall Street Project, Rainbow Push Wall St. Project, https://rainbowpushwallstreetproject.org/about.html [https://perma.cc/A283-TKJ4] (last visited Aug. 20, 2020).

fail disproportionately in the consumer credit market for reasons that have more to do with entrenched racism, sexism, and the like,[371] and less to do with profligacy or lack of personal responsibility. Moreover, the consequences of their failure are similarly magnified for those same reasons.[372] Accounting for debt specifically within the statutes would help to align the purported socially oriented goals of improved access to borrowing with the realities of a market that is constituted within a persistently raced and gendered society.

Specifically, the statutes might authorize partial discharge of related debt or loan modification as part of the available remedies for a violation of their mandates. This would relieve borrowers of the burdens associated with filing for bankruptcy, while providing a targeted remedy. For example, the ECOA currently authorizes individual civil action against creditors who violate its mandates, and available relief includes actual damages, punitive damages, equitable and declaratory relief, and costs and attorney fees.[373] Congress might add to this suite of sanctions a specific provision that would require creditors in violation to forgive some portion of loans that violate the ECOA's prohibition on discriminatory lending.

The HEA provides another opportunity for Congress to meaningfully align its borrowing-as-equality policy with the reality that, especially for marginalized groups, debt has the tendency to frustrate the net present value of a loan. Currently, of the four statutes on which this Article focuses, the HEA gets closest to accounting specifically for the entrenched disparities in income or adverse raced and gendered valuation of assets that diminish the net present value of an educational loan in insidious ways. Over time, Congress has amended the HEA to provide alternative means of loan repayment in order to assist eligible borrowers in repayment.[374] This includes programs that are geared to the actual income of the borrower, like the Income Contingent Repayment (ICR) plan.[375] The ICR plan currently caps monthly payments "at 20% of the difference between the borrower's adjusted gross income and the relevant federal poverty guideline,"[376] and also provides for loan forgiveness, provided that the borrower makes twenty-five years' worth of monthly payments.[377]

This may seem generous, but the ICR plan is biased in favor of borrowers that live in traditional family structures. For example, monthly

371. See supra Part III.

372. See Mian & Sufi, supra note 232, at 19 (observing that "[w]hen house prices collapse in an economy with high debt levels, the collapse amplifies wealth inequality because low net-worth households bear the lion's share of the losses").

373. 15 U.S.C. §§ 1691e(a)–(d) (2018). The ECOA also now authorizes administrative enforcement by the CFPB. Id. § 1691e(e).

374. 20 U.S.C. § 1087e(d) (2018); Doug Rendleman & Scott Weingart, Collection of Student Loans: A Critical Examination, 20 Wash. & Lee J. C.R. & Soc. Just. 215, 226 (2014).

375. 20 U.S.C. § 1087e(d)(1)(D); 34 C.F.R. § 685.209(b) (2019).

376. Rendleman & Weingart, supra note 374, at 228.

377. 20 U.S.C. § 1087e(m)(1)(A)(iv), (m)(2); 34 C.F.R. § 685.209(b)(3)(iii)(D).

payments are determined in part on family size,[378] defined under the relevant regulations as "the borrower, the borrower's spouse, and the borrower's children" and "other individuals" if they "live with the borrower[] and receive more than half their support from the borrower and will continue to receive this support from the borrower for the year the borrower certifies family size."[379] This definition is biased against communities whose familial structures and structures of support do not match this definition.[380] Moreover, the requirement of twenty-five years' worth of payments, which are determined in ways that do not truly reflect what would be a manageable amount of money for a marginalized borrower, is a harsh exaction on which to base forgiveness. In essence, these borrowers must struggle for the bulk of their working lives in order to receive relief under the existing ICR regime, effectively tamping down on the ability of the loan to engender meaningful socioeconomic mobility.

Another inadequate program currently in effect is the Public Service Loan Forgiveness (PSLF) program, passed by Congress in 2007.[381] The PSLF programs authorizes loan forgiveness for graduates who go into various public service jobs and, while in such jobs, make 120 months' worth of qualifying payments.[382] Per the relevant regulations, the purpose of the PSLF program is "to encourage individuals to enter and continue in full-time public service employment," not to account for the challenges that debt might pose for graduates more generally.[383] This approach limits the range of employment into which borrowers can enter to relatively low-wage work, rather than functioning to support students who want to go into relatively high-wage work but, notwithstanding the high wage, may struggle to repay their debt for reasons beyond their control. Thus, in previous work, I have argued that for African American graduates who have to contend with a range of wealth-building obstacles, "the [PSLF's] requirement that participants work in the public sector for a set amount of time seems a limitation on the aspirations of the recent graduate who hopes to work in the private sector."[384]

Moreover, more than ten years after its passage, the PSLF seems an abject administrative failure. In 2018, the Department of Education (DOE), tasked with administering various federal loan programs including

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378. 34 C.F.R. § 685.209(b).

379. Id. § 685.209(a)(1)(iv).

380. See, e.g., Christina Shu Jien Chong, Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination, 18 U. Md. L.J. Race, Religion, Gender & Class 31, 46 (2018) (describing how standardized tests are biased in favor of white children over African American children because they conform more closely to the former's cultural conceptions of home and family structure).

381. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (codified as amended in scattered titles of 20 U.S.C.).

382. 20 U.S.C. § 1087e(m); 34 C.F.R. § 685.219.

383. 34 C.F.R. § 685.219(a).

384. Atkinson, Race and Bankruptcy, supra note 9, at 41.

the PSLF program, reported that of the approximately 33,000 applications that it had received, roughly ninety-nine percent have been denied for either "not meeting the program requirements" or "due to missing or incomplete information on the form."[385] This abysmal showing prompted Seth Frotman, then CFPB Student Loan Ombudsman and Head of the Office for Students and Young Consumers, to publicly resign in protest and led Congress to demand answers from the DOE.[386] If Congress truly intends to promote equality through the subsidization of educational borrowing, Congress should remove the various administrative obstacles to relief and the quid-pro-quo regimes that currently mark the HEA, as amended, and simply provide for a more straightforward means of loan forgiveness for graduates.

In addition to accounting for loan forgiveness within its credit-as-capacity statutes, Congress should also effect meaningful changes within the existing bifurcated structure by making its credit-as-capacity statutes move in tandem substantively and procedurally with its debt statutes. In other words, Congress could mandate that any changes in one should prompt complementary changes in the other. For example, changes to the ECOA or CRA that are meant to provide for greater access to loans should be followed by changes to the Bankruptcy Code that account for the attendant risks to those potential borrowers. First and foremost, this should mean merging the currently disparate pathways of the statutes through Congress. For example, the ECOA, CRA, and FDCPA move though the Senate Committee on Banking, Housing, and Urban Affairs (Banking) and the House Committee on Financial Services (Financial Services),[387] while the Bankruptcy Code exists in the purview of the House and Senate Judiciary Committees.[388] The latter reflects the punitive outlook on debt forgiveness that Congress currently takes, but insofar as Banking and Financial Services take on a positive view of regulating the consumer

385. Federal Student Aid Posts New Reports to FSA Data Center, Fed. Student Aid (Sept. 19, 2018), https://ifap.ed.gov/electronic-announcements/09-19-2018-general-subject-federal-student-aid-posts-new-reports-fsa-data (on file with the *Columbia Law Review*); Cory Turner, Why Public Service Loan Forgiveness Is So Unforgiving, NPR (Oct. 17, 2018), https://www.npr.org/2018/10/17/653853227/the-student-loan-whistleblower [https://perma.cc/3S6F-KL3Q].

386. See Cory Turner, Senators Demand Answers from CFPB Head After Student Loan Watchdog's Resignation, NPR (Sept. 14, 2018), https://www.npr.org/2018/09/14/647467582/senators-demand-answers-from-cfpb-head-after-student-loan-watchdogs-resignation [https://perma.cc/2Y28-LJNN].

387. H.R. Doc. No. 115-177, § 722, at 463–64 (2019) (describing the jurisdiction of the Standing Committees, and noting that the jurisdiction of the Committee on Financial Services includes "[b]anks and banking" in addition to "[m]oney and credit," among other things); S. Doc. No. 113-18, at 20 (2013) (defining the same with respect to the jurisdiction of the Committee on Banking, Housing, and Urban Affairs).

388. H.R. Doc. No. 115-177, § 729(1)(4), at 473 (describing the jurisdiction of Standing Committees and, in noting the jurisdiction of the Committee on the Judiciary, lumping together "[b]ankruptcy, mutiny, espionage, and counterfeiting"); S. Doc. No. 113-18, at 25 (same).

capital markets, Banking and Financial Services should also be tasked with thinking about how to support borrowers in distress. This relatively simple change would better reflect the essential connection between credit and debt and perhaps lead to more considerate and humane policymaking.[389]

C. *Grasping the Nettle in the Proffer of Borrowing as Equality*

Finally, any legislative policy that promotes borrowing as a social good must engage meaningfully with the consequences of debt on marginalized groups.[390] If Congress hopes to address meaningfully the problem of inequality and social mobility through subsidizing consumer borrowing,[391] then its policy must account for the ways in which debt itself drives the very inequality that democratized borrowing is purportedly deployed to correct.[392]

First, notwithstanding the widespread expansion of the public–private welfare state in the United States,[393] it is vital that Congress consider how ceding administration and implementation to private actors contaminates the process with those private actors' own socially constructed norms, value judgments, and interests in maintaining the status quo.[394] The rise of "predatory inclusion"—where loans are extended at high interest rates or on other similarly onerous terms—in the wake of the apparent failure of the Fair Housing Act's low-income homeownership programs to improve the welfare of African Americans is instructive. The Fair Housing Act of 1968 (New FHA), like the ECOA and CRA, also trumpeted democratized access to "credit" as a catalyst for greater socioeconomic inclusion

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389. Funnily enough, the only times when Congress seems to explicitly connect its regulation of credit to debt and vice versa are in arguments about the purported externalities of debt forgiveness. For example, in the vociferous debates around the BAPCPA amendments, proponents of the law argued that an important reason to worry about the discharge of debt was the inherent consequence of debt relief on the availability of credit for future borrowers. See, e.g., Bankruptcy Reform: Hearing Before the S. Comm. on the Judiciary on S. 256, 109th Cong. 29–33 (2005).

390. See Porter, Damage of Debt, supra note 24, at 984–85 (arguing that bankruptcy policy must be premised on the study of both the economic and noneconomic consequences of debt, particularly in marginalized communities).

391. E.g., Dean, supra note 177, at 135 (describing how "[m]inorities were particularly encouraged to take advantage of home ownership incentives from lenders and the federal government as a means of becoming upwardly mobile").

392. E.g., Park, supra note 319, at 1014 (recovering the historical role of debt in the subordination and alienation of Native people in the Colonial Era); see also Quinn, supra note 60, at 18 (observing that "credit continually carries forward the prejudices and inequalities of the past," and, as a consequence, "another way . . . [to] think of the lightness of credit policy [is] as historically serving the interests of white Americans").

393. See, e.g., Jacob Hacker, The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream 51–54 (2008) (examining a shift in attitudes toward personal responsibility and suspicion of the government provision of insurance).

394. Cf. Karl Polanyi, supra note 280, at 48 ("[M]an's economy, as a rule, is submerged in his social relationships.").

and status.[395] Yet, as Professor Taylor has shown, this New FHA failed in its mandate in part because it that was "tethered" to private market actors in the real estate industry who "discriminat[ed] against and demoniz[ed] . . . African Americans as unfit owners and detrimental to property values."[396] This meant that the New FHA's federal appropriations flooded into already segregated neighborhoods with dilapidated homes, yet worked mostly to line the pockets of the private actors who sequestered African American buyers within segregated spaces without engendering any meaningful increase in wealth. Perversely, the blame for the New FHA's failure was placed on the borrowers themselves, even as the influence of private discrimination on the program worked merely to reproduce the same inequality that homeownership through borrowing was ostensibly supposed to solve.[397]

If anything, then, the legacy of the New FHA has been to reproduce the familiar socially constructed notion of risk inherent to lending to socially marginalized groups, which in turn has justified the rise of subprime lending amongst the same.[398] The Office of the Comptroller of the Currency defines subprime loans as "loans [that] are for people with blemished or limited credit histories . . . [that] carry a higher rate of interest than prime loans to compensate for the increased risk to the lending institution."[399] The current logic and justification of subprime lending is informed by and infused with debt's mandate of equivalence;[400] it reasons that lending to purportedly high-risk borrowers, like many marginalized borrowers, requires high interest rates in order to hedge against the likelihood of default.[401] This logic of subprime lending, to the extent that it is tethered to notions of risk, illustrates the limitation of socially constructed and reproduced notions of economic value that seem to transcend existing

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395. See Fair Housing Act of 1968, Pub. L. 90-284, § 805, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3605 (2018)) (prohibiting discrimination from accessing financing to buy a home).

396. Taylor, Race for Profit, supra note 5, at 3–4. Taylor further argues: "When public policies are guided by the objectives of private enterprise, as the HUD homeownership programs undoubtedly were, they are clinched in a dance of conflict." Id. at 253.

397. Id. at 257 (showing that the "reemergence of the discourse of risk within the housing industry legitimized new stringent regimes of fees, fines, higher interest rates, and other modes of extraction").

398. Id.

399. Subprime Lending, Off. of the Comptroller of Currency https://www.occ.gov/topics/supervision-and-examination/credit/retail-credit/subprime-lending.html [https://perma.cc/HP7T-T6A2] (last visited Aug. 20, 2020).

400. See supra section III.B.

401. E.g., Am. Fin. Servs. Ass'n. v. City of Oakland, 104 P.3d. 813, 824 (Cal. 2005) ("While destructive lending practices occur most often in connection with subprime lending, such lending is not inherently abusive, and has enabled an entire class of individuals with impaired credit to enter the housing market or access the equity in their homes.").

efforts to regulate for borrowing equality.[402] As Taylor suggests, as long as private actors are charged with implementing government-subsidized borrowing, they will continue to determine, by reference to the existing social structure, where and with whom value does and should lay, reproducing and justifying the status quo.[403]

Second, Congress must account for the degree to which profit motives not only supersede the social aims of its privatized borrowing-as-equality policy but also justify the reproduction of subordination. For example, in arguing against proposed limits on the discharge of certain credit card debt in the run up to the passage of the BAPCPA, Professor Ronald Mann has shown how credit card lenders make the most money from borrowers who can only afford to pay the monthly minimum, month after month.[404] In other words, credit card companies' vociferous objection to a more streamlined discharge of credit card debt could be explained by their concern for profit, rather than worries of profligacy or wanton bankruptcy filing. Because prodebtor discharge rights would shrink the pool of struggling borrowers who pad the profit margins of credit card lenders, and because credit card lenders would make less profit if all borrowers could pay their balances in full every month,[405] credit card companies lobbied hard to impose a means test that would prohibit some distressed debtors from receiving a quick discharge of their credit card debt.[406]

In sum, by essentially privatizing significant aspects of equality and social mobility through the subsidy of loans, Congress is encouraging the most vulnerable groups to invest in self-help social mobility and equality. This is true despite an imperfect socially constructed market still informed in significant part by discrimination, raced and gendered hierarchy, and other social pathologies that predictably limit (if not overwhelm) the expected social and economic returns on that investment.[407] Consequently,

402. See Taylor, Race for Profit, supra note 5, at 258 (arguing that reflexively offering the construct of homeownership as the way to build economic value undermines the efforts to achieve wealth equality).

403. See Grewal & Purdy, supra note 38, at 13 (describing the dominant "consumer-citizen model of neoliberal economic doctrine" that, in part, characterizes modern American liberalism).

404. Ronald J. Mann, Bankruptcy Reform and the "Sweat Box" of Credit Card Debt, 2007 U. Ill. L. Rev. 375, 385.

405. Id. ("The successful credit card lender profits from the borrowers who become financially distressed" while "[f]inancially secure customers . . . do not generate any interest income, late fees, or overlimit penalties.").

406. Id. at 376–77.

407. See Christopher J. Lebron, The Color of Our Shame: Race and Justice in Our Time 46 (2013). In describing the persistence of social subordination along racial lines even in purportedly neutral economic transactions like the sale of a home, Professor Chris Lebron observes that:

> [T]he fundamental move necessary to undermine racial inequality in the deepest sense is to understand it as the *problem of social value*—the fact that blacks do not occupy equal place in the scheme of normative attention and concern upon which our society depends in the first place to justify

in pushing marginalized groups in this direction, Congress has an obligation to address the consequences of readily predictable failure. A first step would be to come to terms with the ways in which the social and the economic work together in lockstep and to take full account of the sources of inequality.[408] The proffer of "credit," when considered alone, is a necessarily incomplete response.

CONCLUSION

Congress has valorized borrowing money as a social good. In so doing, however, it has reduced its express focus to credit as capacious and alchemical,[409] leaving little room, in the first instance, for the reality of indebtedness. Rather Congress has left its express consideration of "debt" to residual treatment, with little account for the very powerful impact of debt on both economic and social advancement. This borrowing-as-equality policy downplays the notion that once a consumer borrows they are immediately a debtor; that "credit," once extended and received, is merely "debt" by another name. Consequently, the elevation of "credit" as a social good means that "debt" must also work as a social good. But if "debt" is itself central to the project of discrimination and the reproduction of social hierarchy, it seems unrealistic to believe that it can simultaneously be a consistent driver of social good. In this light, the notion that marginalized groups in the grips of historical and entrenched subordination can borrow their way into greater socioeconomic equality and social position seems unworkable. Without a significant transformation of our approach to borrowing money as a means of social change, reformers combating racial and gender subordination cannot expect much more than the reproduction of existing hierarchies wrought by the workings of credit and debt together. Although any antidote to this deeply embedded pathology is certainly multifaceted and complex, a first step,

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> the distribution of benefits and burdens, as well as to identify those who are deserving or appropriate recipients.

Id. (emphasis in original).

408. See Hannah Nicole Jones, What Is Owed, N.Y. Times Mag. (June 26, 2020), https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html (on file with the *Columbia Law Review*) ("[W]hen it comes to truly explaining racial injustice in this country, the table should never be set quickly: There is too much to know, and yet we aggressively choose not to know it.").

409. See Katharina Pistor, The Code of Capital: How Law Creates Wealth and Inequality 101–04 (2019) (observing that debt is a means for private parties to "create something from nothing," but noting that the state may intervene in favor of lenders once the dream of "fantastic returns in the future" is not realized); cf. Carl Wennerlind, Casualties of Credit 44 (2011) (describing how "alchemical thinking . . . contributed importantly to the development of a new political economy within which the first proposals for a credit currency in England were formulated").

however small, must lie in interrogation of the current, unduly credit-focused borrowing-as-equality policy.[410]

410. Cf. Derrick Bell, Racial Realism, 24 Conn. L. Rev. 363, 375–76 (1991) (examining civil rights proponents' continued and, in Bell's view, relatively unfruitful reliance on "equality theory" within the American judicial system, and asking "whether this examination requires us to redefine goals of racial equality and opportunity to which blacks have [traditionally] adhered").