Borrowing and Belonging

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Both formal policies and informal norms encourage a consumerist vision of American belonging, with credit/debt as a primary means of consumption. Consequently, debt-based consumption implicates dignity in the American market society. In contrast, current national credit/debt policies and norms, as best exemplified in the Bankruptcy Code's euphemistic "fresh start" policy, are anti-dignitarian, intentionally marginalizing and excluding distressed debtors who seek relief. This essay posits that because credit/debt-based consumption plays such an integral part in our conceptions of what it means to belong to America and to be American, our credit/debt policies generally, and debt relief policies specifically, should similarly recognize credit/debt-based consumption as an act of belonging.

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INTRODUCTION

In the financialized American "Consumer's Republic,"[1] credit/debt[2]-based consumption is an act of belonging.[3] That is to say, much of how we identify as Americans in our market society has become entangled in our routine and quotidian use of credit/debt, and credit/debt-based consumption is positively intertwined with *being* American.[4] Thus, while in an important sense consumer credit/debt-based consumption is transactional, implicating balance sheets and asset values,[5] it is also suffused with dignitarian concepts like capability,[6] aspiration,[7] and citizenship,[8] which, together, provide a baseline for regulating credit/debt-based consumption as more than just mundane market activity. Rather, they form a basis for positively understanding credit-based consumption in dignitarian terms.[9]

1. *See* LIZABETH COHEN, A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2003).

2. *See* Gustav Peebles, *The Anthropology of Credit and Debt*, 39 ANN. REV. ANTHROPOLOGY 225, 226 (2010) ("[C]redit and debt stand as an inseparable, dyadic unit.").

3. *See* FREDERICK F. WHERRY, KRISTIN S. SEEFELDT & ANTHONY ALVAREZ, CREDIT WHERE IT'S DUE: RETHINKING FINANCIAL CITIZENSHIP 12–14 (2019) (observing that "human well-being now depends on membership in a financialized community" and asking "how do we think about the right to social belonging with regard to the financial system").

4. *E.g.*, A. Mechele Dickerson, *Consumer Over-Indebtedness: A U.S. Perspective*, 43 TEX. INT'L L. J. 135, 136 (2008) (observing that "Americans are voracious consumers" and heavily indebted); KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 6 (1997) ("[F]or better or worse, Americans live in a credit economy.").

5. *See* Jonathan Macey, *Fair Credit Markets: Using Household Balance Sheets to Promote Consumer Welfare*, 100 TEX. L. REV. 683, 698 (proposing "a hypothetical balance sheet" as a means of determining how best to regulate consumer credit) (2022).

6. *See generally* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) [hereinafter SEN, DEVELOPMENT AS FREEDOM] (arguing that capability should be the guiding principle in international development policies).

7. *See generally* AGNES CALLARD, ASPIRATION: THE AGENCY OF BECOMING (2018).

8. *E.g.*, JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2 (1991); *see also* T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 17 (1992) (dividing "citizenship into three elements, civil, political and social").

9. *E.g.*, CHRYSTIN ONDERSMA, DISMANTLING DEBT (forthcoming 2023) (manuscript at 111–14) (on file with the author) (arguing that "[h]uman dignity can dethrone economic efficiency as a

To be sure, dignity is an elusive concept, defying concrete cross-substantive definition. For the purposes of this essay, however, Professor Jeremy Waldron offers an account of dignity that is useful.[10] In his conception, dignity, as protected through law, is "a status-concept [that] has to do with the standing . . . that a person has in society and in her dealings with others," rather than dignity as a more essential human value.[11] For example, modern law has positively conferred equal status on all citizens.[12] This "upward equalization" synthesizes and protects a norm of "equal legal dignity" for all, even when practically "it has to deal with descriptive inequalities among people using a variety of practices and techniques to create something likely a rough and artificial equality in standing before the law."[13] A dignitarian framing of credit/debt-based consumption and its regulation is important in this sense insofar as belonging has become a positive, state-sanctioned basis of its routine use.[14]

Moreover, this dignitarian construction of credit/debt-based consumption is particularly significant for those who remain perpetually hemmed in by their disadvantage in, and exclusion from, the liberal American project.[15] Indeed, consistent with self-help norms that dominate our approach to social well-being, the state and its private partners have urged, in particular, marginalized and disadvantaged Americans to understand credit/debt-based consumption as a legitimate pathway toward dignitarian aims like membership, belonging, prosperity, comfort, and inclusion.[16] In this regard, credit/debt-based

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guiding principle for policymaking around household debt"); Chrystin Ondersma, *A Human Rights Approach to Consumer Credit*, 90 TUL. L. REV. 373, 377 (2015) [hereinafter Ondersma, *A Human Rights Approach to Consumer Credit*] (arguing that "human rights principles should inform consumer credit regulation"); *see generally* DIGNITY AND DEBT, https://www.dignityanddebt.org/ [https://perma.cc/EDQ4-GURL] (observing that "[l]oans enable people to realize their visions for a good life" and "[f]inancial propositions that lack a vision of dignity treat people like robotic quantities, occluding the very moral values that give financial sacrifices meaning"); *accord* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 32 (2017) (observing that the Reconstruction Era creation of the Freedmen's Bank "offered the freed slaves a feeling of racial pride and dignity" even though as described by W.E.B. DuBois, it was "a disgraceful swindle").

10. Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L. J. 200, 201 (2012).

11. *Id.*

12. *Id.* at 213–14.

13. *Id.* at 214–15.

14. *See, e.g.*, Rachel E. Dwyer, *Credit, Debt, and Inequality*, 44 ANN. REV. SOCIO. 237, 239 (2018) ("The reliance on credit and debt in the twenty-first-century American political economy was forged in the nineteenth and twentieth centuries, as the federal state and civil society developed a dependency on financialized solutions to social provision.").

15. Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2446 (2003) ("The story of liberalism is that it never deals with the problem of the subject. The problem of the subject is that it has never been part of the liberal story.").

16. *See* SARAH QUINN, AMERICAN BONDS 18 (2019) (observing that "[f]ederal credit is an important tool of statecraft, one reaching back to the earliest days of the nation . . . [having] always been implicated in distributional politics"); *see also* LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 1 (2009) (describing how American policies, both public and private, have long explicitly and implicitly promoted a populace that "underst[ands] consumption in political terms" as well as in terms of what it means to belong in America); Abbye Atkinson, *Borrowing*

consumption is inherently reasonable[17] even though, when filtered through an economic lens, it may seem irrational in some circumstances.[18]

Booker T. Washington's (likely apocryphal) observations on credit/debt-based consumption among formerly enslaved communities in post-bellum rural Alabama are illustrative of this point. In the late spring of 1881, Washington traveled from Hampton, Virginia, down to Tuskegee, Alabama, to see about starting "a normal school for the coloured people" living there.[19] At the time, Washington had been teaching Black and Native young people at the Hampton Institute, from which Washington himself had recently graduated. He was thrilled to have the opportunity to take charge of an entire school program, where he would "begin [his] life-work."[20] Washington set out immediately for the region in which he would establish his school.

Tuskegee was in the "Black Belt" of the newly emancipated South, where the population of formerly enslaved Black people matched and sometimes outnumbered the White people. It was, as Washington described, "[t]he part of the country possessing this thick, dark, and naturally rich soil," and, as a consequence, "the part of the South where the slaves were most profitable . . . [and taken] in the largest numbers."[21] For this and other reasons, Washington concluded that Tuskegee was a well-suited location for a school intended to introduce formal education where it once was prohibited.

After securing a location to set up the school, Washington set out to "examin[e] into the actual life of the people" his school would serve and to "advertise[] among the class of people that [he] wanted to have attend it."[22] Washington found that many individuals were using their newly bestowed

Equality, 120 COLUM. L. REV. 1403, 1410 (2020) [hereinafter Atkinson, *Borrowing Equality*] (arguing that "the bifurcation and lack of complementarity in Congress's treatment of credit and debt undermine the potential of borrowing money to function as a tool of equality and mobility for reasons related to the deeper inequity that socially marginalized groups continue to experience"); *see also* VIVIANA ZELIZER, THE SOCIAL MEANING OF MONEY 205 (1997). Zelizer writes: "Surely from the eighteenth to the twentieth century in significant areas of market settings, people invented monetary arrangements, such as . . . the enormous variety of credit cards, to regularize and routinize interaction, and reduce the difficulty of social relations in the economy." Zelizer further observes that "as the American case demonstrates, the creation of a centralized, homogenous, uniform legal tender took enormous and sustained governmental effort." *Accord* F. SCOTT FITZGERALD, THE GREAT GATSBY 121 (1925) ("Gatsby believed in the green light, the orgastic future that year by year recedes before us.").

17. *See* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE 309 (1979) (observing how "[t]he new logic of the economy rejects the ascetic ethic of production and accumulation, based on abstinence, sobriety, saving and calculation, in favour [*sic*] of a hedonistic morality of consumption, based on credit, spending and enjoyment").

18. *See, e.g.*, Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1557 (2006) ("Others have noted that troubling market failures result when rational sellers or lenders market to quasi-rational customers: rational actors face every incentive in a competitive marketplace to seek to exploit consumer cognitive biases.").

19. BOOKER T. WASHINGTON, UP FROM SLAVERY 106–08 (1995).

20. *Id.*

21. *Id.*

22. *Id.*

formal autonomy and agency to buy expensive goods on credit. For example, Washington observed: "In these cabin homes I often found sewing-machines which had been bought, or were being bought, on instalments [*sic*], frequently as a cost of as much as sixty dollars, or showy clocks for which the occupants of the cabins had paid twelve or fourteen dollars."[23]

His descriptions of what he witnessed make clear that Washington disapproved of this use of newfound formal autonomy. Washington was bewildered by the decisions of the formerly enslaved people to direct their meager social and economic resources to acquiring goods that held little future economic value and that, by virtue of their purchase on credit, further imperiled the economic well-being of their owners. From this perspective, Washington continued:

> I remember that on one occasion when I went into one of these cabins for dinner, when I sat down to the table for a meal with the four members of the family, I noticed that, while there were five of us at the table, there was but one fork for the five of us to use. Naturally there was an awkward pause on my part. In the opposite corner of that same cabin was an organ for which the people told me they were paying sixty dollars in monthly instalments [*sic*]. One fork, and a sixty-dollar organ![24]

Specifically, Washington viewed the purchase of the organ on credit through a utilitarian lens. He thought his hosts' act of credit/debt-based consumption was a foolish and irrational act in light of their economic and social privation. In Washington's view, the Black people he encountered faced the overwhelming task of becoming equal Americans in a practical sense.[25] This project rationally included education of all sorts: literacy and numeracy, to be sure, but also lessons in social skills and basic self-care.[26] This education was, along with a commitment to hard work, a humanizing force capable of fostering dignity and facilitating belonging where neither had previously existed. By contrast, in Washington's view, the purchase of the flashy organ held no similar

23. *Id.*

24. *Id.*

25. *Id.* at 14 ("In a few hours the great questions with which the Anglo-Saxon race had been grappling for centuries had been thrown upon these people to be solved. These were the questions of a home, a living, the rearing of children, education, citizenship, and the establishment and support of churches.")

26. *Id.* at 75 ("I felt from the first that mere book education was not all that the young people of that town needed. I began my work at eight o'clock in the morning, and, as a rule, it did not end until ten o'clock at night. In addition to the usual routine of teaching, I taught the pupils to comb their hair, and to keep their hands and faces clean, as well as their clothing. I gave special attention to teaching them the proper use of the tooth-brush and the bath. In all my teaching I have watched carefully the influence of the tooth-brush, and I am convinced that there are few single agencies of civilization that are more far-reaching.")

positive promise for the improvement of the condition of the people, and consequently, the use of the debt to do so was wholly unjustified.[27]

Thus, Washington viewed his hosts' credit/debt-based consumption through economic eyes, and he judged and belittled them accordingly. His focus was on their use of catastrophically scarce resources to buy an item that had no future value, with money they did not have. And, through this lens, Washington's assessment seems justified. The flashy organ held little economic value for its formerly enslaved purchaser. As Washington noted, none of the occupants in the cabin knew how to play the organ. Thus, the organ was unlikely to be used as a source of future revenue generation, assuming that there was even a market for such entertainment at the time.

Moreover, even if the organ itself held some future economic value, the sheer destitution and poverty of the cabin's inhabitants suggested that they would have been unlikely to have the means to service the debt. Instead, one might imagine that after Washington left the cabin, the organ was repossessed, leaving the purchasers with lingering debt obligations that would, themselves, justify further exclusion of these already-peripheral people. Indeed, the debt itself might have justified their return to a state of personal restriction and de facto slavery.[28]

While the financed consumption of the organ is an economic transaction on its face, in the then-nascent American "consumer society," it should also be understood as a social transaction, guided by noneconomic principles like membership, belonging, and dignity.[29] These principles were essential for a group of humans whose status as state-less chattel was very recent history.[30] Thus, their credit/debt-based purchase could be viewed as an act of newly found formal agency.[31] Through this act of credit/debt-based consumption, they could experience a modicum of dignity when their very humanity and membership remained informally unrecognized by the ruling population. It was one of the limited means of participation formally and informally available to them.

27. *Id.*

28. *See generally* DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (showing how debt obligations became a legal means to subordinate southern Blacks after Emancipation made outright slavery illegal).

29. *See, e.g.*, DANIEL MILLER, CONSUMPTION AND ITS CONSEQUENCES 52 (2012) ("[A] consumer society is a society that is saturated with consumer goods [that] become the principal idiom for expressing core values."); *accord* BARADARAN, *supra* note 9, at 165 (describing how the Nixon administration's "promot[ion of] minority banks and businesses" in effect masqueraded as a road to "[B]lack prosperity [that could] lead to integration by 'build[ing] bridges to human dignity across that gulf that separates [B]lack America from [W]hite America.'")

30. *See* Dred Scott v. Sanford, 60 U.S. 393, 410 (1857) ("But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted [the Declaration of Independence]."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

31. WHERRY, ET AL., *supra* note 3, at 58 (observing that following the Civil War, "the prudent management of money" became a "new category of 'fitness' for citizenship"); *see also* DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK 156 (2003) (showing how enslaved people vindicated various property rights in the antebellum South notwithstanding their formal status as slaves).

Our nation's formal policies have fomented this belief that Americans require credit-based consumption ostensibly to *be* American. Specifically, the federal government and its business partners have invoked credit/debt-based consumption as both a means of improving the economic well-being of the country and as a means for individuals and communities to belong within the American polity.

For example, Richard Rothstein describes how following the Russian Revolution in 1917, the Wilson administration promoted single-family home ownership among White Americans as a "patriotic duty" in the fight against communism.[32] This preceded a significant increase in the mortgage market that resulted in a "[residential] housing bubble that peaked in the mid-1920's,"[33] when, as Eugene White explains, "[m]ortgage funding, which had accounted for less than 45 percent of residential construction finance before World War I, rose to nearly 60 percent."[34] By the time that the Roosevelt administration's commitment to the Federal Housing Administration (FHA) styled widespread credit-based home improvement and homeownership as a lynchpin of post-crash macro-economic recovery, proponents of this then-unprecedented public-private alliance amalgamated federally subsidized credit-based consumption with "town pride" and "[p]atriotism."[35]

In a similar vein, Mehrsa Baradaran describes how President Nixon campaigned on the notion that so-called "[B]lack capitalism," including the ability to deploy credit for consumption, was a source of "self-determination and dignity" for Black Americans, as compared to "asking the government for help [that] was depriving them of their dignity."[36] In modern times, the Biden administration, in its support for the Deferred Action for Childhood Arrivals (DACA) program, which shields from removal "noncitizens" who entered the United States as children, included access to credit/debt as among the modes of belonging that the program engenders. Specifically, in its 2021 Notice of Proposed Rulemaking, the Department of Homeland Security observed that "DACA recipients have obtained driver's licenses and credit cards, bought cars, and opened bank accounts,"[37] arguing that these and other activities have

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32. RICHARD ROTHSTEIN, COLOR OF LAW 60 (2017).

33. Eugene N. White, *Lessons from the Great American Real Estate Boom and Bust in the 1920s*, *in* HOUSING AND MORTGAGE MARKETS IN HISTORICAL PERSPECTIVE 115, 118 (Eugene N. White, Kenneth Snowden & Price Fishback eds., 2011).

34. *Id.* at 133–34.

35. LOUIS HYMAN, DEBTOR NATION 60–61 (2017).

36. BARADARAN, *supra* note 9, at 178. "In a radio program in April 1968, Nixon took his case directly to [B]lacks. He said that [B]lack Americans 'do not want more government programs which perpetuate dependency. They don't want to be a colony in a nation. They want the pride, and the self-respect, and the dignity that can only come if they have an equal chance to own their own homes, to own their own businesses, to be managers and executives as well as workers, to have a piece of the action in the exciting ventures of private enterprise.'" *Id.*

37. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736-01, 53738; *see also* Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for*

"increased DACA recipients' sense of acceptance and belonging to a community, increased their sense of hope for the future, and given them the confidence to become more active members of their communities and increase their civic engagement."[38]

Thus credit/debt-based consumption lies at the heart of American social and cultural identity; it is not merely economic in nature or significance.[39] It is an act of membership: one that is starkly accessible as against the backdrop of various formal or informal barriers to belonging.[40] Consequently, many on the margins, whose position within the American polity is tenuous and vulnerable if recognized at all (people like the recently enslaved organ purchasers that Washington encountered in Tuskegee or the DACA recipients in 2021, whose pathway to citizenship is represented by and bound up with their ability to shop with a credit card), engage in aspirational acts of credit-based consumption in the hope of financing their way to belonging fully. In this dignitarian context, credit/debt-based consumption is reasonable and significant, separate and apart from any economic irrationality it might simultaneously reflect.[41]

Understanding credit/debt-based consumption in this way challenges our current national policies that regulate the use of credit/debt with a focus on its principle economic identity and characteristics.[42] This focus is perhaps most visible in national policies surrounding distressed consumer debtors, which notwithstanding their ostensible devotion to giving distressed consumer debtors a "fresh start," rest largely on utilitarian norms that prioritize concerns about market interests as opposed to broader notions of belonging and dignity. If, however, credit/debt-based consumption is just as much an act of belonging that implicates human dignity as it is an economic act, then our norms and regulation of consumer credit/debt-based consumption, especially those concerned with debt relief, should similarly center belonging and dignity. Consequently, we need a new way to think about the regulation of credit/debt that attends to and balances both its dignitarian and economic identities.[43]

Childhood Arrivals, 53 U.C. DAVIS L. REV. 1905, 1924 (2020) (describing as among the benefits of the DACA program that its undocumented beneficiaries could "find a stable job and get a credit card and driver's license").

38. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736-01, 53738.

39. QUINN, *supra* note 16, at 19 ("[S]ocial life is not like soft flesh covering an underlying, bone-hard economic truth. It is the marrow. It is the stuff from which economic life is built.").

40. *See, e.g.*, MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020).

41. *See* BOURDIEU, *supra* note 17, at 309.

42. *E.g.*, Ondersma, *A Human Rights Approach to Consumer Credit*, *supra* note 9, at 396–97 (observing that "[p]roponents of more substantive consumer credit regulations are expected to (and typically do) defend their proposals on economic efficiency grounds" and that "[e]ven staunch defenders of consumer protection in the consumer credit context concede that proposed regulations should be evaluated under a cost-benefit analysis to determine whether the rules would unduly increase credit costs or restrict access to credit").

43. *See* ONDERSMA, *supra* note 9, at 109 (arguing that "[w]e can construct sensible, just, and equitable household debt policy around a guiding principle of human dignity"); Jennifer Urban & Margot Kaminski, *The Right to Contest AI*, 121 COLUM. L. REV. 1957, 2000–01 (2021) (arguing in favor of a contestation right to AI decision-making in part in dignitarian terms). Urban and Kaminski

This essay contributes to the body of existing work that situates consumer credit/debt within the realm of noneconomic concerns, like dignity.[44] However, rather than applying dignity as an essential human right, it considers dignity as engendered by the positive role of credit/debt-based consumption in the relative status and standing of Americans. Part I describes the American consumer society, surfacing how government and business have positively associated credit/debt-based consumption with "affiliation" to serve their own particular purposes.[45] This elevation of credit/debt-based consumption is especially salient for marginalized groups who, in the absence of access to formal modes of membership and participation, deploy their status as consumers to cement their "social standing" as true Americans.[46] Part II marshals existing dignitarian concepts of capability, aspiration, and citizenship as a theoretical basis for situating credit/debt-based consumption within the frame of belonging. It offers a justification for a more nuanced understanding of credit/debt-based consumption outside of its more obvious economic identity.[47]

Part III compares this dignitarian frame to the predominantly economic framing of the existing national consumer credit/debt regulatory approach.[48] Using current distressed consumer debt relief policies—as evinced through the Bankruptcy Code and through non-bankruptcy channels of formal debt-relief exemplified in the federal student-debt relief debate—it argues that these existing approaches embrace indignity as a quid pro quo for relief. That is to say, the policies intentionally subvert values like belonging and inclusion that are

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posit that "[a]ffording a right to contest affords a form of respect to individual people in the system. It permits participation. It establishes agency." *Id.*

44. *E.g.*, Chrystin Ondersma, *A Human Rights Framework for Debt Relief*, 36 U. PA. J. INT'L L. 269, 319–20 (2014) [hereinafter Ondersma, *A Human Rights Framework for Debt Relief*] (observing that "[o]ver-indebtedness and the potential responses to over-indebtedness raise a number of concerns relating to the protection of the debtor's human dignity," and arguing that debt relief policies should be consistent with human rights conventions).

45. MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 31 (2011) (defining affiliation in dignitarian terms as "[h]aving the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others [including by] provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin"); *see also* Greta R. Krippner, *Democracy of Credit: Ownership and the Politics of Credit Access in Late Twentieth-Century America*, 123 AMER. J. SOCIO. 1, 4 (2017) (observing "the pivotal role of credit in U.S. society").

46. *See* SHKLAR, *supra* note 8, at 2.

47. *See* A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 215 (2009) (explaining with reference to the subprime mortgage crisis that "[w]hile not all borrowing was irrational or irresponsible, lack of financial sophistication, informational disparities, and certain behavioral biases may help explain why so many borrowers bought homes they could not afford, often accepting risky nontraditional mortgage products they did not understand").

48. *E.g.*, Ondersma, *A Human Rights Approach to Consumer Credit*, *supra* note 9, at 388 (observing that "the protection of the market has played at least as salient a role in the development of consumer credit regulations as has the protection of the consumer").

now positively embedded in quotidian credit/debt-based consumption, in service of achieving a set of market-focused goals.

Part IV imagines how as a second-best matter, a dignitarian framing might shift aspects of the current economically oriented regulation of consumer credit/debt use. Focusing on specific examples from the Bankruptcy Code and the ongoing debate around federal student debt cancellation, it sketches changes that recognize credit/debt-based consumption as an act of belonging and, consequently, focus on disentangling relief from ostracism and exclusion from the community. The latter is particularly significant with respect to disadvantaged and marginalized communities, like Washington's financed-organ purchasers, for whom their status as consumers has been cast as a reasonable mode of belonging.

I.
CREDIT/DEBT-BASED CONSUMPTION AND DIGNITY IN AMERICAN SOCIETY

Our formal and informal policies have made credit/debt-based consumption a matter of dignity and belonging. Consequently, an economic framework is not the only lens through which we should understand or make sense of credit/debt-based consumption. First, consumption is deeply associated with what it means to be American.[49] At times, formal and informal policies have presented consumption as an act of good citizenship, imbued with political, economic, and democratic significance.[50] In other moments, our policies have encouraged the conception of consumption as a rightful indication of social status and belonging

49. *E.g.*, COHEN, *supra* note 1, at 18–20; Charles McGovern, *Consumption and Citizenship in the United States*, *in* GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY 50, 55 (Susan Strasser, Charles McGovern & Matthias Judt eds., 1998) (observing that "[c]onsumption was the foundation of a distinctly American way of life" and "the badge of citizenship and American nationality").

50. *See, e.g.*, Lisa A. Nielson & Pamela Paxton, *Social Capital and Political Consumerism: A Multilevel Analysis*, 57 SOC. PROBS. 5, 6 (2010) ("[C]onsumers use their 'purchase votes' in the marketplace to 'elect' the sort of society they wish to be a part of." (quoting Johannes Brinkman, *Looking at Consumer Behavior in a Moral Perspective*, 51 J. BUS. ETHICS 129 (2004))); COHEN, *supra* note 1, at 18–20 (describing the rise of the "citizen consumer" who was "regarded as responsible for safeguarding the general good of the nation, in particular for prodding government to protect rights, safety, and fair treatment of individual consumers in the private marketplace" and "purchaser consumers" who "contribut[ed] to the larger society more by exercising purchasing power than through asserting themselves politically"); *see also* McGovern, *supra* note 49, at 55 (explaining that by the late 1930s, "the United States was on a road that identified the consumer as citizen and that made enhancing purchasing power the focus of federal intervention in the economy").

within the community.[51] In this regard, consumption is a sign of both formal and informal citizenship and belonging.[52]

Transitively, consumer credit/debt also bears deep significance for belonging and dignity in American consumer society. American consumption and consumer credit/debt became (and remain) inextricably intertwined insofar as credit/debt made mass consumption possible among rank-and-file Americans.[53] This section describes in brief the symbiotic development of credit/debt and consumption and how credit/debt-based consumption became a hallmark of what it means to be American both culturally and politically. It describes how we made credit/debt-based consumption a matter of belonging and dignity.

A. The Significance of Consumption in American Society

Consumption behaviors have been constitutive of human social structures and notions of belonging long before the rise of capitalism or the United States.[54] Yet in the modern American "Consumer Republic," the state has actively sought to infuse consumption, and in particular credit/debt-based consumption, with broad economic and social significance. This in turn has legitimized credit/debt-based consumption as an indication of belonging and participation in American society.

For example, historian Lizabeth Cohen describes the development of a political economy of consumption in the period following the Second World War, in which consumption preferences, as influenced by government policies, engendered major changes in the quotidian experience of American life.[55] She proffers "two images" of the American consumer that rose to prominence in the wake of the Great Depression. The "citizen consumer" was "responsible for safeguarding the general good of the nation, in particular for prodding

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51. *E.g.*, ELIZABETH CURRID-HALKETT, THE SUM OF SMALL THINGS: A THEORY OF THE ASPIRATIONAL CLASS 3 (2017) ("Consumption is a part of how we define ourselves as individuals and vis-à-vis social groups (as members and outsiders and sometimes both at the same time)."); Kerwin Kofi Charles, Erik Hurst & Nikolai Roussanov, *Conspicuous Consumption and Race*, 124 Q.J. ECON. 425, 425 (2009) (showing that "Blacks and Hispanics devote larger shares of their expenditure bundles to visible goods (clothing, jewelry, and cars) than do comparable Whites" and positing that this "conspicuous consumption" is a means of "status-signaling").

52. *See, e.g.*, VIVIANA ZELIZER, ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY 401–02 (2011) ("[C]onsumption reaches far beyond expressive behavior into the very constitution of American public politics."); Nielson & Paxton, *supra* note 50, at 7 ("[C]onsumption is not a wholly individualistic behavior," but rather one that "is embedded in social relations.").

53. *See generally* HYMAN, *supra* note 35 (describing the ascent of credit in twentieth-century America); *accord* BOURDIEU, *supra* note 17, at 309.

54. *E.g.*, ZELIZER, *supra* note 52, at 401–02 (observing that various scholars have "swept away standard utilitarian and individualistic accounts of consumption as maximization," instead "reframing the purchase and use of goods and services as [socially] meaningful practices").

55. COHEN, *supra* note 1; *see also* ZELIZER, *supra* note 52, at 403 (observing that per Cohen, consumption "is not merely expressive behavior but a site, cause, and effect of major changes in the American experience").

government to protect rights, safety, and fair treatment of individual consumers in the marketplace."[56] Meanwhile, the "purchaser consumer" was "viewed as contributing to the larger society more by exercising purchasing powers than through asserting themselves politically."[57] These "competing" conceptions of the "proper role of consumers" nevertheless converged in the positive notion that "consumer interests and behavior had profound economic effects and political consequences for the nation" and the normative belief that "consumers should contribute to a healthy economy and polity."[58]

Cohen highlights the role of the federal government in fomenting this shift. The federal government promoted consumption (and indeed credit/debt-based consumption) during the 1930s as a means of addressing the economic crisis of the Great Depression. For example, most famously, the New Deal centered national economic recovery on financing new home consumption by ordinary Americans through the FHA's promotion of affordable and accessible federally backed mortgages.[59] Moreover, various federal agencies born during this rise of the administrative state "institutionalized the consumer viewpoint," recognizing and endorsing the significant role that ordinary consumption should play in the well-being of the country.[60] Given this significance, at least theoretically, the state could legitimately protect and champion consumer rights.[61] Consequently:

> Never before had the particular problems of consumers been so thoroughly and unequivocally accepted as the direct responsibility of government. The willingness to fulfill that responsibility was, in essence, an extension and amplification of the meaning and content of democratic government.[62]

Sociologist Monica Prasad similarly describes the emergence of a political economy of consumption in the development of the United States's public/private welfare regime.[63] Prasad argues that nineteenth-century federal agricultural subsidies coupled with "American farmers' own productivity" created a surplus of American goods on the market.[64] American farmers became too good at producing their goods, producing so much that the federal government "embarked on a policy of destroying crops to maintain agricultural prices." Thus, once the Great Depression set in, federal policymakers responded

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56. COHEN, *supra* note 1, at 18.

57. *Id.* at 18–19.

58. *Id.* at 20.

59. *See also* Eleanor Brown & June Carbone, *Race, Property, and Citizenship*, 116 NW. U. L. REV. 120, 128 (2021) ("Home ownership has historically been seen as a critical part of the 'American Dream,' contributing to economic security and civic virtue.").

60. COHEN, *supra* note 1, at 28.

61. *Id.* at 29–30 ("Roosevelt justified the new consumer offices in his New Deal agencies as representing a new principle in government—that consumers have the right to have their interests represented in the formulation of government policy.").

62. COHEN, *supra* note 1, at 30 (internal quotation marks omitted) (quoting FDR).

63. MONICA PRASAD, DEMOS, THE AMERICAN WAY OF WELFARE: POLITICAL-ECONOMIC CONSEQUENCES OF THE CONSUMER-ORIENTED GROWTH MODEL 2 (2014).

64. *Id.*

to the economic strain of this problem of overproduction by promoting citizen consumption as the means of stabilizing the economic freefall and more generally promoting national stability.[65]

Prasad compares this American "consumerist" posture with the "producerist" posture that, she observes, developed simultaneously among Western European nations. For example, Germany and France responded to the double-shot socioeconomic devastation of the Great Depression followed by World War II by "restraining consumption and subsidizing production" in order to resuscitate their devastated economies and war-wounded societies.[66] These societies subsidized exports, encouraged citizen savings over spending, and developed more robust centralized social welfare systems to underpin policies that limited wage growth, thus coaxing ordinary citizens to consume less in order to serve the national interest.[67]

By contrast, across various dimensions, American state policy encouraged and redirected Americans to consume more in the marketplace. These policies included progressive income taxation instead of focused consumption taxation, relatively generous bankruptcy laws that supported crucial credit/debt-based consumption, and consumer product and safety regulation, which undergirded consumer confidence in the sanctity and safety of a wide range of products and services on the market.[68] Moreover, a relatively limited national social safety net limited reliance on the public fisc for basic needs.[69]

Thus, through this sustained and concerted effort, state policies actively encouraged rank-and-file Americans, both normatively and positively, to buy their basic needs (i.e., their welfare) in the marketplace instead of looking to the state for direct support like their Western European peers.[70] Consequently, ordinary American citizens became primarily responsible for buying their own shelter, their health and well-being, their old-age security, their social mobility, and more in the marketplace. As Prasad argues, this private/public, consumption-focused regime became the "American way of welfare."[71]

In addition to providing a significant channel of political participation, consumption also flattened the visible contours of American social hierarchy, at

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65. *Id.* at 3 ("In the United States, however, the problem came to be seen as one of producing too much.").

66. *Id.* at 2.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See, e.g.*, Sara Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 249 (2017) (observing that in the run-up to welfare reform in the 1990s, "[i]ndefinite entitlement programs such as welfare were deemed failures, and 'personal responsibility' and 'economic self-sufficiency' were key terms of the rhetoric surrounding federal antipoverty programs" and also subsequent use of credit as "a private safety net for low-income families post-welfare reform").

71. PRASAD, *supra* note 63, at 2 (describing the American approach to welfare as "consumerist").

times concealing class differences and other forms of inequality. It supported the idyll of an equal, democratic, and meritocratic America.[72] This American Dream preached that regardless of origin, every person had the opportunity to be successful. If they worked hard enough, they could consume and accumulate the material trappings of success. In this regard, consumption gave the lower and marginalized classes a means to blur the lines of social division and to present themselves as elevated in the American social hierarchy.[73]

For example, advertisers and big business seized on the increasing salience of consumerism to sell what Roland Marchand termed "the Democracy of Goods," in which "the wonders of modern mass production and distribution enabled every person to enjoy the society's most significant pleasure, convenience, or benefit."[74] By focusing on the increasing ability of ordinary Americans to purchase the same items as those in the wealthy class, advertisers appealed to the egalitarian myth of America in which every American was equal, at least in their ability to use the same brand of soap regardless of wealth.[75] Consequently, Marchand observed that

> [b]y implicitly defining "democracy" in terms of equal access to consumer products, and then by depicting the everyday functioning of that "democracy" with regard to one product at a time, these tableaux offered Americans an inviting vision of their society as one of incontestable equality.[76]

Thus, consumption of goods marked a wide range of Americans as belonging to the culture as represented by the desire for, purchase of, and use of mass-produced goods and services. As historian Traci Parker discusses, this culture of consumption "stressed the diffusion of comfort and prosperity as the centerpiece of the American experience and identity" and "championed the democratization of desire, 'or . . . equal rights to desire the same goods and to enter the same world of comfort and luxury.'"[77] Yet, this vision of a consumption-fueled democracy was largely limited to White Americans.[78] Thus,

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72. *E.g.*, COHEN, *supra* note 1, at 253 (describing how the post-war "landscape of mass consumption evolved into a disaggregated metropolis where community identity and benefits marked people as different and deserving of unequal privileges rather than fostering a common stake in a metropolitan region, a state, and, at times, even a nation").

73. McGovern, *supra* note 49, at 47 (describing "the idea of inclusive democracy in and through products" as being "central to advertising's political language").

74. Roland Marchand, *The Parable of the Democracy of Goods*, LADIES HOME J., Sept. 1929.

75. For example, Marchand writes: "The Association of Soap and Glycerine Producers proclaimed that the charm of cleanliness was as readily available to the poor as to the rich, and Ivory Soap reassuringly related how one young housewife, who couldn't afford a $780-a-year maid like her neighbor, still maintained a significant equality in 'nice hands' by using Ivory." *Id.* Consequently, "according to the parable, no discrepancies in wealth could prevent the humblest citizens, provided they chose their purchases wisely, from retiring to a setting in which they could contemplate their essential equality, through possession of an identical product, with the nation's millionaires." *Id.*

76. *Id.*

77. TRACI PARKER, DEPARTMENT STORES AND THE BLACK FREEDOM MOVEMENT: WORKERS, CONSUMERS, AND CIVIL RIGHTS 16 (2019).

78. *Id.* at 16–17.

"[W]hite people from different classes—workers and consumers, native-born and immigrant, proletarians and the bourgeoisie—met, mingled, shared similar experiences, and, in the process, forged a common sense of racial and class identity" that expressly excluded African Americans.[79] Correlatively, the exclusion of marginalized groups from access to ordinary consumption marked them as alien and other.

Consumption also was a means of practical political participation and expression when formal modes of participation, like the right to vote, were unavailable to marginalized Americans. For example, African Americans regularly relied on acts of political consumerism when formal acts of political participation, like voting, or social participation, like being able to shop in a department store, were either formally or practically denied. For example, "[t]he strategic use of [B]lack spending power represented the cornerstone of the civil right movement."[80] For example, the famed Montgomery Bus Boycott was an exercise of Black "consumer power to demand social change."[81] Similarly, boycotts of department stores were just one form of consumption-based advocacy that exemplified how consumption behavior was a site of political participation.[82] This advocacy was a means of forcing recalcitrant sellers and community members to recognize marginalized groups as being legitimate and important parts of the community, even if only through their pocketbooks.

Long excluded from formal political participation, White women similarly used their influence as consumers to participate in political discourse.[83] Historian Kathryn Kish Sklar describes how women were integral to the success of the National Consumers' League's (NCL) White Label campaign, a political effort to reform unfair and abusive labor practices by appealing to the power of consumers.[84] The NCL was a Progressive Era "women's organization," which enjoyed "institutional and fiscal independence" that insulated it from male dominance.[85] The organization became a way for White middle-class women to exercise political influence through their identity as consumers.[86]

Developed by Florence Kelley, a well-known turn-of-the-century social reformer and labor activist, the eponymous White Label declared that the product

79. *Id.*

80. Robert E. Weems, Jr., *African American Consumers Since World War II*, *in* AFRICAN AMERICAN URBAN HISTORY SINCE WORLD WAR II 359, 359 (Kenneth L. Kusmer & Joe W. Trotter eds., 2009).

81. Susannah Walker, *Black Dollar Power: Assessing African American Consumerism Since 1945*, *in* AFRICAN AMERICAN URBAN HISTORY SINCE WORLD WAR II, *supra* note 80, at 359, 393.

82. *Id.* (describing "sympathy protests" in northern department stores).

83. *E.g.*, COHEN, *supra* note 1, at 31–40 (describing "[w]omen's claim on the politics of consumption").

84. Kathryn Kish Sklar, *The Consumers' White Label Campaign of the National Consumers' League, 1898-1918*, *in* GETTING AND SPENDING, *supra* note 49, at 17, 17.

85. *Id.* at 21.

86. *Id.* at 25 ("The first step toward political power for NCL members lay in their recognition of their economic significance as consumers.").

to which it was affixed was "made under clean and healthful conditions."[87] In order to earn the White Label, manufacturers had to open their production facilities up for inspection to establish that their production complied with state law and that they did not employ underage children, among other "minimum standards."[88] Thus, while women could not vote on political issues of the day, including child labor laws and other important social issues, they used their influence as consumers to engage in political discourse. Shklar observes that the White Label campaign "drew women into public life in ways that validated what might be called their 'social citizenship' almost twenty years before the passage of the women's suffrage amendment to the Constitution."[89] Consumers, and specifically women consumers, could, through their consumption, become "the shapers of their community's future."[90]

B. The Symbiosis of Consumption and Credit/Debt

To the extent that consumption moved into the heart of what it meant to belong in America, both culturally and politically, consumer credit/debt similarly came to bear deep significance for belonging because American consumption and consumer credit/debt became (and remain) inextricably intertwined.[91] Indeed, beginning in the mid-twentieth century, credit/debt became a primary engine of large-scale quotidian American consumption. It was how a large swath of illiquid Americans could become consumers of mass-produced goods and services.

Innovations in consumer borrowing—beginning with early-twentieth-century auto financing and evolving into various forms of credit/debt like personal loans predicated on wage-earning power, revolving store credit cards, universal credit cards, and more—greased the proverbial wheel of ordinary, quotidian consumption in America.[92] For example, it is impossible to imagine the hallmarks of the consumerist American Dream—the house with the white picket fence, the modern appliances, the two cars in the attached two-car garage, etc.—without borrowed money.

In 1919, General Motors created the General Motors Acceptance Corporation (GMAC). GMAC originally provided wholesale financing to individual dealers so that the dealers could afford to keep a stock of cars year-round even though most of their sales occurred in the spring and summer. Thus,

87. *Id.* at 18.

88. *Id.*

89. *Id.* at 34. Sklar also points out, however, that the "White Label campaign reinforced racial distinctions at the same time that it improved working conditions for [W]hite women and children." *Id.* at 22.

90. *Id.* at 27; *see also* Neilson & Paxton, *supra* note 50, at 10 (noting that "political consumerism appeals to women because it lacks the restraints of membership or face-to-face interactions associated with traditional political participation").

91. *See, e.g.*, BOURDIEU, *supra* note 17, at 309.

92. *E.g.*, HYMAN, *supra* note 35, at 27–31 (describing how innovations in auto financing laid the foundation for "financing everything").

its initial purpose was to ease the tension between GM's desire to reduce costs through year-round production of cars and the pattern of seasonal retail sales that made it very difficult for dealers to buy wholesale cars in the fall and winter months.[93]

GM soon discovered that just as its financing innovation improved its wholesale market, financing could improve its retail market. Up until the advent of auto financing, prospective car buyers had to pay all cash. This meant that cars were a luxury, unattainable by the ordinary cash-poor American.[94] In order to increase its customer base in light of innovations in the mass production of cars, GM turned to credit/debt. In the mid-1920s, GMAC began to offer retail financing to car buyers, and shortly thereafter, "retail finance [became] as central to their business as making the cars."[95]

Auto financing helped to normalize the use of credit/debt in ordinary consumption as "[t]he model of the finance company developed for automobiles was adapted for other goods."[96] Soon, mass producers of durable goods like washing machines and vacuum cleaners developed financing subsidiaries or relationships with existing financing companies in order to remain competitive in the sale of their products to rank-and-file Americans.[97]

This "easier access to capital . . . meant that [consumers] could borrow on an unprecedented scale" to engage in consumption of increasingly mass-produced goods.[98] In other words, credit/debt facilitated the flattening of apparent class differences by greasing the wheels of consumption. Consequently, "[w]ith installment credit, the material differences between those who did and those who did not have money lessened[,] . . . blurr[ing] class distinctions in the consumption arena."[99] It became the primary tool of middle-class social mobility: "a rational allocation from the future to the present, maximizing the total pleasure of a lifetime."[100] Those material pleasures were the indicia of the consumption-oriented American Dream.[101]

Historian Louis Hyman explains how federal interventions made consumer credit/debt even more mainstream in American consumer society. The National Housing Act of 1934 created the FHA and its Title I loan program. Title I's

93. *Id.* at 20–22.

94. *Id.* at 21.

95. *Id.* at 25–27.

96. *Id.* at 27.

97. *Id.* at 28–29 ("By the mid-1920s, installment financing for both retailers and consumers became necessary to remain competitive.").

98. *Id.* at 31.

99. *Id.* at 36–37.

100. *Id.* at 37.

101. *Id.* at 40 (observing that "[m]arriage and settling down into middle-class life was seen as requiring a certain set of possessions to go along with it" and "[t]he installment plan, then, enabled true romantic love"). *But see id.* at 41 (noting that "[w]hile credit could allow the purchase of goods that signified respectable marriage, it also threatened the [moral] foundations of success").

purpose was to subsidize a private market for small home improvement and modernization loans.[102] As a significant aspect of the broader New Deal economic recovery initiative, "the Title I loan program connected a demand by consumers with a supply of capital that, in its absence, the market could not."[103] By insulating private lenders from risk through the institution of federal loan insurance, the government "remade the institutional structure and intellectual assumptions of commercial banking" that personal lending was not a profitable enterprise.[104]

Thus incubated and fostered by federal subsidy, the private personal loan market grew significantly throughout the 1930s.[105] The Title I model of short-term, fully amortized, installment-style loans that were backed by a steady salary rather than traditional assets became the norm, as commercial banks turned their newly formed personal lending departments into Fordist loan assembly lines.[106] Lenders made profits by focusing on quantity, not quality.[107] Thus, Hyman observes that "consumer lending quickly became autonomous from the state, leading to our current amnesia about its [state-subsidized] origins."[108]

Credit/debt innovation continued in the post-war era, covalently bonding ordinary American consumption to credit/debt. For example, FHA-backed mortgages and GI Bill-backed mortgages made housing consumption widely possible for a vast number of cash-poor White Americans.[109] This was the material from which the house and picket fence idyll of American success was made. Moreover, revolving store credit cards evolved to provide the basis for "the far more important arena of household consumption."[110] Department stores followed FHA-subsidized and automobile-facilitated suburbanization, permitting their newly middle-class customers to buy more with a revolving store credit card.[111] Thus, as Hyman observes:

> Mortgages, auto payments, and revolving credit began to make sense as

102. Title I, Section 2 of the National Housing Act states: "The Administrator is authorized and empowered, upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies, and other such financial institutions, which are approved by him as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them." National Housing Act, Pub. L. No. 73-479, § 2, 48 Stat. 1252 (1934).

103. HYMAN, *supra* note 35, at 79.

104. *Id.* at 78–79.

105. *Id.* at 88.

106. *Id.* at 88–89.

107. *Id.* at 89–90.

108. *Id.* at 95.

109. *Id.* at 140 ("Black mortgagees paid more than [W]hites for their housing, since [W]hites disproportionately had greater access to lower-cost federal loan programs."); *see generally* ROTHSTEIN, *supra* note 32; IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE (2005).

110. HYMAN, *supra* note 35, at 134.

111. *Id.* at 148–49 (observing that "Americans loved their charge accounts and nearly three-fifths of all households had a store charge account" and that "as American consumers moved to the mortgage-financed suburbs, so too did their locus of shopping").

> part of a larger world of practices and opinions. Credit enabled households with limited wealth to live the lives of their more affluent neighbors. Shopping, however it was financed, provided both a social outlet and a consumer strategy for Americans looking to live the good life. It was on the suburban periphery—built out of mortgage debt, shopped at through department store revolving credit, and driven to on automobile loans—that the true promise, and hidden costs, of credit equality would be understood.[112]

Thus, Americans came to view credit/debt-based consumption as an "entitlement": a natural consequence of their citizenship.[113] Correlatively, "[t]o be denied [credit/debt] went beyond an economic inconvenience"; instead, it "cut to the core of what it meant to be an affluent, responsible adult in postwar America."[114]

II.
FRAMING CREDIT/DEBT-BASED CONSUMPTION IN DIGNITARIAN TERMS

Credit/debt-based consumption embodies important issues of dignity and belonging in the United States. It implicates issues of citizenship, capability, and aspiration, and our credit/debt-based policies, including those that govern debt relief, should be normed accordingly. This Section offers capability, aspiration, and citizenship as useful foundations for formulating a normative basis for understanding and thus regulating credit/debt-based consumption in dignitarian terms.

A. Credit/Debt-Based Consumption and Capability

Given its deep association with what it means to be American in the American consumer society, credit/debt-based consumption is positively a "capability" of basic human functioning, as that concept has been deployed in the international development context.[115] Namely, credit/debt-based consumption has been proffered as a reasonable way to "enhanc[e] the lives we lead and the freedoms [Americans] enjoy" and to promote individual freedom and dignity among all Americans.[116]

Economist Amartya Sen first introduced the concept of capability as a normative theory of human well-being malleable enough to apply broadly to questions of global deprivation.[117] At its core, it is concerned with what it means

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112. *Id.* at 156.

113. *Id.* at 173.

114. *Id.*

115. *See* NUSSBAUM, *supra* note 45, at 16 (observing that "[a]ll nations, then, are developing nations, in that they contain problems of human development and struggles for a fully adequate quality of life and minimal justice").

116. SEN, DEVELOPMENT AS FREEDOM, *supra* note 6, at 14.

117. Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33, 36 (2003) [hereinafter Nussbaum, *Capabilities as Fundamental Entitlements*]

for an individual to live with dignity within the norms and practices of their community. Developed in the international poverty context, the capability approach rejects a purely absolute basis. Rather than defining poverty in terms of the lack of basic human needs like food and water, the capability approach recognizes that poverty is sometimes a relative concept rooted in deprivation.[118] Thus, even economically rich countries of the Global North should be concerned with human deprivation because they "too often have deeply disadvantaged people, who lack basic opportunities of health care, or functional education, or gainful employment, or economic and social security."[119] Sen argued that a "capability approach"[120] to defining human deprivation—one that incorporates an absolutist and a relativist perspective—would more accurately define deprivation generally (and poverty as deprivation, specifically) across the globe, notwithstanding significant substantive cultural and economic differences across countries and cultures.[121] Consequently, the capability approach reveals deprivation among marginalized groups in relatively rich countries.

Sen's approach recognizes that there is "an irreducible absolutist core in the idea of poverty" that includes basic human needs, like food and shelter, that applies to all cultures and countries.[122] Yet, it also includes a set of "substantive freedoms that people have reason to enjoy" with specific reference to the standards of living within their community.[123] Thus, in its absolutist posture, the capability approach offers a binary measure: it posits that one either possesses the capability to exercise these freedoms or lacks such capability. Deprivation, across various contexts, is then simply defined by the lack of capability, given that "[a] truly developed society . . . would enable humans to be and do, and to

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("Thus capabilities have a very close relationship to human rights, as understood in contemporary international discussions. In effect they cover the terrain covered by both the so-called 'first-generation rights' (political and civil liberties) and the so-called second-generation rights (economic and social rights). And they play a similar role, providing both a basis for cross-cultural comparison and the philosophical underpinning for basic constitutional principles.").

118. Amartya Sen, *Poor, Relatively Speaking*, 35 OXFORD ECON. PAPERS 153, 153 (1983) [hereinafter Sen, *Poor, Relatively Speaking*]. Similarly, the capability approach rejects *purely* relativist metrics that consider only the material differences between the highest classes and the lowest classes, because, as Sen argues, "poverty" would simply be replaced "with some imperfect representation of *inequality* as such." *Id.* at 156 (observing that with respect to "a rigidly relativist view" of poverty, poverty "simply cannot be eliminated, and an anti-poverty programme [*sic*] can never really be successful").

119. SEN, DEVELOPMENT AS FREEDOM, *supra* note 6, at 15; Sen, *Poor, Relatively Speaking*, *supra* note 118, at 154 (describing midcentury "premature optimism about the elimination of poverty in rich countries").

120. SEN, DEVELOPMENT AS FREEDOM, *supra* note 6, at 75.

121. Sen, *Poor, Relatively Speaking*, *supra* note 118, at 153 (arguing that "*absolute* deprivation in terms of a person's *capabilities* relates to *relative* deprivation in terms of commodities, incomes and resources"); *see also* NUSSBAUM, *supra* note 45, at 16 ("[A]ll nations, then, are developing nations, in that they contain problems of human development and struggles for a fully adequate quality of life and minimal justice.").

122. Sen, *Poor, Relatively Speaking*, *supra* note 118, at 159–60.

123. *Id.*; SEN, DEVELOPMENT AS FREEDOM, *supra* note 6, at 19.

act and live"[124] in accordance with its specific set of applicable capabilities.[125] In the theory's relativist posture, whether any individual possesses the capability to enjoy the substantive freedoms that, by virtue of their community standards, they have reason to enjoy depends on the "commodities, characteristics and utilities" specific to the community.[126] Capabilities, then, are indications of the degree of freedom and choice "to be and do" that any given member of a society may enjoy.[127]

The freedom to choose to function in a particular sense is the focus of Sen's concern for capabilities. Capabilities facilitate human "functionings," which are "actual *achievements*" that result from the exercise of capabilities.[128] Consequently, observable human functionings tell us something about the incidence and access to human capabilities. Yet, Sen points out that it is important to distinguish between what someone does (i.e., their level of functioning) and what someone is "substantively free to do" (i.e., their capability).[129] In his view, the latter is more significant for the purpose of assessing and ultimately addressing human deprivation and broader questions of human dignity.[130] In other words, it is the choice to be and do what one values that indicates human dignity, not necessarily how one exercises that choice.[131]

Sen, however, does not commit to defining exactly what specific freedoms or capabilities should form the basis of formal policies aimed at addressing problems of deprivation, including global poverty and domestic social injustice.[132] Instead, Sen largely posits that each community and society must

124. David A. Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic*, *in* WOMEN, CULTURE, AND DEVELOPMENT 153, 153 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

125. Sen, *Poor, Relatively Speaking*, *supra* note 118, at 159–60.

126. *See id.* at 160, 167–68 ("[A]n absolute approach in the space of capabilities translates into a relative approach in the space of commodities, resources and incomes in dealing with some capabilities, such as avoiding shame from failure to meet social conventions, participating in social activities, and retaining self-respect."); *see also* NUSSBAUM, *supra* note 45, at 18 (observing that "the most important elements of people's quality of life are plural and qualitatively distinct" and that this "idea of plurality and nonreducibility . . . is a key element of the approach").

127. NUSSBAUM, *supra* note 45, at 25 (observing that "[o]ptions are freedoms, and freedom has intrinsic value").

128. SEN, DEVELOPMENT AS FREEDOM, *supra* note 6, at 75 (noting that "[t]he amount or the extent of each functioning enjoyed by a person may be represented by a real number, and when this is done, a person's actual achievement can be seen as a *functioning vector*"); NUSSBAUM, *supra* note 45, at 24–25 ("A functioning is an active realization of one or more capabilities.").

129. SEN, DEVELOPMENT AS FREEDOM, *supra* note 6, at 75–76.

130. AMARTYA SEN, THE IDEA OF JUSTICE 232 (1999)

131. *Id.* at 234–35 ("The focus of the capability approach is thus not just on what a person actually ends up doing, but also on what she is in fact able to do, whether or not she chooses to make use of that opportunity.").

132. *Id.* (explaining that "[t]he capability perspective does point to the central relevance of the inequality of capabilities in the assessment of social disparities, but it does not, for its own sake, propose any specific formula for policy decisions"); *see also* NUSSBAUM, *supra* note 45, at 19-20 (observing that

decide what capabilities are necessary to optimal, plural human functioning, with the freedom to choose taking precedence over the consequences of the choice.

Building on Sen's theory, philosopher Martha Nussbaum has developed a more concrete capabilities approach that seeks to "construct[] a theory of basic social justice."[133] In Nussbaum's view, government is responsible for facilitating human functioning, not just establishing widespread capability.[134] Thus, while largely agreeing with Sen on the importance of promoting the "exercise of human freedom" in all of its plural complexity,[135] Nussbaum has focused on developing a capabilities theory with an eye to actual functioning as the marker of dignity. She argues that to the extent that the capabilities approach is meant to inform "normative law and public policy," it must "take a stand on substance, saying that some capabilities are important and others less important, some good, and some (even) bad."[136]

Nussbaum has enumerated a specific set of ten "central capabilities," premised on the concept of human dignity, that all nations and communities should aspire to promote in their constituents.[137] Her list of ten central capabilities "focuses on the protection of areas of freedom so central that their removal makes a life not worthy of human dignity."[138] Among the ten are "basic capabilities,"[139] including "affiliation." She defines affiliation as "[h]aving the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others[, including by] provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, [and] national origin."[140]

Nussbaum posits that because the central capabilities have "an intimate relationship to the very possibility of life in accordance with human dignity," government, as "the society's basic political structure," is responsible "for securing capabilities" for all its citizens.[141] Consequently, the central capabilities should form the basis of formal entitlements that are recorded in foundational

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"Sen does not employ a threshold or specific list of capabilities, although it is clear that he thinks some capabilities (for example, health and education) have a particular centrality").

133. NUSSBAUM, *supra* note 45, at 19.

134. *Id.* at 64.

135. *Id.* at 25–26.

136. *Id.* at 28.

137. Martha C. Nussbaum, *Introduction: Aspiration and the Capabilities List*, 17 J. HUMAN DEV. 301, 301 (2016) [hereinafter Nussbaum, *Introduction*]; Nussbaum, *Capabilities as Fundamental Entitlements*, *supra* note 117, at 36 ("[T]he capabilities approach will supply definite and useful guidance, and prove an ally in the pursuit of sex equality, only if we formulate a definite list of the most central capabilities, even one that is tentative and revisable, using capabilities so defined to elaborate a partial account of social justice, a set of basic entitlements without which no society can lay claim to justice.").

138. NUSSBAUM, *supra* note 45, at 31.

139. *Id.* at 24 ("Basic capabilities are the innate faculties of the person that make later development and training possible.").

140. *Id.* at 33.

141. *Id.* at 64.

constitutions and other forms of formal lawmaking, "giv[ing] useful directions for policy."[142]

The capabilities approach is also a useful framework in which to consider issues of belonging and dignity because it explicitly prioritizes the well-being of disadvantaged groups in its own internal justification. For example, Nussbaum has observed that "the [capabilities] approach is concerned with entrenched social injustice and inequality, especially capability failures that are a result of discrimination and marginalization. It ascribes an urgent task to government and public policy—namely, to improve the quality of life for all people, as defined by their capabilities."[143] Indeed, both Sen and Nussbaum have emphasized the benefits of the capabilities approach in providing a means of addressing relative deprivation by taking account of the incidences of deprivation concentrated within minority communities and other disempowered communities, whose socially subordinated condition might otherwise be masked by aggregated absolute metrics like gross domestic product or average incomes.[144]

Sen has explained how the focus on capabilities helps to reveal systemic deprivation among domestically marginalized groups whose subordination and lack of substantive freedom to be and do is otherwise obscured by purely absolute metrics like average income.[145] Sen posited that "one country can have a much higher gross national product per capita than another; at the same time, it can have much lower life expectancy that its less wealthy counterpart because its citizens have poor access to healthcare and basic education."[146] To illustrate his point, Sen observed how the capabilities approach revealed the difference in kind of African American poverty within the United States. Even though, in terms of absolute wealth, African Americans are richer than their counterparts in less-developed parts of the globe, Sen explained that African Americans have a much higher mortality rate than their counterparts. Noting the difference in life expectancy between African Americans in Harlem versus people in China and Kerala, India, Sen explained that

> [t]he nature and extent of the deprivation among [African Americans] cannot be adequately understood when they are measured by the

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142. Nussbaum, *Introduction*, *supra* note 137, at 307. Moreover, on a global scale, the richer countries are similarly obligated to support the poorer countries in securing the central capabilities of their citizens. *Id*. at 303 ("[R]icher nations have a moral obligation to poorer nations to help them meet their capabilities thresholds."); NUSSBAUM, *supra* note 45, at 64.

143. NUSSBAUM, *supra* note 45, at 16.

144. *Cf.* Robert Rector & Rachel Sheffield, *The War on Poverty After 50 Years*, THE HERITAGE FOUND. BACKGROUNDER, Sept. 15, 2014, at 1, 4 http://thf_media.s3.amazonaws.com/2014/pdf/BG2955.pdf, [https://perma.cc/B9DN-UPU7] (arguing that the U.S. poverty rate is unduly inflated when one considers the incidence of durable goods, like computers and microwave ovens, among the poor).

145. *See generally* Amartya Sen, *The Economics of Life and Death*, SCI. AM., May 1993 http://heckeljc.sites.wfu.edu/ecn150/LifeandDeath.pdf [https://perma.cc/UP9P-TQ3D].

146. *Id.*

> yardstick of income. According to that scale, [African Americans] are poor in comparison with U.S. [W]hites, but they are immensely richer than Chinese and Keralan citizens. On the other hand, in terms of life and death, [African Americans] are less likely to survive to a ripe old age than are people in some of the poorest Third World countries.[147]

Thus, by measuring deprivation by means of health and life expectancy, the capabilities approach captures the impact of racism on African Americans' freedoms to be and do in ways that quantitative metrics like income may not capture. Consequently, the capabilities lens reveals "the failure of U.S. policies to make equitable arrangements for public education, health care, nutrition and social peace" in a way that focusing on the relative wealth of the United States would obscure.[148] This crucial "informational" benefit gives societies the means to make decisions on how best to "focus[] on human life" and on each person's ability to enjoy "the substantive freedom to achieve those reasoned ends."[149]

Sen and Nussbaum's concept of "capability" captures a key aspect of credit/debt-based consumption in the United States. Within a rich nation like the United States, the sorts of consumption that credit/debt fuels may go beyond strict necessities of survival—yet nonetheless form an important part of what it means to function fully within American society. Moreover, government policies toward credit/debt have helped to consolidate it as a mechanism that helps individuals achieve their fullest capability. Disentanglement similarly recognizes building capability as one of the ultimate ends of debt relief, by attempting to maintain individuals' ability to function fully during and after the period of debt discharge.

B. Credit/Debt-Based Consumption and Aspiration

Credit/debt-based consumption is "aspirational" in the American consumer society. It is advertised as a source of increased autonomy and agency, especially for those who exist in the disadvantaged spaces of American society and must work to position themselves more firmly within the American polity.[150] They must aspire to have a greater capacity "to be and do" the things that are part and parcel of being American, at least as a positive matter.

Philosopher Agnes Callard's theory of "aspiration" as a normative theory of rational human agency presents a framework for understanding credit/debt-based consumption as justifiable behavior, particularly for marginalized groups, even when that behavior might seem irrational from conventional economic perspectives. For Callard, aspiration is "the rational process by which we work

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147. *Id.*

148. *Id.*

149. SEN, THE IDEA OF JUSTICE, *supra* note 130, at 233–34.

150. *E.g.*, Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 AM. BANKR. L.J. 435, 452 (2013) [hereinafter Sousa, *Bankruptcy Stigma*] (noting the "American ideal that . . . individuals should be self-reliant, and thus held personally responsible for their actions" and that "this American ideal of self-reliance and self-sufficiency relates to one's financial and material well-being").

to care about (or love, or value, or desire . . .) something new."[151] It is "the distinctive form of agency directed at the acquisition of values" that requires the actor to "do[] things" that will "change [her] so that [she is] able to do the same things, or things of that kind, better and better."[152] In other words, aspiration is a "transformative process" in which "we acquire values" in order to "become a certain kind of person."[153]

In this regard, aspiration to acquire an as-yet unknown value[154] (like belonging) is a rational "exercise of human agency," even though the aspirant's actions may appear irrational from conventional standpoints.[155] The aspirant progresses "by doing things,"[156] including the mental work of thinking, imagining, and reasoning."[157] The aspirant's actions are rationally based on what Callard calls "proleptic reasons," which are "provisional" reasons that support the transformation along the road to value acquisition, even though they may not be specifically justified by the end value itself.[158] Aspiration is "rational purposive value-acquisition" in this regard, and acts of "aspirational agency" are imbued with their own rationality even though aspirants of this kind likely "make mistakes," "need help," and generally do "not know exactly what they are doing."[159] Consequently, aspirants are "characteristically needy people" because their "own conceptions of value are insufficient,"[160] and they must "rely more generally on the kindness and empathy or material assistance of those who love them" as they journey forward.[161]

Sociologist Margaret Frye offers an illuminating account of aspiration that similarly eschews the strictures of rational choice reasoning that would fault an act of agency as irrational and ill-advised when the likelihood of its success is unduly small. Instead, Frye justifies seemingly irrational behavior through a dignitarian lens of aspiration "as a model for self-transformation," in which, for

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151. CALLARD, *supra* note 7, at 5.

152. *Id.*

153. *Id.* at 31, 57.

154. According to philosopher Elizabeth Anderson, "[t]o value something is to have a complex of positive attitudes toward it, governed by distinct standards for perception, emotion, deliberation, desire, and conduct." ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 2 (1993).

155. CALLARD, *supra* note 7, at 9.

156. *Id.* at 5.

157. *Id.* at 10, 72.

158. Callard writes that "[t]he reason for doing the work is provided by the value in question, but the defect in your grasp of that value also shapes the character of the activity it motivates." *Id.* at 69. Moreover, Callard argues that an aspirant "can act rationally even if [her] antecedent conception of the good for the sake of which [she] act[s] is not quite on target—and [she] know[s] that." *Id.* at 72.

159. *Id.* at 8, 64, 262. Callard argues that "[i]t is possible to have an inkling of a value that you do not fully grasp, to feel the defect in your valuation, and to work toward improvement." *Id.* at 69.

160. *Id.* at 262.

161. *Id.*

example, "[disadvantaged] youth use visions of a brighter future to refine their narratives about themselves and transcend their present reality."[162]

Frye considers the seemingly irrational aspirations of Malawian girls to receive a postsecondary education against the Malawian government's launch and marketing of its "New Dawn" educational reforms aimed at "expanding access to primary schooling for the poor."[163] The reality in Malawi was that even after the programmatic changes to the country's primary education system, only a small fraction of Malawians could rationally expect to advance to a postsecondary institution and then leave with the credentials to become a doctor, lawyer, or other highly skilled worker. Notwithstanding these abysmal odds, Frye observed that Malawian girls (who were even less likely to complete their education than Malawian boys) were "strikingly optimistic" about their futures even though "when viewed through the rational choice framework, the[ir] imagined futures . . . appear markedly irrational."[164] Frye observed that the schoolgirls continued to "choose strikingly ambitious goals while facing a very low probability of achieving them," "view self-efficacy as sufficient to achieve these goals," and "relegate marriage[, a much more realistic fate,] to the distant future."[165]

Frye rationalizes these beliefs and choices in "aspirational identities." The Malawian government implemented a "bright futures" campaign to convince its citizens that educational success (even at the primary school level) would result in tangible gains for its citizens, thus "forg[ing] a strong link in the popular culture between expanded access to primary schools and later opportunities to attend college and pursue high-skilled careers."[166] This state-sanctioned optimism gave "social meaning" to the Malawian girls' determination to hew to a goal that was unlikely to materialize. Their "educational aspirations" were justified "as assertions of identity."[167] Frye observed that

> [b]y choosing a career requiring long-term investment, and by continuing to express confidence that they will one day achieve these ambitious goals, schoolgirls in Malawi are asserting to others that they have transcended the boundaries of the present [deprived] lives and occupy an elite place in society where such long-term foresight is possible.[168]

Their aspiration, however ill-advised from a rational choice perspective, was valid and valuable as an exercise in self-assertion and social worth against a backdrop of gendered subordination and general poverty.[169]

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162. Margaret Frye, *Bright Futures in Malawi's New Dawn: Educational Aspirations as Assertions of Identity*, 117 AM. J. SOCIO. 1565, 1567 (2012).
163. *Id.* at 1578, 1597.
164. *Id.* at 1582.
165. *Id.* at 1598.
166. *Id.* at 1579.
167. *Id.* at 1599.
168. *Id.* at 1598–99.
169. *Id.* at 1608.

Credit/debt-based consumption is also aspirational, particularly with respect to marginalized groups, because when marginalized people borrow money—for example, to finance a home purchase, a college education, or an organ no one can play—they are aspiring to full citizenship and belonging. In borrowing for these particular reasons, they are aspiring to transform themselves into full Americans. The ownership of a home with equity and the achievement of education with its increased salary and other benefits are not ends in and of themselves. Rather, the underlying goal is a large-scale transformation into full citizenship, with its promise of choosing to be and do in accordance with the American consumer ideal. In this sense, the end result is concerned with individual dignity.

C. Credit/Debt-Based Consumption and Citizenship

The ability to earn is an important aspect of American citizenship. And, because credit/debt is meant to supplement and substitute for the ability to earn,[170] it too should be understood as a mode of citizenship. Philosopher and political theorist Judith Shklar posits that American citizenship should be defined under the broad concept of "social standing."[171] Concerned with ideals such as "full membership," "civic dignity," and "inclusion," this standing is channeled through "two great emblems": "the equality of political rights," as embodied in the right to vote, *and* "the dignity of work and personal achievement," as embodied in "the opportunity to earn."[172] Voting and earning are not essentially important, however. Rather, their importance lies in their "involving activit[ies]" that indicate who belongs and who is "entitled to respect" in the modern American state.[173]

Although less familiarly associated with citizenship than voting, earning assumed its significance as an aspect of American citizenship from the very founding of the nation. The American revolutionary spirit was born of a mother country in which one's social position was static, rooted in the circumstances and station of one's birth. A rigid and strict aristocracy held exalted status and exulted in all that came with its birthright, including an existence in which labor and trade were anathema. The latter were the lot of common folk, who, by divine design, toiled away beneath the nobility to earn their keep.

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170. *E.g.*, Dwyer, *supra* note 14, at 238 (2018) (citing Monica Prasad for the proposition that "expanding access to credit became an alternative to publicly subsidizing key social goods in the United States" and Krippner for the proposition that "[l]oosening credit partially (and often only temporarily) resolved distributional conflicts in the United States by providing resources that less obviously drew on the state than welfare state spending").

171. SHKLAR, *supra* note 8, at 2.

172. *Id.* at 1–3 (describing "the vote and the opportunity to earn" as "the two great emblems of public standing").

173. *Id.* at 2–3.

At the same time, the revolutionary spirit was born into a burgeoning colonial society that increasingly and wantonly enslaved people. An enslaved person was infamously "not a citizen . . . in the sense in which that word [was] used in the [pre-Civil War] Constitution," and instead was akin to an "ordinary article of merchandise and property."[174] More than this, they were "less than subjects of any modern state," not entitled under any legal regime to retain the benefits of their own forced labor.[175]

Against this backdrop, American citizens came to define themselves in "negative" terms. Describing themselves in terms of what they were not, the essential American identity was derived from a rejection of hereditary status as a defining orientation, namely "the twin evils of workless masters and forced labor," be it exalted, worthless aristocrat or debased, worthless slave.[176] Instead, to be American was to have the opportunity to become a self-made person and to rightly enjoy the rights, benefits, and fruit of one's own industry. An American's success depended entirely on their own effort and labor and the freedom to lift their own social status that free labor engendered.[177]

Thus, Shklar posits that the freedom to earn from one's own labor was especially indicative of citizenship for enslaved people.[178] She describes President Lincoln's deep belief in the idea that hard work engendered independence and advancement for all, even as he did not believe that enslaved people were equal to all. For example, while "Lincoln did not think that a [B]lack woman was his equal in all respects," he believed that "in her natural right to eat the bread she earns with her own hands without asking leave of anyone else, she [was his] equal and the equal of all others."[179]

At least with regard to earning, a formerly enslaved person could immediately participate and belong to the American project as a citizen and not as a piece of property. Moreover, "the general ethos of work was alive among the slaves, who shared Lincoln's social vision" of the value of and dignity in free labor.[180] Consequently, "for no other group of Americans did the connection between earning and citizenship appear closer."[181] Free labor and its attendant remuneration were both a right and a duty reflective of citizenship. Indeed, the

174. Dred Scott v. Sanford, 60 U.S. 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

175. SHKLAR, *supra* note 8, at 14.

176. *Id.* at 83–85 (noting that "the absence of 'hereditary distinctions' was the essence of the American political heritage").

177. *See, e.g.*, Sara Sternberg Greene, *Working to Fail*, 27 DUKE J. GENDER L. & POL'Y 167, 167 (2020) ("America has long prided itself on being a nation of mobility . . . where if you just work hard enough, you can and will get ahead."); SHKLAR, *supra* note 8, at 82 (describing how Lincoln believed that "if a [W]hite man tried hard enough, he could become an independent citizen-proprieter," notwithstanding being born without social status).

178. SHKLAR, *supra* note 8, at 83.

179. *Id.* at 81.

180. *Id.* at 83 ("'We understood freedom to mean industry and the enjoyment thereof,' a spokesman for the freedmen declared.").

181. *Id.*

capitalist state "demanded free earners," and the state's political and economic well-being was dependent upon individual citizens who worked to support themselves and their families.[182]

From this standpoint, the opportunity to work outside the home and to earn were similarly of paramount political significance for women as they sought to become first-class citizens, rather than merely subjects of the men in their family.[183] Women demanded the right to enter the workforce not because "free [nonhousehold] labor had an intrinsic dignity," but because they desired the option "to participate as equals in the economic process . . . where citizenship and its rewards and duties now rested."[184] In other words, for women, merely spending their husband's, father's, or brother's money was not enough to imbue a sense of belonging in the market society. Instead, women's demands to work outside the home were rooted in their desire to belong by being able to earn their own keep, without the assistance of men. Moreover, access to credit to smooth income was part and parcel of this mode of belonging.

In other words, credit/debt-based consumption is also indicative of "substantive citizenship," a concept which Professor Ming Hsu Chen develops in her exploration of formal citizenship as a necessary precursor to full citizenship for immigrants.[185] Chen defines substantive citizenship as constituting "more informal claims to social belonging" that might include "economic, social, political, and in some cases legal incorporation" into the society.[186] As contrasted with "formal citizenship," namely "legal status that permits an individual to attain naturalized citizenship and state-conferred rights and benefits,"[187] substantive citizenship is significant because it "fosters a sense of belonging and of deservingness."[188]

D. Synthesizing Capability, Aspiration, and Citizenship in Terms of Credit/Debt-Based Consumption

Together, capability, aspiration, and citizenship offer a theoretical basis on which to view the relationship between credit/debt-based consumption and broader notions of belonging, including autonomy and agency, that are foundational to the American polity. Each individual has to enjoy an unfettered internal set of capabilities in order to then choose among a larger capability set in order to function with dignity. In an environment of consistent discrimination or subordination, however, marginalized groups, like women, may develop an unduly limited sense of "internal capability," one that a capabilities approach

182. *Id.* at 84.
183. *Id.* at 88.
184. *Id.* at 87–88.
185. CHEN, *supra* note 40, at 4–5.
186. *Id.* at 5.
187. *Id.*
188. *Id.* at 7.

would seek to broaden by encouraging something like Callardian aspiration in each person.

At the same time, Callard's theory of aspiration fills in as an account of the form of agency that the capabilities approach might take, particularly with regard to the work of internal capabilities. To the extent that "[i]nternal capabilities are not innate equipment,"[189] but instead more closely aligned with nurture, subordinated people need more support in developing the internal capabilities that will raise them "above a certain threshold level of combined capability"[190] and that will permit "substantial freedom to choose and act."[191] For those who have yet to achieve those internal capabilities and, as a consequence, do not yet value them in a meaningful sense (i.e., have developed an adaptive preference that is inconsistent with achieving necessary internal capabilities), they must learn to value them. They must aspire.

Aspirational agency gives a basis on which to view as rational the activity associated with the individual development of internal capability even though the one aspiring to value such internal capability may "not fully appreciate" possessing the capability until she is "at, close to, the end of the process of transformation."[192] Callard's conception of aspiration leaves space for the likelihood that aspirants of this kind will "tend to make mistakes, to need help, [and] to not know exactly what they are doing."[193]

This is especially useful in the context of disadvantaged and marginalized individuals in society because, from an aspiration perspective, they occupy "a distinctive ethical category of agents whose vulnerability renders our correct treatment of them a matter of especially deep ethical significance."[194] To the extent that as a positive matter, credit/debt-based consumption implicates important issues of dignity in the United States, the capabilities approach provides a framework for evaluating credit/debt policies in the United States vis-à-vis questions of human dignity. Given its deep association with what it means to be American, for better or for worse, access to credit is a "capability" in American society. It is meant to "enhanc[e] the lives we lead and the freedoms [Americans] enjoy" and to promote individual freedom and dignity among all Americans.

Indeed, by the second half of the twentieth century, credit-fueled consumption was something of a birthright,[195] both in terms of the convenience that acquiring mass-produced goods and services brought to daily life and their

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189. NUSSBAUM, *supra* note 45, at 23.
190. *Id.* at 24.
191. *Id.*
192. CALLARD, *supra* note 7, at 75.
193. *Id.* at 262.
194. *Id.*
195. *See, e.g.*, Felicia Kornbluh, *To Fulfill Their "Rightly Needs": Consumerism and the National Welfare Rights Movement*, 69 RADICAL HIST. REV. 76, 78–79 (1997) (observing that in the "affluent" American consumer society, borrowing money to consume goods and services was part and parcel of the "inherent rights of American citizenship").

significance as indications of rightful sharing in American material prosperity.[196] Thus, once established as central to political and cultural belonging in the American "Consumer's Republic," credit/debt-fueled consumption became a platform on which marginalized groups who were practically and formerly excluded from mainstream society could rest their aspiration for greater social inclusion and entry into first-class citizenship.

For example, in midcentury America, when their dignity and place as humans and fellow Americans were formally and informally subverted, some marginalized people aspired alternately to borrow and consume their way to belonging and human dignity. Mattie Lewis's experiences in the 1950s home purchase market in Chicago illustrates this proposition.[197] Mattie Lewis was a Black homebuyer in Chicago who, with her husband, bought a home with an installment contract loan.[198] Contract loans were inferior and often predatory versions of the FHA-backed mortgages that built the White American middle class in the postwar era.[199] Yet, even though Mrs. Lewis seemed to understand the inferiority and dangers of the contract loan product, she explained:

> "All I wanted was a house. And that was the only way I could get it. They weren't giving [B]lack people loans at that time," she said. "We thought, 'This is the way it is. We going to do it till we die, and they ain't never going to accept us. That's just the way it is.'"
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> "The only way you were going to buy a home was to do it the way they wanted," she continued. "And I was determined to get me a house. If everybody else can have one, I want one too. I had worked for [W]hite people in the South. And I saw how these [W]hite people were living in the North and I thought, 'One day I'm going to live just like them.'"[200]

Beryl Satter tells a similar story about the fate of Black people who, having been excluded from participating in the federally subsidized American home-ownership dream, willingly accepted the onerous terms of a contract loan in order to buy a house.[201] Satter describes "Ozirea Arbertha, who lived with her mother and four children in a two-flat building" in midcentury Chicago that she and her husband bought with a contract loan.[202] The Arberthas agreed to pay

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196. *See, e.g.*, LOUIS HYMAN, BORROW: THE AMERICAN WAY OF DEBT 13 (2012) (describing the 1950s-era "surging prosperity fueled by rising wages and easy credit").

197. *See* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [https://perma.cc/VA4V-UH2D].

198. *Id.*

199. Megan S. Wright, *Installment Housing Contracts: Presumptively Unconscionable*, 18 BERKELEY J. AFR.-AM. L. & POL'Y 97, 100–01 (2016).

200. Coates, *supra* note 197.

201. *See generally* BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA (2009).

202. *Id.* at 239–40.

$28,000 "on contract" from a real estate firm that, just three months before, had bought the very same building from White owners for $15,000.[203] When Ozirea Arbertha's husband died unexpectedly, she and her mother struggled to make the exorbitant monthly payments on a home that, by the terms of her real estate contract loan, she would not gain title to until she had fully paid off the debt.[204]

Mrs. Lewis's and Mrs. Arbertha's *in*ability to borrow money on good terms to finance "the post-frontier symbol of what we call the American way of life"[205] was expressive of their relative lack of belonging and the second-class citizenship that Black families like theirs experienced (and continue to experience) in America. It was a stamp of their practical second-class citizenship.[206] Consequently, it was preferable to borrow on extractive and predatory terms to buy the homes because, as Mrs. Lewis put it, she "wanted cabinets and all these things these other people have."[207] Thus, the families' use of the real estate contract loan, while perhaps economically irrational, was nevertheless reasonable in a society in which buying, indeed financing, the house and the cabinets was an expression of dignity and an act of aspirational agency.[208]

In the 1960s and 1970s, Congress came to see credit/debt-based purchases in the same light when it passed a suite of credit-centric statutes that were as much social interventions as they were economic interventions in the wake of entrenched racial and gender discrimination and persistent second-class citizenship.[209] These statutes sought to increase access to credit/debt as a means of greater social inclusion for Blacks, women, and other marginalized groups, and marginalized groups understood credit/debt consumption in this way.[210]

Keeanga-Yahmatta Taylor describes the significance of credit/debt-based housing consumption to marginalized people who wanted to share in this rite of passage for Americans and participate in this federally promoted world of purportedly democratized credit-debt access. She depicts the phenomenon of "predatory inclusion," in which Black homebuyers were able to participate in

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203. *Id.*

204. *Id.*

205. KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 31 (2019) (quoting Charles Abrams, a prominent housing advocate and attorney); *see also* Brown & Carbone, *supra* note 59, at 121 (observing that "[i]n the United States, property ownership and citizenship have long been linked and long served to deny African-Americans full participation in American life").

206. *See* Brown & Carbone, *supra* note 59, at 121.

207. Coates, *supra* note 197.

208. *See* CALLARD, *supra* note 7, at 8 (explaining aspiration as a "rational, purposive value-acquisition").

209. *See* Atkinson, *Borrowing Equality*, *supra* note 16, at 1407–08 (stating that "Congress acted in part to address the demands of marginalized groups who, in a world where access to borrowed capital was increasingly synonymous with belonging, came to believe that equal access to conventional loans and purchase money was integral to their broader quest for equality and first-class citizenship").

210. *Id.*

"conventional real estate practices and mortgage financing, but on more expensive and comparatively unequal terms."[211]

The FHA mortgage substituted credit/debt for the ability of these poor Black women to earn enough money to meet the lending standards introduced by the FHA in the New Deal Era. They had no chance of saving 20 percent down, and the FHA's subsidy of mortgages made the dream of owning a home possible, at least in the short term.[212] This credit/debt innovation, with its veneer of affordability and inclusion, permitted poor Black women to become homeowners.[213]

And yet, "[i]nclusion . . . created the conditions for continued extraction as opposed to development and actual renewal."[214] Black women bought overpriced, dilapidated homes that they could not otherwise afford but for the federally supported, low-income homeownership programs in the 1970s and beyond.[215] Indeed, their inability to pay steadily over time, namely their high risk of default on their loans, was a part of the business model of those predatory lenders intent on squeezing every last drop of wealth from marginalized Black communities.[216] Nevertheless, these women and their families financed these ramshackle homes because owning a house, even one that was ultimately fatally encumbered by debt, "[bespoke] freedom and security" and was "tied up with pride and confidence," values that Black women aspired to achieve.[217] This act brought them closer into the boundaries of full membership, if only in a purely superficial sense.

Similarly, credit/debt-based consumption was central in the National Welfare Rights Organization's (NWRO) activism between 1966 and 1973.[218] The NWRO was an organization comprised of largely marginalized poor, Black mothers who agitated for welfare rights "as a component of their rights as citizens, mothers, consumers, and human beings."[219] They connected the traditional rights discourse of previous movements to petition for "new rights" like access to credit/debt for consumption.[220] For the NWRO's marginalized and largely poor, Black mothers, credit/based consumption rested at the center of their own claims to American identity.

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211. TAYLOR, *supra* note 205, at 5.

212. *Id.* at 178 (explaining that "[t]he possibility of buying a home—the cornerstone of the American dream—represented new opportunities" and that "[f]or many African American women, the HUD-FHA programs seemed to offer an unprecedented opportunity to find what many believed to be decent housing").

213. *Id.*

214. *Id.* at 255.

215. *Id.* at 5.

216. *See id.*

217. *Id.* at 30 (quoting Charles Abrams, a prominent housing advocate and attorney).

218. Kornbluh, *supra* note 195, at 77, 83.

219. *Id.* at 78.

220. *Id.*

Buying things using credit/debt implicated these poor Black NWRO mothers/activists' ability to belong in, and to, their country even as debates about their worth persisted.[221] George Wiley, the founder of the NWRO, argued that although "credit costs money," it was nevertheless "like a telephone or an automobile—it is to be considered a necessity, in the context of our material standard of living."[222] Indeed, to the Black mothers of the NWRO, purely economic considerations like the ability to pay were less important than larger questions relating to autonomy, agency, and belonging. Consequently, NWRO members embarked on credit/debt-focused political campaigns like "the Sears Campaign" to force Sears and other purveyors with revolving credit programs to offer credit to NWRO members.[223] Indeed, Kornbluh notes that "Wiley resisted evaluating credit *per se* and focused instead on the question of whether poor people would be able to decide for themselves about their budgets—to choose whether to acquire charge accounts and evaluate when it was appropriate to use them."[224] In other words, for this deeply disadvantaged and marginalized group, credit/debt-based consumption implicated their capability to function and their aspiration to exist as full members of the American polity: their ability to belong.

Formal citizenship and substantive citizenship, including the right to earn and its credit/debt stand-in, are "prerequisite[s] to *full* citizenship."[225] For marginalized groups who may be formal citizens but who have historically been denied substantive citizenship, like women and African Americans,[226] the federal government has offered access to credit/debt-based consumption to improve substantive citizenship,[227] and these groups have come to view the access to credit/debt in these terms.[228]

III.
CURRENT CREDIT/DEBT POLICIES AS THE OPPOSITE OF DIGNITY

As argued above, credit/debt-based consumption is more than just a relationship that is fundamental to the economic functioning of our market

221. *See id.* at 79 (explaining that "[f]or the most part, these activists argued that they deserved to survive with dignity, and to receive aid from both governments and corporations, irrespective of their participation in the waged labor markets," and that "[t]hey conceived of survival at a fairly high material level as an American right and a human right, a universal 'right to live'"); *see also* MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY 95 (2013) ("In the late 1960s and early 1970s, [B]lack women asserted their claims to welfare rights and first-class citizenship through the welfare rights movement.").

222. Kornbluh, *supra* note 195, at 88 (quoting a letter written by Wiley).

223. *Id.* at 84.

224. *Id.* at 89.

225. CHEN, *supra* note 40, at 7 (emphasis in original).

226. *Id.* at 29 (noting that African Americans tend to experience "low substantive citizenship").

227. *See id.* at 24 (observing that in the case of immigrants, "substantive gaps in inequality give rise to empirical puzzles about the degree to which citizenship matters").

228. *E.g.*, Atkinson, *Borrowing Equality*, *supra* note 16; WHERRY ET AL., *supra* note 3, at 44 (observing that in the civil rights and women's rights movements, people of color and women's groups demanded credit justice).

society.[229] Rather, our nation's policies have implicitly and explicitly presented credit/debt-based consumption as a reasonable pathway to social well-being and belonging. Consequently, whether economically rational or irrational, credit/debt-based consumption of all stripes is positively reasonable.

Nevertheless, economically irrational use of credit/debt, particularly among marginalized and vulnerable communities, is cause for concern because the attendant risk of distressed indebtedness threatens to further marginalize and destabilize those who must engage in self-help socioeconomic mobility in the market.[230] In this regard, Washington was not wrong to worry about the financed organ. One might imagine that the organ buyers did not have the means to service their debt long-term (after all, they could not even afford basic utensils) and ultimately defaulted, with significant and corrosive consequences. Indeed, it is readily predictable that some borrowers—particularly those who are already historically marginalized and whose lives are rife with risk—will fail, at least as an economic matter, in their attempts to leverage credit/debt-based consumption to improve their standing within the American polity.[231]

In light of this particular vulnerability, a first-order remedy would be to disentangle credit/debt-based consumption from broader conceptions of belonging and dignity altogether. In other words, one's capacity to function, to aspire, and to substantively engage in the polity should not be conditioned on one's ability to service debt. Thus, rather than ceding the problem of belonging to credit/debt markets, we should turn our attentions more fully to the problem of persistent social exclusion that is endemic in marginalized and vulnerable communities. Yet, given our national history of devotion to credit/debt as a pillar of the American way of being,[232] this is a gargantuan endeavor whose specifics

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229. *E.g.*, Marco Meyer, *The Right to Credit*, 26 J. POL. PHIL. 304, 306 (2018) (arguing that "credit fulfills a central function in capitalist societies").

230. *See, e.g.*, BARADARAN, *supra* note 9, at 33 ("The credit arrangements of the [Reconstruction Era] South also had the veneer of self-determination and freedom, but . . . turned out to be yet another form of bondage.").

231. *E.g.*, ONDERSMA, DISMANTLING DEBT, *supra* note 9, at 30 ("When it comes to opportunities, debt never generates the promised opportunities in many cases—much of it is designed to extract wealth and resources from borrowers rather than benefit them."); Yvana L.B.H. Mols, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEV. J. 289, 319–22 (2012) (pushing back against the presumption of significant autonomy that underpins bankruptcy policy and offering instead a "vulnerability paradigm" that "questions the very reality of radically independent and autonomous actors in a moral, social, and economic sense" and recognizes that "for humans, dependency is always a possibility"). Mols argues that "[b]ecause vulnerability is a universal and enduring aspect of the human experience, it provides a stronger basis for regulatory structures like bankruptcy than the accidental and fleeting autonomous and independent liberal subject." *Id.*; GROSS, *supra* note 4, at 97 (observing that "taking [financial] risks is exactly what we want people to do" so "we need a mechanism for dealing with the inevitable failures that are a part of the process").

232. *See generally* SARAH QUINN, AMERICAN BONDS (2019); *see also* CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA (2021) (observing that "the founding generation of political leaders placed property law at the heart of the ideology they advanced

exist outside the reach of this project. Indeed, it is a task for future theorization and discourse. Instead, this essay uncomfortably confines itself to engaging within the lines of existing consumer credit/debt policies that evince anti-dignitarian tendencies.

Current credit/debt regulation and policies are largely normed in utilitarian, economic terms that prioritize market well-being.[233] Debt relief policies are most indicative of this approach, insofar as they justify and promote the social exclusion of debtors seeking relief in service of economic norms and concerns. For example, as reflected in the Bankruptcy Code, the distressed debtor must trade in their dignity in exchange for state-sanctioned relief. The tragic irony is that this failed credit/debt-based consumption, that is partly rooted in norms of belonging, has ended in burdensome indebtedness that, in turn, engenders and justifies state-sanctioned ostracism and exclusion.[234]

A. Norming Indignity in the Discharge of Debt

The "fresh start" is the dominant normative baseline for debt relief in consumer bankruptcy.[235] This model aims to rehabilitate the distressed debtor and "encompasses at least three [debtor-focused] goals": "consumer financial education of the debtor, emotional and psychological relief from financial failure, and renewed debtor participation in the open-credit economy."[236] Notwithstanding these benefits, as a normative matter, the distressed debtors must pay a steep dignitarian price in exchange for this relief[237] because the "fresh start" is most conventionally justified by consequentialist norms that willfully subvert dignitarian norms.[238] Specifically, although the fresh-start rationale is

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in the new nation" and "emphasizing the extent to which 'commercial republican' ideology in the founding era celebrated land as a marketable commodity . . . that was a foundation for a world of credit., collateral, and capitalism").

233. *E.g.*, Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1418 (1985) (justifying consumer bankruptcy's "nonwaivable discharge rule" in terms of its potential to "curtail the costs otherwise imposed on a wide range of people—from family and friends, to business associates, to 'society' in general").

234. *See, e.g.*, Sousa, *Bankruptcy Stigma*, *supra* note 150, at 452 ("[A] failure to attain this [American ideal of self-reliance and self-sufficiency] is met by societal derision and scorn, and a need to resort to the bankruptcy process is arguably the paradigmatic expression of one's failure to reach this vaulted societal status.").

235. Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 118 (2017) ("The fresh start policy is preeminent in consumer bankruptcy law.").

236. *See* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 73 (2006) (citing Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047, 1059 (1987)).

237. *See, e.g.*, Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 AM. BANKR. INST. L. REV. 217, 219–20 (2018) (describing the perception that an overly liberal bankruptcy law "erodes" "the social function of bankruptcy stigma, namely, to induce debtors to make good on their financial obligations and to exercise self-restraint by living with a Weberian ideal of asceticism").

238. *E.g.*, Byington, *supra* note 235, at 123 (observing that "there is not a single, unified theory sustaining the fresh start policy"); Mols, *supra* note 231, at 306 ("The importance of the fresh start comes from an American philosophy and attendant morality premised on the primacy of the individual and free market forces, not social protections or subsidy."); Richard E. Coulson, *Consumer Abuse of Bankruptcy:*

steeped in "the rhetoric of rehabilitation,"[239] the fresh start nevertheless posits that indignity is necessary to return the debtor to the marketplace. In the name of efficiency and of balancing the interests of creditor and debtor, the fresh start requires the debtor to accept publicization of their failure, loss of privacy, and shame as quid pro quo for a discharge.[240]

For example, in his influential theory of the fresh start, Thomas Jackson explains why a discharge in bankruptcy could justifiably incorporate implicitly anti-dignitarian costs to the debtor. Jackson posits that individual bankruptcy relief, including the nonwaivable right to discharge certain debts, is best justified by reference to a set of ex ante preferences in the face of bounded rationality.[241] In light of human impulsivity,[242] incomplete heuristics,[243] and the likelihood of

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An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge, 62 ALB. L. REV. 467, 540 (1998) ("The fresh start notion has close connections with individualism and a market philosophy. It reflects a basic decision that the costs and benefits of discharge should be—and safely can be—left to the individual debtor. The system rests on a free market philosophy that throws the social and economic risks of credit on creditors and debtors, rather than on society at large."); *see also* Jackson, *supra* note 233, at 1393 (explaining that a discharge in bankruptcy "not only releases the debtor from past financial obligations, but also protects him from some of the adverse consequences that might otherwise result from his release"). *But see* Byington, *supra* note 235, at 123 (observing that "there is not a single, unified theory sustaining the fresh start policy"); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 96 (1986) (observing that "[t]he evolution of the 'fresh start' policy and its legislative embodiments suggests, if nothing else, that it is a bit of an oversimplification to speak of that policy in the singular. It is apparent, rather, that the idea of the 'fresh start' has long incorporated and been shaped by a complex multiplicity of policy concerns").

239. *E.g.*, Ondersma, *A Human Rights Approach to Consumer Credit*, *supra* note 9, at 396–97 (observing that "[p]roponents of more substantive consumer credit regulations are expected to (and typically do) defend their proposals on economic efficiency grounds" and that "[e]ven staunch defenders of consumer protection in the consumer credit context concede that proposed regulations should be evaluated under a cost-benefit analysis to determine whether the rules would unduly increase credit costs or restrict access to credit"); Porter & Thorne, *supra* note 236, at 68–70 (presenting original data showing that "while bankruptcy appears to help a majority of families to obtain a sustainable fresh start, many former debtors continue to experience financial hardship that is as bad as or worse than the distress that initially triggered their bankruptcy filings").

240. *See, e.g.*, A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 19 (1999) ("Telling people to pay their bills will not make them self-sufficient or ensure that they earn enough to support their families. The solution will simply force some people to continue to drown in debt."); Khiara M. Bridges, *Poor Women and the Protective State*, 63 HASTINGS L.J. 1619, 1620 (2012) (observing that "poor women's current experience with the regulatory state, as dramatized by their experience navigating the requirements of [Prenatal Care Assistance Program], is one in which their autonomy is denied and their privacy rights and expectations are presumed to be nonexistent or negligible").

241. Jackson, *supra* note 233, at 1418 (arguing that "societal intervention in individuals' credit decisions rest on the claim that most people would agree in advance to protect against the distortions caused by defects in their volitional and cognitive processes and that creating a nonwaivable right of discharge is one way to achieve that protection").

242. *Id.* at 1409 (observing that humans are, quite self-consciously, susceptible to irrational impulse-driven behavior; "[a] nonwaivable right of discharge controls impulsive credit decisions by encouraging creditors to monitor borrowing").

243. *Id.* at 1410–12 (observing that humans tend to rely on "heuristic rules of thumb" to facilitate quick decision-making, but these "incomplete heuristics" in the borrowing context "tend to lead

externalities,[244] Jackson concludes although our national commitment to personal autonomy might counsel in favor of an individual's ability to contract away their right to a bankruptcy discharge,[245] "what seems initially to be a paternalistic justification for discharge may in fact be consistent with society's preference for individual autonomy."[246] Namely, a mandated, nonwaivable right to discharge best preserves individual autonomy given human cognitive limitations.[247]

Moreover, Jackson posits that discharge is justifiably "costly" to debtors, requiring that they trade in dignitarian rights like privacy because a cost-free discharge would be "disastrous for [our] credit-based economy."[248] Indeed, in a cost-free discharge system, debtors might otherwise not optimally internalize the costs of their decision to seek a discharge.[249] Thus, the "price" of discharge includes "surrender" of some assets deemed non-exempt from the reach of creditors and "increased difficulty in obtaining credit in the future," notwithstanding the dignitarian and economic significance of credit/debt in the American consumer society.[250] The price of discharge also includes broadly publicizing the fact of a bankruptcy filing, effectively marking those who receive a discharge with the proverbial scarlet letter in order "to put others on notice that [the debtor] might resort to it again."[251] To purposefully exclude someone from credit markets, even for justifiable economic reasons, is to exclude them as well from the social benefit of credit/debt consumption.

Likewise, Congress has normed its bankruptcy policy on a set of utilitarian concerns. As Margaret Howard has observed, bankruptcy is first meant to serve as "a collection device by which a debtor's assets can be discovered and made

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individuals . . . toward underestimating the risks that their current consumption imposes on their future wellbeing").

244. *Id.* at 1418 (observing that "most people would agree in advance to protect against the distortions caused by defects in their volitional and cognitive processes").

245. *Id.* at 1416 (describing "[o]ur general belief that individuals should be able to set their own priorities").

246. *Id.* at 1415.

247. *Id.* ("[W]hat seems initially to be a paternalistic justification for discharge may in fact be consistent with society's preference for individual autonomy, because the nonwaivable right of discharge accords with the result of a hypothetical initial deliberation behind a Rawlsian 'veil of ignorance.' If people in the 'original position' had known about the problems of incomplete heuristics and impulsive behavior, *and* about the difficulty of adjusting for these problems in making credit decisions, they presumably would have opted for a legal rule designed to avert those problems in advance. This self-protective course is similar to the one that individuals follow when they take steps to remove their ability to act on later impulses.").

248. *Id.* at 1427–28.

249. *See id.* For example, Jackson argues that the market for credit would shift in response to a cost-free discharge, making credit less available and more expensive for all borrowers. *Id.* at 1430–31.

250. *Id.* at 1426–28.

251. *Id.* at 1427. Similarly, Charles Hallinan describes the normative benefits of the fresh start in utilitarian concerns. He argues that the bankruptcy discharge is meant to "allocate risks" of failure. *See* Hallinan, *supra* note 238, at 100. He reasons that "[c]ast in terms of the economic theorists' insurance characterization, the discharge provides the debtor with [unwaivable] credit insurance coverage in an amount equal to his dischargeable liabilities less his nonexempt assets at bankruptcy." *Id.*

available for creditors."[252] Secondly, it is meant to serve as a sorting mechanism, ferreting out whose and which debts are worthy of state-sponsored discharge.[253]

Similarly, debtor-focused justifications for bankruptcy policy are also normed in utilitarian terms. Howard notes that although "bankruptcy is [ostensibly] designed to rehabilitate the debtor," and even to engender an "emotional and psychological cleansing for the debtor," it also aims to educate the debtor on how to be successful in credit markets and to "restore[] participation by the debtor in the open credit economy."[254] Even so, it can only support the debtor to the extent that doing so simultaneously "achieve[s] economic efficiency in its allocation of the risk of loss, connected with nonpayment, between debtor and creditor."[255] Consequently, in the name of efficiency and balancing the interests of creditor, debtor, and other stakeholders, the fresh start intentionally publicizes intimate details of the debtor's life and justifies the debtor's exclusion from a range of social and economic activities.[256]

Karen Gross has offered a seemingly more "humanistic" justification of the fresh start.[257] She roots consumer bankruptcy relief in "notions of forgiveness and rehabilitation."[258] Forgiveness is necessary because the debtor has committed a social wrong by not paying their contracted debts and requires absolution.[259] Thus, Gross concludes that "the fresh start is how society . . . mandates that creditors and other members of society forgive non-paying debtors."[260]

However, Gross's normative conception of forgiveness in bankruptcy requires the debtor publicly to "admit to failure."[261] The debtor must accept that in "accessing the legal system," their process of debt relief is justifiably "a matter of public record," and the debtor must "submit to judicial scrutiny."[262] Only then can "the wrongdoer (the debtor) . . . regain self-esteem and become once again a productive member of society." Moreover, the process of admission and

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252. Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1048 (1987).

253. *See id.* at 1048. Protection of "particularly worthy" creditors is also a "weak" animating rationale for consumer bankruptcy policy.

254. *Id.*

255. *See id.*

256. *E.g.*, Myers v. Toojay's Management Corp., 640 F.3d 1278, 1280 (11th Cir. 2011) (holding that the Bankruptcy Code does not prohibit private employers from discriminating on the basis of a bankruptcy filing).

257. Susan Block-Lieb, *A Humanistic Vision of Bankruptcy Law*, 6 AM. BANKR. INST. L. REV. 471, 471–73 (1998) (reviewing KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM (1997)).

258. GROSS, *supra* note 4, at 2.

259. *Id.* at 93 ("For debtors, the wrong is the nonpayment of legitimate obligations.").

260. *Id.*

261. *See id.* at 94.

262. *Id.*

submission is good for the debtor and good for our "capitalistic economy."[263] Indeed, in exchange for their dignity, the debtor can be rehabilitated, "enabl[ing] the wheels of commerce to turn."[264] This fresh start will enable the debtor to "fend for themselves," without "becoming a drain on scarce societal resources."[265] Thus, even as Gross evinces an understanding of the desperation of debtors filing for bankruptcy, she justifies the formal discharge of their debts in largely utilitarian terms.

Similarly, in her humanistic meditation on the role of forgiveness in American law, Martha Minow suggests that the seemingly debtor-focused forgiveness aspects of our nation's existing bankruptcy norms nevertheless rest on a quasi-Faustian bargain.[266] Minow first observes that "[t]here is something powerful about the chance that bankruptcy represents; the chance to start anew without punishing debt can allow an individual or a business to save enough to build for something better."[267] And yet, she concludes that

> [t]he legal mechanisms of bankruptcy implement the idea of forgiveness by allowing individuals and companies to declare insolvency, discharge debt, and obtain immunity from suit on those debts *in exchange* for meeting certain requirements. Those requirements may include financial counseling, selling off assets to repay creditors, and restructuring the payment schedule and amounts. They also most likely involve receiving a poor risk rating, which reduces access to future credit after bankruptcy.[268]

Consequently, even this arguably more sympathetic normative account of the fresh start nevertheless recognizes that the debtor's dignity is a prerequisite for relief. It requires that we view distressed debtors as infantile and irresponsible sinners[269] and wrongdoers,[270] and that we use a debtor's request for relief as a teachable moment for the debtor on what they have done wrong. This acceptance of blame is followed by an opportunity to be washed clean, even though they have merely done what we have told them to do and failed.[271] Indeed, as Professor Chrystin Ondersma has observed, "[m]ost of us in this country cannot achieve our basic needs, including health, housing, and education, without resorting to borrowing," and yet "[w]hen borrowers are forced to turn to credit to survive, or when they try to pursue the American dream in precisely the way in which they are instructed—and then are unable to repay—they are disparaged,

263. *See id.*
264. *See id.*
265. *See id.*
266. Martha Minow, *Forgiveness, Law, and Justice*, 103 CALIF. L. REV. 1615, 1639 (2015).
267. *Id.*
268. *Id.* at 1638–39 (emphasis added).
269. GROSS, *supra* note 4, at 98 ("Bankruptcy is the helping hand given to children learning to walk.").
270. *Id.* at 99 (comparing debtors to drug dealers and robbers).
271. Chrystin Ondersma, *Borrowing Equality: Dispossession and the Need for an Abolitionist Approach to Survival Debt*, 120 COLUM. L. REV. F. 299, 300–01 (2020).

punished, dispossessed, and too often criminalized."[272] Consequently, the debtor who requests formal relief through bankruptcy must subject themself to indignity in trading for a discharge.[273]

B. Codifying Indignity in Exchange for Debt Discharge

The Bankruptcy Code effectuates anti-dignitarian norms in several aspects. For example, the publicization of failure is effectuated through the required public filing requirements that give a voyeuristic view into the unseemly realities of a person in financial distress.[274] The Federal Bankruptcy Rules of Procedure require the debtor to "file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs."[275] Moreover, "anyone can visit the courthouse and request a copy of any bankruptcy petition that was filed in the district,"[276] including potential employers, landlords, and even love matches.[277]

There is no dignity in this ceremonial stripping.[278] Rather, our bankruptcy policy intentionally invites the public into the private life of the most vulnerable.[279] The interested viewer can reconstruct the debtor's medical history, public assistance status, parenthood, unemployment status, and marital status, in addition to the type of car the debtor drives, what furniture the debtor owns, and the estimated market value of the debtor's pots, pans, and clothing.[280] Moreover, entrepreneurs have exploited this information in order to monetize filers' financial distress.[281]

Bankruptcy's mandated public disclosure of private information, along with "other acts of public ceremony attendant to a bankruptcy filing," are

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272. *Id.*

273. GROSS, *supra* note 4, at 98.

274. Deborah Thorne & Leon Anderson, *Managing the Stigma of Personal Bankruptcy*, 39 SOCIO. FOCUS 77, 84 (2006) ("Declaration of bankruptcy is a public act, and petitioners cannot restrict the many venues through which their bankruptcies are publicly declared.").

275. Fed. R. Bankr. Proc. 1007(b)(1)(a)-(d).

276. Thorne & Anderson, *supra* note 274, at 84.

277. *See, e.g.*, Karen Levy, Opinion, *You Had Me at 'Has Never Filed for Bankruptcy'*, N.Y. TIMES (Mar. 31, 2021), https://www.nytimes.com/2021/03/31/opinion/tinder-match-background-check.html [https://perma.cc/HC3L-9M5K] (explaining the implications of dating sites' increased use of data on romantic matches).

278. *See, e.g.*, Thorne & Anderson, *supra* note 274, at 82 (finding that "debtors who had been through the process insisted that filing personal bankruptcy was, more than anything else, especially stigmatizing").

279. *See* Sousa, *Bankruptcy Stigma*, *supra* note 150, at 444 (observing that "the first ritualized ceremony associated with filing bankruptcy is recognizing that "one is 'laid bare' financially" and that "[t]his public ritual results in a loss of privacy and personal dignity, adding to the sense of shame").

280. Bankr. Scheds. C–J.

281. *See, e.g.*, Thorne & Anderson, *supra* note 274, at 84 (observing that "there are companies . . . that notify residents about neighbors who have filed for bankruptcy" and that "[f]or a price, the company will provide the resident with the bankrupt neighbor's name, Social Security number, list of creditors and amount owed to each—all information that was provided by the debtor to the court").

intended to "satisf[y] society's need to punish debtors for acting irresponsibly in their financial affairs."[282] Yet, it is more than just a reprimand for failure. It is an invitation for others to exclude bankruptcy filers on the basis of their status as bankruptcy filers.[283] Thus, even though the Bankruptcy Code permits the discharge of a variety of unsecured debts, like credit card debt and medical debt, it does so only in exchange for the debtor's complete loss of privacy and consequent socioeconomic exclusion.

The Bankruptcy Code is also anti-dignitarian in its insistence on the categorical nondischargeability of mortgage debt[284] and practical nondischargeability of student loans[285] even though these types of debts directly reflect uses of credit/debt-based consumption as a means of belonging, especially among historically marginalized groups.[286] Specifically, the federal government has promoted financed post-secondary education as a means of aspiration and belonging for racial minorities, women, and other marginalized groups. Yet, with respect to dischargeability, student loan debt is treated exceptionally in the Bankruptcy Code. It can only be discharged following an adversarial proceeding in which the debtor establishes that repayment would constitute an "undue hardship."[287] This is exceptional treatment within the Bankruptcy Code.

282. *See* Sousa, *Bankruptcy Stigma*, *supra* note 150, at 445. Sousa describes the credit counseling requirements, one pre-filing and one pre-discharge, that the debtor must complete. Sousa notes that "[a]s for the pre-filing credit counseling course, Congress's mission was to have prospective debtors understand the potential alternatives to filing for bankruptcy relief with the goal of having a significant portion of them settle their debt obligations outside of the bankruptcy system. With respect to the post-filing financial management course, Congress wanted debtors who went through the bankruptcy system to learn effective financial management techniques to employ following their bankruptcy cases, such as utilizing budgeting and using credit wisely." *Id.*; *see also* Ondersma, *A Human Rights Framework for Debt Relief*, *supra* note 44, at 316 (noting that "privacy is another relevant human rights consideration in the debt relief context" and that the "[American Convention on Human Rights], [International Covenant on Civil and Political Rights], and [European Convention on Human Rights] all provide for freedom from arbitrary interference with privacy, home, or correspondence.").

283. *See* Levy, *supra* note 277.

284. 11 U.S.C. § 1322(b)(2); *see also* Abbye Atkinson, *Modifying Mortgage Discrimination in Consumer Bankruptcy*, 57 ARIZ. L. REV. 1041, 1052–53 (2015) [hereinafter Atkinson, *Modifying Mortgage Discrimination*] (discussing the troubling consequences of the antimodification provision).

285. 11 U.S.C. § 523(a)(8); *see also* Abbye Atkinson, *Race, Educational Loans, and Bankruptcy*, 16 MICH. J. RACE & L. 1, 16–21 (2010) (arguing that bankruptcy policy regarding educational loans should be reformed to account for disparities in educational benefits obtained by Black Americans as compared to White Americans).

286. *See, e.g.*, Brown & Carbone, *supra* note 59, at 128 (observing that "[a]s a marker of full citizenship and middle-class investment, home ownership remains a potent symbol"); Minow, *supra* note 266, at 1639-40 (observing that "student loans used to finance higher education cannot be forgiven by undergoing bankruptcy except in instances of total disability or death and some instances of public service" and that "[d]ebates over programs to forgive student loans reflect concerns about both irresponsibility and impossible burdens").

287. 11 U.S.C. § 523 (a)(8); *see also* Matthew Bruckner, Brooke Gotberg, Dalie Jimenez & Chrystin Ondersma, *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. COLO. L. REV. 183, 193–94 (2020) (observing that "the adversary proceeding functions much like a typical lawsuit . . . it can be costly and complicated, frequently requiring debtors to hire an attorney even if the underlying bankruptcy case could be accomplished pro se").

Similarly, mortgage loans on a primary residence may not be altered in a bankruptcy proceeding,[288] causing the home buyer to bear most of the risk that the home will lose value after purchase.[289] Thus, even as our policies have idealized homeownership to marginalized communities as a primary means of self-help social mobility, these groups are at a greater risk of loss due to their socioeconomically subordinated status.[290] Specifically, in the credit/debt-based housing market, discrimination will not only raise the price of their loan; it will lower the value of the asset (namely the home) that supports the loan just because a marginalized person lives in it. Thus, marginalized borrowers experience the nondischargeability of underwater mortgage debt more harshly because they bear "the significant risk that discriminatory lending practices and other structural inequities will lead to an underwater mortgage or other mortgage-related financial hardships."[291]

Thus, categorical nondischargeability of debt "further entrenches existing economic disenfranchisement when certain varieties of debt that are more likely to be concentrated in economically disenfranchised communities" persist.[292] Like the mandated loss of privacy, nondischargeability policies sometimes strip away both economic and dignitarian progress made through credit/debt-based consumption. For example, borrowing money for education is often an economically risky endeavor for a marginalized prospective student whose statistical ability to repay is limited by their socioeconomic status, phenotype, etc.[293] Even so, there is value in the education sought that extends beyond what this perhaps economically irrational risk-taking would suggest.[294] Yet, instead of supporting that risk-taking, "the Bankruptcy Code, having adjudged them as insufficiently deliberative and reflective for choosing the rock instead of the hard place, will offer no relief."[295] More than that, the Code's harsh approach to the discharge of student loans counteracts some of the tangible and intangible benefits that the post-secondary education may usher into the lives of marginalized Americans.[296]

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288. *See* 11 U.S.C. § 1322(b)(2).

289. *See generally* ATIF MIAN & AMIR SUFI, HOUSE OF DEBT (2014).

290. *See* Atkinson, *Modifying Mortgage Discrimination*, *supra* note 284, at 1070.

291. *See id.* at 1077.

292. *See* Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 982 (2017) [hereinafter Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*].

293. *See* Atkinson, *Race, Educational Loans, & Bankruptcy*, *supra* note 285, at 24 (stating that, for one explanation of student loan nondischargeability, "[t]he suggestion seems to be that if African Americans are unlikely to be able to repay unmanageable loans for any reason, including disparate socio-economic circumstances, they should not pursue higher education because the risks associated with student loan repayment are perhaps significant enough to render the decision irresponsible").

294. *See id.* at 24–25.

295. *Id.* at 24.

296. *See* Andre M. Perry, Marshall Steinbaum & Carl Romer, *Student Loans, the Racial Wealth Divide, and Why We Need Full Student Debt Cancellation*, BROOKINGS REP. (June 23, 2021),

Consider as illustrative Mrs. Arbertha and Mrs. Lewis's experiences with contract homebuying as a means of belonging in the 1950s and what would have become of them in the current fresh start regime. Both Black women and their families lived in a world in which being American, culturally and politically, was wrapped up in credit/debt-based consumption of homes. Their families' access to this indication of belonging, however, was limited by their subordinate social status. Contract lending embodied a business model built on this social exclusion. Contract lenders would scare White families out of neighborhoods by suggesting that their home values were declining by the increasing presence of Black families.[297] The contract lenders would buy those houses from fleeing White families and immediately resell them at a premium to Black families who wanted the dream as well.[298] In essence, then, what the families received was a knock-off loan for an asset that was worth less than the amount they borrowed.

Thinking anachronistically, if either family found themselves in financial distress and filed a bankruptcy petition, the fresh start would have prioritized the preservation of the housing market rather than Mrs. Albertha and Mrs. Lewis's ability to keep their homes.[299] Since debtors cannot write down the debt owed on a primary residence to the actual value of the residence, the women's home-related debt obligations would have generally been left in place.[300] This limitation is specific to primary residences, notwithstanding their broader significance in American society. This example illustrates how, in significant ways, utilitarian concerns outstrip important notions of belonging when it comes to debt relief and justify marginalization as a necessary consequence of rehabilitating the debtor.

For disadvantaged debtors, whose starting positions are already vulnerable and tenuous, these debt relief policies further mark them as marginal, implicitly justifying their subordinated position and status and draining social and economic value from them. In important ways, then, our current approach to debt relief eschews notions of dignity and belonging in credit/debt-based consumption, instead embracing indignity rooted in consequentialist concerns. The fresh start actively places debtors in a worse position because it normalizes ostracism and exclusion of those who have failed in engaging in the most American of activities: credit/debt-based consumption.

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https://www.brookings.edu/research/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation/ [https://perma.cc/WW8W-LRH2] (observing that "Black households carry more student debt, which pushes down their creditworthiness" and that "[d]ifferent patterns of intergenerational transfers contribute to nearly three-quarters of Black borrowers' student loans having a higher balance today than they did originally").

297. *E.g.*, Wright, *supra* note 199, at 100–01.

298. *Id.*

299. *See, e.g.*, Atkinson, *Modifying Mortgage Discrimination*, *supra* note 284, at 1053–54 ("[I]f lenders are made to bear the risks related to home buying, including, for example, a negative change in value that results in underwater collateral, they will pass the risk along to prospective borrowers resulting in higher mortgage credit costs and decreased availability of mortgage credit.").

300. 11 U.S.C. § 1322(b)(2).

IV.
SKETCHING BELONGING IN CREDIT/DEBT REGULATION

A second-best approach to indignity in consumer credit/debt policy would seek to address the pervasiveness of indignity in existing policy, even if only to achieve harm-reductive ends. To the extent that consumers are explicitly and implicitly encouraged to rely on credit/debt-based consumption, in part to belong in the American society, credit/debt policy should be more attentive to the dignitarian aspects of borrowing to belong.[301] Although a complete disentanglement of indebtedness and belonging would most completely solve the challenges of predicating inclusion on one's ability and willingness to successfully engage in financed consumption, this Section very briefly sketches some relatively modest shifts in debt relief policy, both in and outside of bankruptcy law, that would, at a minimum, better reflect the dignitiarian consequences of credit/debt-based consumption.

A. Belonging and Relief in Bankruptcy

Bankruptcy norms and policies could readily reject the reflexive derogation of individual privacy as a necessary condition for relief. The public availability of filers' most personal life details in bankruptcy filings merely reinforces the persistent belief that distressed debtors should feel shame.[302] The bankruptcy petition requires debtors to disclose the most intimate details of their lives, laying their lives out for any interested observer to pass judgment on how much money the debtor spends on food each month or whether the debtor receives public assistance.

From an economic perspective, this public disclosure is meant to provide predictive information to future creditors and other interested parties about the risks associated with a given filer. Yet, a future creditor could still discover the fact of a bankruptcy without also having access to the intimate details of the debtor's life. The creditor's interest in underwriting can be accomplished in other ways that do not, to the same degree, extract basic privacy as a quid pro quo for relief. For example, the bankruptcy trustee, who otherwise administers the bankruptcy process, could affirm the completeness and truthfulness of the debtor's financial status without permitting creditors and others to be privy to the specifics of the debtor's demise. In other words, in this small way, bankruptcy policy could prioritize belonging and inclusion, rather than shame and exclusion.

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301. *See* Thorne & Anderson, *supra* note 274, at 94 (observing the "inadequacy of the purely economic model for analyzing personal bankruptcy"). *But see* Ondersma, *Borrowing Equality*, *supra* note 271, at 308, 313 (worrying that "easier access to debt relief [is] problematic because accessible debt relief might give legitimacy to the system that we have" in which "one must become indebted in order to survive" and observing that this reliance on "survival debt" is "a collective moral failing").

302. *See generally* Sousa, *Bankruptcy Stigma*, *supra* note 150 (discussing the sociology and sources of bankruptcy stigma and presenting research findings regarding the same).

Similarly, a focus on belonging would support a more expansive approach to dischargeability of debts.[303] For example, given the decades-long federal policy of encouraging marginalized groups to address their marginalization through the incurrence of mortgage debt, lessening the penalty of mortgage default by allowing mortgage write-downs would meaningfully support these debtors. It is also apt because this particular form of credit/debt-based consumption is quintessentially aspirational. Especially for marginalized groups, bankruptcy policy should permit underwater homeowners to write down their mortgages to the market value. This approach would recognize that financed homeownership, although aspirational, is necessarily risky for homebuyers because the borrower bears the brunt of the risk of asset depreciation as compared to the lender. This risk of asset depreciation is especially acute for marginalized borrowers because their very marginalization makes the asset less valuable in the eyes of the market. They borrow to belong, but their borrowing, under current credit/debt policies, threatens to further marginalize them.

B. Belonging and Relief Outside of Bankruptcy

Belonging should also serve as a normative basis for student debt relief where equality of resources (specifically with reference to the wealth gap) has been a principal rationale underpinning arguments both in favor of and against executive action cancelling federal student debt. These arguments have focused, at least explicitly, on a utilitarian account of fairness where the effect of debt as a burden on quantitative wealth serves as a basis for (or against) debt relief.[304] Although this account is implicitly attuned to issues of social equality and dignity insofar as "the wealth gap merely puts a number on something we feel but cannot say,"[305] its primary focus on wealth as a quantitative value limits its application to those for whom dignity and wealth are not consistently aligned.[306]

For example, one view argues in favor of a federal student debt cancellation policy that attends to issues of racial equity by focusing on the positive effects of student debt cancellation on the wealth of African American and Latinx families and other marginalized groups.[307] This proposal is based on four "policy

303. *See, e.g.*, Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, *supra* note 292, at 964 ("The categorical nondischargeability of certain debts in bankruptcy . . . has negative implications for bankruptcy's normative lodestar, the fresh start principle.").

304. *E.g.*, Brief of Amici Curiae Local Governments in Support of Petitioners, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506), 2023 WL 287739, at *2–3.

305. Ta-Nehisi Coates, *supra* note 197.

306. *See* Shatema Threadcraft, *'Movement' Justice and the Capabilities Approach: Resources, Social Environments and Social Attitude in Black Urban Space*, 41 PHIL. & SOC. CRITICISM 55, 56 (2014) (discussing how the capabilities approach "invites us to think beyond economic disadvantage in proposals to bring justice to a community").

307. *See, e.g.*, Raphael Charron-Chenier, Louise Seamster, Thomas M. Shapiro & Laura Sullivan, *A Pathway to Racial Equity: Student Debt Cancellation Policy Designs*, 9 SOC. CURRENTS 4, 5 (2021) (arguing that racial equity should be centered in the analysis of the impacts of proposed student debt cancellation plans).

goals," including "[p]romoting wealth accumulation, as measured in absolute wealth gains for those targeted [by a student debt relief policy]," and "[p]romoting greater racial equity, as measured by changes in the [B]lack-[W]hite and Latinx-[W]hite wealth gaps among all households."[308] Implicit in these goals is the notion that a more egalitarian distribution of wealth will itself contribute to improved equality among traditionally disadvantaged groups and traditionally advantaged groups.

Federal lawmakers have similarly couched their proposals for student debt cancellation in terms of wealth-focused equality of resources. For example, in a press conference introducing a bicameral resolution to urge President Biden to cancel up to $50,000 in federally held student loan debt, Senator Elizabeth Warren urged that

> [b]y cancelling up to $50,000 in federal student loan debt for borrowers, President Biden can take the single most effective executive action available to provide a massive stimulus to our economy, help narrow the racial wealth gap, and lift this impossible burden off of tens of millions of families.[309]

Speaking on the floor of the House of Representatives in support of the $50,000 debt cancellation policy, Representative Ayanna Pressley argued that

> the student debt crisis is one that disproportionately impacts our Black community. But for too long, the narrative has excluded us and the unique ways in which this debt is exacerbating racial and economic inequities, compounding our gender and racial wealth gap. We have to borrow at higher rates just for a shot at the same degree as our [W]hite peers. . . . President Biden has an opportunity and a responsibility and the authority to address the hurt and harm these communities are feeling by using his executive authority to cancel $50,000 in federal student loan debt. Doing so is one of the most effective ways that he can provide sweeping relief to millions of families while helping to reduce the racial wealth gap to lay the groundwork for an equitable and just long term recovery.[310]

Likewise, various amici writing in support of the Biden administration's case for partial loan forgiveness before the Supreme Court in *Biden v. Nebraska* argued in the register of wealth equality and social mobility. For example, "a collection of city and county governments from across the country" argued that

308. *Id.* at 9.

309. Press Release, Elizabeth Warren, Warren, Schumer, Pressley, Colleagues: President Biden Can and Should Use Executive Action to Cancel up to $50,000 in Federal Student Loan Debt Immediately (Feb. 4, 2021), https://www.warren.senate.gov/newsroom/press-releases/warren-schumer-pressley-colleagues-president-biden-can-and-should-use-executive-action-to-cancel-up-to-50000-in-federal-student-loan-debt-immediately [https://perma.cc/R8DA-27E9].

310. Press Release, Ayanna Presley, Rep. Pressley Continues Pushing President Biden to Cancel Student Debt (Dec. 2, 2021), https://pressley.house.gov/media/press-releases/rep-pressley-continues-pushing-president-biden-cancel-student-debt [https://perma.cc/5HQD-WXEB].

loan forgiveness was "crucial for addressing the racial wealth gap as well as related gaps in employment, homeownership, and other sources of wealth creation."[311] The Lawyers' Committee for Civil Rights Under Law and partner organizations, focusing on the effects of the COVID-19 pandemic, argued in similar tones:

> While the debt relief plan reasonably and rightly mitigates severe economic fallout for all lower-income borrowers, the stakes are especially high for people of color, and especially women of color, because COVID-19 has compounded racial disparities and inflicted particularized harm on Black and Latinx borrowers. . . . Wealth, in essence, acts as an emergency buffer that becomes critically important during periods of economic instability; Black and Latinx households have less wealth and less stability, rendering them far more vulnerable in emergency circumstances such as the COVID-19 pandemic.[312]

All of these accounts rightly center wealth as a primary tool of dismantling entrenched racialized and gendered socioeconomic subordination. Yet, they have been susceptible to arguments that rest on regressivity claims about broad-based federal student debt amnesty.[313] For example, one rejoinder to the equality of wealth focus of proponents of federal student loan amnesty argues that as based on present values, "universal and capped forgiveness policies are highly regressive, with the vast majority of benefits accruing to high-income individuals."[314] Another argues that "[w]hether the debt cancellation is full or partial, 'debt forgiveness is regressive by income and education, meaning a disproportionate share of the benefit goes to people with higher levels of education and those currently earning high incomes.'"[315]

Critics' claims assume that quantitative metrics, like wealth, alone should define deprivation, at least for the purposes of student debt relief. Yet quantitative metrics tend to obscure underlying systemic inequalities that call into question whether a relatively high post-degree income alone can justify

311. Brief of Amici Curiae Local Governments, *supra* note 304, at *1–3.

312. Brief of the Lawyers' Committee for Civil Rights Under Law and 21 Other Organizations as Amici Curiae in Support of Petitioners, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506), 2023 WL 205984, at *4, 21.

313. *See, e.g.*, David Dayen, *Means-Testing Student Debt Relief: Big Hassle, No Results*, THE AM. PROSPECT (May 5, 2022), https://prospect.org/education/means-testing-student-debt-relief-big-hassle-no-results/ [https://perma.cc/GQ66-AJ6V] (noting that in pushing for a means-tested approach to federal student debt relief, "the White House is desperate to avoid headlines about 'undeserving' borrowers of means who are getting a free ride on higher ed from the government," the latter being "the typical talking point expressed by Republicans: that rich, educated elites are being bailed out").

314. *See* Sylvain Catherine & Constantine Yannelis, *The Distributional Effects of Student Loan Forgiveness* 22 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28175, 2021) https://www.nber.org/system/files/working_papers/w28175/w28175.pdf [https://perma.cc/E3YE-2EKN] (suggesting that "enrolling more borrowers in [income-dependent repayment] plans linking repayment to earnings leads to forgiveness for borrowers in the middle of the income-distribution" is a better approach).

315. Brief of Amicus Curiae the Foundation for Government Accountability in Support of Respondents, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506), 2023 WL 1869664, at *11.

disqualifying student loan debtors from federal debt relief, particularly where the credit/debt-facilitated degree is meant to foster increased belonging.

For example, political scientist Shatema Threadcraft suggests that equality of wealth alone has not served to ensure equality or dignity or belonging in America. Rather, deprivation can hide behind aggregate metrics like relative wealth among various groups. Specifically, Threadcraft considers how the capability approach reveals the impact of racial inequality in the United States, notwithstanding mere equality of wealth.[316] She highlights Sen's stipulation that "we be attentive to what is often the significant incongruence between a community member's resources and his or her overall well-being."[317] For example, then, in the United States, absolute quantitative metrics of well-being, like income or wealth, do not capture the degree to which something like "stop and frisk" policies disproportionately enforced against African American men infringe upon the freedom of even wealthy African American men to be and do.[318] By contrast, the capabilities approach "is attentive to the needs of a socially constructed, developing 'whole' human being and not a simple Lockean acquirer."[319] It thus justifies "address[ing] the emotional costs of unjust practices on the young men's overall development."[320] In other words, regressivity analyses couched in quantitative terms do not capture the full social impact of indebtedness and debt relief.

Thus, while the wealth gap should certainly factor heavily in the norming of debt relief, belonging, as discussed above, provides normative support for the arguments for debt amnesty that Representative Pressley, Senator Warren, and others have made. For example, proponents might instead link their arguments to Currid-Halkett's inconspicuous consumption-based aspiration theory in which aspiration requires credit/debt-based consumption for those who cannot afford to pay outright. In this regard, it is unsurprising that women and minorities hold the vast bulk of student debt. They are marginalized groups doing exactly what our society has communicated they should do to live the liberal American Dream: borrow your way to equality and social inclusion. Moreover, their end goal is not only money or any other similar quantitative metric. Rather, their end goal is greater inclusion and belonging in light of their persistent second-class citizenship.[321]

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316. *See* Threadcraft, *supra* note 306, at 56 (arguing that "the [capabilities] approach helps us to remain attuned to the multidimensional aspects of injustice, past and present, and invites us to think beyond economic disadvantage in proposals to bring justice to a community").

317. *Id.* at 57.

318. *Id.* at 58 (observing that these policies "profoundly impact young [B]lack men's ability to move about in civic space").

319. *Id.*

320. *Id.*

321. Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFFALO L. REV. 281, 327 (2020) ("Both the wealth transfer and the elimination of indebtedness (the same thing in

Nevertheless, the aspiration to belong requires those who aspire to belong in that sense to make an "economic choice" (and maybe even an economically irrational one) that the aspirant hopes will influence the value-based objective.[322] For example, women graduates and graduates of color take out student loans knowing ahead of time that, in light of gender and race disparities in pay as well as a host of other aspects of social subordination, they are likely to have a more difficult time translating the education into success. But our policies encourage them to borrow and aspire to pull themselves more firmly into full citizenship. Consequently, when their efforts fail or push them into distress, a recognition that borrowing implicates important questions of belonging justifies relief beyond mere economic considerations.

This approach is consistent with the work of others who argue that credit/debt policy should align more substantively with higher-order concerns of human well-being, rather than being wholly subsumed in utilitarian and economic concerns. For example, Professor Chrystin Ondersma has argued that international human rights principles should help guide consumer credit and debt relief policies.[323] Ondersma defines human rights as "ethical demands whose importance relates to the 'significance of the freedoms that form the subject matter' of these demands."[324] Once identified, a human right justifies legislative intervention that "nam[es] the right and pressur[es] governments or businesses to respect the right."[325] Ondersma argues that consumer credit regulation requires a human rights approach because existing efficiency-normed regulation neither "adequately address[es] many of the problems associated with consumer credit, particularly those stemming from consumer confusion or consumer desperation," nor "insist[s] on at least a minimum level of protection for debtors."[326] Instead, existing regulation has prioritized "wealth maximization" over "protecting debtors' basic needs."[327]

Further, the existing and "widely accepted"[328] international human rights framework found in foundational documents such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides a basis for international regulation of consumer credit.[329] Ondersma posits that the human rights framework can "provide a nonnegotiable floor of protection" across varying jurisdictions that is normatively impermeable to "economic efficiency arguments" that otherwise

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accounting terms, but not in every way) would make debtors' lives—and the lives of the families, friends, and communities on which debtors depend—easier.").

322. Currid-Halkett, *supra* note 51, at 59–60 ("[W]hat to spend one's money on as a general principle, are markers of where one fits in.").

323. Ondersma, *A Human Rights Approach to Consumer Credit, supra* note 9, at 377.

324. *Id.* at 408 (quoting Sen).

325. *Id.*

326. *Id.* at 410.

327. *Id.*

328. *Id.*

329. *Id.* at 416.

"justify circumvention of substantive protections against consumer credit contracts that violate [cognizable] human rights."[330] For example, to the extent that global consumer over-indebtedness is "both a broader economic problem and . . . a problem of human suffering," a human rights framing can temper credit/debt policies that interfere with the various rights enumerated in the UDHR and ICESCR.[331]

As a final and important matter, there is the concern for the unintended consequences of a dignity-focused approach to credit/debt regulation. After all, "the wheels of commerce [must continue] to turn," and the "complete disregard for fulfillment of obligations is sometimes unpalatable."[332] A belonging approach would not ignore or automatically supplant these and other market concerns. Instead, it would require that, in addition to the traditional economic analysis, policymakers also consider the role of credit/debt-based consumption as a source of social well-being and dignity, affirmatively balancing these two interests accordingly. Conflict and tensions are certain to quickly materialize, but engaging in the work of acknowledging and addressing the positive dignitarian aspects of credit/debt consumption is vital, at a minimum, to the well-being of disadvantaged groups who must engage in self-help social welfare in the consumer credit/debt markets.

CONCLUSION

In addition to its economic and transactional qualities, credit/debt-based consumption is a reasonable act of belonging in the American consumer society, even though when viewed through an economic lens, that consumption seems irrational. Consequently, as long as credit/debt-based consumption is positively entangled with belonging, our credit/debt policies must broaden their existing normative framing beyond their dominant economic orientation.

330. *Id.* at 411.
331. Ondersma, *A Human Rights Framework for Debt Relief*, *supra* note 44, at 272.
332. GROSS, *supra* note 4, at 94.