

Written Testimony¹ of

Abbye Atkinson
Assistant Professor of Law
University of California, Berkeley, School of Law

Before the United States Senate
Committee on Banking, Housing, and Urban Affairs

*Wall Street vs. Workers: How the Financial System Hurts Workers and Widens the Racial
Wealth Gap*

March 4, 2021
10:15 am

¹ This written testimony includes material that has been previously published as follows: Abbye Atkinson, *Borrowing Equality*, 120 COLUMBIA LAW REVIEW 1403 (2020); Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STANFORD LAW REVIEW 1095 (2019). It also incorporates material from Abbye Atkinson, *Commodifying Marginalization*, 71 DUKE LAW JOURNAL (forthcoming January 2022).

Mr. Chairman Brown, Ranking Member Toomey, and Members of the Committee:

Good morning, and thank you for inviting me to testify before this Committee. It is my great honor. My name is Abbye Atkinson. I am an Assistant Professor of Law at the University of California, Berkeley, School of Law, where I teach Contract Law as well as courses on the legal structures of debt and inequality. I appear here today in my capacity as an academic who studies the law of creditors and debtors as it affects traditionally marginalized communities and implicates the widening racial and gender wealth gap.

In this regard, I'd like to make three points. First, credit, and by natural extension, debt (hereinafter "credit/debt"²), has become a critical means of carrying out federal social welfare policies, even though indebtedness contributes significantly to many of the entrenched socioeconomic problems we rely on credit/debt to solve. Second, credit/debt itself provides a channel through which wealth drains from marginalized communities, toward more affluent entities. Its burdens are not equally distributed, which exacerbates the racialized and gendered wealth gap. Third, because credit/debt has become so critical to federal social welfare policies, Congress should not delegate the regulation of credit/debt to private, profit-motivated interests whose stock in trade is credit/debt.

I. Credit/Debt Has Become an Important Aspect of American Social Provision.

Credit/debt has become vital to current social provision³ policy, particularly for socioeconomically-marginalized Americans, including low-income workers,⁴ women,⁵ and African Americans⁶. It is an important feature of our unique American public-private welfare regime.⁷ This is true both (1) as to marginalized borrowers themselves, who are encouraged to rely on consumer credit markets to smooth consumption, to become socially-mobile, and to address entrenched inequality more generally; and (2) as to third party beneficiaries, like retirement-

² Gustav Peebles, *The Anthropology of Credit and Debt*, 39 ANN. REV. ANTHROPOLOGY 225, 226 (2010) (noting that "credit and debt stand as an inseparable, dyadic unit" and adopting the term "credit/debt" because "debt is always already a dyadic relation that requires its opposite[, credit]").

³ The term "social provision" refers to the range of state policies implemented to improve general welfare, including for example, "nation-spanning social insurance and public assistance programs" such as "federally required, state-run unemployment insurance; federally subsidized public assistance; and national contributory old-age insurance." E.g., Theda Skocpol, *A Society without a 'State'? Political Organization, Social Conflict, and Welfare Provision*, 7 J. OF PUB. POL'Y 349, 350-51 (1987); see also Ann Shola Orloff, *Social Provision and Regulations: Theories of States, Social Policies*, in Julia Adams, Elisabeth S. Clemens, & Ann Shola Orloff, MODERNITY IN REMAKING MODERNITY: POLITICS, HISTORY, AND SOCIOLOGY 190 (2005) ("Social provision and regulation have taken on many public and mixed public/private forms, from poor relief and publicly subsidized charity to 'workingmen's insurance' and pension, 'social security,' 'the welfare state,' 'welfare capitalism,' 'the social state,' and '*l'etat providence*.'").

⁴ E.g., Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1095, 1105-1120(2019) (hereinafter Atkinson *Rethinking*) (describing debates about how to regulate the cost of payday loans).

⁵ E.g., Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1419-22 (2020) (describing 1960s and 1970s advocacy for increased access to credit as a means of greater socioeconomic equality for women).

⁶ *Id.* at 1422-24 (describing 1960s and 1970s advocacy for increased access to credit as a means of greater socioeconomic equality for African Americans).

⁷ See Jacob Hacker, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES 11-12 (2002) (defining the American public-private welfare regime as a combination of: (1) "direct pension social programs" like Social Security, (2) "the constellation of more indirect or 'hidden' government interventions," like tax breaks and government subsidies, "that are designed to provide similar social benefits or shape their private provision," and (3) "publicly-regulated and subsidized private benefits").

insecure workers, who, through their participation in public pensions, increasingly rely on wealth extracted through the channel of “marginalized debt,” the array of high-interest-rate, subprime, risky debt that tends to concentrate in and among historically marginalized communities.⁸ I briefly describe each below.

a. Credit/Debt as Social Provision for Marginalized Borrowers

The ability to borrow money in consumer capital markets is an important aspect of federal social provision policy. Consequently, much of the current discourse of access to credit/debt for low-income and other marginalized Americans rests on the assumption that credit/debt extended on good terms is a universal public good.⁹ Moreover, on the view that credit/debt can effectively and properly fill the void left by welfare retrenchment, legislators and policymakers largely confine themselves to debating the appropriate regulation of consumer credit/debt access rather than exploring the essential qualities of credit/debt that may make it a poor substitute for a robust, public safety net.¹⁰

For example, the legislative debates that emerged in the wake of the Second Circuit’s 2015 decision in *Madden v. Midland Funding, LLC*¹¹ and the Consumer Financial Protection Bureau’s Payday Rule,¹² centered largely around the optimal regulation of credit/debt for high risk, low-income borrowers. There was otherwise minimal engagement with the important threshold normative question of whether credit/debt, an institution rooted in private markets, should be a viable component of social provision for low-income Americans. Perspectives on both sides of the aisle shared a common baseline for their arguments, notwithstanding their differences in political ideology or methodology. Each began from the shared premise that credit/debt can and should benefit the working poor, thus implicitly framing credit/debt as a valid means of social provision.¹³ These views thus implicitly naturalized the idea that credit/debt *should* be a significant component of social provision for the working poor.

Similarly, Congress has articulated a legislative policy premised on the conviction that by democratizing access to credit/debt, marginalized groups, like women and African Americans, can borrow their way to increased socio-economic inclusion, better relative economic health, and even

⁸ E.g., Taz George, Robin Neuberger, & Mark O’Dell, *The Geography of Subprime Credit*, FEDERAL RESERVE BANK OF CHICAGO, (Nov. 6, 2019), <https://www.chicagofed.org/publications/profitwise-news-and-views/2019/the-geography-of-subprime-credit>.

⁹ See, e.g., Marek Hudon, *Should Access to Credit Be a Right?*, 84 J. BUS. ETHICS 17, 17 (2009) (“Credit is central to the welfare of many citizens and the effective management of the economy in high- and low-income countries.”).

¹⁰ See, e.g., Greta R. Krippner, *Democracy of Credit: Ownership and the Politics of Credit Access in Late Twentieth-Century America*, 123 AM. J. SOCIO. 1, 2 (2017); Gunnar Trumbull, *Credit Access and Social Welfare: The Rise of Consumer Lending in the United States and France*, 40 POL. & SOC’Y 9, 10 (2012).

¹¹ *Madden v. Midland Funding, LLC*, 786 F.3d 246, 248-50 (2d Cir. 2015). In this case, the Second Circuit ruled that loans transferred to non-national-bank entities in the secondary market are subject to state usury caps even if the loan was originated by a national bank that would otherwise enjoy federal preemption from state usury caps.

¹² 12 C.F.R. § 1041 (2020). As initially promulgated in 2017, the Payday Rule, regulated payday lending by, for example, requiring that payday determine whether a prospective customer has the “ability-to-pay” certain types of loans before lending to the customer. The Rule was amended in July of 2020, among other reasons, to rescind the “ability-to-pay” requirement. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44382 (Oct. 20, 2020) (codified at 12 C.F.R. § 1041 (2020)).

¹³ Atkinson *Rethinking*, *supra* note 4, at 1108-1120 (describing the legislative debates surrounding the so-called *Madden*-fix legislation and the Payday Rule).

first-class citizenship.¹⁴ For example, 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 market.¹⁵ Significant among these interventions were the Higher Education Act of 1965,¹⁶ which made it more widely possible for financially constrained students to borrow money for higher education; the Consumer Credit Protection Act of 1968,¹⁷ which implemented a regime to make private lending fairer through heightened transparency; the Equal Credit Opportunity Act of 1974,¹⁸ which prohibited lending discrimination on the basis of sex and race, among other protected categories; and the Community Reinvestment Act of 1977,¹⁹ which encouraged conventional lenders to do business in marginalized communities who had been historically excluded from mainstream consumer capital markets.

With respect to 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 synonymous with belonging, came to believe that equal access to conventional loans and purchase money to acquire the material trappings of American citizenship was integral to their broader quest for equality and first-class citizenship.²⁰ Consequently, each of these laws embraces “credit” as a source of social provision, even as they ignore the debt that inevitably flows from taking a loan. Instead, Congress bifurcated its contemporaneous treatment of debt, taking a relatively restrictive and regressive approach to regulating distressed debtors in the Bankruptcy Reform Act of 1978 (Bankruptcy Code)²¹ and the Fair Debt Collection Practices Act of 1977²².

b. Credit/Debt as Social Provision for Third Party Beneficiaries

Marginalized borrowers are not the only ones for whom social provision policy invokes the power of credit/debt as a valid means of social provision. Social provision policy also encompasses credit/debt as a valid means of wealth extraction in service of retirement security for workers. Specifically, public pension funds—which rely heavily on investment returns to meet

¹⁴ E.g., Kamille Wolff Dean, *Foreclosures and Financial Aid: Mind over Mortgages in Closing the Plus Loan Gap*, 4 COLUM. J. RACE & L. 129, 135 (2014) (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.”); Monica Prasad, *THE LAND OF TOO MUCH* 221-225 (2012).

¹⁵ E.g., 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.”); Michael S. Barr, *Modes of Credit Market Regulation* in Nicolas P. Retsinas & Eric S. Belsky, *BUILDING ASSETS, BUILDING WEALTH: CREATING WEALTH IN LOW-INCOME COMMUNITIES* (2005).

¹⁶ Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001–1107 (2018)).

¹⁷ Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1616 (2018)).

¹⁸ Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f).

¹⁹ Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1117 (codified as amended at 12 U.S.C. §§ 2901–2908 (2018)).

²⁰ Greene, *supra* note 15, 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.”).

²¹ Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101–1532 (2018)).

²² Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692 (2018)).

their obligations to retirees²³—have increasingly moved their enormous pools of “labor’s capital”²⁴ into “alternative” investments, like marginalized debt, that promise higher yields crucial to fund pension obligations even as they portend greater risk of loss.²⁵ Consequently, marginalized debt is increasingly an asset that rounds out the diversified portfolios of the nation’s public pension funds.²⁶

In this context, marginalized debt serves as a mechanism of social provision because it furnishes a basis from which working people might, at least nominally, shore up their often-precarious retirement prospects.²⁷ Yet, in this iteration of credit/debt as social provision, it is the investor-pensioners who ostensibly benefit from the borrowing, not the borrowers themselves. In addition, the financial intermediaries, like private equity firms, who both construct and privately regulate these channels of redistribution are significant winners in this arrangement, reaping fees on the front end and a disproportionate percentage of returns relative to their initial investments on the back end.²⁸ Thus, while neither lending and borrowing nor the accumulation of wealth through investment is inherently harmful,²⁹ pension fund investment in marginalized debt may not

²³ E.g., Pew Charitable Trusts, *State Pension Funds Reduce Rates of Return at 5* (Dec. 2019) (hereinafter *Pew Report*) (observing that “[i]nvestment returns make up more than 60 percent of public pension plan revenues [while] employer and employee contributions make up the rest”).

²⁴ E.g., David Webber, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR’S LAST BEST WEAPON* 8 (2018) (defining “labor’s capital” as “the trillions of dollars held in public pension funds”); Teresa Ghilarducci, *LABOR’S CAPITALISM: THE ECONOMICS AND POLITICS OF PRIVATE PENSIONS* 50 (1992) (observing that “[p]ensions may not be labor’s wages, but labor’s capital” in part because they function “as an insurance fund in which every [worker] holds a share”).

²⁵ Ben Christopher, *Riskier Bet: Why CalPERS, the Country’s Largest Pension Fund, is Getting into Banking*, O.C. REG., (Jul. 9, 2020), <https://www.ocregister.com/2020/07/09/why-calpers-the-countrys-largest-pension-fund-is-getting-into-banking/>, (observing that in the search for investment returns, “pensions [have] ventured further into the Wild West of ‘alternative investments’ — private equity, one-off infrastructure projects and real estate, with e]ach step t[aking] the funds into potentially more profitable, but also more perilous, terrain”); see also Gordon L. Clark, *PENSION FUND CAPITALISM* 28 (2000) (observing “the rise of pension fund capitalism and the world of finance with which it is intimately associated”); David F. Swensen, *PIONEERING PORTFOLIO MANAGEMENT: AN UNCONVENTIONAL APPROACH TO INSTITUTIONAL INVESTMENT* 55 (2009) (noting that “[f]inance theory posits that acceptance of greater risk leads to the reward of higher expected returns”).

²⁶ *Pew Report*, *supra* note 23, at 1; see also, Sondra Albert, *The Subprime Crisis’ Impact on Fixed-Income Funds*, AFL-CIO Housing Investment Trust, (Nov. 13, 2007), https://www.sec.gov/Archives/edgar/data/225030/000116923207004677/d73205_40-24b2.htm, (observing that “public pension funds have also increased their investments in hedge funds in an attempt to boost their returns due to larger funding requirements”).

²⁷ E.g., Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 6 (2013) (observing that “many public pension plans are seriously underfunded either intentionally or due to unrealistic assumptions concerning investment performance and the amount that will be owed over time” and that one of the worries of the public pension crisis is the potential “consequences to public employees and retirees, especially those who did not participate in Social Security, who could be left with insufficient assets for a decent retirement”).

²⁸ Ludovic Phalippou, *An Inconvenient Fact: Private Equity Returns & The Billionaire Factory* 24-25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623820, (“Private equity funds tend to charge an annual management fee of 2% and a performance fee of 20%. Added to the generally higher fees already paid for target date funds, the returns will really have to be supersized to justify the cost of the alternative investments.”); accord Webber, *supra* note 24, at 81 (observing that [h]edge funds are very often a bad investment for everyone except hedge fund managers”).

²⁹ See, e.g., Atkinson *Rethinking*, *supra* note 4, at 1100 (observing that “credit and debt often amplify the underlying set of circumstances into which they are introduced” and that “where credit and its amplifying qualities are concerned, what is good gets better, and what is bad gets worse”).

be a public good, when balanced against the burden that marginalized debt and chronic indebtedness disproportionately imposes in the lives of marginalized communities.³⁰

The significance of marginalized debt in pension-fund investment highlights two aspects of credit/debt-focused privatization in social welfare policy. First, it shows how the current public-private welfare regime has largely shifted retirement security into the hands of private financial actors, whose fiduciary duties and profit-sensitive incentives eschew broader moral considerations of the externalities of retiree wealth maximization.³¹ Second, the rise of marginalized debt as a source of retiree wealth maximization shows how in the financialized economy, the tenuous socio-economic condition of one community³² is now openly a source of wealth accumulation for another vulnerable community, retirement-insecure workers.³³ Perversely then, just as credit/debt is an expedient means of promoting and facilitating a decent standard of living for low-income and other economically-vulnerable groups, without the political burdens of solving for “persistent wage stagnation and other entrenched social pathologies,”³⁴ it is also an expedient means of promoting and facilitating a decent standard of living for older people, without the political burden of solving for the real failures of retirement security, like overpromising.³⁵

II. Credit/Debt is a Means of Regressive Redistribution that Entrenches Inequality.

Credit/debt itself provides a channel through which wealth can leave economically vulnerable communities, traveling upstream toward more affluent entities.³⁶ This regressive redistribution has grave consequences for low-income borrowers and, more broadly, for other communities whose economic prospects are consistently dim. For example, as noted by political scientist, Gunnar Trumbull, “there’s a feature of consumer credit that makes it fundamentally regressive” because “the poorest people who take out loans pay the highest interest rates.”³⁷ Those

³⁰ See, 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>, (observing that “[n]ationally, bankruptcy filings are much higher among blacks than whites” and that “[t]he higher filing rates among black communities can be partly explained by greater financial stress on the population as a whole”); William R. Emmons & Lowell R. Ricketts, *The Demographics of Loan Delinquency: Tipping Points or Tip of The Iceberg?*, FED. RESERVE BANK OF ST. LOUIS, (Oct. 18, 2016) (“Families headed by an African-American are about 81 percent more likely to be seriously delinquent on a debt than a non-Hispanic white family while Hispanic-headed families (of any race) are about 8 percent more likely to be seriously delinquent than a white family.”).

³¹ Webber, *supra* note 24, at 9.

³² E.g., Peter Whoriskey, ‘A way of monetizing poor people’: How private equity firms make money offering loans to cash-strapped Americans, WASH. POST, (Jul. 1, 2018), https://www.washingtonpost.com/business/economy/a-way-of-monetizing-poor-people-how-private-equity-firms-make-money-offering-loans-to-cash-strapped-americans/2018/07/01/5f7e2670-5dee-11e8-9ee3-49d6d4814c4c_story.html, (“Private equity firms, with billions to invest, have taken significant stakes in the growing [small-dollar installment loan] field.”).

³³ E.g., Webber, *supra* note 24, at 8 (observing that for many employees with public pensions, the “loss of their jobs and pensions would leave them on the knife’s edge of poverty, if not impoverished”).

³⁴ E.g., Atkinson *Rethinking*, *supra* note 4, at 1101.

³⁵ G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 KY. L.J. 785, 803 (2012) (“Some states have in the past balanced their budgets in part by inducing public employee unions to accept lower wage increases with the promise of future benefits payments, and the effects of this short-term gimmick are now being felt.”); cf. Beermann, *supra* note 27, at 27 (arguing that “[u]nfunded pension promises benefit politicians” by “allow[ing] for current officials to provide services without requiring taxpayers to pay for them until much later, when they may be out of office.”).

³⁶ Ctr. for Competition Pol’y, *Gunnar Trumbull at CCP Annual Conference (2011)*, YOUTUBE (Jan. 20, 2012), <https://www.youtube.com/watch?v=9yQvOzinTGg>.

³⁷ *Id.* at 1:32-1:46.

payments made in the credit “sweat box” move wealth out of distressed communities and into more affluent ones.³⁸

Moreover, 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 meaningfully accounting for the consequences of debt in their lives.³⁹ Indeed, the expanded ability to borrow money has had mixed results for various marginalized groups who continue to struggle to find socioeconomic parity.⁴⁰ 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.⁴¹

The challenges that women and African Americans face with regard to student loan shed light on this outcome. Specifically, in the present day, student loan debt is quickly approaching a crisis of epic proportions.⁴² Some forty-four million Americans currently owe approximately 1.6 trillion dollars in outstanding educational debt.⁴³ Women and African Americans (both separately and at their intersections) are carrying the brunt of this burden.⁴⁴ For example, although “college degrees have been a pathway to greater economic and personal independence for decades---especially for women[,] . . . acquiring those degrees results in more debt for women than for men.”⁴⁵ Women currently hold two-thirds of educational debt (over 900 billion dollars) and are more likely than men to default on these loans.⁴⁶ 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

³⁸ Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 384 (2007) (“Debt-based [credit card] issuers . . . attempt to maximize the number of customers who do not repay their account balances in full each month. That strategy would not seem unusual, but for the fact that the most profitable customers are sometimes the least likely to ever repay their debts in full.”).

³⁹ E.g., 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”); 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> (hereinafter AAUW Report) (noting that women earn less than 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”).

⁴⁰ See, e.g., AAUW Report, *supra* note 39, at 9, 28 (noting that although in the last 50 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).

⁴¹ See Atif Mian & Amir Sufi, HOUSE OF DEBT 30 (2014) (observing that “[d]ebt is the anti-insurance . . . concentrate[ing] the risks on those least able to bear it”). Mian and Sufi also observed that “debt significantly amplified wealth inequality during the Great Recession.” *Id.*; see also Jen Mishory, Mark Huelsman, & Suzanne Khan, *How Student Debt and the Racial Wealth Gap Reinforce Each Other*, (Sept. 9, 2019), <https://tcf.org/content/report/bridging-progressive-policy-debates-student-debt-racial-wealth-gap-reinforce/?session=1&agreed=1>, (reporting that “while many Black families currently need to rely on debt to access a college degree and its resulting wage premium, the disproportionate burden of student debt perpetuates the racial wealth gap”).

⁴² 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/>, (noting \$1.6 trillion in outstanding student loans and sharing examples of the personal impact of debt).

⁴³ Richard Cordray, WATCHDOG: HOW PROTECTING CONSUMERS CAN SAVE OUR FAMILIES, OUR ECONOMY, AND OUR DEMOCRACY 6 (2020).

⁴⁴ See AAUW Report, *supra* note 39, at 1-2.

⁴⁵ *Id.* at 24.

⁴⁶ *Id.* at 1-2.

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.⁴⁷

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.⁴⁸ 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.”⁴⁹ Consequently, persistent inequities in gender pay are a “major factor that contributes to a substantial loan repayment gap between men and women following graduation,”⁵⁰ leaving women and African Americans to face challenges in repayment that confound the net present value in a loan (even in the absence of predatory lending) for marginalized groups.⁵¹

Moreover, general difficulty in repayment further reveals the ways in which debt overwhelms the capacity of credit across gender and race, and at their intersections, to facilitate greater socioeconomic equality. For example, “[w]omen and men of different races and ethnicities pay off their student loans at different rates.”⁵² 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.⁵³ 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.⁵⁴ Notwithstanding greater achievements in academic attainment by women and people of color,⁵⁵ higher education has not been able to break the cycle of gender and race-based income inequality,⁵⁶ which directly affects the viability of borrowing to begin with. More than that, it further entrenches the wealth gaps that run along both racial and gendered lines.

⁴⁷ *Id.* at 1-2.

⁴⁸ *E.g.*, A. Mechele Dickerson, *Sorting the Neighborhood*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 311, 321 (2015) (“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.”)

⁴⁹ AAUW Report, *supra* note 39, at 24; *see also* Daniele Kurtzleben, *How Coronavirus Could Widen the Gender Wage Gap*, NPR (Jun. 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).

⁵⁰ AAUW Report, *supra* note 39, at 24.

⁵¹ *See, e.g.*, Abbye Atkinson, *Race, Educational Loans, and Bankruptcy*, 16 MICH. J. RACE & L. 1, 11 (2010) (reporting bankruptcy data that suggests that “attaining a higher level of education does not appear to shield African Americans against financial ruin” and noting “the tension between two federal policies with respect to educational attainment: educational lending policy that encourages Americans to take on debt to finance their educations and bankruptcy policy that makes discharge of educational debt practically impossible”); Teresa A. Sullivan, Elizabeth Warren & Jay Westbrook, *AS WE FORGIVE OUR DEBTORS* 151-52, 158 (2001) (describing the disproportionate impact of debt on women). Bankruptcy filings that continue to show women and African Americans represented in disproportionate numbers confirm this 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> (noting that “[t]he higher filing rates among black communities can be partly explained by greater financial stress on the population as a whole”).

⁵² AAUW Report, *supra* note 39, at 27.

⁵³ *Id.* at 26-27.

⁵⁴ *Id.* at 27.

⁵⁵ *See id.* at 7-11.

⁵⁶ *Id.* at 28 (noting that “a college degree does not erase gender and race gaps in pay”).

Indebtedness also has social consequences that undermine our national goals for increased equality. Indeed, indebtedness is an independently powerful social institution whose harm, particularly in marginalized communities, should be broadly considered. In that regard, policies that promote engagement in private markets in order to achieve welfare-related ends should meaningfully engage with the notion that economic market transactions are formed and calibrated within and by the broader social context in which they are formed.⁵⁷ In other words, the market is not an autonomous institution free from sexism, racism, ageism, and other social pathologies.

For example, ostensibly economic behavior, like taking out a private loan, is necessarily “embedded” within the broader social relationships and order in which it occurs, intertwined in ways that defy partitioned consideration.⁵⁸ Thus, where there is a preexisting social relationship, such as hierarchical, racialized, and gendered subordination, it 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.⁵⁹ Consequently, a policy that encourages taking on debt as a means of social provision, including as a catalyst to greater equality, should consider how these market transactions are affected by specific social networks and relations, particularly to the extent that these relationships are intractably raced and gendered.⁶⁰ Moreover, credit/debt also engenders moral hierarchy that challenges the degree to which encouraging marginalized groups to become indebted to powerful private market entities, conventional though their products may be, can truly be a catalyst for increased relative socioeconomic equality.⁶¹

III. Because Credit/Debt is Critical to Federal Social Provision Policies, Congress Should Not Delegate the Regulation of Credit/Debt to Private, Profit-Motivated Interests.

Credit/debt as social provision policy for marginalized Americans is an example of how privatized welfare has become a meaningful “alternative form of redistribution,” even offered as a means of social and civil rights.⁶² Moreover, the reliance on private credit/debt to achieve general welfare-focused ends is an example of the how private intermediaries and actors are now, at least indirectly, significantly responsible for important socioeconomic ends like closing the racial wealth gap and promoting equality among all Americans. This reliance on private actors to implement government policy must wrestle with the potential for private actors to diminish broader

⁵⁷ 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.”).

⁵⁸ See, e.g., Karl Polanyi, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 74-76 (2001). Polanyi’s 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 57, at 484.

⁵⁹ 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).

⁶⁰ See Granovetter, *supra* note 57, at 485-86 (discussing leading sociological arguments for viewing economic actors as an extension of their social circumstance).

⁶¹ See Rachel E. Dwyer, *Credit, Debt, and Inequality*, 44 ANN. REV. SOCIO. 237, 238 (2016) (“Creditor-debtor relationships are inherently unequal, and the prevalence and types of credit and debt holding in a society structures social inequality more broadly.”).

⁶² PRASAD, *supra* note 14, at 239.

wellbeing by prioritizing their own narrow financial interests, implicit biases, or prior commitments.⁶³

For example, credit/debt as a source of public pension fund wealth accumulation, the phenomenon of public pension fund investment in private equity reveals how the retirement security of millions of American retirees lies in the hands of a relatively few financial intermediaries, who freely invest in credit/debt as a means of regressive wealth extraction. The “fund-first” focus that private equity funds embrace is not aligned with the broader public mission that public pension plans are supposed to reflect, nor is it consistent with a robust sense of accountability for the externalities that private equity investment in alternative assets, like marginalized debt, may impose.⁶⁴

Indeed, by essentially privatizing significant aspects of equality and social mobility through the promotion of credit/debt, social provision policy encourages the most vulnerable groups to invest in “self-help” social mobility and equality. This is true despite an imperfect socially-constructed market, populated by private actors 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.⁶⁵ Consequently, in pushing marginalized groups in this direction, we have an obligation to address the consequences of readily predictable failure.

Finally, like other market-based forms of privatized social provision, credit/debt expediently cloaks the significant role of government intervention by functioning through government-subsidized private channels.⁶⁶ In this sense, it preserves the largely “obscured” two-track, hierarchical arrangement in American social provision that has bifurcated social welfare along class lines.⁶⁷ It implicates the pervasive and perverse reputational divide between forms of government subsidy in the welfare system that tend to favor hidden forms of government subsidy, namely privatized social provision, over more patent forms such as public assistance.⁶⁸ By

⁶³ See, e.g., David H. Webber, *The Use and Abuse of Labor’s Capital*, 89 N.Y.U. L. REV. 2106, 2144 (2014) (observing pension funds’ “fund first” fiduciary duty that permit a public pension fund to select investments that may “undermine participant employment” as long as those investments were “are of equal economic value to a plan”).

⁶⁴ Cf. Divya Kirti & Natasha Sarin, *What Private Equity Does Differently: Evidence from Life Insurance* at 22 (SSRN, Jul. 6, 2020) (describing private equity’s incursion into insurance and their penchant for “direct[ing] premiums from their insurance subsidies toward risky alternative investments, like ownership stakes in other portfolio companies”); also Bryan Ayash & Mahdi Rastad, *Leveraged Buyout and Financial Distress* 4 (2019) (reporting that 20% of firms taken over by private equity file for bankruptcy relief as compared to 2% of control firms).

⁶⁵ 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, Lebron observes that, “the 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 the distribution of benefits and burdens, as well as to identify those who are deserving or appropriate recipients.” *Id.* (emphasis in original).

⁶⁶ See Chloe N. Thurston, *AT THE BOUNDARIES OF HOMEOWNERSHIP: CREDIT, DISCRIMINATION, AND THE AMERICAN STATE* (2018).

⁶⁷ Karen M. Tani, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016).

⁶⁸ See, e.g., Suzanne Mettler, *THE GOVERNMENT-CITIZEN DISCONNECT* 6-7, 9-13 (2018); Derek Thompson, *Busting the Myth of ‘Welfare Makes People Lazy,’* ATLANTIC, (Mar. 8, 2018), https://www.theatlantic.com/business/archive/2018/03/welfare-childhood/555119/?utm_source=atlfb (“‘Welfare makes people lazy.’ . . . [This notion] is an intellectual pillar of conservative economic theory, which recommends

invoking the market, advocates of more privatized, individualized welfare measures, like credit, seek to reduce, at least nominally, the primacy of the government in direct social provision.⁶⁹ For example, the mortgage interest tax deduction, an “extravagant” subsidy that rewards private homeowners, is less offensive to the American ethos of individualistic bootstrap-pulling than is a direct subsidy like housing credits for low-income Americans; yet a government subsidy by any other name is still a government subsidy.⁷⁰

IV. Conclusion & Recommendations

In sum, credit/debt as social provision conscripts marginalized groups into the belief that borrowing money can consistently and meaningfully facilitate social wellbeing, including social mobility. It draws attention to the aspirational upside of the creditor/debtor relationship while obscuring the inherent economic and social risk engendered by the act of borrowing money.⁷¹ It places the burden and risk of solving for entrenched and intractable inequality entirely on marginalized borrowers, unreasonably requiring them to lift themselves out of socioeconomic distress.⁷² Moreover, credit/debt as social provision for marginalized groups also opens up a channel of regressive redistribution, providing a means to extract wealth from the most socioeconomically vulnerable communities. In this regard, it also commodifies the adverse conditions that predictably and consistently churn out individuals and communities who have very limited options and must borrow to survive and/or to become upwardly mobile.

Congress can ease these credit/debt-related burdens in any number of ways. For example, Congress should make the discharge of debt, including student loan debt more specifically, in bankruptcy much simpler to provide a backstop for those whose find themselves in extreme financial distress.⁷³ Similarly, Congress should address the relative lack of transparency requirements imposed on private financial intermediaries in light of their significance to credit/debt social provision policy.⁷⁴ Lastly, in recognition that credit/debt and other private-market approaches to social welfare are limited by the persistence of racial and gender inequality, Congress should shore up other aspects of social provision that do not rely on a private entity’s ability to make money from the very marginalization that Congress hopes to solve with the proffer of credit/debt as social provision.⁷⁵

slashing programs like Medicaid and cash assistance, partly out of a fear that self-reliance atrophies in the face of government assistance.”).

⁶⁹ See Thurston, *supra* note 66, at 221-22.

⁷⁰ See, e.g., Marie Gottschalk, *THE SHADOW WELFARE STATE: LABOR, BUSINESS, AND THE POLITICS OF HEALTH CARE IN THE UNITED STATES* 1-3 (2000).

⁷¹ See, e.g., Mian & Sufi, *supra* note 41, at 17-24 (describing the economic consequences of debt on low-wealth households in the Great Recession).

⁷² See, e.g., Mehra Baradaran, *Jim Crow Credit*, 9 UC IRVINE L. REV. 887, 943 (2019) 943 (observing that “the state has repeatedly placed the burden to close the wealth gap on the black community itself.”).

⁷³ Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 984-985 (2012) (arguing that bankruptcy policy must be premised on study of both the economic and non-economic consequences of debt, particularly in marginalized communities).

⁷⁴ Jason Kelly, *Everything Is Private Equity Now*, BLOOMBERG BUSINESSWEEK, (Oct. 8, 2019), <https://www.bloomberg.com/news/features/2019-10-03/how-private-equity-works-and-took-over-everything>, (observing that “[o]ne of PE’s superpowers is that it’s hard for outsiders to see and understand the industry”).

⁷⁵ E.g., Nathan Fiala, *The Problem Is Bigger Than Payday Loans*, WASH. POST: IN THEORY (July 1, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/07/01/the-problem-is-bigger-than-payday-loans/?utm_term=.6c0d29bfa235 (“What the U.S. truly needs are policies that ensure that low-income people don’t need payday loans to begin with.”).

Finally, any legislative policy that promotes credit/debt as a social good for marginalized groups must engage meaningfully with the consequences of indebtedness. If Congress continues to address problems of inequality and social mobility, like the wealth gap, through credit/debt, then its policy must account for the ways in which debt itself drives the very inequality that democratized borrowing is purportedly deployed to correct.⁷⁶

⁷⁶ *E.g.*, Sarah L. Quinn, *AMERICAN BONDS: HOW CREDIT MARKETS SHAPED A NATION* 18 (2019) (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”).