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Shifting Burdens at the Fringe

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SHIFTING BURDENS AT THE FRINGE

VIJAY RAGHAVAN*

ABSTRACT

Scholars are increasingly arguing that consumer law can be a site of distribution. This raises at least two concerns: the classic argument associated with Louis Kaplow & Steven Shavell against redistributing income through legal rules, and a more recent concern that additional equity in consumer law will mean less equity in other important domains. In this Essay, I defend the pivot toward distribution by largely sidestepping these issues. Rather than arguing that consumer law is a good site for distribution and that it will not crowd out other options, I suggest that the pivot toward distribution is justified by the structure of consumer credit markets.

Leveraging insights from the recent literature on the legal design of money, I argue that consumer credit is best understood as new money, and price and access in consumer credit markets are best understood as ways to finance the private disbursement of public obligations. The upshot of this framing is it offers a new way to think about the function and potential of consumer law and consumer credit regulation. Consumer credit regulation is best understood as a way to shift the incidence of financing the creation of new money and not as an intervention in purely private exchange. As such, it has the potential to unwind some of the regressivity of money creation in our system by progressively redistributing burdens in credit markets. In this Essay, I consider how these ideas can change the way we justify consumer law and regulate consumer credit markets.

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INTRODUCTION

The primary justification for modern consumer financial regulation is allocative efficiency.[1] Consumer credit markets feature large imbalances between financial institutions and consumers.[2] Financial institutions can leverage these imbalances in ways that are both costly for consumers and inefficient.[3] And, at its best, consumer financial regulation is a tool that can prevent or dampen the effects these inefficiencies have on consumers.[4]

But efficiency has its limits as a justification. Inefficiency is often difficult to prove.[5] Transactions that seem unambiguously inefficient (for example, short-term credit with an outrageously high interest rate) might be efficient.[6] Moreover, focusing on efficiency and ignoring equity fails to account for the way certain transactions might offend basic notions of fairness.[7] As a result,

[1] *See, e.g.*, Luke Herrine, *What is Consumer Protection For?*, 32 LOY. CONSUMER L. REV. (forthcoming 2022) (manuscript at 4) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3781762 [https://perma.cc/2W3V-65PD]) [hereinafter Herrine, *Consumer Protection*] (arguing that law and economics understanding of efficiency, which Herrine describes as the "consumer sovereignty framework," orients most consumer law scholarship); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 220 (2019) [hereinafter Van Loo, *Consumer Law*] ("Many existing consumer protection laws, and many calls for new regulation by legal scholars, aim to lessen information asymmetries and behavioral biases, in part because this foundational economic theory holds that markets function best, and society benefits most, when consumers are informed and rational."). Efficiency as I use it here generally refers to the "efficiency produced by well-functioning markets not subject to [market] failures." ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 15 (2022) (discussing varieties of efficiency in public policy).

[2] Classic accounts emphasized domination and bargaining asymmetry. *See, e.g.*, Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); Karl N. Llewellyn, *What Price Contract?—an Essay in Perspective*, 40 YALE L.J. 704, 717 (1931). Modern accounts emphasize information asymmetry and bounded rationality. *See* discussion *infra* Part I.

[3] *See* discussion *infra* Part I.

[4] *See* Herrine, *Consumer Protection*, *supra* note 1 (manuscript at 4) ("Those who favor [consumer] regulation tend to argue that actually existing markets are littered with 'market failures' and 'transaction costs' that clog up market forces."); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 884 (2007) ("In sum, the best case against payday lending is that the market is plagued by cognitive failures, unlikely to be well policed by competitive forces, and likely to generate external costs borne by the rest of society.").

[5] *See* discussion *infra* Part I.

[6] *See infra* Part I.

[7] *Cf.* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 74 (2006) (discussing fairness norms underlying unconscionability doctrine).

scholars are increasingly turning to distribution as an alternative ground for justifying interventions in consumer credit markets.[8]

A pivot toward distribution raises two issues. First, is consumer law a good site for wealth distribution? There is extensive literature questioning the wisdom of pursuing wealth distribution through the law.[9] Second, what are the costs of pursuing wealth distribution through consumer law? Will more equity in consumer law mean less equity in other important domains?

The recent literature on distribution attempts to navigate efficiency-equity tradeoffs[10] and to manage the problems of path dependency in different ways.[11] In this Essay, I defend the pivot toward distribution in consumer law by largely sidestepping these issues. Rather than arguing that consumer law is a good site for distribution and that it will not crowd out other options, I consider the costs of ignoring distribution in consumer law. And I argue that these costs suggest we ought to pursue distributional goals through consumer law, even if it is suboptimal or may crowd out other options.

The main move in this Essay is a structural one. There is an emerging shift in legal scholarship away from conceptualizing markets as unstructured and self-correcting to legally structured and actively governed.[12] Recent examples of this shift include efforts to understand how the law structures and distributes burdens in housing and student finance and how legal changes in these areas are best

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[8] *See* Vijay Raghavan, *Consumer Law's Equity Gap*, 2022 UTAH L. REV. (forthcoming) (manuscript at 4) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812412 [https://perma.cc/PB79-JPN3]); John Linarelli, *Debt in Just Societies: A General Framework for Regulating Credit*, 14 REGUL. & GOVERNANCE 409, 409 (2020); Van Loo, *Consumer Law*, *supra* note 1, at 211; Michael D. Guttentag, *Law and Surplus: Opportunities Missed*, 2019 UTAH L. REV. 607, 617; Chrystin Ondersma, *A Human Rights Approach to Consumer Credit*, 90 TUL. L. REV. 373, 418 (2015).

[9] *See* discussion *infra* Part I.

[10] For example, Rory Van Loo and Michael Guttentag separately suggest there might be opportunities to distribute "overcharge" or "surplus" without significant efficiency losses. *See* Van Loo, *Consumer Law*, *supra* note 1, at 213; Guttentag, *supra* note 8, at 610.

[11] In other work, I suggest the problems of path dependency may be overstated, and pursuing more distribution in consumer law may not necessarily crowd out other options. *See* Raghavan, *supra* note 8 (manuscript at 8); *see also* John Linarelli, *Equality and Access to Credit: A Social Contract Framework*, 84 LAW & CONTEMP. PROBS. 165, 178-79 (2021) (recognizing that credit-welfare tradeoffs may exist but justifying intervention in consumer credit markets on Rawlsian grounds).

[12] *See, e.g.*, KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 2-3 (2019); William Boyd, *Ways of Price Making and the Challenge of Market Governance in U.S. Energy Law*, 105 MINN. L. REV. 739, 743 (2020); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 378 (2020); Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, *in* THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW (manuscript at 1) (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., forthcoming May 2022); Herrine, *Consumer Protection*, *supra* note 1 (manuscript at 3).

understood as ways to reallocate burdens in those markets.[13] In this Essay, I seek to extend this methodological approach to fringe finance.[14]

This Essay makes two claims. The first is that consumer credit is a way to create and distribute new money. The second is that price and access in consumer credit markets are ways to distribute the burdens of disbursing public money through private means. In making these claims, I build on several insights from the recent scholarship on the legal design of money. Core claims of that scholarship are that the legal design of money shapes exchange and matters for distribution,[15] that our current legal arrangement relies on financial institutions to expand the money supply by distributing public obligations in something that resembles a franchise relationship,[16] and that most new money is generated and allocated through private extensions of credit.[17]

As I argue below, a natural implication of these observations is that the cost of credit and access to credit are ways of financing the private disbursement of public obligations. The law determines how these disbursement costs are allocated. Under a permissive legal regime (like our own), financial institutions have broad freedom to determine access and price credit, and the burdens are disproportionately borne by poorer consumers who have sporadic access to credit at high cost.[18] Under a restrictive legal regime, financial institutions have limited freedom to determine access and price credit, and the burdens are distributed more broadly.

This framing has two important virtues. First, it reveals the public nature of consumer credit markets and how interventions in these markets are less about unsettling private exchanges and more about incidence shifting.[19] This does not

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[13] *See, e.g.*, ADAM J. LEVITIN & SUSAN M. WACHTER, THE GREAT AMERICAN HOUSING BUBBLE: WHAT WENT WRONG AND HOW WE CAN PROTECT OURSELVES IN THE FUTURE 1 (2020); Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV. 1561, 1577-79 (2015); John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 246 (2016).

[14] I use the term fringe finance and fringe credit here to broadly include financial products primarily offered to poor consumers. This would include any bank and nonbank products that are commonly understood as fringe (e.g., payday loans, title loans, overdraft) and newer products on the margins (e.g., installment loans, wage advance products).

[15] *See* CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 23 (2014); DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 46-52 (2011) (discussing credit and state theories of money).

[16] *See* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1147 (2017).

[17] *See* Christine Desan, *The Key to Value: The Debate over Commensurability in Neo-classical and Credit Approaches to Money*, 83 LAW & CONTEMP. PROBS. 1, 14 (2020); ANDREW JACKSON & BEN DYSON, MODERNISING MONEY: WHY OUR MONETARY SYSTEM IS BROKEN AND HOW IT CAN BE FIXED 22 (2012).

[18] *See* discussion *infra* Section II.C.

[19] In this sense, legislative or regulatory changes are not interventions at all but simply a reallocation of benefits and burdens.

mean that broad interventions are always wise but that these interventions involve a different set of tradeoffs than those that are presently debated.

Second, it allows one to support more consumer credit regulation without believing in the generative potential of consumer credit markets. How money should be created and distributed is a first-order question of monetary design. This is true for both fully public systems and public-private hybrids. Ignoring distributional issues in the legal design of money can undermine other important social goals.[20] For this reason, current proposals to nationalize parts of our banking system tend to be distributionally neutral or progressive with respect to new money creation.[21]

This Essay argues that these concerns do not disappear when the monetary system is a kludgy public-private hybrid like our own. In many ways, these concerns become more acute. If we leave consumer credit markets largely unregulated and focus exclusively on direct state support, unregulated consumer credit markets might undermine the efficacy of direct state support.[22] Though nationalizing our banking is one way to solve this problem, to the extent we keep our present monetary structure, consumer law can help unwind some of the regressivity in consumer credit markets.[23] In other words, we ought to intervene in consumer credit markets not because credit is an important form of social provision but because we presently allocate our money through private institutions and finance this scheme with what are functionally regressive taxes.[24]

The remainder of this Essay proceeds in three parts. Part I describes the shape of conventional debates in consumer law. Part II details how a reconceptualization of the problems in consumer credit markets along structural lines can help overcome some of the problems with conventional rationales. Finally, Part III sketches out some implications for the regulation of consumer credit.

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[20] *See infra* Part III.

[21] *See* Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1261 (2021) (noting that public money creation might be best issued on a "progressive scale" to "channel more funds to the people who both need it most and will be more likely to spend the money on daily purchases").

[22] Paul Kiel & Jeff Ernsthausen, *Debt Collectors Have Made a Fortune This Year. Now They're Coming for More*, PROPUBLICA (Oct. 5, 2020, 5:00 AM), https://www.propublica.org/article/debt-collectors-have-made-a-fortune-this-year-now-theyre-coming-for-more [https://perma.cc/XEZ7-QXXZ] (discussing how Americans used stimulus money to service existing debts); *cf.* Matthew Adam Bruckner, *Debtor-Creditor Issues with Basic Income Guarantees*, 29 AM. BANKR. INST. L. REV. 171, 174 (2021) (arguing that basic income guarantees "could leave the poorest and most vulnerable in our society worse off" without consumer protections against debt collectors).

[23] *See infra* Section II.C.

[24] *See generally* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019) [hereinafter Atkinson, *Rethinking Credit*] (conceiving of credit as regressive redistribution harming the poor).

I. Market Distortions and Market Failure

Modern debates over the wisdom of consumer law tend to prioritize efficiency over fairness or other goals.[25] This was not always the case. Historic consumer credit laws were justified in moral terms, but moral concerns were displaced by market-oriented concerns in the late twentieth century.[26] While it is hard to identify a single event that caused this shift, its beginnings and the eventual shape of modern discourse in consumer credit law were evident in debates over the wisdom of *Williams v. Walker-Thomas Furniture Co.*[27] fifty years ago.

Williams concerned credit sales between Walker-Thomas Furniture and Ora Lee Williams. Ora Lee Williams was a single mother with seven children whose sole source of income was $218 of monthly public assistance.[28] From 1957 to 1962, Williams signed at least fourteen contracts to purchase household goods on credit from Walker-Thomas Furniture.[29] Unbeknownst to Williams, the contracts contained a pro rata clause that permitted Walker-Thomas to seize all the goods Williams had purchased on credit.[30] After her monthly payments sharply increased in late 1962, Williams defaulted and Walker-Thomas sued to recover all the goods Williams had purchased on credit since 1957.[31] At the time of her default, Williams had paid Walker-Thomas over $1,000.[32]

Williams' case and a companion case involving Walker-Thomas wound up at the D.C. Circuit Court of Appeals.[33] In a now-famous majority opinion, Judge Skelly Wright found that Walker-Thomas's pro rata clause might violate the common law doctrine of unconscionability if Williams lacked "meaningful choice" and the contracts terms were "unreasonably favorable" to Walker-Thomas.[34] Skelly Wright's opinion and the doctrine of unconscionability have

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[25] *See supra* note 1 and accompanying text.

[26] *See* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 435, 445 (2021) [hereinafter Herrine, *Folklore*] (discussing moral economy roots of "unfair or deceptive acts and practices" prohibitions and market-oriented shift in late twentieth century); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1111 (2008) (reviewing changes in usury laws in last twenty years); *see also* Schmitz, *supra* note 7, at 75 (discussing moral foundations of unconscionability). For a recent history on the intellectual shift in American public policy in the latter half of twentieth century, see generally POPP BERMAN, *supra* note 1.

[27] 350 F.2d 445 (D.C. Cir. 1965).

[28] *Id.* at 448.

[29] Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 915 (D.C. 1964).

[30] *Id.*

[31] Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor,'* 102 GEO. L.J. 1383, 1397 (2014) [hereinafter Fleming, *Unconscionability*].

[32] *Id.* at 1396.

[33] *Williams*, 350 F.2d at 445.

[34] *Id.* at 449-50.

been the subject of extensive scholarly debate and critique since the *Williams* decision was originally issued in 1965.[35]

Early critiques suggested that unconscionability was paternalistic[36] and indeterminate.[37] In 1975, Richard Epstein offered a somewhat different critique.[38] Epstein argued that unconscionability was not bad merely because it was indeterminate but because it was inefficient.[39] In particular, Epstein argued that add-on clauses like the one used by Walker-Thomas provide sellers with additional security limiting their loss in case a buyer defaults.[40] Without the option to include a pro rata clause, sellers like Walker-Thomas might increase prices to minimize their losses when buyers default.[41] Thus, rather than helping poor consumers like Williams, a ban on such clauses may harm these consumers by pricing them out of the market for necessary household goods. Epstein did suggest that unconscionability might be justified in limited cases of duress or fraud where the transaction does not reflect individual preferences.[42]

The beauty of Epstein's simple efficiency argument was that it extended beyond *Williams* and the unconscionability doctrine. Any intervention in consumer financial markets that limited creditors' freedom to manage risk could be inefficient and regressive.[43] This included efforts to regulate industries with

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[35] *See, e.g.*, Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488, 551-58 (1967); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306-08 (1975); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 3 (1981); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 610 (2009); Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011, 1011 (2015).

[36] This is a point Judge Dahner implied in his dissent, noting that there had been no finding of "sharp practice" by Walker-Thomas and that Williams "seems to have known precisely where she stood." *Williams*, 350 F.2d at 450 (Dahner, J., dissenting).

[37] *See* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 763 n.22 (2004) (listing early critiques arguing unconscionability concept was "too plastic").

[38] *See generally* Epstein, *supra* note 35.

[39] *See id.* at 307.

[40] *See id.*

[41] *See id.* Judge Dahner made a similar point in his dissent: "Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk." *Williams*, 350 F.2d at 450 (Dahner, J., dissenting).

[42] Epstein, *supra* note 35, at 294-95.

[43] Intervening in consumer credit markets might close credit markets to consumers who rely on high-cost credit to purchase essential goods or pay for essential services or push these consumers to more expensive and predatory alternatives. *See, e.g.*, *id.* at 315 ("[Substantive unconscionability] serves only to undercut the private right of contract in a manner that is apt

open-textured prohibitions, such as unconscionability and unfairness or complex technical rules.[44] With the rise of the Law and Economics movement in the 1970s and 1980s, critiques like Epstein's had greater purchase.[45] And in the following decades, scholars and policymakers would extend these arguments to criticize interventions in mortgage lending,[46] student lending,[47] credit cards,[48] and payday lending.[49]

Scholars who favored interventions in consumer financial markets generally responded to the efficiency revolution in two ways. First, scholars argued that there were costs associated with nonintervention that extended beyond individual transactions.[50] In particular, risky loans that pose a high risk of default might push borrowers to increasingly rely on the state for support.[51] And the cost

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to do more social harm than good."); Andrew T. Hayashi, *Myopic Consumer Law*, 106 VA. L. REV. 689, 694 (2020) ("[P]rohibiting credit terms that are designed to tempt present-biased individuals [to consume goods or services they might under-consume] might hurt those that the ban is meant to help."); Mann & Hawkins, *supra* note 4, at 886-95 (arguing that bans on payday loans might force borrowers to seek worse alternatives).

[44] In other words, critiques like Epstein's extended to statutory efforts to ban provisions of certain consumer contracts, such as the pro rata clause at issue in *Williams*. *See* Fleming, *Unconscionability*, *supra* note 31, at 1424-31 (describing passage of installment sales legislation in Washington, D.C., after *Williams*).

[45] *See* Herrine, *Folklore*, *supra* note 26, at 437 (noting influence of Chicago School over Reagan-era developments in consumer law).

[46] Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 78-84 (2009) (arguing against suitability standards in mortgage lending in wake of 2007-2008 financial crisis).

[47] *See* Anthony J. Guida, Jr. & David Figuli, *Higher Education's Gainful Employment and 90/10 Rules: Unintended "Scarlet Letters" for Minority, Low-Income, and Other At-Risk Students*, 79 U. CHI. L. REV. 131, 132 (2012) (arguing that regulations designed to curb predatory practices by for-profit colleges will eliminate access to education for minority and at-risk students).

[48] *See* Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 128 (2000) (arguing against interventions in credit card markets on efficiency grounds).

[49] *See* Hayashi, *supra* note 43, at 713-16 (arguing that welfare effects of payday loans cannot be analyzed without considering goods or services loans are used for).

[50] The most notable example of this view is Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995). For other examples, see Amy J. Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 CHI.-KENT L. REV. 65, 101-102 (2014), arguing that the "community bears burdens derived from short-term fringe lending" in the form of increased reliance on state services; and Mann & Hawkins, *supra* note 4, at 884, arguing that the "best case against payday lending is that the market is plagued by cognitive failures, unlikely to be well policed by competitive forces, and likely to generate external costs borne by the rest of society." For a discussion of the longer history of this view, see generally Anne Fleming, *The Public Interest in the Private Law of the Poor*, 14 HARV. L. & POL'Y REV. 159 (2019) [hereinafter Fleming, *Private Law of the Poor*].

[51] Posner, *supra* note 50, at 285.

of this state support might outweigh any efficiency gains in individual transactions.[52]

Second, scholars suggested that the set of inefficient transactions might be much larger than the limited cases of duress or fraud Epstein initially identified. Scholars generally offered two reasons why seemingly efficient transactions might be inefficient. The first reason is that lenders might be leveraging information asymmetries to encourage borrowers to enter transactions they might otherwise avoid.[53] The second reason is that consumers might be boundedly rational in a way that causes them to over- or under-borrow.[54] The second rationale drew heavily from the behavioral psychology literature that captured the imaginations of liberal scholars and policymakers for the last two decades.[55]

But there are important limits to each of the arguments above. Arguments that emphasize welfare-benefits might be used to justify a contraction of the welfare state. Indeed, Anne Fleming argues that a key claim of early consumer advocates was that consumer credit regulation would "prevent pauperism and thereby reduce spending on public welfare as well as private charity."[56] Arguments that lean on information economics and behavioral psychology might rest on shaky

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[52] *Id.* at 286.

[53] A representative example of this kind of scholarship is Kathleen C. Engel & Patricia A. McCoy's prescient 2002 article, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1280 (2002). *See also* Howell E. Jackson & Paul Rothstein, *The Analysis of Benefits in Consumer Protection Regulations*, 9 HARV. BUS. L. REV. 197, 259 (2019) (explaining that "[i]nformation failures provide a very common rationale for consumer protection regulations"); Will Dobbie & Paige Marta Skiba, *Information Asymmetries in Consumer Credit Markets: Evidence from Payday Lending*, 5 AM. ECON. J. 256, 256 (2013) (analyzing "empirical relevance of asymmetric information using administrative data from the payday lending market").

[54] *See, e.g.*, Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV 249, 250 (2006) (providing "a general outline of the reasons that boundedly rational borrowing might occur and the possible legal remedies"); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 9 (2008) (arguing that "[i]mperfect rationality exacerbates . . . problems" in consumer credit markets).

[55] *See* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1637-44 (2014) (explaining behavioral revolution and its influence on development of consumer credit law).

[56] Fleming, *Private Law of the Poor*, *supra* note 50, at 162 (tracing history of anti-pauperism arguments in favor of credit restrictions).

empirical grounds.[57] Moreover, even if the empirics suggest cognitive bias, behaviorally based interventions might still be ineffective[58] or inefficient.[59]

The limits of efficiency-oriented arguments have pushed scholars to search for alternative grounds to justify consumer credit regulation. Some scholars suggest we appeal to first principles and return to something resembling the moral norms that shaped historic consumer credit law. Recent suggestions in this vein include grounding consumer credit law in principles of distributive justice,[60] human rights,[61] or fundamental fairness.[62] But appeals to first principles run into site-based critiques.

Site-based critiques do not contest the normative claims of scholars pushing for intervening in consumer credit markets on non-efficiency grounds. Instead, these critiques suggest that consumer credit law is not the best way to achieve any of these first-order goals. The most well-known and influential site-based critique is Louis Kaplow and Steven Shavell's "double-distortion" argument.[63] Kaplow and Shavell argue that pursuing more equity through the law may distort markets in ways that are in tension with the aims of scholars pushing for more

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[57] As an example, below are some of the conflicting studies on the cognitive bias in payday lending. For studies finding bias, see, for example, Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 568-69 (2010); Marianne Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66 J. FIN. 1865, 1865-68 (2011); and Jesse B. Leary & Jialan Wang, Liquidity Constraints and Budgeting Mistakes: Evidence from Social Security Recipients 1 (Feb. 2016) (unpublished manuscript) (available at https://conference.nber.org/confer/2016/LEs16/Leary_Wang.pdf [https://perma.cc/AZ9U-D984]). For studies not finding bias, see, for example, Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUP. CT. ECON. REV. 105, 112 (2013); and Hunt Allcott, Joshua J. Kim, Dmitry Taubinsky & Jonathan Zinman, *Are High-Interest Loans Predatory? Theory and Evidence from Payday Lending* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28799, 2021), https://www.nber.org/system/files/working_papers/w28799/w28799.pdf [https://perma.cc/8VWF-2AY8].

[58] *See* Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1155 (2013) ("[P]olicy defaults intended to protect individuals when firms have the motivation and means to move consumers out of the default are unlikely to be effective unless accompanied by substantive regulation."); Bubb & Pildes, *supra* note 55, at 1647-58 (explaining shortfalls of behavioral-focused intervention and arguing that disclosure forms "are unlikely to significantly improve outcomes in consumer credit markets").

[59] Hayashi, *supra* note 43, at 689 (finding that payday loan regulations "increased the use of an alternative credit product and reduced the use of paid tax preparers and the take-up of the earned income tax credit").

[60] *See* Linarelli, *supra* note 8, at 423.

[61] *See* Ondersma, *supra* note 8, at 373.

[62] *See* Schmitz, *supra* note 7, at 107 ("Unconscionability's historical and philosophical foundations justify its use as a flexible fairness safety net.").

[63] Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994).

equity.[64] A better approach would be to manage the equity costs of efficient legal rules through tax-and-transfer systems.[65]

There is a vast literature on Kaplow and Shavell's double-distortion argument and much of it is quite critical.[66] Thus, there are good reasons to be skeptical of their argument. Moreover, even if Kaplow and Shavell are correct, there are ways to pursue more distribution in consumer credit law without significantly distorting market outcomes.[67] But there is a second site-based critique we ought to worry about: path dependency. Proponents of this view point out that consumer credit law has often been used as a form of indirect and private social provision to avoid direct and public social provision.[68] And given this history, there are reasons to worry that a renewed effort to pursue more equity in consumer credit law might crowd out other options, which would leave poor and marginalized communities worse off.

In my view, neither of the two site-based critiques necessarily imperils the project to seed consumer credit interventions in richer soil. But they highlight a problem that is common to the rationales detailed in this Part: one of perspective. The rationales in this Part either explicitly or implicitly share a background assumption that credit markets are privately ordered. Financial institutions are best understood as mere intermediaries that link savers with spenders. To efficiently intermediate, financial institutions need freedom to manage the costs of intermediation with the tools of access and price. And interventions that take

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[64] *Id.*

[65] *Id.*

[66] *See generally, e.g.*, Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998); Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001); Ronen Avraham, David Fortus & Kyle Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125 (2004); Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511 (2005); David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1 (2014); Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478 (2014); Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016); Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489 (2018); Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018); *see also* Raghavan, *supra* note 8 (manuscript at 9-18) (summarizing this literature).

[67] *See supra* note 10 and accompanying text.

[68] *See* MONICA PRASAD, THE LAND OF TOO MUCH: AMERICAN ABUNDANCE AND THE PARADOX OF POVERTY 227-45 (2012) (finding trade-off between credit and welfare in OECD countries); Rachel E. Dwyer, *Credit, Debt, and Inequality*, 44 ANN. REV. SOCIO. 237, 239 (2018) (arguing that expanded access to credit in place of subsidizing social goods creates credit-welfare state trade-off (citing PRASAD, *supra*)); Atkinson, *Rethinking Credit*, *supra* note 24, at 1158 (explaining that "the persistence of talk about low-income Americans' access to credit indicates that the balance in the public-private American welfare regime has shifted too far toward individualism and private provision").

away this freedom will distort consumer credit markets in potentially regressive ways.

Anyone who seeks to unsettle consumer credit markets must demonstrate that interventions will not distort markets or that some distortion is tolerable. But this is not the only way to conceptualize the shape of markets and the costs of interventions. There is an alternative perspective that denaturalizes the market by detailing the way the law structures exchange. And this richer, descriptive account can help explain interventions that are otherwise difficult to defend.

Structural approaches to legal and economic problems are not new but are newly relevant. The next Part details the emerging structuralism in consumer law scholarship and considers how we may leverage some of these insights to reconceptualize problems in consumer credit markets.

II. THE STRUCTURAL TURN: BEYOND MARKET FAILURE

As noted in the introduction, there is an emerging shift in legal scholarship away from conceptualizing markets as unstructured and self-correcting to legally structured and actively governed. Part of this structural turn includes recent scholarship on housing finance and student finance where scholars foreground the way the law shapes these markets and consider the distributive implications of particular legal arrangements.[69] Key conclusions of this scholarship are that legal changes in the late twentieth century reshaped mortgage lending and student lending in ways that reallocated the benefits and burdens of these markets, and reform of these markets requires more than solving for market failure or policing bad conduct. In this Part, I briefly describe this recent scholarship on housing and student finance. I then suggest how we might extend these insights to reconceptualize problems in fringe financial markets.

A. *Housing Finance*

The wave of mortgage defaults and foreclosures that followed the financial crisis of 2008 revealed that there were deep problems in mortgage markets. Following the crisis, there was extensive debate about why so many risky loans were originated and sold. One way to explain these problems in consumer scholarship was to focus on predatory lending practices. As explained in Part I, consumer credit markets feature large imbalances between financial institutions and consumers across multiple dimensions. Scholars argued that market changes prior to the crisis put financial institutions in a position where they could take advantage of these imbalances on an unprecedented scale.[70] And this predatory

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[69] *See infra* Sections II.A, II.B.

[70] *See generally, e.g.*, Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 1; KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS (2016); Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185 (2007).

behavior precipitated a wave of defaults that metastasized into a global financial panic.

Recently, some scholars have offered a different account that foregrounds the state's role in shaping mortgage markets.[71] The American mortgage market features extensive government involvement.[72] The federal government engages in direct lending, insures mortgages, provides secondary market liquidity, and indirectly subsidizes the mortgage market in other ways.[73] Many of these interventions were products of New Deal efforts to reform the housing market after the Great Depression.[74] And these interventions fundamentally reshaped the mortgage market from a small, private, and extremely risky market to a large, public, and stable market.[75]

Prior to the Great Depression, most mortgage loans were short-term, interest-only loans that required significant down payments.[76] These loans were made primarily to small farmers, and performance turned on seasonal farm income, which was notoriously unstable.[77] The pre-Depression mortgage market featured regular cycles of default, foreclosure, and collapse in housing prices.[78] The extensive New Deal interventions converted these risky, short-term loans into stable, long-term loans.[79] The thirty-year, fixed-rate, amortizing mortgage—what's become the canonical example of a plain and safe loan product—was created out of whole cloth by the federal government.[80]

For scholars such as Adam Levitin and Susan Wachter, the problems in the mortgage market were not solely the product of market failure or predatory practices.[81] Instead, these problems grew out of legal changes in the late twentieth century, where the government ceded public control of the mortgage market to private institutions.[82] These changes would convert the mortgage

[71] *See, e.g.*, LEVITIN & WACHTER, *supra* note 13, at 16; GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 2 (2012); SARAH L. QUINN, AMERICAN BONDS: HOW CREDIT MARKETS SHAPED A NATION (2019).

[72] *See* LEVITIN & WACHTER, *supra* note 13, at 38.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 16, 21.

[77] *Id.* at 23.

[78] *Id.*

[79] *Id.* at 40.

[80] *Id.* at 38. Indeed, Adam Levitin and Susan Wachter call this product the "American Mortgage" to highlight its public roots. *Id.* at 54.

[81] Levitin and Wachter's specific story of the bubble is that it was a was a supply-side phenomenon caused by features that are endemic to private mortgage finance. *Id.* at xi ("the shift from regulated agency securitization to unregulated [private-label securitization] produced an oversupply of underpriced mortgage finance in the form of [Depression Era] bullet loans.").

[82] *See id.* at 106 ("Freed of its New Deal regulations, the U.S. mortgage market quickly

market into a publicly guaranteed but privately managed market and lead to the same unstructured and unsafe lending practices that prevailed prior to the Great Depression. Only now, mortgage markets were much larger and more liquid, and the costs were borne by a much larger class of people.

Thus, intervening in mortgage markets is less about remedying market failure and more about repairing our broken housing finance infrastructure to reallocate market risk.[83] Indeed, as the federal government is heavily involved in mortgage markets, housing regulation is really not best understood as an intervention at all. Instead, it is a way to change market governance and progressively redistribute the benefits and burdens of housing finance. In the next Section, I suggest that we can tell a similar story about student finance.

B. *Student Finance*

The explosive growth in student debt over the last fifteen years has made problems in student lending particularly salient. One way to understand problems in the student lending market is as the product of predatory behavior by lenders and financial institutions.[84] But an alternative account that is increasingly gaining purchase is to understand these problems as fundamentally shaped by federal policy.[85]

For most of the twentieth century, higher education was directly subsidized by the federal government in the form of reduced tuition and education grants.[86] This structure would change in the 1970s, when, for a variety of reasons, higher education policy would shift from direct subsidies, low tuition, and limited student borrowing to indirect subsidies, higher tuition, and significant student borrowing.[87] In particular, the government would provide less direct aid to

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reverted to Depression-Era 'bullet' loans, shifting interest rate and refinancing risk back to borrowers.").

[83] As an example, Adam Levitin and Susan Wachter propose creating a new federally chartered corporation that would act as a single purchaser and guarantor of mortgages and issuer of mortgage-backed securities, which would reallocate interest rate risk to capital markets and credit risk to the federal government. *Id.* at 255-61.

[84] *See* Sarah Ann Schade, *Reining in the Predatory Nature of For-Profit Colleges*, 56 ARIZ. L. REV. 317, 320 (2014); Joseph Sanders & Vijay Raghavan, *Improvident Student Lending*, 2018 UTAH L. REV. 919, 930. *See generally* TRESSIE MCMILLAN COTTOM, LOWER ED: THE TROUBLING RISE OF FOR-PROFIT COLLEGES IN THE NEW ECONOMY (2017).

[85] *See* SUZANNE METTLER, DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM 10-12 (2014); Glater, *supra* note 13, at 1577-79; Brooks, *supra* note 13, at 245 (discussing evolution of higher education policy from direct grants to student loans and income-driven repayment as tool to unwind regressivity of student loans).

[86] *See* METTLER, *supra* note 85, at 5-7, 51-64 (2014); Brooks, *supra* note 13, at 245-46.

[87] A common explanation is that this shift was the product of changing political and economic conditions. Rapidly rising tuition costs and declining state budgets during this time put significant strain on the then-existing regulatory framework in higher education. *See* Brooks, *supra* note 13, at 246. The legislative response to these economic and fiscal changes

students and institutions and instead provide subsidies to financial institutions to lend to students at favorable rates.[88]

This shifted the burdens of financing the cost of higher education from the general public to individual students.[89] Rather than pay a reduced rate for tuition with grants, students are charged a higher rate but defer payment until after graduation. Students then repay in increments over an extended period. While wealthier students might fare better under this scheme, lower-income students likely fare worse as they devote more disposable income to financing the cost of education.[90]

In other words, the shift in education policy in the late twentieth century reallocated the cost of financing higher education in a somewhat regressive way.[91] Whereas, prior to the shift, the cost of financing higher education was largely borne by the public, after the shift, the cost would be borne largely by students.[92] And this meant that students who derived the least benefit from their education would bear a higher burden as a percentage of their income. For scholars such as Jonathan Glater and John Brooks, the problems in the student lending market are not solely a function of predatory behavior but also a function of federal policy.[93] And solving problems in student lending requires reallocating the burdens of financing higher education in some manner.[94] In the next Section, I suggest we can reconceptualize problems and solutions in fringe financial markets in a similar way.

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was to scale back direct subsidies for tuition and expand indirect subsidies for student loans. *See* METTLER, *supra* note 85, at 64-68. Suzanne Mettler suggests that this legislative response was a product of both policy "drift" and the innate characteristics of higher education law. *Id.* at 67 (quoting Jacob Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 246 (2004)). Per Mettler, the politics of fiscal conservatism led lawmakers to respond to rising tuition and declining state budgets by scaling back Pell grant spending and expanding student loans. *Id.* at 76.

[88] METTLER, *supra* note 85, at 64-68.

[89] *See* Brooks, *supra* note 13, at 246.

[90] *See id.* The shift from grants to loans not only deepened the wealth gap but also deepened the racial wealth gap. *See* Andre M. Perry, Marshall Steinbaum & Carl Romer, *Student Loans, the Racial Wealth Divide, and Why We Need Full Student Debt Cancellation*, BROOKINGS INST. (June 23, 2021), https://www.brookings.edu/research/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation/ [https://perma.cc/KW5T-K48U].

[91] *See* Glater, *supra* note 13, at 1563 (arguing that "rising tuition and growing use of education loans reallocate risk to students and their families and make paying for college excessively risky"); Brooks, *supra* note 13, at 246.

[92] Brooks, *supra* note 13, at 246.

[93] *See* Glater, *supra* note 13, at 1563-64; Brooks, *supra* note 13, at 258.

[94] *See* Glater, *supra* note 13, at 1563-64; Brooks, *supra* note 13, at 258; John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L.J. 5, 5 (2020) ("[T]he student loan crisis is due not to the scale of student loan debt, but to the federal education finance system's failure to utilize its existing mechanisms for progressive, income-based payments and debt cancellation.").

C. *Neochartalism and Fringe Finance*

A structural approach to the problems in fringe financial markets may seem odd at first blush. Mortgage lending and student lending feature direct and long-standing state involvement.[95] Thus, it is sensible that scholars are increasingly conceptualizing problems in those markets in broader terms. But fringe financial markets do not appear to bear any obvious state imprint. Instead, economic factors seem to drive the demand for fringe financial products.

Here is a conventional account: Consumers need money to engage in economic life. But, for a variety of reasons, poor consumers lack sufficient cash to pay for basic and emergency expenses.[96] Whereas wealthier consumers can rely on low-cost credit and insurance to smooth consumption between pay periods and manage emergencies, poor consumers have limited access to these markets because their finances are unstable.[97] Financial instability poses risk and creditors manage this risk by charging poor consumers what seems like excessive rates for access to credit.[98] Yet these rates, though facially excessive, are sensible given the high likelihood that poor consumers will default on their obligations.[99]

This conventional account of supply and demand in fringe financial markets suggests that the state plays little to no role in the structure of these markets. But there is an alternate way to conceptualize problems with consumer credit markets that foregrounds the state's role. And that is to understand these problems as money problems that stem from the legal design of money. To make sense of this claim, it is helpful to understand the different ways one might conceptualize money.

Broadly speaking, there are two different ways to think about money: as a neutral medium or as legally constructed.[100] Under the neutral view, lending is

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[95] *See supra* Sections II.A, II.B.

[96] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54474 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041) ("[C]onsumers living paycheck to paycheck and with little to no savings have also used credit as a means of coping with financial shortfalls.").

[97] *See, e.g.*, Adair Morse, *Payday Lenders: Heroes or Villains?*, 102 J. FIN. ECON. 28, 30 (2011) ("Individuals restricted in access to credit [offered by mainstream banking, mortgage companies, and credit cards] resort to borrowing from high interest lenders.").

[98] *See* Jim Hawkins, *Earned Wage Access and the End of Payday Lending*, 101 B.U. L. REV. 705, 708 (2021) (explaining that core complaint against payday loans is that they "are simply too expensive").

[99] *See* Mann & Hawkins, *supra* note 4, at 861-65 (discussing economics of payday lending).

[100] There are alternative ways to characterize these competing perspectives. *See* Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 758 (explaining two competing paradigms have dominated understandings of banking and its regulation: the intermediation paradigm and the money paradigm); MICHAEL O'MALLEY, FACE VALUE: THE ENTWINED HISTORIES OF MONEY & RACE IN AMERICA 4 (2012) (explaining that, for two

mostly a private affair and money is ancillary to "real" exchange. For proponents of this view, money emerged as a technological solution to problems with primitive barter economies. Money is best understood as downstream of markets: money represents value that precedes exchange. Thus, money is best understood as a neutral medium that does not shape exchange but merely facilitates it.

The neutral view was largely dominant in the twentieth century and undergirds the conventional account of demand in fringe financial markets I describe above. Under this view, financial institutions are best understood as mere intermediaries that link savers with spenders.[101] To efficiently intermediate, financial institutions need freedom to manage the costs of intermediation with the tools of access and price.[102] And interventions that take away this freedom will distort consumer credit markets in regressive ways.[103]

Under the alternative perspective—which I'll call the legal view—money is legally constructed and upstream of markets. In other words, the legal design of money matters and shapes exchange. The legal nature of money was once well-understood by the broader public, and the institutional design of money was a site of political contestation throughout the eighteenth and nineteenth centuries.[104] However, throughout most of the twentieth century, the legal nature of money was minimized and obscured by scholars and policymakers.[105]

The economic crises of the last two decades have brought the legal nature of money into sharp focus and revitalized the long dormant legal view of money. Neochartalists, or new proponents of the legal view,[106] make three important claims about the nature of money that are particularly relevant here. The first is that creating and disseminating money is a state project, and the institutional design of money shapes exchange and has distributive implications.[107] As Christine Desan explains, history reveals that money did not arise as a technical

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hundred years, American debates over money took place between two basic camps: hard money and soft money). I opt here for neutral vs. legal as a broader way to characterize the debate beyond the best understanding of banks and regulation or the amount of money we ought to have and the way we should determine its value.

[101] Ricks, *supra* note 100, at 758.

[102] *Id.* at 765.

[103] *Id.*

[104] Mehrsa Baradaran, *Banking on Democracy*, 98 WASH. U. L. REV. 353, 399-409 (2020); Nadav Orion Peer, *Negotiating the Lender of Last Resort: The 1913 Federal Reserve Act as a Debate over Credit Distribution*, 15 N.Y.U. J.L. & BUS. 367, 372-86 (2019); O'MALLEY, *supra* note 100, at 138.

[105] Roy Kreitner, *Money in the 1890s: The Circulation of Politics, Economics, and Law*, 1 U.C. IRVINE L. REV. 975, 977 (2011).

[106] *See* GRAEBER, *supra* note 15, at 46-52 (discussing chartalism and state theories of money); Tankus & Herrine, *supra* note 12 (manuscript at 2) (discussing emergence of neochartalism).

[107] DESAN, *supra* note 15, at 1.

solution to problems with primitive exchange but as "a governance project" created and designed to facilitate state building.[108]

Money, in Desan's account, is invented by a community to "denominate[] in a homogenous way the disparate contributions received from members, and recognizes them as a medium and mode of payment."[109] In medieval England, the "disparate contributions" from community members were denominated in metal coins minted by the state that could be used for exchange and redeemed for taxes.[110] With the onset of capitalism, making money would shift from the state to private institutions in a way that buried the public nature of the project.[111] Desan's history seeks to recover an older understanding of money as "a medium constructed publicly with costs and profits that are material."[112] For Desan, creating and distributing money is not a costless enterprise but a costly one with distributive implications.[113] As Desan explains: "the process [of making money] allocates expenses and profits across many parties, including the tax-paying public, those buying money for its cash services, and the stakeholder—who can be a small ruler, a sovereign state, or an agent like a bank licensed to multiply the public unit of account."[114] Thus, the project of making money is fundamentally a political project, which Desan shows "has been a profoundly important and deeply contested project" throughout history.[115]

The second claim about the nature of money is that in our current institutional order, we rely on private financial institutions to expand the money supply by distributing public obligations in something that resembles a franchise relationship.[116] As Robert Hockett and Saule Omarova explain, the full faith and credit of our government flows through the financial system as "publicly accommodated and monetized private liabilities."[117] Banks create private liabilities by issuing deposits.[118] These private bank liabilities are then publicly accommodated (taken on as a public liability) and monetized (spendable like currency) by the Federal Reserve through reserve accounting.[119] Thus, banks are

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[108] *Id.*

[109] *Id.* at 24.

[110] *Id.* at 62.

[111] *Id.* at 2.

[112] *Id.* at 50.

[113] *Id.* at 49-50.

[114] *Id.* at 50.

[115] *Id.*

[116] Hockett & Omarova, *supra* note 16, at 1147-48.

[117] *Id.* at 1147 (emphasis omitted).

[118] *Id.* at 1159-60.

[119] *Id.* at 1161-62; *see also* Desan, *supra* note 17, at 14 ("Commercial banks issue credit denominated in the official unit of account in the form of promises-to-pay money to one sovereign or another. Those representations of private credit—bank deposits—are treated as money, not just credit: they hold immediate purchasing power.").

not mere private intermediaries but public instrumentalities that expand the money supply through credit generation.[120]

The third claim is that banks create and disseminate new money through private extensions of credit.[121] Much of our new money is issued by banks as credit.[122] Banks' lending decisions affect how much money is in circulation.[123] And the criteria that banks use to determine who gets a loan and on what terms can shape economic outcomes and the distribution of resources.[124]

If these claims are correct, then a few things follow. The first is that consumer credit is a way to create and distribute publicly accommodated private money. The second is that the fees banks charge for consumer credit (e.g., interest and penalties) are ways to finance the private disbursement of public obligations. And the third is that criteria that banks use to determine the cost of credit and access to credit are ways to distribute the burdens of disbursing public obligations through private means.

If these ideas seem a bit abstract, consider the daily transactions of modern life. Purchasing coffee, riding the train, buying groceries, ordering dinner—these transactions are routinely paid for with credit. Credit cards increasingly account for a larger share of all payments, while cash accounts for a smaller share. For example, credit cards accounted for 27% of all payments in 2020, up from 17% in 2012.[125] By contrast, cash accounted for 19% of all payments in 2020, down from 40% in 2012.[126] Moreover, many retailers and small businesses now refuse to accept cash and only take electronic payments.

Thus, regular access to money is not just a way to smooth consumption or to pay for emergencies but is necessary to participate in the consumer economy. Yet, as noted above, many poor consumers only have sporadic access to money at a very high cost. These consumers cannot get low-cost credit cards with forgiving terms and instead must turn to expensive alternatives such as overdraft, installment loans, payday loans, and title loans.

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[120] Hockett & Omarova, *supra* note 16, at 1164.

[121] JACKSON & DYSON, *supra* note 17, at 21-22.

[122] *Id.* at 22; *see also* Desan, *supra* note 17, at 14 (noting that "[m]oney issued by commercial banks [has been] a profuse source of money since the nineteenth century").

[123] JACKSON & DYSON, *supra* note 17, at 22.

[124] *Id.* at 156-59.

[125] KELSEY COYLE, LAURA KIM & SHAUN O'BRIEN, FED. RSRV. SYS., CASH PROD. OFF., 2021 FINDINGS FROM THE DIARY OF CONSUMER PAYMENT CHOICE 3 (2021), https://www.frbsf.org/wp-content/uploads/sites/7/2021-findings-from-the-diary-of-consumer-payment-choice-may2021.pdf [https://perma.cc/RQJ4-NXQM] (noting increase in credit card share of payments for 2020 driven by decrease in use of other payment instruments); CLAIRE GREENE, SCOTT SCHUH & JOANNA STAVINS, FED. RSRV. BANK OF BOS., THE 2012 DIARY OF CONSUMER PAYMENT CHOICE 8 (2018), https://www.atlantafed.org/-/media/documents/banking/consumer-payments/research-data-reports/2018/the-2012-diary-of-consumer-payment-choice/rdr1801.pdf [https://perma.cc/P99Z-2X5B] (finding most commonly used payment instrument was cash, followed by debit and credit cards).

[126] COYLE ET AL., *supra* note 125, at 3; GREENE ET AL., *supra* note 125, at 8.

Our current legal regime is a permissive one. With some exceptions, banks are generally free to allocate money on their own terms.[127] Banks choose to manage the costs of money creation[128] in a way that privileges those whose income, assets, and borrowing history are organized to signal low credit risk.[129] Individuals who are deemed creditworthy (i.e., a low credit risk) have regular access to money at nominal costs; individuals deemed uncreditworthy (i.e., a high credit risk) have limited access to money at exceedingly high costs.[130]

Price of and access to credit are ways to distribute the benefits (access to new money) and burdens (the costs of new money) of our present institutional arrangement. Because the price of credit and access to credit are tied to wealth, these benefits and burdens are distributed regressively. Those with more wealth receive greater benefits (easier access to new money) with lower burdens (less cost), and those with less wealth receive fewer benefits (less access to new money) with greater burdens (higher cost). Although credit risk is the way banks rationalize allocating new money in this fashion, credit risk is not the only determinant of price or access. In some cases, banks explicitly cross-subsidize the cost of credit by imposing higher fees on lower-income consumers to subsidize lower fees to higher-income consumers.[131]

The situation in consumer credit markets is, in many ways, similar to the situation in housing and student finance. Consumer credit markets are publicly constructed, but access to credit is privately mediated. As with housing and student finance, consumer credit markets are loosely regulated, which means benefits and burdens are distributed unevenly and regressively. Poorer consumers generally share a disproportionate burden of financing this arrangement relative to their wealthier peers.[132]

Unlike housing and student finance, there was no large policy shift from a fully federal system to a fragmented and private one. Our current institutional arrangement has largely been the same since the Civil War.[133] But there have

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[127] *See* Desan, *supra* note 17, at 15 (arguing that "credit money enters circulation selectively: it is an advance (a credit) made to some people relative to others").

[128] This includes operational costs and the fees banks charge for the private distribution of public obligations. *See* Omarova, *supra* note 21, at 1239.

[129] *See* Dwyer, *supra* note 68, at 242.

[130] Baradaran, *supra* note 104, at 361.

[131] *See* Natasha Sarin, *Making Consumer Finance Work*, 119 COLUM. L. REV. 1519, 1569 (2019) (discussing regressive cross-subsidies in consumer financial markets).

[132] This is because of higher fees and the declining marginal utility of income. *See* Baradaran, *supra* note 104, at 361; *see also* Raghavan, *supra* note 8 (manuscript at 17) (explaining goods are either "rich-biased" or "poor-biased" depending on marginal utility of consumption in relation to income).

[133] *See generally* Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951 (2021) [hereinafter Menand, *Why Supervise Banks*]. To be sure, although our basic arrangement of using commercial banks to expand the money supply has been in place since the civil war, the governance and regulatory structure

been a series of legal and technological changes in the late twentieth century that made problems in these markets more acute.[134] In the next part, I explain how reorienting our perspective can help us reconsider the purpose and value of consumer credit regulation.

III. IMPLICATIONS

Reconceptualizing problems in consumer credit markets as money problems that stem from the legal design of money might be interesting, but is it useful? In this Part, I suggest this framing has two important virtues. First, it reveals the public nature of consumer credit markets and how interventions in these markets are less about unsettling private exchanges and more about incidence shifting. Second, it allows one to support more consumer credit regulation without believing in the generative potential of consumer credit markets.

A. *Shifting Burdens in Fringe Finance*

Modern debates over the wisdom of consumer credit regulation tend to conceptualize markets as unstructured and self-correcting. Conceptualizing markets as purely private means that interventions may distort market outcomes in inefficient and regressive ways. There are ways to deal with these objections, but none of them are perfect. Reconceptualizing markets as actively governed and legally structured illustrates that the obsession with market distortions is misguided.

If markets are legally constructed, then markets are never truly distorted or out of equilibrium. Instead, markets are contingent arrangements that are constituted to achieve a particular distributive outcome. Mortgage markets evolved out of New Deal interventions designed to spread the benefits of homeownership to white borrowers in order to revive the American economy. Financial deregulation in the late twentieth century reallocated the benefits and burdens of housing finance in ways that were regressive and deepened existing racial disparities in the housing market. Modern efforts to reform mortgage markets are thus best understood as a progressive reallocation of the benefits and burdens in housing finance.

The student lending market evolved out of legal changes in the 1960s and 1970s that shifted the cost of financing higher education onto students in order to manage a complex set of political, social, and economic pressures. Recent changes such as the elimination of private federal loans and the introduction of

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has shifted over time. *See supra* note 104 and accompanying text; Lev Menand, The Logic and Limits of the Federal Reserve Act 21-22 (Feb. 10, 2022) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031875 [https://perma.cc/4WLK-ZY6K]).

[134] *See* ANNE FLEMING, CITY OF DEBTORS: A CENTURY OF FRINGE FINANCE 213-46 (2018) (discussing unraveling of state consumer credit law in late twentieth century); KRIPPNER, *supra* note 71, at 58-86 (discussing deregulation of financial markets).

income-based repayment are best understood as efforts to progressively redistribute the benefits and burdens in student finance.[135]

We can tell a similar story about money and consumer credit. Our current institutional arrangement of using commercial banks to expand the money supply was initially setup to solve the "extremely difficult governance problem [of] creating an elastic money supply."[136] As Lev Menand explains, "us[ing] specially chartered banks to create money and supervisors to act as outsources, overseeing the managers who operate banks" was perceived as a "middle course" that would "diffus[e] the power [over money creation while] constraining it as much as possible."[137] But there were important distributive consequences to this decision. As Christine Desan explains, banks "have no reason to issue money evenly across the population," and as a result, bank money is often issued selectively and unevenly.[138]

Throughout our history, various stakeholders have fought to rewrite the terms of this settlement[139] and shift power away from banks. Many scholars have written about the way agrarian populists fought for and changed monetary governance in the late nineteenth and early twentieth centuries.[140] And today, some scholars are again calling for a similar shift on democratic grounds.[141] One way to understand consumer credit regulation in this context is as a tool to shift power and redistribute burdens in consumer credit markets.

As an example, consider an interest rate cap with a universal access mandate. On the one hand, these interventions would decrease costs for poor consumers by decreasing the cost of credit and expanding access to credit.[142] On the other hand, these interventions would likely increase costs for banks and rich consumers.[143] And this cost-increase might distort the efficient allocation of resources in the consumer credit markets.

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[135] *See* Brooks, *supra* note 13, at 258.

[136] Menand, *Why Supervise Banks*, *supra* note 133, at 958.

[137] *Id.* at 951, 958.

[138] Desan, *supra* note 17, at 5.

[139] *See* Menand, *Why Supervise Banks*, *supra* note 133, at 958 (referring to our current institutional arrangement as "The American Monetary Settlement").

[140] *See supra* notes 104-05; PRASAD, *supra* note 68, at 10.

[141] *See* Baradaran, *supra* note 104, at 362; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1625 (2018) (arguing public utility-style concepts can help conceptualize and respond to contemporary problems where private actors have concentrated control over essential goods and services); John Crawford, Lev Menand & Morgan Ricks, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113, 116 (2021); Omarova, *supra* note 21, at 1234-35.

[142] To be sure, the incidence of a rate cap is subject to extensive debate. For a summary of this debate and a discussion of a broader set of regulatory tools we might use to redistribute income in consumer law, see generally Raghavan, *supra* note 8.

[143] Banks may try to cross-subsidize these costs by raising prices on rich consumers.

But if consumer credit is new money, and price and access are ways to finance the private disbursement of public obligations, then a rate cap and mandate are merely ways to shift incidence in the consumer credit markets. Indeed, a rate cape coupled with a mandate is best understood as a way to shift costs between market participants and not as an intervention to cure market failure. Acknowledging this fact does not mean that rate caps, mandates, or any similar measures are always wise. Nor does it mean that efficiency is irrelevant. It just means that the wisdom of a particular legal change involves a different set of tradeoffs than those that we presently debate.

B. *Incidence Shifting, not Social Provision*

Reconceptualizing problems in fringe markets not only offers a different way to think about the value of consumer credit regulation, but it provides a partial answer to one of the sharpest challenges to consumer credit law in recent years. Across several articles, Abbye Atkinson has identified fundamental flaws with the normative aims of consumer scholarship and advocacy.[144] Consumer scholars and advocates tend to view credit as essential to the "economic well-being" of low-income communities because it can serve as a mechanism to smooth consumption or "as a catalyst for social mobility."[145] For these scholars and advocates, consumer credit regulation is desirable because it can expand access to this particularly vital resource.

Atkinson identifies two important problems with this view. The first is that credit is an intertemporal transfer of wealth, shifting "an individual's future capital to facilitate present consumption."[146] If there is no interperiod redistribution, credit can only work as a social provision if the borrower's economic standing improves between when the debt is incurred and must be repaid.[147] And there is little evidence that private credit facilitates this economic transformation.[148] The second issue is that credit that cannot be repaid becomes debt, which has often functioned as a mechanism to subordinate socioeconomically marginalized groups.[149] Thus, when consumer credit is used as our exclusive form of social provision, it can compound inequality and deepen the racial wealth gap.

One important takeaway from Atkinson's work is that we should focus less on tackling inequality through indirect social provision (i.e., credit) and more on direct social provision (i.e., transfers).[150] And this raises an important question: What is the normative case for consumer credit regulation? If consumer credit

[144] *See* Atkinson, *Rethinking Credit*, *supra* note 24; Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403 (2020).

[145] Atkinson, *Rethinking Credit*, *supra* note 24, at 1096-97.

[146] *Id.* at 1098.

[147] *Id.* at 1099.

[148] *Id.*

[149] Atkinson, *Borrowing Equality*, *supra* note 144, at 1406.

[150] *Id.* at 1161.

regulation has often been pursued to the exclusion of direct social provision,[151] and if access to credit without a robust social safety net means that that credit will often function as a tool of inequality and subordination, shouldn't we focus our energy on expanding the social safety net and ignore consumer credit markets?[152]

This Essay suggests that at least part of the answer to the normative question lies in understanding consumer credit as new money. The legal design of money has distributive implications. How we choose to allocate new money determines how resources are allocated in our society. For this reason, proposals to nationalize our banking system, such as Saule Omarova's public ledger, contemplate allocating new money in a neutral or progressive way.[153]

Distributional concerns do not disappear when the monetary system is a kludgy public-private hybrid like our own. In many ways, these concerns become more acute. If we move to a world in which the state provides more direct social provision but leaves consumer credit markets largely unregulated, rich consumers will continue to have access to new money at comparably cheaper rates, which would discount the value of direct social provision. Moreover, because new money creation through credit markets is often inherently regressive (for the reasons Atkinson suggests), it is arguably more important to constrain new money creation in a private system than it might be in a purely public system.

Thus, we ought to pursue consumer credit regulation to unwind the regressivity of money creation in our system even if consumer credit is a poor form of social provision. To be sure, this is only a partial answer to Atkinson's challenge. In earlier work, Atkinson suggests that consumer credit's value is partially a function of particular legal arrangements.[154] Consumer credit is not necessarily a tool of subordination but can function as a tool of subordination where the existing legal order privileges credit (to the exclusion of direct social provision) and penalizes debt. In more recent work, Atkinson offers a deeper structual critique of consumer credit. Consumer credit in this account is a device capitalist economies use to commodify marginalized status and extract surplus value from this marginalization.[155]

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[151] *See* PRASAD, *supra* note 68, at 250 (2012) (postulating that "a set of progressive interventions taken [by the United States] during the early twentieth century produced decidedly non-progressive results"); *see also* Rachel E. Dwyer, *Credit, Debt, and Inequality*, 44 ANN. REV. SOCIO. 237, 239 (2018) (discussing credit-welfare trade-off).

[152] *Cf.* Pamela Foohey & Sara S. Greene, *Credit Scoring Duality*, 86 LAW & CONTEMP. PROBS. (forthcoming 2022) (manuscript at 22) (available at https://papers.ssrn.com/sol3 /papers.cfm?abstract_id=3992749 [https://perma.cc/S7QX-MNG2]) (making a similar point about combatting harms in credit scoring).

[153] Omarova, *supra* note 21, at 1239.

[154] This account is reflected in Atkinson, *Rethinking Credit*, *supra* note 24; and Atkinson, *Borrowing Equality*, *supra* note 144.

[155] This understanding is most evident in Atkinson's recent article. Abbye Atkinson, *Commodifying Marginalization*, 71 DUKE L.J. 773 (2022).

Whether consumer credit regulation is normatively desirable turns on which account you believe is correct. If credit is fundamentally a tool of subordination and extraction, then it is hard to argue that shaving down credit's rougher edges will change its nature. But if the costs of credit are a function of particular legal arrangements, and less about credit's fundamental nature, then we may be able to change the law. And it is possible to imagine a world in which less regressive credit markets are both obtainable and desirable.[156]

CONCLUSION

The current cost structure in consumer credit markets is a political choice. It is a choice to allocate the costs of distributing our money in a regressive way. We are not bound by this choice, and we can regulate price and access in order to shift the burdens in consumer credit markets. As noted above, acknowledging this fact does not mean that regulating price and access is always wise or that efficiency is irrelevant. It just means that the wisdom of a particular legal change involves a different set of tradeoffs than those that we presently debate.

For example, we may conclude that an elastic money supply justifies regressive pricing. Given their superior knowledge, banks are in the best position to efficiently allocate credit,[157] and we ought to be careful about constraining their freedom. On the other hand, we may think equity concerns outweigh efficiency concerns in the allocation of credit. My goal here is not to suggest that resolving these tradeoffs is easy but instead to suggest that reconceptualizing problems in consumer credit markets can help us honestly engage with the actual tradeoffs involved with a legal change.

In other words, even if consumer financial law is not a good site for distribution and may crowd out other options, we cannot ignore distribution in regulating consumer credit markets. Consumer credit markets are sites where we make critical decisions about how to distribute resources. Distribution is inherent in the design of consumer credit markets. Determining how we allocate benefits and burdens in consumer credit markets turns on our values.[158]

Refusing to "intervene" in consumer credit markets or choosing to prioritize allocative efficiency is not distributionally neutral. It reflects a judgment that

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[156] *Cf.* Monica Prasad, *Histories of Hammers*, LAW & POL. ECON. PROJECT (Aug. 26, 2021), https://lpeproject.org/blog/histories-of-hammers/ [https://perma.cc/LR8H-638F] (making similar point with respect to municipal bond financing).

[157] *See* Desan, *supra* note 17, at 20 (explaining that case for granting commercial banks control over money creation stems from their purported expertise in allocating credit).

[158] *Cf.* Glater, *supra* note 13, at 1564 ("[D]etermining the desirability of a particular risk distribution [in student finance] requires identifying goals, such as a target number of college graduates or matriculants. There is no baseline for these assessments; they should be subjects of public debate."); Herrine, *Consumer Protection*, *supra* note 1 (manuscript at 5) (arguing that reorienting consumer protection along a "moral economy view treats consumer markets as contingent ways to solve problems of social provision," which necessarily involves "the question of which values should govern" and "whose interests should be represented and how").

resources should be distributed regressively in order to promote other goals. There may be merit to that position. But the burden of justification ought to be on those who seek to preserve this regressive arrangement and not on those who seek to unsettle it.