Getting Out of Debt Poverty

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Abstract

This dissertation advances a novel government program that could remedy inadequate access to credit for unbanked and underbanked individuals – those it defines as the "very poor." It sets out the socioeconomic circumstances that create singular barriers for the very poor. It analyses the credit needs of the very poor, the unique institutions they interact with to meet these needs, and the ways in which these institutions intertwine extreme poverty, credit, and marginalisation. The dissertation proceeds to examine the role of the state in the provision and regulation of credit, and in the entrenchment of extreme poverty. It provides a sustained historical analysis of the role of the postal service, a public institution, in the provision of banking and credit and discusses a number of analogous programs and proposals that normalise and contextualise its novel government program. The dissertation extends a framework drawn from antitrust law to argue that state intervention in the marketplace is best understood as falling along a spectrum, from the provision of a competing product or service to the monopolisation of an entire industry. This framework elucidates how we justify state intervention with respect to certain essential, "public" products and services. The dissertation closes with a detailed proposal for a government program that would provide credit to the very poor through loans repaid through additional, progressive taxation. Individuals whose income does not reach a certain level would not need to repay the loan, whereas those with a high income would effectively repay a multiple of the loan principal amount. Repayment would depend on income, but only for a limited period of time. The program may have unique potential to alleviate persistently lower social mobility for the very poor.

To those who are hurting and those who are hurting to be heard

Acknowledgements

I am embarrassingly lucky. Certainly much luckier than I am smart. I undertook this project in two intellectual homes that sustained me, enriched this project, and helped me grow into a better scholar and teacher – Osgoode Hall Law School and the Bora Laskin Faculty of Law.

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I am also grateful to Allan Hutchinson and Jennifer Nedelsky for accepting, almost immediately, to join my doctoral committee. To be honest, I'm still starstruck. Having two senior, distinguished scholars on my committee – whose work I have admired for years – was a true privilege. They both exemplify the reasons I wanted to become a law professor. They are generous, thoughtful, passionate, and deeply humble.

I am also grateful to Craig Scott, Ruth Buchanan, Sonia Lawrence, and Susan Drummond for helping me navigate the logistical and personal implications of undertaking a doctoral program while working full-time. (Flying in weekly for a course for part of my first year was a tad

exhausting, but I'm so glad I did it.) I am also grateful to the other professors at Osgoode with whom I've had extended conversations about my project and about legal education – particularly Carys Craig, Philip Girard, Palma Paciocco, and Sara Slinn. I was fortunate to present parts of this project in many fora, including the annual conferences of the Canadian Association of Law Teachers and the Canadian Law and Society Association. I'm grateful for the many conversations I had with participants about my project, the law, and legal education. Legal education – like the legal profession – faces momentous challenges, but we couldn't have better people to move it forward.

I am also grateful to everyone at the Bora Laskin Faculty of Law for making my job so easy and fun. Bora Laskin is an amazing place. We have outstanding, diverse, engaged students and professors who are passionate about teaching and mentoring them. We know each other by name, and we care about each other. One of my colleagues once said we're "small but mighty" and "pretty resilient." I agree. It took incredible courage and resilience to launch the first law school in decades. It's easy to forget that, at the time just 10 years ago, we were the first to question articling and integrate Indigenous law in our mandatory curriculum. (I, of course, had nothing to do with any of that!)

Being a law professor is the best job in the word. It requires a fair bit of sacrifice and a crazy amount of luck. I never felt like I deserved the job, but I've been trying hard to grow worthy of the privilege. I turned 25 two months after I was appointed. I was younger than most of my upper-year students when I started. My colleagues and Dean gave me the greatest gift in the world: an opportunity. They launched my academic career and helped me grow into the job. Like everyone at Osgoode, they helped alleviate my impostor syndrome by always treating me as a colleague, with deep respect and regard. I'm grateful to our staff, who let me tap into their invaluable institutional memory. I'm grateful to my Indigenous colleagues and students, who spent hours answering my dumb questions while entrusting me with their memories of pain, trauma, grit, and resilience. Most of all, I'm grateful to my students. They taught me as much as I can hope to have taught them. Their stories continue to impress and inspire me. They've earned their place in law school far more than I did mine, and I'm excited for how they will challenge and change the profession. The law needs more people like them.

I am of course very grateful for all of the material support I received from Osgoode, Bora Laskin, Mitacs, and the Social Sciences and Humanities Research Council – in the form of a generous salary, a significant doctoral grant, and multiple research grants and awards. I am also grateful to all of the research assistants I have had over the past two years: Talia Karam, Nicholas Petrozzi, Mallory Lanvin, Simon Fisher, Abhinandan Sethi, and Tetiana Skab. They worked on a million things so I could focus on this. They put up with my dizzying research interests, peculiar working hours, and tendency to take on too much. Two of them even accepted to go on a 22 km hike with me! Each enlivened my days, challenged me, and exemplified professionalism, perfectionism, and assiduity.

I remain grateful to everyone at the McGill Faculty of Law because it's where I grew up and found my calling. I spent most of my adult life, from age 18 to 23, at the Faculty. I got three of the four degrees the Faculty offers just so I could stick around. In 2014, an admissions officer and two professors decided that an 18-year-old Francophone from Quebec City, who hadn't done much, deserved one of its 25-or-so spots for CEGEP students. That decision changed the course of my career. It empowered me to aspire to things I didn't know existed – the New York Bar, the clerkship, the academic career. I still have a feeling of awe every time I walk into Chancellor Day Hall. It's been a springboard for so much and so many. I'm grateful to Shauna Van Praagh, who taught me how to think and how to be a law professor. I'm also grateful to Robert Leckey, Daniel Jutras, Omar Farahat, Kun Fan, Mark Antaki, Rosalie Jukier, Kirsten Anker, and Daniel Weinstock. They supervised my term papers, read my article drafts, and shared what they love about their job. Many times, they rightfully told me how bad my writing was. But they always made me feel like I could aspire to anything.

I have amazing friends and a great family. I undertook this project during a particularly difficult period in my personal life. My friends and family honoured me with wholly undeserved patience and generosity. Over the years, my friends have also read countless drafts and challenged countless ideas. I'm disappointed this is written in a language my parents cannot understand, but I'm grateful for their support. For most of my life, my parents didn't know exactly what I was doing, but they always knew I could do it. They never said I was crazy, even when I was. They just kept telling me not to forget to cook my own food, go to bed before midnight, and exercise. They were right, and I need to do better.

At some points of my life, I've had very little money. I've owed more money than I had. I've worried about debt, and I've felt that debt impacted my wellbeing and my freedom of choice. But I'm not poor. The state, which I discuss and criticise throughout this project, pays me well to teach law courses and write law review articles. I get to write this precisely because of astounding privilege. Credit can be a source of opportunity and a springboard to a better life. Debt can be a source of pain, stress, and desperation. It can slow us down. It can trap and trip us. It has pernicious persistence in hurting the most vulnerable. I'm grateful to all of those who shared their stories with me. I'm grateful for your time and your trust. Those we call "poor" work much harder than I do and are far more resilient and resourceful than I am. They are the backbone of our society. I hope this helps; I hope it makes sense; and I hope I did you justice.

Contents

List of Tables

A table is included as an appendix to chapter V. It provides the first comprehensive aggregation of yearly data regarding the Post Office Savings Bank (including information on the number of branches, deposits and withdrawals (in number and dollar value), and net assets of the Bank at year end).

I. Introduction

This project is about access to credit for the very poor.[1] The very poor are generally in the bottom quintile of income distribution. They are highly diverse and face significant barriers to social participation. They experience significantly lower social mobility than average, and they resort to different institutions to meet their credit needs – in part because they have inadequate or no access to the banking system.[2] I examine how the state might alleviate poverty by providing credit directly to the very poor.

Chapter II defines the group I label as the very poor. It critically analyses, to eventually defend, the use of this label. This short chapter also introduces the importance of rhetoric in law and in defining individual and collective conceptions of poverty. The importance of rhetoric undergirds many aspects of the arguments presented in subsequent chapters.

Chapter III discusses the reality of the very poor. It focusses on how the very poor access credit. The chapter argues that the very poor use credit in different ways than the rest of the society,

[1] Throughout, I alternatively refer to the very poor as individuals experiencing "extreme poverty."

[2] These institutions are different from traditional banking institutions, and I refer to them collectively as "alternative financial services providers." I did consider using an acronym to lighten the text throughout. However, I believe an acronym would have made the writing style less accessible. I don't think the very poor will understand most of what I wrote. Part of my job is to translate their concerns into the foreign, obscure language used in academic discourse. Their concerns need a theoretical foundation because people with power said so. I do hope that I have kept the writing style as accessible as it could be – as complex as helps the argument, but not a bit more.

which contributes to their disadvantage and marginalisation. It analyses how and why the very poor rely on alternative financial services providers for banking and credit services, instead of traditional banking institutions. The chapter introduces the concept of a "façade of informality," which helps explain why the very poor choose to rely on alternative financial services providers even when other, cheaper options may be available. It ties this social preference to other aspects of the identity of the very poor. The chapter then introduces the financial services and products offered by alternative financial services providers. The services they provide usually replace bank accounts and ancillary operations, such as cashing a cheque or depositing funds, while their credit products replace traditional lending. They include payday lending, earned wage access programs, cheque cashing, pawnbroking, automobile title lending, refund anticipation lending, and rent-to-own schemes. Finally, the chapter briefly introduces the role of the state in extreme poverty by discussing how the state often becomes a creditor of the very poor – through debts resulting from government programs and the justice system. The state has unique power in creating and collecting these debts and, as a result, contributes to entrenching extreme poverty.

Chapter IV builds upon that discussion and analyses the role of the state in extreme poverty. It focusses on the ways in which the state has sought to respond to the prevalence of poverty and the growing importance of alternative financial services providers. It argues that the importance of credit provided by alternative financial services providers grew as the state gradually reduced the direct assistance it provides to the very poor. Social assistance programs initially provided unconditional cash payments to beneficiaries. Over the past several decades, they were reconceptualised to limit cash assistance and impose eligibility conditions relating to integration into the labour force. This discussion harkens back to the importance of rhetoric in the constitution and individual and collective identities. The chapter argues that rhetoric played a fundamental role in shaping the views of citizens and state actors that social assistance programs disincentivise work and that some (or most) individuals who benefit from them are able but unwilling to work. As social assistance programs eroded and the safety net was privatised, the very poor have grown increasingly reliant on the expensive and predatory credit provided by alternative financial services providers. The very poor have also internalised this shifting paradigm. Many choose not to claim benefits they are entitled to.

The chapter then discusses how the state has intervened in the provision of credit to groups other than the very poor – mainly middle-class individuals – through programs that incentivise home ownership and higher education. While the state's intervention through these programs generally involves various forms of guarantees of credit risk, the programs have direct and indirect costs for the state, just like the government programs which seek to assist the very poor. Through these credit programs, the state invests significant financial resources that otherwise could be dedicated to assisting those in greater need. Additionally, the analysis of these programs aimed at the middle class helps refute arguments that the state does not, should not, or is not competent to get involved in the provision of credit.

Finally, the chapter discusses the state's approach to alternative financial services providers, as well as how the state uses bankruptcy law to alleviate poverty. Alternative financial services providers were initially regulated through usury provisions, which criminalise cost of borrowing exceeding a prescribed limit. However, over time, governments chose to exempt alternative financial services providers from most forms of financial regulation – while subjecting banks and traditional financial services providers to increasingly stringent regulation. Today, each Canadian province except Quebec allows alternative financial services providers to charge interest rates of hundreds of percentage points per year. The chapter's discussion of bankruptcy law helps delineate how the state can use public law mechanisms to allocate some of the cost of social support to private actors.

Chapter V provides a sustained case study of the most analogous alternative to my proposed government program: postal banking. It uses a recently announced partnership between Canada Post and the Toronto-Dominion Bank to assess the potential role of the postal service in providing banking and credit. Through this partnership, Canada Post offers personal loans at interest rates that exceed those of traditional bank loans but are significantly lower than those of alternative financial services providers. The chapter notes that Canada Post, and similar postal services across the world, have a long and rich history of providing various financial services to their citizens. The chapter provides the first comprehensive account of the emergence, growth, and eventual decline of Canada's historical federal postal bank. It unearths more than one hundred original archival sources from the last two centuries – most of which were never cited before. This account helps us assess the significance, promise, and risks of Canada Post's – and the Canadian state's – contemporary foray into banking and credit. It raises, and contextualises, broader issues regarding the fundamental importance of banking and credit to social participation and the correlative role and potential responsibility of the state to ensure the provision of banking and credit to citizens.

Although it relates to the rest of the argument I advance, and provides historical context for the argument, Chapter V was conceived and written as internally coherent and free standing. It was submitted to a law review for publication. As a result, Chapter V comprises its own abstract, and its earlier portions reiterate points made in other chapters.

Chapter VI is the crux of the project. It sets out a proposed government program which could remedy some of the issues discussed in earlier chapters. The state would provide credit to the very poor through loans repaid through additional, progressive taxation. Individuals whose income does not reach a certain level would not need to repay the loan, whereas those with a high income would effectively repay a multiple of the loan principal amount. Repayment would depend on income, but only for a limited period of time. The program may have unique potential to alleviate persistently lower social mobility for the very poor.

The various sections of chapter VI are structured differently and play different roles. They each help support the need for the program I propose and delineate the key features of the program that make it different from current and proposed alternatives, and uniquely responsive to the circumstances and preferences of the very poor explored throughout the project. The first section of the chapter further discusses postal banking. It focuses on the United States and lays out a contemporary proposal by scholars that would use the postal service to enhance access to banking for the very poor. Through this discussion, the section on postal banking presents a contextual history of, and the contemporary justification for, state intervention. The following section is central to the argument advanced in this project. It provides a theoretical framework through which we can conceptualise state intervention in the private sector. It lays out, and then extends and develops, a theoretical framework that is drawn from antitrust law. This framework both explains and normalises state intervention in the marketplace that might initially appear heavy-handed. My key contribution is an argument that state intervention is best conceptualised as falling along a spectrum, from the enactment of comprehensive, specialised regulatory regimes and obligations to the direct provision of a product or service by the state, and then to the monopolisation of an entire industry (to the exclusion of private actors). I argue that each of these forms of intervention serves the same goal of ensuring that essential products and services are provided to citizens. This broader framework will remain relevant to our conceptualisation of state intervention beyond my proposed program and the type of state intervention it proposes. I then use the spectrum I present to argue that alternative solutions to access to credit for the very poor – other than direct provision of credit by the state – have previously failed and will continue to provide an incomplete and inadequate answer to the problem. The sections on postal banking and antitrust law provide analogies to regulation and programs that were previously, or are currently, implemented. In addition to highlighting the key features of my proposed program, the sections help advance a normative argument for state intervention in the provision of credit. The following section of chapter VI discusses the universal basic income, a proposed program that would have significant similarities to the program I propose. Unlike postal banking and antitrust law, it has not been implemented. The comparison to a universal basic income eventually helps delineate how my proposed program is a hybrid between a loan and a grant program. Its characteristics of universal accessibility and dischargeability are best understood through this comparison, and with reference to theoretical justifications advanced to advocate for a universal basic income. The last section of the chapter provides further detail regarding my proposed government program.

II. The "Very Poor"

This chapter defines the group I discuss throughout this project. It briefly addresses objections to the categorisation of disadvantaged individuals as the "very poor" – and to labelling of social groups more generally. It explains why I think this label advances my argument. In doing, so, this chapter introduces the importance of rhetoric in law and in defining individual and collective conceptions of poverty. Rhetoric undergirds many aspects of the arguments presented in subsequent chapters. It is central to Chapter IV, where I provide a sustained analysis of how rhetoric could explain the shift in the state's conceptualisation of social assistance over the past several decades, and in how we see the very poor. As becomes plain throughout the project, this is an important methodological decision. Most chapters are densely footnoted – to engage existing scholarship on these issues and to provide empirical support for claims that warrant it. Empiricism, of course, is crucial to a measurable social phenomenon such as poverty. I cannot pretend to advance a credible potential solution to poverty without engaging this data. Yet poverty is also a social construct – a consequence of how we treat others and organise our society. It is a very *legal* problem. Not solely legal; perhaps not even principally legal; but legal nonetheless. The law helps define who is poor, who remains poor, how we help the poor, and how we see the poor. Because the law is rhetorical – and because poverty is sustained and (re)defined by rhetoric, this project engages rhetoric. It aspires to give rhetoric as much room as it does empiricism.

Poverty is both an objective reality and a socially constructed identity. It can be defined and measured objectively: there is a set number of individuals who, in relative or absolute terms, have little money or less money than others. Yet the consequences of poverty, the reality of those who are poor, the barriers they encounter, and the likelihood that they remain poor are at least in part socially constructed. They do not solely flow from the objective reality of lacking money.

Governments in developed economies such as Canada and the United States have long sought to measure the prevalence of poverty, foremost to assess whether they are making progress toward eliminating or alleviating it. There are many ways to measure poverty, and none is most widely accepted.[3] The Canadian government tracks and reports several indicators which relate to poverty, but it has no "official" method of measuring poverty. For the purposes of this project, purely relative indicators of poverty are least helpful, as they define poverty solely as a level of income relative to the median or average income.[4] These indicators are less helpful in understanding the *prevalence* of poverty, i.e. the relative proportion of individuals who lack sufficient funds to meet their basic needs. While social inequality can be construed as a significant

[3] There are three main indicators used by the Canadian government to measure poverty: the Market Basket Measure, the Low Income Measure, and Low Income Cut-Offs. The Market Basket Measure sets a list of products and services necessary to maintaining a basic standard of living and deems poor the households who lack sufficient financial resources to purchase them. The Low Income Measure defines poverty as a household income inferior to half of the median household income. Low Income Cut-Offs are defined and discussed in the next footnote. See "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", online: *Employment and Social Development Canada* <https://www.canada.ca/en/employment-social-development/programs/poverty-reduction/backgrounder.html#h2.1>; Statistics Canada, *Low Income Measurement in Canada*, by Philip Giles, Catalogue No 75F0002MIE (Ottawa: Statistics Canada, December 2004); Ivan P Fellegi, "On Poverty and Low Income" (September 1997), online: *Statistics Canada* <https://web.archive.org/web/20070916175141/http://www.statcan.ca/english/research/13F0027XIE/13F0027XIE1999001.htm> ("The underlying difficulty is due to the fact that poverty is intrinsically a question of social consensus, at a given point in time and in the context of a given country"). See also Shauna MacKinnon, "The Politics of Poverty in Canada" (2013) 32:1 Social Alternatives 19.

[4] These include the Low Income Measure. See "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 3; Statistics Canada, *Low Income Measurement in Canada*, *supra* note 3.

social issue, it is poverty as assessed more absolutely that creates the barriers to daily life and social engagement explored in this project.

A helpful indicator of poverty in such terms is the Low Income Cut-Off (LICO) rate, which was created by Statistics Canada and has been reported for reference years starting in 1959.[5] Statistics Canada defines the LICO rate as: "[The] income threshold[d] below which a family will likely devote a larger share of its income on the necessities of food, shelter and clothing than the average family. The approach is essentially to estimate an income threshold at which families are expected to spend 20 percentage points more than the average family on food, shelter and clothing."[6] This indicator does not measure poverty in solely relative terms, as it focusses on the ability of a household to meet its basic needs.

I noted above that governments measure poverty chiefly to assess whether they are making progress toward eliminating or alleviating it. Generally, they have made little progress on that front. LICO rates have not fluctuated significantly over the past several decades. For instance, the LICO rate in the early 2000s hovered around 12%, which is approximately the same rate as that in

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[5] See Statistics Canada, *Low Income Measurement in Canada*, *supra* note 3 at 6.

[6] "Low Income Cut-Offs" (last modified 27 November 2015), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/75f0002m/2012002/lico-sfr-eng.htm>. Low Income Cut-Offs are reported for various household sizes and geographic areas. See Statistics Canada, *Low Income Measurement in Canada*, *supra* note 3 at 6.

1985.[7] For the past decade, the LICO rate has been stable at approximately 9.7%.[8] The United States Census Bureau does not use LICO rates. It adopts an analogous measure of poverty mandated by the Office of Management and Budget, which similarly assesses poverty in more objective terms.[9] (Like LICO rates, it assesses the percentage of individuals and households who lack adequate financial resources to meet their basic needs.) As in Canada, the proportion of

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[7] See "Persons in Low Income after Tax, by Prevalence in Percent, 1986-2005" (17 December 2015), online: *Statistics Canada* <http://www40.statcan.ca/l01/cst01/famil19g.htm>. See also "Low Income Cut-Offs (LICOs) Before and After Tax by Community Size and Family Size, in Current Dollars" (last updated 23 March 2022), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110024101>; Low Income Cut-Offs (LICOs) Before and After Tax by Community Size and Family Size, in Constant Dollars" (last updated 23 March 2022), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110019501>.

[8] See e.g. "Percentage of Persons in Low Income Based on Low Income Cut-Off (LICO)" (February 2016), online: *Canadian Index of Wellbeing* <https://uwaterloo.ca/canadian-index-wellbeing/what-we-do/domains-and-indicators/percentage-persons-low-income-based-low-income-cut-lico>. The fluctuations that *can* be observed in LICO rates appear to be tied to the cyclical nature of economic growth. Higher LICO rates coincide with economic recessions. See also Alex Smith & Nasreddine Ammar, "Federal Support for Low Income Individuals and Families" (21 November 2017), online: *Office of the Parliamentary Budget Officer* <https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Fed%20Support%20for%20Low%20Income%20Families/Fed Fede%20Support%20for%20Low%20Income%20Individuals%20and%20Families_EN.pdf> at 8 ("PBO estimates that in 2017, the low income measure based on market income would be 26.8% (9.7 million individuals), compared to the low income measure based on disposable income (after government taxes and transfers), which would be 11.0% (or 4.0 million individuals"). See also Joseph A Califano Jr, "What Was Really Great About The Great Society", *The Washington Monthly* (October 1999), online: <https://web.archive.org/web/20140326175845/http://www.washingtonmonthly.com/features/1999/9910.califano.html>; Dylan Matthews, "How Many Americans Live on $2 a Day? The Biggest Debate in Poverty Research, Explained", *Vox Media* (5 June 2019), online: <www.vox.com/future-perfect/2019/6/5/18650492/2019-poverty-2-dollar-a-day-edin-shaefer-meyer>.

[9] See "Office of Management and Budget (OMB) in Statistical Policy Directive 14 (May 1978)" (8 October 2021), online: *United States Census Bureau* <https://www.census.gov/topics/income-poverty/poverty/about/history-of-the-poverty-measure/omb-stat-policy-14.html>; United States Census Bureau, *Income and Poverty in the United States: 2020*, by Emily A Shrider et al, Report Number P60-273 (Washington: United States Census Bureau, 2021) at 51-52; United States Census Bureau, *Poverty in the United States: 2021*, by John Creamer et al, Report Number P60-277 (Washington: United States Census Bureau, 2022) at 19-20. The United States census data is more comprehensive than the data collected by Statistics Canada, and it is helpfully tabulated across a broader range of relevant factors, such as race, ethnicity, immigration status, state, and household type.

individuals and households experiencing poverty has not fluctuated significantly since the 1970s – and shows no discernable trend.[10]

The absence of government progress toward eliminating or alleviating poverty helps justify the necessity of rethinking current approaches to alleviating poverty and looking beyond the role we traditionally ascribe to the state in alleviating poverty. My project seeks to advance such solutions.

Prof. Mehrsa Baradaran aptly notes: "The label poor is judgment-laden [and] paternalistic[.] … Poverty is not just about low wages and may not be a permanent condition, and those who are poor do not share common traits."[11] The very poor are people, too. Using labels to categorise people is bound to be reductive. It reduces individual identities to particular traits. Regarding the use of the word "criminal," I have previously noted: "We do not speak of persons who commit crimes or, more helpfully, of persons with children and futures who encountered significant barriers at all stages of their lives and eventually committed a crime. Instead, we speak of criminals. In a powerful rhetorical and constitutive exercise, the individual's identity is

[10] See "Historical Poverty Tables: People and Families - 1959 to 2021" (30 January 2023), online: *United States Census Bureau* <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html> (Tables 2 and 12 provide the relevant historical data); United States Census Bureau, *Income and Poverty in the United States: 2020*, *supra* note 9 at 14. The poverty rate does decrease through the late 1960s (*ibid*).

[11] Mehrsa Baradaran, "How the Poor Got Cut Out of Banking" (2013) 62:3 Emory LJ 483 at 483. See also Stephen Wexler, "Practicing Law for Poor People" (1970) 79:6 Yale LJ 1049 at 1049-50 ("Poor people are not just like rich people without money" at 1050); Tracy Smith-Carrier & Andrea Lawlor, "Realising Our (Neoliberal) Potential? A Critical Discourse Analysis of the Poverty Reduction Strategy in Ontario, Canada" (2017) 37:1 Critical Social Policy 105.

subsumed into the crime."[12] Poverty, like criminality, is a single aspect of an individual's identity. It is a trait rooted in a reality. The criminal has committed a crime. The very poor have little money. Neither fully defines an individual's identity. More importantly, neither is necessarily predictive, or bound to be a "permanent condition"[13]: criminals are rehabilitated, and the poor can become wealthier. Labelling can suggest otherwise. As Prof. Baradaran notes, the label poor is also "judgment-laden [and] paternalistic."[14] Like the label criminal, it highlights a negative aspect of an individual's reality and imports social judgment, even contempt.

Prof. Baradaran adds that the very poor "do not share common traits."[15] Somewhat ironically, the very poor are a highly diverse group of individuals.[16] They are diverse in nationality,

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[12] Phil Lord, "Moral Panic and the War on Drugs" (2022) 20:2 UNH Law Review 407 at 426-27. See also Jean Bracher, "Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill" (2004) 44:4 Santa Clara L Rev 1065 at 1078 ("Bankruptcy 'reform' initiatives tend to deflect attention from the bigger problem of over-indebtedness by focusing on those who file as if they were deviant 'others'").

[13] Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 11 at 483. See also Sara Sternberg Greene, "The Bootstrap Trap" (2017) 67:2 Duke LJ 233; "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 3. In Canada, discussions as to whether poverty is a permanent condition have constitutional relevance under the test for what constitutes impermissible discrimination pursuant to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. On analogous issues, see Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15:1 JL & Equality 59; Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43:2 Queen's LJ 297.

[14] *Ibid*.

[15] *Ibid*.

[16] See e.g. Paul Bowles et al, "Urban Aboriginal Use of Fringe Financial Institutions: Survey Evidence from Prince George, British Columbia" (2011) 40:6 Journal of Behavioral and Experimental Economics 895; Kathryn Fritzdixon, Jim Hawkins & Paige Marta Skiba, "Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets" 2014:4 U Ill L Rev 1013; Mehrsa Baradaran, "Credit, Morality, and the Small-Dollar Loan" (2020) 55:1 Harv CR-CLL Rev 63 [Baradaran, "Small-Dollar Loan"]; "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 3; Joan Kendall, "Circles of Disadvantage: Aboriginal Poverty and Underdevelopment in Canada" (2001) 32:2 American Review of Canadian Studies 43. In Canada, Indigenous individuals are significantly more likely to experience poverty.

ethnicity, and cultural belonging. They are poor for different reasons. Some were always poor; some will always be; some only are for a limited period of time.[17] The very poor are by definition economically vulnerable. They tend to be less educated.[18] They experience poorer physical and mental health, notably as a result of food and housing insecurity.[19] The very poor are more likely to be victims of criminality.[20] They often face differing, yet inevitably significant, barriers and are vulnerable to multiple and overlapping forms of discrimination as a result of factors that include their immigration or legal status, race, and ethnicity.[21] Their economic status and disadvantage correlate with their social status and disadvantage.

See also "Historical Poverty Tables: People and Families - 1959 to 2021", *supra* note 10. The United States data shows that poverty rates for Black, Hispanic and Native individuals and households range from double to triple the poverty rates for White individuals and households (*ibid* at Tables 2, 3, 4, and 13). The poverty rate is significantly higher for non-citizens (approximating that of other minoritised groups), though not for naturalised citizens (*ibid* at Table 16).

[17] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 11 at 483; Greene, *supra* note 13; "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 3 ("Most low-income Canadians are poor for a short period of time, improving their incomes to exit low income within a year. For example, in the period between 2005 and 2010, only 1.5% of low-income Canadians lived in low income for up to 6 years based on the Low Income Cut-offs after tax").

[18] See e.g. Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 11 at 483; Fritzdixon, Hawkins & Skiba, *supra* note 16; Baradaran, "Small-Dollar Loan", *supra* note 16; Bowles et al, *supra* note 16; Michael S Barr, Jane K Dokko & Benjamin J Keys, "Borrowing to Make Ends Meet" in Michael S Barr, ed, *No Slack: The Financial Lives of Low-Income Americans* (Washington: Brookings, 2012); Laura Lamb, "Financial Exclusion and Financial Capabilities in Canada" (2016) 8:2 Journal of Financial Economic Policy 212; Statistics Canada, *Do Youth from Lower- And Higher-Income Families Benefit Equally from Postsecondary Education?*, by Marc Frenette, Catalogue No 11F0019M (Ottawa: Statistics Canada, 26 April 2019). Lower educational attainment is one of the factors which has been advanced to explain significantly lower social mobility for those in the bottom quintile of income distribution. For a more detailed discussion of these issues, see the sources cited in note 36, below.

[19] See "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 3; Dalié Jiménez, "Ending Perpetual Debts" (2018) 55:3 Hous L Rev 609 at 638; Jerzy Eisenberg-Guyot et al, "From Payday Loans To Pawnshops: Fringe Banking, The Unbanked, And Health" (2018) 37:3 Health Affairs 429. Poorer health also significantly affects productivity. Even in countries with nationalised healthcare systems, such as Canada, the very poor have more limited access to healthcare than the rest of the population.

[20] See "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 3.

[21] Wealth, income, and other factors which make individuals vulnerable to overlapping forms of discrimination are intimately intertwined. See e.g. Mehrsa Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap*

While they lack money, the very poor tend to be exceptionally hard-working and resourceful. They work multiple jobs to make ends meet, and often occupy physically and emotionally demanding positions. Each new day is a challenge to survive. Making ends meet is a constant source of stress, and requires significant grit and creativity. Scholar Barbara Ehrenreich spent several months purposefully seeking positions occupied by the very poor and trying to survive on the income these positions provided. At the end of this journey, she noted: "To go from the bottom 20 percent to the top 20 percent is to enter a magical world where needs are met, problems are solved, almost without any intermediate effort. If you want to get somewhere fast, you hire a cab. If your aged parents have grown tiresome or incontinent, you put them away where others will deal with their dirty diapers and dementia. If you are part of the upper-middle-class majority that employs a maid or maid service, you return from work to find the house miraculously restored to order[.]"[22] A few pages on, reflecting on her transition from low-wage employed to employer, she adds: "The 'working poor' […] are in fact the major philanthropists of our society. They neglect their own children so that the children of others will be cared for; they live in

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(Cambridge: Harvard, 2019); Elizabeth Warren, "The Economics of Race: When Making It to the Middle Is Not Enough" (2004) 61:4 Wash & Lee L Rev 1777; Melvin L Oliver & Thomas M Shapiro, "Disrupting the Racial Wealth Gap" (2019) 18:1 Contexts 16; Randall Akee, Maggie R Jones & Sonya R Porter, "Race Matters: Income Shares, Income Inequality, and Income Mobility for All U.S. Races" (2019) 56:3 Demography 999; Kendall, *supra* note 16; Maria A Wallis & Siu-ming Kwok, eds, *Daily Struggles: The Deepening Racialization and Feminization of Poverty in Canada* (Toronto: Canadian Scholars Press, 2008); Ricardo Tranjan, "Swimming with the Sharks: Poverty, Pandemics and Payday Lenders" (April 2020), online: *Canadian Centre for Policy Alternatives* <https://policyalternatives.ca/publications/reports/swimming-sharks>; Claire Cain Miller, Sarah Kliff & Larry Buchanan, "Childbirth Is Deadlier for Black Families Even When They're Rich, Expansive Study Finds", *The New York Times* (12 February 2023), online: <https://www.nytimes.com/interactive/2023/02/12/upshot/child-maternal-mortality-rich-poor.html>.

[22] Barbara Ehrenreich. *Nickel and Dimed: On (Not) Getting By in America* (New York: Macmillan, 2011) at 215.

substandard housing so that other homes will be shiny and perfect; they endure privation so that inflation will be low and stock prices high."[23]

Although labelling downplays and obscures the singular diversity which defines the very poor, the very poor are the only group of individuals who can be so helpfully categorised by reference to their income. This is indicative of the salience of the issues they face, and of how much these issues, and their lived reality, differ from those of the rest of the population.[24] These issues are understudied, arguably because most scholars – like the broader population – rarely encounter them.[25] The very poor are underrepresented, if represented at all, in the institutions and classes of individuals that govern and influence our society.[26] Most individuals are aware of the challenges facing the lower middle class, of relatives or friends who can hardly make ends meet and rely on credit card debt to do so. However, the very poorest segment of the population faces substantially different challenges. The very poor are either unbanked (completely shut off from the banking system) or underbanked (lack adequate access to banking or credit products).[27] They

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[23] *Ibid* at 221.

[24] The very poor also share certain social preferences relating to financial services that make them rely on alternative financial services providers. These preferences are discussed in the next chapter through the "façade of informality."

[25] See e.g. Wexler, *supra* note 11; Ehrenreich, *supra* note 22.

[26] See e.g. Ehrenreich, *supra* note 22 at 215-17 ("[Our] society makes the poor almost invisible to their economic superiors. The poor can see the affluent easily enough – on television, for example, or on the cover of magazines. But the affluent rarely see the poor or, if they do catch sight of them in some public space, rarely know what they're seeing, since – thanks to consignment stores and, yes, Wal-Mart – the poor are usually able to disguise themselves as members of more comfortable classes" at 216); Barbara Ehrenreich. *Fear of Falling: The Inner Life of the Middle Class* (New York: Twelve, 2020). See also Frederick Mark Gedicks, "The Poverty of Academic Rhetoric" (1993) 44:2 Mercer L Rev 543 at 545 ("Poor people are perpetually handicapped by lack of funds to organize themselves into a cohesive force in elective politics").

[27] A recent report on access to banking services in Canada finds that 6 percent of Canadians are unbanked. See "The Underbanked Canada: February 2016", online: *Mintel* <https://store.mintel.com/the-underbanked-canada-february-

2016?_ga=2.150848245.2126905070.1570466499-1705706870.1570466499>. See also “It’s Expensive to Be Poor: How Canadian Banks Are Failing Low Income Communities” (May 2016), online: *ACORN Canada* <https://acorncanada.org/wp-content/uploads/2016/04/ACORN-Canada-Fair-Banking-Campaign-Backgrounder.compressed_0.pdf>; Laura Lamb, “Aboriginal Fringe Finance Use and Financial Capabilities: Survey Evidence from a Canadian City” (2015) 34:3 Economic Papers 273 at 276 (noting that, in 2008 and 2009, 13 percent of adults in Canada were estimated to be unbanked, while 16 percent were estimated to be underbanked). This figure is contested. The Mintel study (*ibid*) has a relatively small sample size, and the Canadian government, unlike the United States government, does not systematically collect data on access to banking. Furthermore, the percentage of underbanked individuals is inherently subjective to assess: the adequacy of banking access depends on individual needs and circumstances. A recent report from Canada’s House of Commons appears to conclude that 99 percent of Canadians have access to a bank account. See House of Commons, “The Way Forward for Canada Post: Report of the Standing Committee on Government Operations and Estimates” by Tom Lukiwski (Chair), Sessional Paper, 42-1 (December 2016) at 58. This is highly perplexing. The source is a witness named Darren Hannah, who serves as Vice-President, Finance, Risk and Prudential Policy of the Canadian Bankers Association (Canada, House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 42-1, No 53 (31 October 2016) at 1000-1630). The Canadian Bankers Association is an industry lobbying group that dubs itself the “voice of more than 60 domestic and foreign banks operating in Canada and their 280,000 employees” (“The CBA Today” (17 November 2022), online: *Canadian Bankers Association: Advocating for a Sound Canadian Banking System* <https://cba.ca/cba-today>). It relies on a 2017 report from the World Bank, which has a sample size of just 1,007 Canadians and a margin of error of 3.6 percent (Asli Demirgüç-Kunt et al, “The Global Findex Database 2021: Financial Inclusion, Digital Payments, and Resilience in the Age of COVID-19”, online: *The World Bank* <https://www.worldbank.org/en/publication/globalfindex/Report> at 165). It must be re-emphasised that access to banking differs widely based on geographical location and socioeconomic factors. We do not know who makes up the sample group – although we do know the Northwest Territories, Yukon, and Nunavut were excluded, which the World Bank dismisses as immaterial because they represent “approximately 0.3 percent of the Canadian population” (Asli Demirgüç-Kunt et al, *ibid*). It is hard to fathom how the Canadian government could draw an apparent factual conclusion from this unreliable data, without even mentioning (1) the source; (2) the margin of error; or (3) anything else about sampling. That is not all. The House of Common report actually miscites the World Bank data. The House of Commons notes that “[e]xisting banking services are accessible, and 99% of Canadians have a bank account” (House of Commons, *ibid*). However, the World Bank report actually concludes that 100 percent of Canadian adults have a bank account, while 99 percent of *poor adults* have a bank account (poor is defined as the bottom two quintiles of income distribution) (Asli Demirgüç-Kunt et al, *ibid* at 175-78). The Canadian Bankers Association has consistently disseminated this incorrect figure without context and adopted positions that serve the industry’s competitive interest. See e.g. “Focus: Fast Facts About the Canadian Banking System” (13 March 2023), online: *Canadian Bankers Association: Advocating for a Sound Canadian Banking System* <https://cba.ca/fast-facts-the-canadian-banking-system>; Stephanie Ben-Ishai, “Reaffirmation of Debt in Consumer Bankruptcy in Canada” (2015) 56:2 Can Bus LJ 238 at 256 (“Some stakeholders, such as the Canadian Bankers Association, oppose legislative action on the grounds that it would offend personal liberty”); “Focus: Banks and Consumers” (13 March 2023), online: *Canadian Bankers Association: Advocating for a Sound Canadian Banking System* <https://cba.ca/banks-and-consumers?l=en-us>; “A Conflict of Interest: How Canada’s Largest Banks Support Predatory Lending” (18 November 2014), online: *ACORN Canada* <https://acorncanada.org/resources/conflict-interest-how-canadas-largest-banks-support-predatory-lending/>; “Canada’s Financial Consumer Protection Framework: Consultation Paper Submission by the Canadian Bankers Association” (28 February 2014), online: *Canadian Bankers Association: Advocating for a Sound Canadian Banking System* <https://cba.ca/Assets/CBA/Documents/Files/Article%20Category/PDF/sub_20140227_consumerprotection_en.pdf>. It is certainly plausible that the Canadian Bankers Association was aware that it was misciting the report yet chose to cite the 99 percent figure because it felt the 100 percent figure would unsettle common sense.

Regardless of the source one prefers, it seems clear that there are more unbanked individuals per capita in the United States. In the United States, 38 percent of the population is estimated to be unbanked or underbanked. See Mehrsa Baradaran, “It’s Time for Postal Banking” (2014) 127:4 Harv L Rev F 165 at 168. See also Baradaran, “How the Poor borrow at astronomical interest rates, which routinely reach hundreds or thousands of percentage points,[28] and rely on "payday lenders, check cashers, or other fringe banking institutions" for credit.[29] They dedicate a significant portion of their income (some 10%) to services that those with a bank account get for free, which contributes to a cycle of poverty, marginalisation, and bankruptcy.[30] Private lenders generally extend credit for very short periods of time (often two weeks). The very poor must rely on this short-term credit for longer-term needs, often falling into

Got Cut Out of Banking", *supra* note 11 at 485-86; Baradaran, "Small-Dollar Loan", *supra* note 16; Catherine Martin Christopher, "Mobile Banking: The Answer for the Unbanked in America?" (2015) 65:2 Cath U L Rev 221; "How America Banks: Household Use of Banking and Financial Services" (17 December 2021), online: *Federal Deposit Insurance Corporation* <www.fdic.gov/analysis/household-survey/index.html>; AARP Foundation, "A Portrait of Older Underbanked and Unbanked Consumers Findings from a National Survey", online: *AARP* <https://assets.aarp.org/rgcenter/ppi/econ-sec/underbank-economic-full-092110.pdf>; Michael S Barr, "Banking the Poor" (2004) 21:1 Yale J Reg 121; John P Caskey, *Fringe Banking Check-Cashing Outlets, Pawnshops, and the Poor* (New York: Russel Sage, 1994); Joe Fantauzzi, "Predatory Lending: A Survey of High Interest Alternative Financial Service Users" (December 2016), online: *Canadian Centre for Policy Alternatives* <https://policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2016/12/CCPA-ON%20predatory%20lending%20Dec%201.pdf>.

[28] As detailed below, the credit the very poor rely on is often effectively exempt from the usury provision of the *Criminal Code* (RSC 1985, c C-46, s 347), which caps interest rates at 60%. Lenders can often charge additional fees, and interest compounding may not be covered by the provision. See Phil Lord, "Ending Poverty: A Step in the Right Direction" [2021] Ottawa Law Review Blog, online: <https://rdo-olr.org/2021/ending-poverty-a-step-in-the-right-direction/>. This article is a revised version of my doctoral proposal. It was published in October 2022.

[29] Baradaran, "It's Time for Postal Banking", *supra* note 27 at 166–67.

[30] See *ibid*; Baradaran, "Small-Dollar Loan", *supra* note 16 at 123. See also Guiseppe Coco & David De Meza, "In Defense of Usury Laws" (2009) 41:8 Journal of Money, Credit and Banking 1691; Regina Austin, "Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions" (2004) 53 Am U L Rev 1217 [Austin, "Of Predatory Lending"]; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 11; Mehrsa Baradaran, "Banking and the Social Contract" (2014) 89:3 Notre Dame L Rev 1283; Oren Bar-Gill & Elizabeth Warren, "Making Credit Safer" (2008) 157:1 U Penn L Rev 1; Caskey, *supra* note 27. See also Eisenberg-Guyot et al, *supra* note 19 at 430-431 ("Indebtedness is often a source of shame, and fringe debt may be especially stigmatized. Social isolation, looming default, and harassment from debt collectors also contribute to debt-induced anxiety, depression, and suicide"); Chris Chhim & Sean Simpson, "Factum: Nearly Half of Canadians (48%) Are $200 or Less Away from Financial Insolvency" (28 October 2019), online: *Ipsos* <https://www.ipsos.com/en-ca/news-polls/Canadians-and-Bankruptcy-Oct-2019>.

a debt spiral.[31] They take on ever-increasing loans to pay back principal and interest on maturing loans.

Labelling the very poor by reference to their income is helpful because they face these common issues and share this reality. It helps delineate the nature, structure, and systems of the oppression they face. Describing their reality and contrasting it with that of middle-income individuals helps bring the very poor into public discourse and begins the process of advancing solutions to the singular issues they face. In other words, until we find better ways to talk about barriers, oppression, and vulnerability – and we should – the use of this label can be beneficial. Studying the very poor as a group should not hinder studying those who are very poor through the lens of other characteristics that make them vulnerable to discrimination and oppression. Indeed, doing so is particularly important given the diversity which defines the very poor.[32]

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[31] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 11; Austin, "Of Predatory Lending", *supra* note 30; Baradaran, "Small-Dollar Loan", *supra* note 16 at 91; Chrystin Ondersma, "Small Debts, Big Burdens" (2019) 103:5 Minn L Rev 2211.

[32] See e.g. Bowles et al, *supra* note 16; "Historical Poverty Tables: People and Families - 1959 to 2021", *supra* note 10; Fritzdixon, Hawkins & Skiba, *supra* note 16; Baradaran, "Small-Dollar Loan", *supra* note 16.

III. Being Very Poor

The previous chapter described the groups of individuals I define as the very poor in this project. It assessed and supported my decision to use this label. This chapter further discusses the reality of those who are very poor. It focusses on the reasons why and ways in which the very poor access credit.

Credit is a key aspect of the reality of the very poor. Of course, poverty means having little money, so it is unsurprising that the very poor interact with credit more often than the average individual. They borrow and owe money because they are poor, and they are poor because they owe money.

However, such statements obscure a far more complex and nuanced social problem. The very poor do not just borrow money (i.e. use credit). They do so differently from the rest of the population. Unlike most wealthier individuals, they do not borrow to purchase assets or services that will increase their income and assets over time. Instead, they generally borrow to fund their living expenses. The very poor also borrow from different institutions that the rest of the population, and these institutions often trap them into long-term, almost inescapable cycles of debt and poverty. Credit or, more accurately, the *type* of credit used by the very poor contributes to poverty and marginalisation. In addition, the very poor resort to these different, often predatory institutions to meet their credit needs for complex and overlapping reasons. They of course do so by necessity, i.e. as a result of their lack of money. However, this necessity in part results from the inadequate ways in which the state has sought to combat poverty over the past several decades, and from the investment of significant public resources in programs that directly or indirectly help middle-income individuals instead of the very poor.[33] Even when government programs are available, they poor may choose not to use them.[34] The very poor also "need" to resort to alternative financial services providers because they are unbanked or underbanked. Banks often choose not to service the very poor even if servicing them would be profitable. Even when they might have access to more traditional forms of credit, the very poor may prefer to resort to alternative financial services providers because of the ways in which these providers interact with them – what has been repeated termed a "façade of informality." I discuss each of these points in this chapter.

1. Extreme Poverty and Access to Credit

At least in Canada and the United States, the very poor disproportionately remain poor. While, as noted, poverty is not an inherently permanent condition,[35] the very poor encounter greater barriers to social mobility than the rest of the population. Those in the bottom quintile of the population are extremely unlikely to see their income grow.[36] While Canada and other

[33] The role of the state, and the ways in which the state has sought to combat poverty, are discussed in the next chapter.

[34] As detailed below, the identity that is constructed by the very poor may prevent them from seeking help, for instance if they feel that they would be unworthy or inadequately self-reliant if they did.

[35] See Mehrsa Baradaran, "How the Poor Got Cut Out of Banking" (2013) 62:3 Emory LJ 483 at 483; Sara Sternberg Greene, "The Bootstrap Trap" (2017) 67:2 Duke LJ 233; "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", online: *Employment and Social Development Canada* <https://www.canada.ca/en/employment-social-development/programs/poverty-reduction/backgrounder.html#h2.1>.

[36] See Miles Corak, "Divided Landscapes of Economic Opportunity: The Canadian Geography of Intergenerational Income Mobility" (2017) University of Chicago Human Capital and Economic Opportunity Working Paper No 2017–043 [Corak, "Divided Landscapes of Economic Opportunity"]; Miles Corak, "Do Poor Children Become Poor Adults? Lessons from a Cross Country Comparison of Generational Earnings Mobility" in John Creedy & Guyonne Kalb, eds, *Dynamics of Inequality and Poverty* (Binley: Emerald, 2006) 143 (Volume 13 of the Research on Economic Inequality

developed countries have recently experienced growing wealth inequality,[37] social mobility is, on average, relatively high in Canada.[38] Yet the very poor experience significantly lower income mobility than average.[39]

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series) [Corak, "Do Poor Children Become Poor Adults?"]; Richard V Reeves, *Dream Hoarders: How the American Upper Middle Class Is Leaving Everyone Else in the Dust, Why That Is a Problem, and What to Do About It* (Washington: Brookings, 2017) [Reeves, *Dream Hoarders*]. See also CNBC, "Why Americans Feel So Poor | CNBC Marathon" (20 January 2023), online (video): <https://www.youtube.com/watch?app=desktop&v=kCQiywN7pH4&ab_channel=CNBC>. In Canada, social mobility for the very poor has decreased over the past decades. See "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 35.

37 See Emmanuel Saez & Gabriel Zucman, "The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts" (2020) 34:4 Journal of Economic Perspectives 3; Emmanuel Saez & Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (New York: WW Norton, 2020); Thomas Piketty & Gabriel Zucman, "Capital Is Back: Wealth-Income Ratios in Rich Countries 1700–2010" (2014) 129:3 Quarterly Journal of Economics 1255; Shi-Ling Hsu, "The Rise and Rise of the One Percent: Considering Legal Causes of Inequality" (2015) 64 Emory LJ Online 2043. See also TED, "Beware, Fellow Plutocrats, the Pitchforks Are Coming | Nick Hanauer" (12 August 2014), online (video): <https://www.youtube.com/watch?v=q2gO4DKVpa8&list=WL&index=120&ab_channel=TED>; Emmanuel Saez & Gabriel Zucman, "How to Tax Our Way Back to Justice", *The New York Times* (11 October 2019), online: <www.nytimes.com/2019/10/11/opinion/sunday/wealth-income-tax-rate.html>; Emil Skandul, "There's an Easy Way to Tax Billionaires that Would Actually Work" (27 November 2021), online: *Business Insider* <www.businessinsider.com/easy-way-tax-billionaires-that-would-actually-work-tax-loans-2021-11?utm_source=facebook.com&utm_campaign=sf-bi-main&utm_medium=social&fbclid=IwAR0U8tI2eIAeAvVnvE6KkYILWvRwVLXe5tX72buAOqr8oWnFqd1HUhp3SlI>.

38 See Corak, "Divided Landscapes of Economic Opportunity", *supra* note 36; Orsetta Causa & Åsa Johansson, "Intergenerational Social Mobility in OECD Countries" [2010] OECD Journal: Economic Studies (noting that Canada, along with Nordic European countries and Australia, has one of the highest rates of intergenerational social mobility among OECD countries); Organisation for Economic Cooperation and Development, *Divided We Stand: Why Inequality Keeps Rising* (Paris: OECD, 2011); Josh Curtis, "Social Mobility and Class Identity: The Role of Economic Conditions in 33 Societies, 1999–2009" (2016) 32:1 European Sociological Review 108. Social mobility generally refers to intergenerational mobility. It assesses the likelihood that socioeconomic privilege or vulnerability persists intergenerationally. For a discussion of alternative ways to assess social mobility, see Marco HD van Leeuwen & Ineke Maas, "Historical Studies of Social Mobility and Stratification" (2010) 36:1 Annual Review of Sociology 429.

39 See Corak, "Divided Landscapes of Economic Opportunity", *supra* note 36; Corak, "Do Poor Children Become Poor Adults?", *supra* note 36; Reeves, *Dream Hoarders*, *supra* note 36. This is also true of individuals at the very top of income distribution. Social mobility is generally most significant for middle-income individuals and becomes progressively lower with each percentile toward both extremes (extremely high and low economic status). The bottom and top quintiles experience notably lower social mobility than the middle three quintiles, while the top and bottom percentiles experience significantly lower social mobility than even their quintile average. To illustrate this phenomenon, Corak notes: "The children of the top one percent are as likely to stay in the top fifth of their income distribution as they are to fall into the bottom 80 percent. While they face a 49.9 percent chance of being in the top

My project focusses on credit. As summarised above, credit is an important aspect of the reality of the very poor. The very poor tend to be unbanked or underbanked,[40] and they interact with alternative financial services providers to meet their credit needs. This reliance on predatory forms of credit defines their reality, and it is a key factor that contributes to keeping them in poverty.[41] As further detailed in the next chapter, governments have contributed to intensifying the

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fifth. their most likely outcome is, at 8.6 percent, to remain in the top one percent" (Corak, "Divided Landscapes of Economic Opportunity", *supra* note 36 at 16). This is true even in countries with overall higher social mobility. In another piece, Corak notes: "In the United States almost one half of children born to low income parents become low income adults. This is an extreme case, but the fraction is also high in the United Kingdom at four in ten, and Canada where about one-third of low income children do not escape low income in adulthood. In the Nordic countries, where overall child poverty rates are noticeably lower, it is also the case that a disproportionate fraction of low income children become low income adults" (Corak, "Do Poor Children Become Poor Adults?", *supra* note 36 at 144).

[40] See "The Underbanked Canada: February 2016", online: *Mintel* <https://store.mintel.com/the-underbanked-canada-february-2016?_ga=2.150848245.2126905070.1570466499-1705706870.1570466499>; Mehrsa Baradaran, "It's Time for Postal Banking" (2014) 127:4 Harv L Rev F 165 at 168; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 485-86; Mehrsa Baradaran, "Credit, Morality, and the Small-Dollar Loan" (2020) 55:1 Harv CR-CLL Rev 63 [Baradaran, "Small-Dollar Loan"]; Catherine Martin Christopher, "Mobile Banking: The Answer for the Unbanked in America?" (2015) 65:2 Cath U L Rev 221 [Christopher, "Mobile Banking"]; "How America Banks: Household Use of Banking and Financial Services" (17 December 2021), online: *Federal Deposit Insurance Corporation* <www.fdic.gov/analysis/household-survey/index.html>; Michael S Barr, "Banking the Poor" (2004) 21:1 Yale J Reg 121; John P Caskey, *Fringe Banking Check-Cashing Outlets, Pawnshops, and the Poor* (New York: Russel Sage, 1994); Creola Johnson, "Payday Loans: Shrewd Business or Predatory Lending?" (2002) 87:1 Minn L Rev 744; Aaron Huckstep, "Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits" (2007) 12:1 Fordham J Corp & Fin L 203; Joe Fantauzzi, "Predatory Lending: A Survey of High Interest Alternative Financial Service Users" (December 2016), online: *Canadian Centre for Policy Alternatives* <https://policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2016/12/CCPA-ON%20predatory%20lending%20Dec%201.pdf>.

[41] Prof. Baradaran has analogously noted that trying to determine whether these predatory forms of credit are good or bad for consumers, a key question which has animated related research, is unhelpful. She adds: "This research is inconclusive and unsatisfying because it focusses on the wrong question. It is both true that people need these loans and that these loans are harmful. Thus, depending on your research question, you can conclude that these loans alternatively benefit or hurt consumers. On the one hand, payday loans are the only credit option for many households. Cutting off access to a loan that can help a family make it from one paycheck to the next can result in severe financial distress. On the other hand, these loans are too costly and can lead to a debt trap" (Baradaran, "Small-Dollar Loan", *supra* note 40 at 107). See also Paige Marta Skiba, "Regulation of Payday Loans: Misguided?" (2012) 69:2 Wash & Lee L Rev 1023; Todd J Zywicki, "Consumer Use and Government Regulation of Title Pledge Lending" (2010) 22:4 Loy Consumer L Rev 425; Ronald J Mann & Jim Hawkins, "Just Until Payday" (2007) 54:1 UCLA L Rev 855; Brian Dijkema & Rhys McKendry, "Banking on the Margins Finding Ways to Build an Enabling Small-Dollar Credit Market" (February 2016), online: *CARDUS* <https://www.cardus.ca/research/work-economics/research-report/banking-on-the-margins/>.

role of credit in the lives of the very poor, notably by redefining social provision, or the social "safety net," and by endorsing purported "self-reliance" ideals and paradigms. The role of the state therefore far exceeds the state's inability or unwillingness to tackle the reliance on predatory credit. The state has contributed, and continues to contribute, to redefining social provision, the way in which we perceive the legitimacy and nature of poverty, and how the very poor see themselves.

The key contribution of my project also focusses on credit. Although I energetically criticise the role of the state in leading the very poor to rely on predatory credit, I argue that this reliance, and the other negative consequences of poverty, can best be alleviated through a government program that would provide credit to the very poor, to be repaid through additional, progressive taxation. Among other things, I argue that such a program will likely be more politically and financially stable, and therefore more likely to durably alleviate poverty.

Although my project focusses on credit, I study the issues facing the very poor, as well as poverty itself. As a social and economic phenomenon, extreme poverty is grasped by looking beyond access to credit, and microcosmic aspects of extreme poverty such as the reliance on predatory credit are contextualised and constituted by other aspects and consequences of poverty. In addition, the solution advanced in my project, which involves the use of a reconceptualised form of credit, is designed and presented as a potential solution to extreme poverty – not solely to the reliance on alternative financial services providers or to their impact on poverty. I have therefore defined the population I study in this project as the very poor. In this respect, my focus is broader than that adopted by the majority of the scholars I cite[42] and of empirical work conducted on these issues.[43] Most of these authors study how the very poor interact with alternative financial providers and advance alternatives to lessen their reliance on these providers.

2. Why the Very Poor Borrow

I noted above that the very poor borrow for different reasons than the rest of the population and rely on different institutions to meet their credit needs. First, the very poor generally borrow to fund their daily expenses.[44] They borrow to survive. They are not poor because they overspend

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[42] See e.g. Christopher, "Mobile Banking", *supra* note 40; Baradaran, "Small-Dollar Loan", *supra* note 40; Mehrsa Baradaran, *How the Other Half Banks* (Cambridge: Harvard, 2015).

[43] See e.g. Paul Bowles et al, "Urban Aboriginal Use of Fringe Financial Institutions: Survey Evidence from Prince George, British Columbia" (2011) 40:6 Journal of Behavioral and Experimental Economics 895 (studying Aboriginal users of alternative financial services providers in a city in British Columbia); Kathryn Fritzdixon, Jim Hawkins & Paige Marta Skiba, "Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets" 2014:4 U Ill L Rev 1013 (studying users of certain automobile title lenders in several United States states). *Contra* Laura Lamb, "Financial Exclusion and Financial Capabilities in Canada" (2016) 8:2 Journal of Financial Economic Policy 212 [Lamb, "Financial Exclusion and Financial Capabilities"] and Laura Lamb, "Aboriginal Fringe Finance Use and Financial Capabilities: Survey Evidence from a Canadian City" (2015) 34:3 Economic Papers 273 [Lamb, "Aboriginal Fringe Finance Use"] (using a survey designed by Statistics Canada to contrast the financial capability of users of alternative financial services providers and of the broader population); Michael S Barr, Jane K Dokko & Benjamin J Keys, "Borrowing to Make Ends Meet" in Michael S Barr, ed, *No Slack: The Financial Lives of Low-Income Americans* (Washington: Brookings, 2012) 133 (studying all low-income households, notably to determine the prevalence and interrelatedness of use of various products provided by alternative financial services providers).

[44] See Abbye Atkinson, "Rethinking Credit as Social Provision" (2019) 71:5 Stan L Rev 1093 at 1152, 1157 ("In a nutshell, low-income Americans have an exceedingly difficult time making ends meet, and that is often the reason they are likely to use credit. Indeed, data show that low-income borrowers often use credit to pay for recurrent expenses like rent and utilities, and 'rarely for frivolous or discretionary expenditures'" at 1152 [references omitted]); "Payday Lending in America: Report 2: How Borrowers Choose and Repay Payday Loans" (February 2013), online: *The Pew Charitable Trusts* <https://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf> ("Sixty-nine percent of first-time payday borrowers used the loan to cover a recurring expense, such as utilities, credit card bills, rent or mortgage payments, or food, while 16 percent dealt with an unexpected expense, such as a car repair or emergency medical expense"); Fantauzzi, *supra* note 40; AARP Foundation, "A Portrait of Older Underbanked and Unbanked Consumers Findings from a National Survey", online: *AARP* <https://assets.aarp.org/rgcenter/ppi/econ-sec/underbank-economic-full-092110.pdf> at 88 (quoting a borrower as

or because they spend frivolously.[45] Wealthier individuals, including those in the middle class, do not principally borrow by necessity. They often borrow to make strategic investments in assets or services that will increase their income and assets over time.[46] For instance, a significant portion of the population borrows to purchase a house or attend university. A house is an asset that can be crucial to ensuring one's financial security in retirement,[47] and higher education contributes to increasing a borrower's income.[48] Of course, the very poor are unlikely to benefit from education

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stating: "Well, I make the interest payment and pay down the balance maybe $50 each month but it sure kills my budget. There is always something that really needs to be paid and they make it so easy to get cash that most people fall into the trap. I now simply wait for my check and do without if I run out of money before then. Things like taxes, car payments, rent, medicine, heating and utility bills can be budgeted and when unexpected expenses happen something just has to wait"). There are statistically significant differences in the reasons for borrowing. For instance, those 65 and older are "more likely to say they had borrowed to pay medical bills, pay back money, or fix a car," and "more than half of Hispanic and black persons age 65+ said they borrowed to help out family, versus 4 percent of similarly aged white persons" (AARP Foundation, *ibid* at 81-82). See also Dijkema & McKendry, *supra* note 41 at 28 (finding that younger households are more likely to borrow); Aimee Picchi, "A $500 Surprise Expense Would Put Most Americans into Debt", *CBS News* (12 January 2017), online: <www.cbsnews.com/news/most-americans-cant-afford-a-500-emergency-expense>.

[45] See Baradaran, "Small-Dollar Loan", *supra* note 40 at 108 ("Nor is the borrowing frivolous. Surveys reveal that the loan is being used to pay for food, or rent, but the budget shortfall is likely due to a variety of setbacks such as a medical emergency, car problems, or some other unexpected life expense"); Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1152; Robert L Clarke & Todd J Zywicki, "Payday Lending, Bank Overdraft Protection, and Fair Competition at the Consumer Financial Protection Bureau" (2013) 33:1 Rev Banking & Fin L 235 at 245. Prof. Baradaran also notes the racial undertones to the collective conception that the very poor spend frivolously and do not save enough of their income. She highlights that African Americans save more than White Americans. See Baradaran, "Small-Dollar Loan", *supra* note 40 at 111.

[46] See Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1133; Baradaran, "It's Time for Postal Banking", *supra* note 40 at 173; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 510-20; Abbye Atkinson, "Borrowing Equality" (2020) 120:6 Colum L Rev 1403 at 1442-43. See also Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1148 ("Because credit often amplifies the underlying circumstances into which it is introduced, in times of economic opportunity and expected growth, credit can be a powerful instrument for capturing value and exploiting existing opportunity that might otherwise be lost due to illiquidity").

[47] See Makoto Nakajima & Irina A Telyukova, "Home Equity in Retirement" (2020) 61:2 International Economic Review 573; Statistics Canada, *Incomes of Retirement-Age and Working-Age Canadians: Accounting for Home Ownership*, by W Mark Brown, Amélie Lafrance & Feng Hou, Catalogue No 11F0027M (Ottawa: Statistics Canada, July 2010).

[48] See Statistics Canada, *Do Youth from Lower- And Higher-Income Families Benefit Equally from Postsecondary Education?*, by Marc Frenette, Catalogue No 11F0019M (Ottawa: Statistics Canada, 26 April 2019) [Statistics Canada, *Postsecondary Education*]; Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1144-45;

or real estate loans, notably because they experience lower educational achievement[49] and social mobility,[50] are unlikely to accumulate the down payment necessary to purchase real estate, and are often unbanked or underbanked.[51] However, as discussed in the next chapter, the state has also played a key role in making education, real estate, and other loans that benefit the middle class more accessible and affordable. These distinctions in why the very poor and the rest population borrow and subsequently use the funds mean that the very poor are structurally disadvantaged. They are less likely to be in a financial position that will allow them to pay back the funds they borrowed, and they are more likely to fall into a debt spiral.[52]

Bruce Chapman, "Income Contingent Loans for Higher Education: International Reforms" in E Hanushek & F Welch, eds, *Handbook of the Economics of Education* (Amsterdam: North-Holland, 2006) 1435.

[49] See e.g. Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 483; Fritzdixon, Hawkins & Skiba, *supra* note 43; Baradaran, "Small-Dollar Loan", *supra* note 40; Bowles et al, *supra* note 43; Barr, Dokko & Keys, *supra* note 43; Lamb, "Financial Exclusion and Financial Capabilities", *supra* note 43.

[50] See Corak, "Divided Landscapes of Economic Opportunity", *supra* note 36; Corak, "Do Poor Children Become Poor Adults?", *supra* note 36; Reeves, *Dream Hoarders*, *supra* note 36; "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 35.

[51] See "The Underbanked Canada: February 2016", *supra* note 40; Baradaran, "It's Time for Postal Banking", *supra* note 40 at 168; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 485-86; Baradaran, "Small-Dollar Loan", *supra* note 40; Christopher, "Mobile Banking", *supra* note 37; Barr, *supra* note 40; Caskey, *supra* note 40. Real estate and education loans are generally provided by traditional banking institutions, not the alternative financial services providers the very poor rely on to meet their credit needs.

[52] In this respect, credit is regressive. It contributes to making the rich richer and the poor poorer. Other aspects of credit I discuss have analogous impacts, such as the higher cost of borrowing for the very poor. Furthermore, the disproportionate impact of credit on historically marginalised groups is not limited to the diverse composition of the very poor (Bowles et al, *supra* note 43; "Historical Poverty Tables: People and Families - 1959 to 2021", *supra* note 10; Fritzdixon, Hawkins & Skiba, *supra* note 43; Baradaran, "Small-Dollar Loan", *supra* note 40; "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 35). See Atkinson, "Borrowing Equality", *supra* note 46 at 1442-43; Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1133; Regina Austin, "Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions" (2004) 53 Am U L Rev 1217 [Austin, "Of Predatory Lending"]; Abbye Atkinson, "Race, Educational Loans & Bankruptcy" (2010) 16:1 Mich J Race & L 1; Abbye Atkinson, "Modifying Mortgage Discrimination in Consumer Bankruptcy" (2015) 57:4 Ariz L Rev 1041; Abbye Atkinson, "Commodifying Marginalization" (2021) 71:4 Duke LJ 773.

It is worth noting that the very poor often have assets when they seek to borrow. They are often driven to borrow by liquidity issues, not solvency issues.[53] As further discussed below, certain credit products used by the very poor appear to carry little credit risk by traditional standards. For instance, car title loans are fully secured by the value of the underlying asset (a car),[54] and payday loans are secured by future income (generally the following week's paycheque).[55] The very poor appear to encounter much greater barriers to borrowing against their assets, and the cost of borrowing often appears largely unrelated to the underlying credit risk.[56]

3. Why the Very Poor Resort to Alternative Financial Services Providers

The very poor rely on different institutions to meet their credit needs because they often have no access or inadequate access to the banking system, i.e. are unbanked or underbanked. Unlike the United States government, the Canadian government does not systematically gather

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[53] See Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1147. See also Nakita Q Cuttino, "The Rise of 'Fringetech': Regulatory Risks in Earned-Wage Access" (2021) 115:6 Nw U L Rev 1505, discussing earned wage access programs, which allow employees to gain access to earned wages before their regular payroll date. One of the rationales for the recent creation of this service is that users experience short-term liquidity crises (not underpinned by solvency problems) that can be solved by giving them access to their earned wages.

[54] See Fritzdixon, Hawkins & Skiba, *supra* note 43.

[55] Payday lenders generally require either full access to the borrower's bank account or a post-dated cheque. See Nick Bourke, "Payday Loan Facts and the CFPB's Impact" (14 January 2016), online: *The Pew Charitable Trusts* <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/payday-loan-facts-and-the-cfpbs-impact>; Fritzdixon, Hawkins & Skiba, *supra* note 43 at 1035; Austin, "Of Predatory Lending", *supra* note 52 at 1241; Baradaran, "Small-Dollar Loan", *supra* note 40 at 91; Ben-Ishai, "Regulating Payday Lenders in Canada", *supra* note 71 at 325; Barr, Dokko & Keys, *supra* note 43 at 136-37; Lynn Drysdale & Kathleen E Keest, "The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society" (2000) 51:3 SCL Rev 589 at 600-601.

[56] These issues are further discussed below.

data regarding the use of banking services by the very poor.[57] A recent report finds that at least 6 percent of Canadians are unbanked.[58] This data suggests that the proportion of unbanked individuals is approximately the same in Canada and the United States.[59] In the United States, 38 percent of the population is estimated to be unbanked or underbanked.[60] Importantly, the very poor are not unbanked or underbanked because servicing them is unprofitable. Traditional banks often choose not to service the very poor (and marginalised communities where they are overrepresented) even when doing so would be profitable.[61] Individuals who have no access or

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[57] In the United States, analogous data is obtained through the Federal Deposit Insurance Corporation (FDIC) Survey of Household Use of Banking and Financial Services – formerly the FDIC National Survey of Unbanked and Underbanked Households. See "How America Banks: Household Use of Banking and Financial Services", *supra* note 40.

[58] See "The Underbanked Canada: February 2016", *supra* note 40.

[59] The reasons why are not readily apparent. We can speculate that the rate of unbanked individuals is low in the United States due to the limited services which can be offered by banking institutions in a more diverse and competitive marketplace. In contrast, the Canadian banking sector is dominated by very few large banks. It might well be that the underlying reasons for these similar rates of unbanked households differ significantly, or that the level of banking actually provided to those who *are* banked differs. For comparative discussions of Canada's and the United States' banking systems, see e.g. Michael D Bordo, Angela Redish & Hugh Rockoff, "Why Didn't Canada Have a Banking Crisis in 2008 (or in 1930, or 1907, or …)?" (2014) 68:1 The Economic History Review 218; Charles Gibney, Sami Bibi & Bruno Lévesque, "Banking Fees in Canada: Patterns and Trends" (June 2014), online: *Financial Consumer Agency of Canada* <https://onlinelibrary.wiley.com/doi/full/10.1111/1468-0289.665>.

[60] See Baradaran, "It's Time for Postal Banking", *supra* note 40 at 168. See also Gibney, Bibi & Lévesque, *ibid*, noting that, while banking fees have kept pace with inflation, ancillary fees have increased significantly between 2005 and 2013. These fees are disproportionately borne by low-income individuals.

[61] See Iain Ramsay, "Consumer Credit Law, Distributive Justice and the Welfare State" (1995) 15:2 Oxford J Leg Stud 177 at 187; Christopher, "Mobile Banking", *supra* note 40 at 225-26 ("Banks, for their part, believe there is little financial incentive to offer traditional banking products specifically to the unbanked. Because unbanked individuals make such small transactions and carry small balances, banks do not expect significant profit from these customers"); Christopher Choe, "Bringing in the Unbanked off the Fringe: The Bank on San Francisco Model and the Need for Public and Private Partnership" (2009) 8:1 Seattle Journal for Social Justice 365 at 367 ("A third barrier is the low prevalence of banks and credit unions in low-income areas. […] [A] fourth barrier is that banks tend to find low-income consumers to be less profitable and do not believe it is worth the time, effort, and money to market to them"); Caskey, *supra* note 40; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 528; Terri Friedline & Mathieu Despard, "Mapping Financial Opportunity: Final Report" (1 September 2017), online: *University of Michigan Center on Assets, Education, and Inclusion* <https://aedi.ssw.umich.edu/sites/default/files/publications/Mapping-Financial-Opportunity.pdf>. See also Financial Times, "US Bank Branch Closures Widen Social Inequality | FT Film" (12 December 2022) at 6m:19s, online (video): <https://www.youtube.com/watch?app=desktop&v=tAhU3IeOKJw&feature=youtu.be&ab_channel=FinancialTimes

inadequate access to traditional banks must look to alternative financial services providers to meet their credit needs.

Even those with access to traditional banking services often *choose* to rely on alternative financial services providers. This has led some to suggest that the very poor may misunderstand the nature of the credit and banking products they resort to because of lower educational attainment and other factors such as race, social status, and language barriers which make them more vulnerable to marginalisation.[62] However, the data simply does not support the assertion that the very poor rely on alternative financial services providers because of a lack of financial education.[63]

> (“We've seen about 7,000 branches close since 2017, about 4,000 since the start of the pandemic in March of 2020. So the pace of branch closures has really accelerated, which is partially driven by the fact that people are doing more banking online, but it's also driven by profitability. A lot of communities – especially in the southwest of the US, southeast, certain areas in the Midwest – that have generally been in decline have lost their banks. So as banks merge, they close up their inefficient branches. That's part of the model for banking. Banking deserts exist across the country, but they are more concentrated in places like the Deep South, in communities of colour, in inner city urban neighbourhoods”). See also Richard Hynes, “Payday Lending, Bankruptcy, and Insolvency” (2012) 69:2 Wash & Lee L Rev 607 (unable to empirically show that payday lenders target vulnerable individuals, although they mainly have branches in communities where vulnerable individuals are overrepresented).

[62] See e.g. Fritzdixon, Hawkins & Skiba, *supra* note 43; Barr, Dokko & Keys, *supra* note 43.

[63] See Baradaran, “Small-Dollar Loan”, *supra* note 40 at 108-110; Lauren E Willis, “The Financial Education Fallacy” (2011) 101:3 American Economic Review 429; Annamaria Lusardi & Olivia S Mitchell, “The Economic Importance of Financial Literacy: Theory and Evidence” (2014) 52:1 Journal of Economic Literature 5; “A Pound of Flesh: The Criminalization of Private Debt” (2018), online: *American Civil Liberties Union* <https://www.aclu.org/report/pound-flesh-criminalization-private-debt#:~:text=One%20in%20three%20adults%20in,more%20are%20threatened%20with%20jail>; Paul Kiel & Annie Waldman, “The Color of Debt: How Collection Suits Squeeze Black Neighborhoods” (8 October 2015), online: *ProPublica* <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods>; Ronald J Mann, “After the Great Recession: Regulating Financial Services for Low- and Middle-Income Communities” (2012) 69:2 Wash & Lee L Rev 729 [Mann, “After the Great Recession”]. See also Jean Bracher, “Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill” (2004) 44:4 Santa Clara L Rev 1065 at 1081-85; “G20 High-Level Principles on Financial Consumer Protection” (October 2022), online: *OECD* <https://www.oecd.org/daf/fin/financial-markets/48892010.pdf> at 6-7. But see “Payday Loans: Market Trends” (25 October 2016), online: *Financial Consumer Agency of Canada* <https://publications.gc.ca/site/eng/9.833981/publication.html>.

Instead, the very poor appear to choose to rely on these providers because of what has repeatedly been termed a "façade of informality."[64] This preference, which is now central to academic research on access to credit for the very poor, appears to have first been introduced by scholars Michael A. Stegman and Robert Faris, who noted that, in focus groups, the very poor identified "five ways in which check cashers were superior to banks: (a) easier access to immediate cash; (b) more accessible locations; (c) better service in the form of shorter lines, more tellers, more targeted product mix in a single location, convenient operating hours, and Spanish-speaking tellers; (d) more respectful, courteous treatment of customers; and (e) greater trustworthiness."[65] Alternative financial services providers, such as payday lenders,[66] can provide loans much faster than

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[64] See e.g. Austin, "Of Predatory Lending", *supra* note 52 at 1229; Baradaran, "Small-Dollar Loan", *supra* note 40 at 89; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 495. While this phrase is most used by and attributed to Prof. Baradaran, the notion of informality was used by other scholars in earlier decades (see e.g. Austin, "Of Predatory Lending", *supra* note 52).

[65] Michael A Stegman & Robert Faris, "Payday Lending: A Business Model That Encourages Chronic Borrowing" 17:1 Economic Development Quarterly 8 at 13. The focus groups were conducted by the Union Bank of California in 2001. See also Austin, "Of Predatory Lending", *supra* note 52 at 1247; Christopher, "Mobile Banking", *supra* note 40 at 225; Greene, *supra* note 35 at 303; Caskey, *supra* note 40; Ben-Ishai, "Regulating Payday Lenders in Canada", *supra* note 71 at 330; "Cheque Cashing: Cash When You Need It!", online: *CA$H 4 YOU* <https://cash4you.ca/services/cheque-cashing/#>; "Cheque Cashing Service: From Personal to Payroll, We're Ready to Cash!", online: *CASHMONEY* <https://www.cashmoney.ca/financial-services/cheque-cashing/>. Some 13 percent of unbanked households cite "Bank Locations Are Inconvenient" and "Bank Hours Are Inconvenient" as a reason for not holding a bank account, while some 2 percent cite these as their main reason for not holding a bank account. See "How America Banks: Household Use of Banking and Financial Services", *supra* note 40 at 17. Scheduling flexibility is particularly important to the very poor, as the positions they hold afford little such flexibility. For example, prior research has repeatedly shown that poorer defendants are more likely to plead guilty to criminal charges because they are unable to miss work. See Barbara Ehrenreich. *Nickel and Dimed: On (Not) Getting By in America* (New York: Macmillan, 2011) at 215; Amy E Lerman, Ariel Lewis Green & Patricio Dominguez, "Pleading for Justice: Bullpen Therapy, Pre-Trial Detention, and Plea Bargains in American Courts" (2022) 68:2 Crime & Delinquency 159 ("[E]xtant research points toward the myriad ways that pre-trial detention might induce both emotional and financial hardship. This can include being fired from employment for missing days of work, financial strain from lost wages or having to post bail, and emotional stress imposed on parents, children and partners as they wait for a family member to come home. These stressors are especially severe for economically disadvantaged defendants. As one attorney observed, 'For a lot of people, taking a day off from their job, or childcare … is a much worse consequence than taking the plea they're offered'" at 164 [references omitted]).

[66] The various forms of credit provided by alternative financial services providers are described later in this chapter.

traditional banks.[67] Customers can access their locations without an appointment, apply for a loan far more quickly and with less documentation, and receive the funds almost instantly.[68] In contrast, banks generally require a pre-set appointment and extensive documentation and take days or weeks to approve and disburse loans.

The phrase "façade of informality" highlights that this sense of informality is merely a façade for predatory institutions that significantly profit from extreme poverty. Prof. Baradaran notes that "[d]espite the informal facade, fringe banks are highly profitable corporations."[69] Although there are many businesses that offer credit to the very poor, they often have the same ultimate owner.[70] This becomes clear when a customer defaults on a loan. Alternative financial services providers resort to aggressive and, more than seldom, illegal techniques to collect loan

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[67] Unsurprisingly, the very poor often need to quickly gain access to the funds they borrow.

[68] Analogously, 36 percent of unbanked households cite greater privacy as a reason for not holding a bank account (with 7.1 percent citing it as the main reason). See "How America Banks: Household Use of Banking and Financial Services", *supra* note 40 at 17. See also Austin, "Of Predatory Lending", *supra* note 52 at 1247 ("Among the features that customers find desirable are better locations and more favorable operating hours than top-tier firms; less stringent risk-screening procedures; and swifter approvals. All of these factors increase the cost of the credit").

[69] Baradaran, "Small-Dollar Loan", *supra* note 40 at 90. See also Richard R W Brooks, "Credit Past Due" (2006) 106:4 Colum L Rev 994 at 1007. These "fringe banks" are the institutions I refer to as alternative financial services providers.

[70] See Gary Rivlin, *Broke, USA: From Pawnshops to Poverty, Inc. – How the Working Poor Became Big Business* (New York: HarperCollins, 2011) at 28. See also Baradaran, "Small-Dollar Loan", *supra* note 40 at 90 ("This business strategy yields more clientele because when customers feel cheated by a lender, they will move to the competition, [mistakenly] believing that they will be treated differently"); Ricardo Tranjan, "Swimming with the Sharks: Poverty, Pandemics and Payday Lenders" (April 2020), online: *Canadian Centre for Policy Alternatives* <https://policyalternatives.ca/publications/reports/swimming-sharks> ("A closer look, however, points to corporate consolidation, with fewer independent stores. Today, [in Canada,] one chain (Money Mart) owns nearly half of the market, and the five largest chains own as much as 65% of it"); "Duo Bank of Canada Rebrands to Fairstone Bank of Canada" (20 June 2022), online: *Fairstone* <www.fairstone.ca/en/press/duo-bank-renamed-fairstone-bank>; Dijkema & McKendry, *supra* note 41 (finding that Money Mart controls 38 percent of the market and CASHMONEY controls 12 percent of the market).

proceeds.[71] They file tens of thousands of lawsuits yearly and are often legally entitled to garnish the wages of their debtors.[72]

The preference of the very poor for alternative financial services providers should not be equated to a lack of sophistication. Instead, social and cultural factors, which closely affect identity formation, drive the very poor to prefer these providers. In his seminal essay, "Practicing Law for

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[71] See Christopher L Peterson, *Taming the Sharks: Towards a Cure for the High-Cost Credit Market* (Akron: University of Akron Press, 2004); Baradaran, "Small-Dollar Loan", *supra* note 40 at 90; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 496; Kiel & Waldman, *supra* note 63; Paul Kiel, "Debt Inc.: When Lenders Sue, Quick Cash Can Turn Into a Lifetime of Debt", *ProPublica* (13 December 2013), online: <https://www.propublica.org/article/when-lenders-sue-quick-cash-can-turn-into-a-lifetime-of-debt> ("So AmeriCash sued her, a step that high-cost lenders – makers of payday, auto-title and installment loans – take against their customers tens of thousands of times each year. [...] In some states, if a suit results in a judgment – the typical outcome – the debt can then continue to accrue at a high interest rate. [...]Many states also allow lenders to charge borrowers for the cost of suing them, adding legal fees on top of the principal and interest they owe. One major lender routinely charges legal fees equal to one-third of the debt, even though it uses an in-house lawyer and such cases usually consist of filing routine paperwork"). See also *In Re Daniels*, 316 BR 342 (Bankr D Idaho 2004) ("The Court can not ignore the status of the parties in this case. Debtor is a lay person with no particular legal training who is, by his public declaration, without resources to pay his debts. Debtor erroneously believed he had complied with the state court's order to turn over his tax information to Creditor. In contrast, Creditor is a professional collection agency, presumably experienced, if not keenly cognizant, of the import of a bankruptcy filing to its collection activities"). Some have criticised the state for also resorting to aggressive collection strategies and further indebting the marginalised. See Stephanie Ben-Ishai, Saul Schwartz & Jeremy Barretto, "The Role of Government as a Creditor of the Disadvantaged" (2010) 35:2 Queen's LJ 539; Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 New Criminal Law Review 73; Stephanie Ben-Ishai & Arash Nayerahmadi, "Over-Indebted Criminals in Canada" (2019) 42:4 Man LJ 207; Marie-Eve Sylvestre, Nicholas Blomley & Céline Bellot, *Red Zones Criminal Law and the Territorial Governance of Marginalized People* (New York: Cambridge, 2020). Bankruptcy relief is key to protecting the indebted and the otherwise marginalised. See e.g. Stephanie Ben-Ishai & Saul Schwartz, "Bankruptcy for the Poor?" (2007) 45:3 Osgoode Hall LJ 471; Todd J Zywicki, "The Economics of Credit Cards" (2000) 3:1 Chap L Rev 79; Stephanie Ben-Ishai, "Regulating Payday Lenders in Canada: Drawing on American Lessons" (2008) 23:2 BFLR 323 at 360-61 [Ben-Ishai, "Regulating Payday Lenders in Canada"]; Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1153.

[72] See Kiel, *supra* note 71. See also Bruce A Green & David Udell, "Amicus Brief of the National Center for Access to Justice in Upsolve, Inc. v. James" (11 January 2023), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4328714> (United States Court of Appeals for the Second Circuit, Case 22-1345, Document 121) at 2 ("Debt-collection cases account for approximately 25% of all civil cases filed in state courts"). See also Dalié Jiménez, "Dirty Debts Sold Dirt Cheap" (2015) 52:2 Harv J on Legis 51; Jessica Steinberg, Colleen F Shanahan, Anna E Carpenter & Alyx Mark, "The Democratic (Il)legitimacy of Assembly-Line Litigation" (2022) 135 Harv L Rev F 359.

Poor People," Prof. Stephen Wexler elegantly remarks that "[p]oor people are not just like rich people without money."[73] Prof. Baradaran adds: "[T]hey cannot be banked just like rich people with less money. The poor often have different financial habits, culture, and preferences than the middle class[.]"[74] The preference of the very poor for informal, more easily accessible locations and interactions has corollaries in other aspects of their lives. The very poor often belong to social groups which favour informality, trust, and personal relationships. These preferences form part of their broader identity.

The very poor also often dislike and mistrust traditional banking institutions. The latest United States data shows that 36.3 percent of unbanked household cite "Don't trust banks" as a reason for resorting to alternative financial services providers, and 16.1 percent of unbanked households cite it as their primary reason for doing so.[75] This is likely why some 34 percent of the unbanked report that they previously had a bank account.[76] Although they have withdrawn from the places where the very poor are overrepresented, traditional banks significantly profit from

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[73] See Stephen Wexler, "Practicing Law for Poor People" (1970) 79:6 Yale LJ 1049 at 1049-50 ("Poor people are not just like rich people without money" at 1050).

[74] Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 547. See also Stegman & Faris, *supra* note 65 at 13; Ramsay, *supra* note 61 at 194; Patricia J Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22:2 Harv CR-CL L Rev 401 at 407.

[75] See "How America Banks: Household Use of Banking and Financial Services", *supra* note 40 at 3. This is the second most cited reason by unbanked households for not holding a bank account. See also Board of Governors of the Federal Reserve System, *Consumers and Mobile Financial Services 2014* (Washington: Board of Governors of the Federal Reserve System, 2014); Stegman & Faris, *supra* note 65 at 13. Analogously, 20.5 percent of unbanked households cite "Personal Identification, Credit, or Former Bank Account Problems" as a reason for not holding a bank account, while 8 percent cite it as their main reason for not holding a bank account. See "How America Banks: Household Use of Banking and Financial Services", *supra* note 40 at 17.

[76] See Board of Governors of the Federal Reserve System, *supra* note 75. See also Tranjan, *supra* note 70.

banking behaviour that relates to poverty. For example, in 2003, the banking industry is estimated to have earned 30.7 billion dollars in profit from overdraft fees.[77] Banks can make overdraft protection available "on a 'discretionary' basis without prior notice to customers of the substantial fees or implicit interest being charged."[78] 34.2 percent of unbanked households cite prohibitively

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[77] See Owen B Asplundh, "Bounce Protection: Payday Lending in Sheep's Clothing" (2004) 8:1 North Carolina Banking Institute 349 at 353. The Consumer Financial Protection Bureau, adopting a slightly different taxonomy, estimates that Americans paid 15.5 billion dollars in overdraft and insufficient funds fees in 2019, and that these fees were one of the main revenue sources of banks relating to checking accounts. See Éva Nagypál, "Data Point: Overdraft/NSF Fee Reliance Since 2015 – Evidence from Bank Call Reports (Data Point No. 2021-12)" (December 2021), online: *Consumer Financial Protection Bureau* <https://files.consumerfinance.gov/f/documents/cfpb_overdraft-call_report_2021-12.pdf>. See also "Overdraft/NSF Metrics for Top 20 Banks Based on Overdraft/NSF Revenue Reported During 2021" (6 December 2022), online: *Consumer Financial Protection Bureau* <https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_overdraft-table_2023-05.pdf>; Baradaran, "Small-Dollar Loan", *supra* note 40 at 87 ("Faced with seemingly random and punitive fees, low-income customers have taken their business to the fringe banking sector. […] Many major banks require balances of $1,500 to avoid fees on their basic accounts"); Christopher, "Mobile Banking", *supra* note 40 at 224 ("These individuals, mostly poor, typically transact relatively small amounts of money, and they find (or fear) that minimum balance requirements, overdraft fees, and other bank account features are more expensive than the value of the account"). See also Gibney, Bibi & Lévesque, *supra* note 59. But see Julie Andersen Hill, "Transaction Account Fees: Do the Poor Really Pay More than the Rich?" (2012) 15:1 University of Pennsylvania Journal of Business Law 65 (seeking to empirically refute the claim that poorer bank customers cross-subsidise wealthier customers). See also Mann & Hawkins, *supra* note 41 at 889 (arguing that overdraft protection is an unusual instance where banks compete with alternative financial services providers).

Since overdraft protection does not directly involve lending, it is not subject to the stringent regulatory regimes that apply to lenders, including, in the United States, The *Truth in Lending Act of 1968* (Pub L No 90-321, 82 Stat 146 (1968) (codified through 15 USC ch 41 § 1601)). The *Act* is further discussed in note 104, below. Although it is not a loan, overdraft protection involves a fee for access to funds, like earned wage access programs, which are discussed in the text accompanying notes 99 to 107, below, Overdraft protection raises the same regulatory issues I discuss with respect to earned wage access programs.

See also *Bank Act*, SC 1991, c 46, s 627.13 ("An institution shall, without delay, send to a natural person an alert, by electronic means, if the balance of the person's personal deposit account that is opened in Canada falls below any amount that the person communicates to the institution or, if the person does not communicate an amount, below the prescribed amount or, if there is no prescribed amount, $100").

[78] Austin, "Of Predatory Lending", *supra* note 52 at 1240; Asplundh, *supra* note 70. See also "Consumer Financial Protection Circular 2022-06: Unanticipated Overdraft Fee Assessment Practices" (26 October 2022), online: *Consumer Financial Protection Bureau* <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-06-unanticipated-overdraft-fee-assessment-practices/>. See also Rourke O'Brien, "We Don't Do Banks: Financial Lives of Families on Public Assistance" (March 2012), online: *New America Foundation* <https://static.newamerica.org/attachments/3772-we-dont-do-banks/RourkeMarch2012.280c7e858336448499de926c84038108.pdf> ("It's always been I'd get charged for something, or I over charge… Overdraft and then it's like the bill to pay the overdraft fee is like thirty something dollars to pay for a $2 overdraft, and it was just—I couldn't handle that mathematics. I didn't want to have to deal

high fees as a reason for not holding a bank account,[79] while 31.3 percent cite unpredictable fees as a reason for not holding a bank account.[80]

4. The Characteristics and Impact of Credit Provided to the Very Poor

As noted above, the credit provided by the alternative financial services providers the very poor resort to to meet their credit needs is predatory. It contributes to a cycle of poverty and marginalisation. The very poor borrow at astronomical interest rates, which can easily reach hundreds or thousands of percentage points per year. As mentioned, these interest rates appear largely unrelated to the underlying credit risk.[81] While banks are subject to significant and sophisticated regulatory regimes,[82] alternative financial services providers are almost entirely

with something like that. Or if I made the mistake of overcharging one dollar, you know, now I gotta pay $30, it didn't make any sense to me. So I just stopped with the whole credit cards and banking and stuff like that. So I keep money hidden in my little safe I got, you know").

[79] 7.3 percent of unbanked household cite it as their main reason for not holding a bank account. See "How America Banks: Household Use of Banking and Financial Services", *supra* note 40 at 17.

[80] 1.6 percent of unbanked household cite it as their main reason for not holding a bank account. See "How America Banks: Household Use of Banking and Financial Services", *supra* note 40 at 17. Canadian data also suggests that users of payday loans (not of alternative financial services providers more generally) do not understand the cost of these loans and lack access to credit cards and other lower-cost credit products. See "Payday Loans: Market Trends", *supra* note 63. See also O'Brien, *supra* note 80.

[81] See Guiseppe Coco & David De Meza, "In Defense of Usury Laws" (2009) 41:8 Journal of Money, Credit and Banking 1691; Ramsay, *supra* note 61 at 188; Austin, "Of Predatory Lending", *supra* note 52; Bourke, *supra* note 55 ("The payday loan market is not price competitive. Most lenders charge the maximum rate allowed under state law. States without rate limits have the highest prices"); Ronald J Mann & Jim Hawkins, "Just Until Payday" (2007) 54:1 UCLA L Rev 855. I noted above that many credit products provided by alternative financial services providers are fully secured by the value of an underlying asset, such as a car or a paycheque.

[82] See Mehrsa Baradaran, "Banking and the Social Contract" (2014) 89:3 Notre Dame L Rev 1283; Baradaran, *How the Other Half Banks*, *supra* note 42; Mehrsa Baradaran, "Reconsidering the Separation of Banking and Commerce" (2012) 80:2 Geo Wash L Rev 385 [Baradaran, "Banking and Commerce"]; *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, 124 Stat 1376 (2010) (codified through 12 USC § 5301 et seq); Hill, *supra* note 77; Donald JS Brean, Lawrence Kryzanowski & Gordon S Roberts, "Canada and the United States: Different Roots, Different Routes to Financial Sector Regulation" (2011) 53:2 Business History 249; Sana Mohsni &

exempt from regulation. The main form of regulation are usury provisions. One scholar has aptly noted: “Usury laws initially operated to morally shame the practice of lending, but they were later adapted specifically to stigmatize high-cost lending. Today, usury laws are intended to protect unsophisticated and vulnerable borrowers from unfair loan terms that lead to inescapable cycles of debt.”[83] Usury provisions limit the total cost of borrowing.[84] (This generally includes fees and expenses, in addition to interest.) In Canada, section 347 of the *Criminal Code* criminalises total cost of borrowing exceeding 60 percent per year.[85] However, if provincial legislatures adopt legislation regulating private lenders, they can exempt these lenders from the usury provision.[86] Using Ontario as an example, I have previously noted that these lenders can charge an annualised interest rate of 390 percent.[87] The prescribed fee is per two-week period, and borrowers often

Isaac Otchere, “Does Regulatory Regime Matter for Bank Risk Taking? A Comparative Analysis of US and Canada” (2018) 53 Journal of International Financial Markets, Institutions and Money 1. This issue is further analysed in the next chapter.

[83] Cuttino, *supra* note 53 at 1533. See also Drysdale & Keest, *supra* note 55; John D Skees, “The Resurrection of Historic Usury Principles for Consumption Loans in a Federal Banking System” (2006) 55:4 Cath UL Rev 1131. See also Margaret Craig-Bourdin, “High-Interest Loans: Why Canadian Borrowers Are Still Taking On the Steep Commitment” (13 August 2018), online: *Chartered Professional Accountants of Canada* <https://www.cpacanada.ca/en/news/canada/2018-08-13-high-interest-loans-why-canadian-borrowers-are-still-taking-on-the-steep-commitment> (“After taking out a $10,000 instalment loan from an alternative lender in 2005, the single mother from Toronto found herself in a situation where she still owed $7,500 after 10 years—and that is after paying $25,000 on the loan”).

[84] This issue is further analysed in the next chapter.

[85] See *Criminal Code*, RSC 1985, c C-46, s 347.

[86] See Phil Lord, “Ending Poverty: A Step in the Right Direction” [2021] Ottawa Law Review Blog, online: <https://rdo-olr.org/2021/ending-poverty-a-step-in-the-right-direction/> [Lord, “Ending Poverty”]. See also Ben-Ishai, “Regulating Payday Lenders in Canada”, *supra* note 71.

[87] See Lord, “Ending Poverty”, *supra* note 86. This is pursuant to the *Payday Loans Act, 2008*, SO 2008, c 9, s 32, which prohibits cost of borrowing that exceeds the “prescribed limit” and O Reg 98/09, s 23 and O Reg 358/16, s 4, which define the “prescribed limit.”

rollover their loan, paying the fee with new credit.[88] It is therefore more accurate to assume interest compounding at each period, which brings the annualised interest rate to 3,786 percent.[89] In the United States, payday loans are available "in 36 states, with annual percentage rates averaging 391 percent" (non-compounded).[90] The very poor dedicate a significant portion of their income (some 10%) to services, such as cheque cashing, that those with a bank account get for free, which contributes to a cycle of poverty, marginalisation, and bankruptcy.[91]

Alternative financial services providers generally extend credit for very short periods of time (often two weeks). The very poor must rely on this short-term credit for longer-term needs, often falling into a debt spiral.[92] (Of course, this longer-term need often results from the high and

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[88] See Michael A Stegman & Robert Faris, "Payday Lending: A Business Model That Encourages Chronic Borrowing" (2003) 17:1 Economic Development Quarterly 8; Austin, "Of Predatory Lending", *supra* note 52 at 1222; Baradaran, "Small-Dollar Loan", *supra* note 40 at 91; Bourke, *supra* note 55; "Payday Loans: Market Trends", *supra* note 63.

[89] See Lord, "Ending Poverty", *supra* note 86. In other words, expressing an annual interest rate is essentially meaningless when a short-term loan is used for long-term borrowing. Compounding exponentially increases the stated annual interest rate.

[90] Bourke, *supra* note 55. See also Christopher L Peterson, "Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits" (2008) 92:4 Minn L Rev 1110 at 1139.

[91] See Baradaran, "It's Time for Postal Banking", *supra* note 40 at 166–67; Baradaran, "Small-Dollar Loan", *supra* note 40 at 123; Coco & De Meza, *supra* note 81; Austin, "Of Predatory Lending", *supra* note 52; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35; Baradaran, "Banking and the Social Contract", *supra* note 82; Oren Bar-Gill & Elizabeth Warren, "Making Credit Safer" (2008) 157:1 U Penn L Rev 1; Caskey, *supra* note 40. These issues undoubtedly help explain the significantly lower social mobility experienced by the very poor. See Corak, "Divided Landscapes of Economic Opportunity", *supra* note 36; Corak, "Do Poor Children Become Poor Adults?", *supra* note 36; Reeves, *Dream Hoarders*, *supra* note 36.

[92] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35; Drysdale & Keest, *supra* note 55; Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1108; Austin, "Of Predatory Lending", *supra* note 52 at 1222 ("The typical two-week time frame of the payday loan leaves borrowers with little opportunity to accumulate the surplus required to pay off the debt. Rollovers are quite common. The borrower can pay a fee to extend the loan which means that the lender keeps the check and the borrower has an additional two weeks to redeem it. Alternatively, the borrower can take out a new loan with the same or a different payday lender and use the proceeds of the new loan to pay off the old obligation. […] [C]ustomers become entrapped in what sympathetic commentators consider an 'insidious downward spiral' or 'a vicious cycle of indebtedness'" [references omitted]); Baradaran, "Small-Dollar Loan", *supra* note 40 at 91 ("The loan is technically one pay cycle, but these loans are often 'rolled over,' which

compounding interest rates charged by alternative financial services providers.) The very poor quickly need take on ever-increasing loans to pay back principal and interest on maturing loans.

5. Products and Services Provided to the Very Poor

Alternative financial services providers offer various services and credit products, which generally match the characteristics described above. I use the words "product" and "service" in their usual sense. Services provided by alternative financial services providers usually replace bank accounts and ancillary operations, such as cashing a cheque or depositing funds. Credit products offered by alternative financial services providers replace traditional lending. These products and services include payday lending, earned wage access programs, cheque cashing, pawnbroking, automobile title lending, refund anticipation lending, and rent-to-own schemes.[93] I briefly discuss each of these below. At the end of this section, I also discuss prepaid cards. While not provided by alternative financial services providers, they similarly serve as a substitute to the banking system.

means that they are renewed for a fee"). Recent United States data shows that the average individual who holds a payday loan is indebted for five months of the year and is charged an average of 520 dollars in fees to repeatedly borrow 375 dollars. 80 percent of payday loans are requested within two weeks of an earlier loan, and 75 percent of borrowers obtain 11 or more loans per year. See Bourke, *supra* note 55. The data shows that this problem is less acute in Canada. Nonetheless, most Canadian borrowers report having used payday loans multiple times over a three-year period. See "Payday Loans: Market Trends", *supra* note 63.

[93] Together, these products and services fully replace the traditional banking system for those who are unbanked or underbanked. The only component missing from that alternative financial system is, saliently, a savings product. See also Lamb, "Aboriginal Fringe Finance Use", *supra* note 43 at 276 ("finance institutions do not offer developmental services for long-term financial planning").

Payday lending is the most common service provided by alternative financial services providers.[94] Recent data shows four percent of Canadians resort to payday loans, a figure which has doubled in recent years.[95] Customers of these providers are able to borrow against future income, essentially the following week's paycheque.[96] While, as noted, the approval process for such loans is far quicker than that of traditional banks,[97] alternative financial services providers still require proof of income and stable employment, which arguably makes these loans almost as safe as secured loans. As mentioned above, payday lenders generally require either a post-dated cheque or access to the borrower's bank account.[98]

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[94] See Baradaran, "Small-Dollar Loan", *supra* note 40 at 90-91 ("Currently, the most common fringe loans are payday loans, which are permitted in thirty-eight states. There are more payday lender branches today than there are McDonald's or Starbucks stores, without even counting online lenders"). It is also the most analysed in academic research. See also at "President Obama Remarks on Consumer Protection and the Economy" (26 March 2015), online (video): <https://www.c-span.org/video/?325030-1/president-obama-remarks-consumer-protection-economy> at 21m:04s ("I want to just break this down for folks. Every year, millions of Americans take out these payday loans – here in Alabama, there are four times as many payday lending stores as there are McDonald's. Think about that. Because there are a lot of McDonald's"); Peterson, *supra* note 90 at 1111.

[95] See "Payday Loans: Market Trends", *supra* note 63. See also Jerry Buckland, "Payday Lending Literature Review" (3 May 2023), online: *Public Utilities Board* <http://www.pubmanitoba.ca/v1/payday_loan/buckland_payday_literature_review_may%203_13.pdf>.

[96] See Ben-Ishai, "Regulating Payday Lenders in Canada", *supra* note 71 at 325; Baradaran, "Small-Dollar Loan", *ibid*; Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1106; Barr, Dokko & Keys, *supra* note 43 at 136-37. See also Christopher, "Mobile Banking", *supra* note 40 at 229; Austin, "Of Predatory Lending", *supra* note 52 at 1219; Lamb, "Financial Exclusion and Financial Capabilities", *supra* note 43; Drysdale & Keest, *supra* note 55 at 600-605; Johnson, *supra* note 40; Huckstep, *supra* note 40.

[97] See Stegman & Faris, *supra* note 65 at 13; Austin, "Of Predatory Lending", *supra* note 52 at 1247; Christopher, "Mobile Banking", *supra* note 40 at 225; Greene, *supra* note 35 at 303; Caskey, *supra* note 40; Ben-Ishai, "Regulating Payday Lenders in Canada", *supra* note 71 at 330; "How America Banks: Household Use of Banking and Financial Services", *supra* note 40 at 17; Johnson, *supra* note 40; Huckstep, *supra* note 40.

[98] See Bourke, *supra* note 55; Fritzdixon, Hawkins & Skiba, *supra* note 43 at 1035; Austin, "Of Predatory Lending", *supra* note 52 at 1241; Baradaran, "Small-Dollar Loan", *supra* note 40 at 91; Ben-Ishai, "Regulating Payday Lenders in Canada", *supra* note 71 at 325; Barr, Dokko & Keys, *supra* note 43 at 136-37; Drysdale & Keest, *supra* note 55 at 600-601; Johnson, *supra* note 40; Huckstep, *supra* note 40.

Earned wage access programs are a recently created service[99] through which employees can gain access to wages they have earned (relating to hours they have worked) before the next payroll processing date.[100] These programs are thought to displace the payday lending industry by providing a cheaper and more accessible option to meet short-term liquidity needs.[101] They do differ from payday loans in a number of ways. Interest is not charged to the customer. Instead, the programs are funded through fixed or variable fees, which may be paid in whole or in part by the employer as a retention strategy.[102] However, they bear many similarities with payday loans. Both lenders and regulators adopt a number of categorisations of the fees charged to customers for

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[99] Like many of my contemporaries, I am reluctant to use the phrase "financial innovation," which is often used to describe these programs.

[100] See generally Cuttino, *supra* note 53; Jim Hawkins, "Earned Wage Access and the End of Payday Lending" (2021) 101:2 BUL Rev 706 [Hawkins, "Earned Wage Access"]. See also "DailyPay Instant Access to Earned Income: An On-Demand Pay Benefit", online: *ADP Marketplace* <https://apps.adp.com/en-US/apps/221925/dailypay-instant-access-to-earned-wages> ("Bills, rent, and emergencies don't always coincide with traditional pay periods. PAY from DailyPay eliminates the uncertainty associated with a paycheck and gives employees access to their pay and tips when they need it, and the ability to plan — before payday arrives. We reduce financial stress and increase financial stability"). There is significant, and legitimate, debate as to whether these programs can be classified as a "money transmission" service. They share many of the characteristics of payday loans. Overdraft protection, which is discussed in the text accompanying notes 77 to 80, above, raises the same issues.

[101] While this industry has grown to process billions of dollars in yearly transactions, it remains a comparatively small portion of the overall market for lending to unbanked and underbanked borrowers, which is estimated to be worth 80 billion US dollars. See Karen Graham & Elaine Golden, "Financially Underserved Market Size Study: 2019", online: *Financial Health Network* <https://finhealthnetwork.org/research/2019-financially-underserved-market-size-study/>. See also Kevin Dugan, "Popular Cash Advance App Earnin Operating in Payday Loan 'Gray Area,' Critics Claim", *The New York Post* (21 March 2019), online: <https://nypost.com/2019/03/21/popular-cash-advance-app-earnin-operating-in-payday-loan-gray-area-critics-claim/> ("Earnin doesn't disclose its valuation, but The New York Times recently put it on a list of 'potential unicorns,' meaning its value could exceed $1 billion").

[102] See Cuttino, *supra* note 53; Hawkins, "Earned Wage Access", *ibid*. A limited number of these programs involve solely voluntary payments ("tips"), though there appear to be limitations to accessibility for users who choose not to make a voluntary payment. See *ibid* at 1522-1523. See also "Does Earnin Charge Fees or Interest?", online: *Earnin* <https://help.earnin.com/hc/en-us/articles/223283747-Does-Earnin-charge-fees-or-interest-> ("Earnin does not charge mandatory fees, interest, or have any hidden costs to use the app. We rely on our community's support by voluntarily tipping what they think is fair when they use the app. When you tip at Cash Out, you're supporting us and an entire community of people, but there are no mandatory fees or interest"). Another potential benefit of these programs is that the provider generally has access to real-time information regarding payroll and hours worked. This information is more reliable than that provided to payday lenders.

payday loans, and this characterisation is part of why lenders can be exempted from the usury provision of the *Criminal Code*.[103] Quite saliently, though, payday loans and earned wage access programs both involve a payment by the customer (however labelled) for short-term, immediate access to funds.[104] Both serve the very poor,[105] and both seek to respond to some of the reasons why the very poor choose not to resort to traditional financial services providers.[106] The data suggests that users of earned wage access programs, like payday borrowers, use these short-term solutions to fund longer-term credit needs.[107]

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[103] *Criminal Code*, *supra* note 85, s 347.

[104] As noted, the very poor tend to be less educated and financially sophisticated. See e.g. Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 483; Fritzdixon, Hawkins & Skiba, *supra* note 43; Baradaran, "Small-Dollar Loan", *supra* note 40; Bowles et al, *supra* note 43; Barr, Dokko & Keys, *supra* note 43 at 136-37; Lamb, "Financial Exclusion and Financial Capabilities", *supra* note 43; Lamb, "Aboriginal Fringe Finance Use", *supra* note 43; Statistics Canada, *Postsecondary Education*, *supra* note 48. See also "Payday Loans: Market Trends", *supra* note 63. See also Jeff Sovern, "Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs" (2006) 47:5 Wm & Mary L Rev 1635. The complexity of and diverse ways in which fees and interest are disclosed is a singular source of peril for financially and otherwise vulnerable borrowers. The *Truth in Lending Act of 1968* (*supra* note 77) mandates more uniform disclosure. See Mann, "After the Great Recession", *supra* note 63. However, it does not apply to earned wage access programs. Additionally, if we construe earned wage access programs as lending programs, the annual percentage rate is exceptionally difficult to calculate, as the fees and borrowing period vary with each loan.

[105] By relying on the average wages paid by employers which make such programs available to their employees, one scholar estimates that the average wage of users likely falls between 20,000 and 30,000 US dollars. See Cuttino, *supra* note 53 at 1525. This is admittedly a debatable methodology.

[106] See *ibid* at 1526 ("Historically, low-income borrowers have placed a high premium on easy access to funds, flat fees, and privacy, all of which are provided by earned-wage programs"). This relates to my discussion of the façade of information and is supported by empirical data. See Austin, "Of Predatory Lending", *supra* note 52 at 1229; Baradaran, "Small-Dollar Loan", *supra* note 40 at 89; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35 at 495; "How America Banks: Household Use of Banking and Financial Services", *supra* note 40.

[107] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 35; Drysdale & Keest, *supra* note 55; Atkinson, "Rethinking Credit as Social Provision", *supra* note 44 at 1108; Austin, "Of Predatory Lending", *supra* note 52 at 1222; Baradaran, "Small-Dollar Loan", *supra* note 40 at 91; Bourke, *supra* note 55; Cuttino, *ibid* at 1549.

Pawn lending involves a loan to a customer secured by an underlying asset (personal property) that is given to the lender for the duration of the loan.[108] Pawn loans are also more widely accessible, as they do not generally require credit or employment verifications.[109] Much like payday lending, pawn lending involves a fixed – and high – interest rate or fee for short-term lending (typically two weeks to a month).[110] The customer is only able to borrow some 20 percent of the value of the pawned item, but, unlike with other products and services offered by alternative financial services providers, their total debt obligation is capped – and cannot exceed the value of the item.[111] As a result, pawn loans have been labelled "the oldest and perhaps least financially ruinous form of fringe loans."[112]

Automobile title loans are, like the other forms of credit provided by alternative financial services providers "high-cost, short-term, small-dollar loans."[113] They are secured by an automobile that "the borrower usually owns outright."[114] The most common term for these loans

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[108] See Baradaran, "Small-Dollar Loan", *supra* note 40 at 95; Barr, Dokko & Keys, *supra* note 43 at 139-40. See also Christopher, "Mobile Banking", *supra* note 40 at 229; Austin, "Of Predatory Lending", *supra* note 52 at 1219; Lamb, "Financial Exclusion and Financial Capabilities", *supra* note 43; Drysdale & Keest, *supra* note 55 at 597-600.

[109] See Baradaran, "Small-Dollar Loan", *ibid.*

[110] See *ibid*.

[111] See *ibid*.

[112] See *ibid*.

[113] Fritzdixon, Hawkins & Skiba, *supra* note 43 at 1014. See also Austin, "Of Predatory Lending", *supra* note 52 at 1230; Christopher, "Mobile Banking", *supra* note 40 at 229; Drysdale & Keest, *supra* note 55 at 600-605; Jim Hawkins, "Credit on Wheels: The Law and Business of Auto-Title Lending" (2012) 69:2 Wash & Lee L Rev 535 at 537-38; Baradaran, "Small-Dollar Loan", *supra* note 40 at 93-94 ("In states where payday lending is prohibited, title loans often take its place" at 93). Automobile title loans have received the least attention in academic research. See e.g. Hawkins, "Credit on Wheels", *ibid* at 538.

[114] Fritzdixon, Hawkins & Skiba, *supra* note 43 at 1014. See also Austin, "Of Predatory Lending", *supra* note 52 at 1230; Christopher, "Mobile Banking", *supra* note 40 at 229; Baradaran, "Small-Dollar Loan", *supra* note 40 at 93-

is one month, with an annual interest rate of 300 percent.[115] The median loan-to-value ratio is 26 percent.[116] In other words, borrowers are only able to borrow 26 percent of the value of the automobile. As for pawn lending, given the secured nature of the loan and the low loan-to-value ratio, the interest rate appears unrelated to the underlying credit risk. The borrower retains the automobile throughout the loan period, and the lender can repossess it if the borrower defaults on the loan.[117] Repossession can have devastating consequences on borrowers, who often rely on their automobile to work.[118] Title lenders operate in 21 U.S. states.[119]

94; Hawkins, "Credit on Wheels", *supra* note 113 at 538; Susanna Montezemolo, "The State of Lending in America & its Impact on U.S. Households" (July 2013), online: *Center for Responsible Lending* <https://www.responsiblelending.org/sites/default/files/uploads/7-car-title-loans.pdf>.

[115] See Fritzdixon, Hawkins & Skiba, *supra* note 43 at 1014-15; Hawkins, "Credit on Wheels", *supra* note 113. See also Baradaran, "Small-Dollar Loan", *supra* note 40 at 91.

[116] See Montezemolo, *supra* note 114.

[117] See Fritzdixon, Hawkins & Skiba, *supra* note 43 at 1014-15; Hawkins, "Credit on Wheels", *supra* note 113 at 538; Baradaran, "Small-Dollar Loan", *supra* note 40 at 93. See Montezemolo, *supra* note 114 (finding that at least one in six borrowers faces repossession and that repossession fees significantly add to the borrower's debt).

[118] See Fritzdixon, Hawkins & Skiba, *supra* note 43 at 1015; Drysdale & Keest, *supra* note 55 at 600; Hawkins, "Credit on Wheels", *supra* note 113 at 538 ("It is not surprising that this transaction creates concern among policymakers because it involves people […] risking what is potentially their most valuable asset and their only means of transportation"); Drysdale & Keest, *supra* note 55 at 600; Kate Elengold, "Debt and Physical Mobility", California Law Review [forthcoming in 2023], online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366039> at 51 ("Transportation-induced social exclusion limits individuals, families, and communities from accessing economic, educational, and social opportunities, exacerbating the economic disadvantage and isolation in their communities. Unsurprisingly, scholars have found a connection between lack of transportation and social unrest. In addition to the general sense of belonging to a larger community and accessing a wide array of opportunities, lack of transportation also affects access to healthy foods, housing opportunities, and individual and public health outcomes"); Robert D Bullard, "Addressing Urban Transportation Equity in the United States" (2003) 31:5 Fordham Urb LJ 1183; Pamela Foohey, Robert M Lawless & Deborah Thorne, "Driven to Bankruptcy" (2020) 55:2 Wake Forest L Rev 287. This leads borrowers to repeatedly renew their loans to retain possession of the automobile. See Jean Ann Fox et al, "Driven to Disaster: Car-Title Lending and Its Impact on Consumers" (28 February 2013), online: *Center for Responsible Lending* <https://www.responsiblelending.org/research-publication/driven-disaster> ("The average car-title borrower renews a loan eight times, paying $2,142 in interest for $951 of credit").

[119] See Montezemolo, *supra* note 114.

Refund anticipation lending involves a short-term, high-interest-rate loan secured by the anticipated tax refund that the customer will receive.[120] These loans are available at the offices of tax preparers.[121] The tax preparer partners with an alternative financial services provider, and both receive a fee for originating the loan.[122] Like payday loans, refund anticipation loans are secured against future income. As the projected tax refund is calculated by a tax professional, they arguably involve very limited credit risk.

Rent-to-own schemes allow customers to eventually own personal property (often furniture) by making periodic payments.[123] Like other products and services offered by alternative financial services providers, these schemes are extremely costly. Their cost significantly exceeds that of traditional installment sales for the same items.[124] In Canada, the data shows: "[R]ent-to-own consumers who acquire merchandise through the completion of all their periodic payments typically pay 2.0 to 3.4 times the cost of purchasing the same merchandise at conventional retailers. This reflects two factors. First, consumers typically pay 40 to 100 per cent more through periodic payments than if they purchased the item at the outset. Second, rent-to-own 'buy it today' prices

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[120] See Drysdale & Keest, *supra* note 55 at 612-14; Austin, "Of Predatory Lending", *supra* note 52 at 1219; Barr, Dokko & Keys, *supra* note 43 at 140-42.

[121] See Barr, Dokko & Keys, *supra* note 43 at 140; Drysdale & Keest, *supra* note 55 at 612-14.

[122] See Barr, Dokko & Keys, *supra* note 43 at 140; Drysdale & Keest, *supra* note 55 at 612-14. The sources highlight that the interest rate or fees are generally not adequately disclosed and that some customers do not understand that they are paying for the loan.

[123] See Drysdale & Keest, *supra* note 55 at 614-16; Austin, "Of Predatory Lending", *supra* note 52 at 1219; Barr, Dokko & Keys, *supra* note 43 at 142-43.

[124] See Drysdale & Keest, *supra* note 55 at 614-16; Barr, Dokko & Keys, *supra* note 43 at 142-43. These schemes are also more lightly regulated. See also Drysdale & Keest, *supra* note 55 at 614 (noting that the market for these schemes significantly exceeds the market for installment sales).

are also typically higher than prices at conventional retailers – from 20 per cent higher for refrigerators to 150 per cent higher for laptop computers."[125] Rent-to-own lenders are "permitted in most U.S. states but are concentrated in states with the fewest other credit options for lower-income individuals."[126] The terms of rent-to-own schemes will usually provide for repossession of the item if the customer fails to make one of the periodic payments.[127] In other words, although the cumulative payments will often significantly exceed the value of the item and its fair rental value, the customer will permanently lose the right to own the item.

Cheque cashing is an example of a *service* provided by alternative financial services providers – in contrast to the credit products listed above. By providing this service, these providers replace the traditional banking system. Cheque cashers charge a fee to convert a customer's cheque

[125] Denise Barrett, *Consumer Experiences With Rent-to-Own* (Toronto: Consumers Council of Canada, 2016). Inflated prices reduce the effective interest rate, which helps remove the transaction from the purview of applicable legislation.

[126] Mann & Hawkins, *supra* note 81 at 893. Like in Canada, these lenders will escape most interest caps.

[127] See Barr, Dokko & Keys, *supra* note 43 at 142. The data suggests that fewer than 25 percent of customers rent long enough to own the item.

to cash.[128] As noted above, those with a bank account generally get this service for free.[129] Cheque cashers provide immediate access to the funds (unlike banks) for a significant fee.[130]

Recent Canadian data suggests that 52.3 percent of users of alternative financial services providers use payday loans, 50 percent use cheque cashing services, 20.3 percent make rent-to-own purchases, and 12.5 percent request an automobile title loan.[131]

It is worth briefly mentioning that prepaid, reloadable cards also serve to substitute the banking system. I discuss them separately because, unlike the products and services discussed above, they are not typically provided by alternative financial services providers. They can be purchased from grocery stores, drug stores, and postal outlets.[132] These cards are generally issued

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[128] See Christopher, "Mobile Banking", *supra* note 40 at 229; Austin, "Of Predatory Lending", *supra* note 52 at 1219; Lamb, "Financial Exclusion and Financial Capabilities", *supra* note 43; Drysdale & Keest, *supra* note 55; Ben Gran & Daphne Foreman, "What Is A Check-Cashing Service?", *Forbes* (8 January 2021), online: <https://www.forbes.com/advisor/banking/what-is-a-check-cashing-service/>; "Cheque Cashing: Cash When You Need It!", *supra* note 65 ("We turn thousands of cheques into cash instantly at our 100+ locations. We offer cost-effective option and extended hours to serve you better. No waiting for your cheque to clear through a bank. And no bank account is required to cash your cheque with us"); "Cheque Cashing Service: From Personal to Payroll, We're Ready to Cash!", *supra* note 65.

[129] See Baradaran, "It's Time for Postal Banking", *supra* note 40 at 166–67. In Canada, sections 627.25 and 627.26 of the *Bank Act* (*supra* note 77) requires banks to cash government-issued cheques for free.

[130] See e.g. Peggy D Hamilton, "Why the Check Cashers Win: Regulatory Barriers to Banking the Unbanked" (2007) 30:1 W New Eng L Rev 119 at 128.

[131] See Fantauzzi, *supra* note 40.

[132] See Morgan Ricks, "Money as Infrastructure" [2018] Colum Bus L Rev 757 at 833-36; "Canada Post Prepaid Reloadable Visa Card: A Simple and Secure Prepaid Card for All Your Needs", online: *Canada Post* <https://www.canadapost-prepaid.ca/>; "Getting to Know Cash Passport", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/manage-money/prepaid-cards/mastercard/overview.page?>; "Prepaid Reloadable Cards", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/manage-money/prepaid-cards/mastercard/overview.page?>; "Giving Gifts Has Never Been Easier: Mastercard® Prepaid Gift Card", online: *Mastercard* <https://www.mastercard.ca/en-ca/personal/find-a-card/gift-card.html>; "Frequently Asked Questions", online: *Mastercard* <https://www.mastercard.ca/en-ca/frequently-asked-questions.html>. See also "2022 Annual

by credit card providers. They fully replace banking and credit cards, allowing user to make purchases and withdrawals as they would with a regular banking or credit card. They facilitate the conversion of cash into electronic forms of money, which is especially problematic for those who lack a bank account. Providers often promote aspects of prepaid cards that respond to the needs of the very poor, such as lower fees and the lack of credit verification.[133] Recently, government agencies in certain North American jurisdiction began delivering social assistance through prepaid, reloadable cards – ostensibly when they recognised that the unbanked are unable to access welfare when it continues to require a physical address and be delivered through cheques.[134] Although the

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Report Canada Post Corporation: Financial Section", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/doc/en/aboutus/financialreports/2022-annual-financial-report.pdf> at 31 ("Over the last two years, we studied, tested, and confirmed that there are financial needs across the country that Canada Post is uniquely positioned to fill. We are working on more ways to expand our financial services as part of our commitment to deliver more for Canadians. This includes a strategy that considers Canada Post's reach into Indigenous communities across the rural and remote Canadian landscape to address the needs of these communities from a financial literacy and financial inclusion perspective. […] In 2022, we successfully relaunched the Canada Post Prepaid Reloadable Visa card and Visa Single Load Prepaid Card in partnership with Payment Source and issuing bank Peoples Trust"); David C Williams, "Bank on the Post Office to Save America's 'Bank Deserts'", *Los Angeles Times* (2 April 2014), online: <www.latimes.com/opinion/la-xpm-2014-apr-02-la-oe-williams-post-office-banks-20140331-story.html>.

[133] See e.g. "Canada Post Prepaid Reloadable Visa Card: A Simple and Secure Prepaid Card for All Your Needs", *supra* note 132 ("No credit check or bank account is required to open an account and you never have to worry about interest charges"); "Getting to Know Cash Passport", *supra* note 132 ("Not linked to your bank account").

[134] Ontario's two major social assistance program, Ontario Works and Ontario Disability Support Program, are delivered through prepaid, reloadable cards. See "RBC Right Pay® Visa Prepaid Card", online: *RBC Royal Bank* <https://www.rbcroyalbank.com/business/campaign/_assets-custom/pdf/RightPay_InfoBrochure_01.2020_English_121110.pdf>; "RBC Right Pay Prepaid Card Reloadable Program FAQs: Overview of the RBC Visa Right Pay Prepaid Card", online: *RBC Royal Bank* <http://www.rbcroyalbank.com/credit-cards/documentation/pdf/Reloadable-FAQs-EN-Toronto.pdf>; "Ontario Introduces Reloadable Payment Card for Social Assistance: Province Offering New, Safer Option for Clients" (16 May 2016), online: *Ontario* <https://news.ontario.ca/en/release/38841/ontario-introduces-reloadable-payment-card-for-social-assistance>; Ontario Works, Policy No H.11.6, "Reloadable Payment Cards" (27 April 2020); Paul Morden, "Prepaid Cards Could Replace Ontario Works Cheques for Some Clients", *The Sarnia Observer* (21 January 2020), online: <https://www.theobserver.ca/news/local-news/prepaid-cards-could-replace-ontario-works-cheques-for-some-clients>; Laurie Monsebraaten, "Ontario Trades Cheques for Debit Cards for Disabled People on Welfare", *The Toronto Star* (16 May 2016), online: <https://www.thestar.com/news/gta/ontario-trades-cheques-for-debit-cards-for-disabled-people-on-welfare/article_2e648b30-7181-54e8-bc70-bfc21657aab5.html?>. The cards can only be loaded with Ontario Works payments. While the descriptive documents note that certain fees may be applicable, they refer to a web page which can only be viewed by card users. See "RBC Right Pay Fee Information", online: *RBC Royal*

fees of prepaid cards are undoubtedly lower than those charged by alternative financial services providers for cheque cashing, they remain high – especially given that those with a bank account generally get the same services for free. The prepaid cards offered by Canada Post are sold for 10-15 dollars, cost 3 dollars per month, and can be reloaded for 3 dollars.[135]

6. <u>The State as a Creditor of the Very Poor</u>

Bank <https://ca.visaprepaidprocessing.com/rbc/gov/Program/Fee>. Other sources suggest that there are no usage fees, and that ATM withdrawal fees are 2 dollars per withdrawal from the fifth monthly withdrawal. See “Ontario Works Assistance Payment Methods”, online: *Toronto* <https://www.toronto.ca/community-people/employment-social-support/support-for-people-in-financial-need/assistance-through-ontario-works/ontario-works-assistance-payment-methods/>. See also “Electronic Benefits Transfer (EBT)”, online: *Department of Social Services* <https://www.cdss.ca.gov/inforesources/ebt> (in California); “Alberta Government Prepaid Cards”, online: *Alberta* <https://www.alberta.ca/alberta-government-prepaid-cards.aspx>; Stacia West et al, “Preliminary Analysis: SEED’s First Year” (2021), online: *Stockton Economic Empowerment Demonstration* <https://static1.squarespace.com/static/6039d612b17d055cac14070f/t/603ef1194c474b329f33c329/1614737690661/SEED_Preliminary+Analysis-SEEDs+First+Year_Final+Report_Individual+Pages+-2.pdf> at 12; David J Kennedy, “Due Process in a Privatized Welfare System” (1998) 64:1 Brook L Rev 231 at 267-275 (discussing privacy risks resulting from analogous programs); Ari M Cohen, “Protecting the Underserved: Extending the Electronic Fund Transfer Act and Regulation E to Prepaid Debit Cards” (2010) 5:1 Brooklyn Journal of Corporate, Financial & Commercial Law 215 (discussing the regulatory context of prepaid cards in the United States); Karen K Harris & Ji Won Kim, “The Next Frontier in Public Benefits Electronic Benefit Cards” (2011) 45:1 Clearinghouse Review 42 (discussing early iterations of prepaid cards usage in government programs in the 2000s and the regulatory context of prepaid cards in the United States); Miranda Perry Fleischer & Daniel J Hemel, “Atlas Nods: The Libertarian Case for a Basic Income” 2017:6 Wis L Rev 1189 at 1245 (“Most states, for example, provide Temporary Assistance for Needy Families (TANF) funds through electronic benefit transfer (EBT) cards”); Rourke O’Brien, “We Don’t Do Banks: Financial Lives of Families on Public Assistance” (March 2012), online: *New America Foundation* <https://static.newamerica.org/attachments/3772-we-dont-do-banks/RourkeMarch2012.280c7e858336448499de926c84038108.pdf>. Ontario Works is further discussed in the text accompanying notes 158, 159, 167, and 168, below.

A significant benefit of delivering social assistance through prepaid cards is that the funds are instantly accessible. In contrast, when beneficiaries receive a cheque, they must wait for funds to be available after cashing – which, as noted, drives many to rely on cheque cashing services.

[135] See “Prepaid Reloadable Cards”, *supra* note 132. Additionally, one might argue that prepaid card providers take on no risk that would justify these fees.

Until the MyMoney Loan program discussed in chapter V, this was ostensibly the only market area where Canada Post directly competed with alternative financial services providers.

While alternative financial services providers are a significant creditor of the very poor (and correspondingly contribute to extreme poverty), the state also plays a complex and multifaceted role in extreme poverty. The next chapter discusses most aspects of that role. At times, the state acts as a *creditor* of the very poor. I discuss the state's role as a creditor separately because the state's characteristics significantly differ from those of alternative financial services providers. The state has unique power in creating and collecting debts and, as a result, proportionately contributes to entrenching extreme poverty.

There are two main categories of debts owed to the state. The first result from government programs.[136] Individuals will generally either have misstated personal information (intentionally or not) in obtaining government benefits, or the state will have mistakenly overpaid them. The second result from the justice system, often from various fees or fines related to criminal, quasi-criminal, and penal offenses.[137] In collecting these debts, the government benefits from collection

[136] See generally Ben-Ishai, Schwartz & Barretto, *supra* note 71.

[137] See generally Ben-Ishai & Nayerahmadi, *supra* note 71; Skolnik, "Rethinking Homeless People's Punishments", *supra* note 71; Sylvestre, Blomley & Bellot, *supra* note 71. See also Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43:3 Fordham Urb LJ 741; Jessica M Eaglin, "Improving Economic Sanctions in the States" (2015) 99:5 Minn Law Review 1837 ("a 2008 study demonstrated that incarcerating individuals for failure to pay debts in many instances resulted in the state spending more money on enforcement than the offenders owed in total court debt" at 1853); Torie Atkinson, "A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons" (2016) 51:1 Harv CR-CLL Rev 189 ("Today, legal financial obligations are imposed on a substantial majority of those convicted of crimes, both petty and serious, each year" at 194); Neil L Sobol, "Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses" (2017) 88:4 U Colo L Rev 841; Saul Schwartz, ed, *Oppressed by Debt: Government and the Justice System as a Creditor of the Poor* (New York: Routledge, 2022). These schemes create agency issues and conflicts of interests as collection activities are outsourced to third parties and revenue beneficiaries, such as municipalities, desperately need additional revenue. See also Samir D Parikh, "A New Fulcrum Point for City Survival" (2015) 57:1 Wm & Mary L Rev 221; Sobol, *ibid* at 860 ("Promotion of police officers was based on the number of tickets issued. Additionally, daily postings at the police station highlighted the top ticket producers"); Atkinson, *ibid* at 200 ("Fines and fees are disproportionately assessed against minorities"). This debt is often deemed involuntary. See e.g. Ben-Ishai & Nayerahmadi, *supra* note 71 at 208 ("Debt is often seen as a middle-class problem. A person funds purchases through

options that are unavailable to private creditors. It may reduce the amount of government benefits payable to the very poor, or seize tax refunds or tax credits.[138] As two scholars put it, "the government, which is often their most important creditor, controls their income."[139] For instance, Ontario social assistance payments may be reduced by up to ten percent to compensate for an overpayment.[140] Additionally, in parts of the United States, an individual may be jailed for failure

credit, and then struggles to repay the loan. Underpinning this idea is the agency of the debtor: the borrower has access to credit, and chooses to spend beyond their means. Difficulty in repayment is the inevitable consequence of that decision. […] This narrative stands in stark contrast to […] the daily experiences of many homeless or indigent offenders").

[138] See Ben-Ishai, Schwartz & Barretto, *supra* note 71. Certain tax credits, such as the National Child Tax Benefit and the Universal Child Care Benefit, cannot be subject to set off (government seizure) (*ibid* at 556-57). Provincial agencies must each have an agreement with the Canada Revenue Agency. The Agency requires that debts be deemed unrecoverable by the collaborating agency and has additional safeguards in place for financial hardship and the protection of personal information. See "Privacy Impact Assessment Summaries: Individual Refund Set-Off Program v 2.0" (12 April 2022), online: *Canada Revenue Agency* <https://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/protecting-your-privacy/privacy-impact-assessment/individual-return-set-off-program.html>. The Office of the Auditor General of Ontario has repeatedly argued that agencies should be more aggressive in collecting these debts. See e.g. "Ministry of Community and Social Services: Ontario Disability Support Program" (2009), online: *Office of the Auditor General of Ontario* <https://www.auditor.on.ca/en/content/annualreports/arreports/en09/309en09.pdf>. Given the natural incentive of state actors to collect these funds as state revenue, the exercise of their discretion might best be left unquestioned.

[139] *Ibid* at 544.

[140] See *ibid* at 548; "Ontario Works Policy Directives: 9.3 Recovery of Overpayments" (May 2019), online: *Ontario* <https://www.ontario.ca/document/ontario-works-policy-directives/93-recovery-overpayments#:~:text=Overpayments%20on%20active%20cases%2C%20including,is%2010%25%20of%20budgetary%20requirements>. This is done for the Ontario Works program and the Ontario Disability Support Program. These programs are further discussed below.

to pay a debt resulting from the criminal justice system.[141] In all states, individuals can see their driver's license suspended for failure to pay such a debt.[142]

The impact of these debts, and of the state's collection methods, is particularly acute for individuals who are already financially disadvantaged.[143] They contribute to driving the very poor to detrimentally rely on alternative financial services providers and heighten the risk of insolvency.[144] The state's distinct collection methods allow for the collection of funds from individuals who would otherwise be protected by statute – who are deemed "judgment-proof" because they lack the assets and income to repay their debts.[145]

Furthermore, the very poor often do not benefit from the debt relief mechanisms that are available to the middle class. The next chapter discusses how state programs disproportionately

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[141] See "Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor" (February 2014), online: *ACLU Washington* <https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf> ("In Benton County, our investigation revealed that approximately 20% of the people in custody on any given day are being sanctioned for non-payment of [Legal Financial Obligations]" at 8; "At no point in the district court process did we see the court (1) advise people that ability to pay is a crucial issue; (2) inquire into a defendant's actual financial resources and expenses" at 10). See also Chrystin Ondersma, "Small Debts, Big Burdens" (2019) 103:5 Minn L Rev 2211; Eaglin, *supra* note 137. The criminalisation of poverty, in various forms, is a recurring theme that undergirds this project.

[142] See Elengold, *supra* note 118 at 33-35. See also Michael Leyendecker & Kate Elengold, "State Debt-Based Driver's License Suspension Laws" (8 February 2023), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4349752>. The same is true of car registrations. See Michael Leyendecker & Kate Elengold, "State Debt-Based Car Registration Suspension Laws" (8 February 2023), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4349773>. A discussion of the potentially devastating impact of losing access to one's automobile is provided in note 118, above.

[143] See Atkinson, *supra* note 137; Sobol, *supra* note 137.

[144] Needless to say, state funds dedicated to collection are funds that could otherwise be dedicated to social assistance. See also Tranjan, *supra* note 70 (finding that 35.8 percent of Canadian users of alternative financial services providers report government assistance as their main source of income).

[145] See e.g. *Execution Act*, RSO 1990, c E.24; arts 2648, 2649 CCQ; arts 694-701 CCP.

benefit middle-income individuals by guaranteeing credit risk, mainly for residential properties and education, that the very poor cannot take on. Analogously, traditional debt relief mechanisms, such as credit counseling, debt management plans, and bankruptcy, are designed for the needs of middle-income individuals and often unavailable to the very poor.[146] Scholars have long pointed out that bankruptcy is often unavailable to the very poor because the cost of bankruptcy proceedings is simply too high for them to bear.[147] Some debts to the state remain non-

[146] This likely relates to the assumption that "judgment-proof" debtors are not affected by the consequences of indebtedness.

[147] See Ben-Ishai & Schwartz, *supra* note 71; Ronald J Mann & Katherine Porter, "Saving Up for Bankruptcy" (2010) 98:2 Geo LJ 289 ("[T]he primary factor that affects the date on which people actually file is their ability to save up the money to pay their attorneys and filing fees. Thus, among other things, we see an annual peak in bankruptcies shortly after families receive their tax refunds and a semimonthly peak related to the receipt of paychecks"); Ondersma, *supra* note 141; Ben-Ishai, Schwartz & Barretto, *supra* note 71; Stephanie Ben-Ishai, "The Gendered Dimensions of Social Insurance for the 'Non-Poor' in Canada" (2005) 43:3 Osgoode Hall LJ 289 [Ben-Ishai, "Gendered Dimensions of Social Insurance"]; Angela K Littwin, "The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success" (2011) 52:6 Wm & Mary L Rev 1933; Stephanie Ben-Ishai, Saul Schwartz, Alina Butt & Megan Linton, "Bankruptcy Lessons for Payday Lending Regulation" (2021) 72 UNBLJ 173; Pamela Foohey, Robert M Lawless, Katherine Porter & Deborah Thorne, "'No Money Down' Bankruptcy" (2017) 90:5 S Cal L Rev 1055. See also Pamela Foohey, "Access to Consumer Bankruptcy" (2018) 34:2 Emory Bankruptcy Developments Journal 341 (arguing that detrimental delays result from the fact that debtors must first see insolvency as a *legal* problem to which bankruptcy provides a solution); Dalié Jiménez, "Ending Perpetual Debts" (2018) 55:3 Hous L Rev 609 (arguing for automatic, periodic discharge of consumer debts); J David Griener, Dalié Jimenez & Lois Lupica, "Self-Help, Reimagined" (2017) 92:3 Ind LJ 1119 (advancing a proposal to empower consumer debtors to represent themselves in the bankruptcy process). In the United States, the cost of bankruptcy leads many debtors to file a Chapter 13 bankruptcy instead of Chapter 7 bankruptcy because, while the costs of a Chapter 13 bankruptcy may be higher, they can be paid over time (instead of upfront). Chapter 7 bankruptcies offer an immediate discharge, while Chapter 13 bankruptcies require debtors to continue paying their debts for a period of time. This has a regressive impact and partly explains why marginalised groups (especially African Americans) disproportionately file Chapter 13 bankruptcies. See e.g. Foohey, Lawless, Porter & Thorne, "'No Money Down' Bankruptcy", *ibid*; Melissa B Jacoby, "Collecting Debts From the Ill and Injured: The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay" (2001) 51:2 Am U L Rev 229; Foohey, Lawless & Thorne, *supra* note 118 at 331 ("Until the racial disparities in the consumer bankruptcy system are addressed, bankruptcy will continue to compound racial disparities in household finance and wealth"); Rory Van Loo, "A Tale of Two Debtors: Bankruptcy Disparities by Race" (2009) 72:1 Alb L Rev 231. See also Jean Braucher, Dov Cohen & Robert M Lawless, "Race, Attorney Influence, and Bankruptcy Chapter Choice" (2012) 9:3 J Empirical Leg Stud 393 (showing that African-American couples are more frequently recommended a Chapter 13 bankruptcy when they express the same preference; "Attorneys seem to thus be evaluating their white and African-American clients against different sets of standards or expectations about what it means to be a mature, competent, financially responsible couple. The competent African-American couple takes care of the mistakes of the past; the competent white couple wants a fresh start on their future" at 420). Some have also pointed out that the bankruptcy process allows

dischargeable in bankruptcy: bankruptcy will have no effect on them.[148] The state also gives priority to debts it is owed in the bankruptcy process.[149]

This chapter discussed the reality of those who are very poor, focussing on the reasons why and ways in which they access credit. The next chapter focusses on the role of the state in extreme poverty. It discusses how the states has sought to respond to the prevalence of poverty and the growing importance of alternative financial services providers over the past several decades. The chapter also discusses how the state has contributed, and continues to contribute, to redefining social provision, the way in which we perceive the legitimacy and nature of poverty, and how the very poor see themselves.

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bankrupts to retain significantly greater assets than the welfare system. See Ben-Ishai, "Gendered Dimensions of Social Insurance", *ibid* at 315. Bankruptcy is further discussed in the text accompanying notes 242 to 277, below.

[148] See *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178. The main one are provincial and federal student loans, which are discussed below. The section also references debts accrued through dishonest or criminal conduct. For a discussion of why this exclusion should not apply to debts related to social assistance, see Ben-Ishai, Schwartz & Barretto, *supra* note 71. For a discussion of why it should not apply to involuntary justice debt, see Ben-Ishai & Nayerahmadi, *supra* note 71.

[149] See *Bankruptcy and Insolvency Act*, *supra* note 148, s 81.

IV. The State and Extreme Poverty

This chapter first discusses how the state has responded to poverty. This analysis highlights how these responses have constitutively challenged our broader conception of poverty and social assistance. The chapter then discusses other social programs that involve credit. It highlights how these programs have disproportionately benefitted the middle class (instead of the poor). Finally, this chapter analyses how the state has responded to the growing importance of alternative financial services providers over the past several decades, and it provides a discussion of how the state has used bankruptcy law to respond to extreme poverty.

1. The State's Response to Poverty

The importance of credit provided by alternative financial services providers grew as the state gradually reduced the direct assistance it provides to the very poor. The most intuitive, and one of the most common, forms of assistance to alleviate poverty has been the provision of direct cash payments to the poor, through programs that are often labelled "welfare." For reasons that quickly become obvious as this chapter unfolds, I prefer the more neutral phrase "social assistance."[150] Over the past several decades, there has been a slow but marked social and political shift in how social assistance programs are designed and conceived. Governments and citizens

[150] See also Clara Loiseau, "Aide sociale : vivre avec moins de 1200 $ par mois, ça peut être l'enfer", *Le Journal de Montréal* (2 August 2022), online: <https://www.journaldemontreal.com/2022/08/02/vivre-avec-moins-de-1200-par-mois-ca-peut-etre-lenfer>.

developed a conviction that these programs disincentivise work and that some (or most) individuals who benefit from them are able but unwilling to work.[151] As a result, social assistance programs have been redesigned, purportedly to more strongly incentivise work and self-sufficiency. Most experts agree that these reforms have made the financial position of the poor yet more precarious, leading them to rely on alternative financial services providers.

Social assistance programs in Canada and the United States have many similarities. In the United States, they were formerly fully administered and remain funded by the federal government.[152] The significant reforms I discuss in this chapter, including the transfer of some of these responsibilities to the states, began with and happened largely through the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*.[153] In Canada, social assistance programs are administered by provincial governments. Social assistance programs generally take the form of direct cash assistance. For instance, the monthly benefit payment for a single person deemed able to work is 733 dollars per month in Ontario[154] and 633 dollars per month in Quebec.[155]

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[151] On analogous issues, see Tracy Smith-Carrier & Andrea Lawlor, "Realising Our (Neoliberal) Potential? A Critical Discourse Analysis of the Poverty Reduction Strategy in Ontario, Canada" (2017) 37:1 Critical Social Policy 105 (on the role of rhetoric); Angela K Littwin, "The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success" (2011) 52:6 Wm & Mary L Rev 1933 at 1937, 1943 ("All redistributive programs are subject to a deep ambivalence rooted in [a] fear of abuse" at 1937).

[152] See Greene, "The Bootstrap Trap" (2017) 67:2 Duke LJ 233.

[153] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub L No 104-193, 110 Stat 2105 (1996) (codified throughout 42 USC).

[154] See "Social Assistance" (last updated 8 August 2022), online: *Ontario* <https://www.ontario.ca/page/social-assistance>. The enabling statute is the *Ontario Works Act, 1997*, SO 1997, c 25.

[155] See "New Benefit Amounts: Social Assistance Program and Social Solidarity Program", online: *Travail, Emploi et Solidarité sociale* <https://www.emploiquebec.gouv.qc.ca/fileadmin/fichiers/pdf/Publications/00_nouv-montants-prestation_2018_A.pdf>. The enabling statute is the *Individual and Family Assistance Act*, SQ 2005, c 15.

In the United States, social assistance is provided through the Temporary Assistance for Needy Families (TANF) program.[156] Benefit payments differ somewhat significantly between states, but they are generally lower than those provided in Canada.

In Canada, the way in which social assistance is provided (through cash payments) has not changed over the past several decades. It has changed more significantly in the United States, as funds could be diverted by states to other programs that serve analogous purposes.[157] However, direct cash payments remain available. In both countries, the reconceptualisation of the role and importance of social assistance programs I mentioned earlier occurred through the addition of employment-related conditions to receiving social assistance, which often eventually make individuals ineligible for social assistance.

In Ontario, for example, social assistance is currently provided through the "Ontario Works" program,[158] which directly ties eligibility for monthly cash payments to actions related to

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[156] See Greene, *supra* note 152.

[157] See Greene, *ibid*.

[158] There are two major social assistance schemes in Ontario. The Ontario Works program, described above, covers the majority of individuals who show financial need. The Ontario Disability Support Program (ODSP) covers individuals with a disability and limited additional classes of individuals who are deemed members of "prescribed classes" – such as certain individuals over the age of 65 and certain individuals with mental health issues. The enabling statute for the ODSP is the *Ontario Disability Support Program Act, 1997*, SO 1997, c 25.

seeking and gaining employment.[159] Analogous conditions exist in other provinces.[160] In the early 2000s, Quebec's social assistance scheme drew significant attention as certain provisions of its enabling regulations were challenged before Quebec Courts and the Supreme Court of Canada.[161] The social assistance program had been modified in 1984 to limit the benefits that could be claimed by individuals under the age of 30 to approximately one third of the regular benefit payment.[162] These individuals were required to participate in employment-related training to receive an amount equal or slightly inferior to the regular benefit payment.[163] The plaintiff unsuccessfully sought to invalidate the relevant regulatory provisions, claiming that they violated sections 7 and 15 of the

[159] See "Social Assistance", *supra* note 154; "Working and Earning While on Ontario Works" (last updated 29 April 2022), online: *Ontario* <https://www.ontario.ca/page/working-and-earning-while-ontario-works> ("To be eligible for Ontario Works, you and adult members of your family must take part in approved activities that will help you find and keep a job. Together with your Ontario Works caseworker, you will develop an individual plan that is focused on improving your skills towards finding and keeping a job. The plan is updated regularly when you complete activities or begin new ones").

See also Katherine DeClerq & Abby O'Brien, "Ontario Has No Immediate Plans to Increase Social Assistance Funds Despite 'Steadily Growing' Caseload: Documents", *CP24* (28 July 2023), online: <https://www.cp24.com/mobile/news/ontario-has-no-immediate-plans-to-increase-social-assistance-funds-despite-steadily-growing-caseload-documents-1.6498456?referrer=https%3A%2F%2Fwww.google.com%2F>.

[160] See e.g. "New Benefit Amounts: Social Assistance Program and Social Solidarity Program", *supra* note 155; "Aide sociale : à savoir avant de faire une demande", online: *Éducaloi* <https://educaloi.qc.ca/capsules/aide-sociale-avant-faire-demande/>; "Employment and Income Assistance", online" *Manitoba* <https://www.gov.mb.ca/fs/eia/>.

[161] See *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin SCC*]; *Gosselin c Québec (Procureur général)*, [1999] RJQ 1033, 1999 CanLII 13818. The Supreme Court's decision was rendered over 10 years after the proceedings were instituted. The challenged provisions were repealed in the interim, but the plaintiff sought financial compensation for the violation of her *Charter* rights.

[162] See *Gosselin SCC*, *ibid* at 2, 7. On related issues, see Tom Gorman, "Riverside Plan Puts Welfare Recipients on Job Track: Social Services: GAIN Shows Participants How to Find Work. Plan Has Reduced County's Payments $16.8 Million", *The Los Angeles Times* (26 April 1993), online: <https://www.latimes.com/archives/la-xpm-1993-04-26-mn-27515-story.html> ("The five-day, 20-hour-long seminar tackles the nuts and bolts of how to find work. […] If the participant fails to cooperate, refuses or quits a job, or does not go to school or participate in other activities if required, he forfeits his welfare grant and receives only the money due his dependents, if any. […] Townsend explains it this way: 'Of course you have the option of not participating with us. If you don't, we will very cheerfully apply the sanction'"). This context of this source is discussed in the text accompanying note 186, below.

[163] See *ibid* at 7.

Canadian Charter of Rights and Freedoms.[164] A majority of the Supreme Court notes that the scheme was "based on the philosophy that the most effective way to encourage and enable young people to join the workforce was to make increased benefits conditional on participation in […] [employment] programs"[165] and sought to "encourage under-30s to get training or basic education, helping them to find permanent employment and avoid developing a habit of relying on social assistance during these formative years."[166] Canadian statutes which create social assistance schemes continue to list the furtherance of self-sufficiency and employment as one of their main objectives. Ontario's statute seeks to "recogniz[e] individual responsibility and promot[e] self reliance through employment,"[167] and "provid[e] temporary financial assistance to those most in need while they satisfy obligations to become and stay employed,"[168] while Quebec's statute seeks to "implement measures, programs and services designed to foster the economic and social self-sufficiency of persons and families"[169] and "encourage persons to engage in activities that promote their social integration, their entry on the labour market and their active participation in society."[170]

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[164] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See *ibid*.

[165] *Gosselin SCC*, *supra* note 161 at 7.

[166] *Ibid* at 7.

[167] *Ontario Works Act, 1997*, *supra* note 154, s 1(a).

[168] *Ibid*, s 1(b). The other two objectives are to "effectively serv[e] people needing assistance" and "[be] accountable to the taxpayers of Ontario" (*ibid*, ss 1(c)-1(d)). Three of the four objectives appear to refer to limitations to social assistance benefits.

[169] *Individual and Family Assistance Act*, *supra* note 155, s 1.

[170] *Ibid*.

In the United States, social assistance reform through the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*[171] sparked a yet more fundamental redefinition of social assistance. The *Act* created a new program, Temporary Assistance for Needy Families (TANF).[172] As one scholar concisely put it, the new program "imposed lifetime limits on receiving aid, subjected able-bodied participants to work requirements, incentivized states to cut welfare rolls, and transformed welfare into a block grant program that gave states wide flexibility in how they spend welfare funds."[173] In addition to imposing employment-related conditions similar to those described above, state programs often bar individuals from receiving social assistance after a set number of months – independently of financial need or employment status.[174] Through a "block grant" structure, TANF decentralises the provision of social assistance and, in fact, does not require states to spend the transferred funds on what anyone would reasonably construe as social assistance.[175] The data shows that some 26 percent of these funds are currently spent on social

[171] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, *supra* note 153.

[172] See *ibid*.

[173] See Greene, *supra* note 152 at 236. See also David J Kennedy, "Due Process in a Privatized Welfare System" (1998) 64:1 Brook L Rev 231.

[174] See *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, *supra* note 153.

[175] See e.g. *ibid*, ss 817, 852. On analogous issues, see Kennedy, *supra* note 173.

assistance.[176] The rest of the funds is allocated to arguably loosely related budget line items, such as employment support and childcare programs and various refundable tax credits.[177]

The language used throughout the 236 pages of the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*[178] echoes the Quebec and Ontario statutory provisions cited above – although it is more pointed (and alarming).[179] For example, one of the stated purposes of the block grant structure is to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage,"[180] and the new structure is not to be "interpreted to entitle any individual or family to assistance under any [funded] State program."[181]

The rhetoric cited above aptly illustrates how the similar reforms of social assistance undertaken by governments over the past several decades were driven by a social and political

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[176] I refer here to social assistance as cash payments. See Liz Schott, Ladonna Pavetti & Ife Floyd, "How States Use Federal and State Funds Under the TANF Block Grant" (last updated 15 October 2015), online: *Center on Budget and Policy Priorities* <https://www.cbpp.org/research/family-income-support/how-states-use-federal-and-state-funds-under-the-tanf-block-grant>. This figure has decreased over time, from 70 percent when TANF was first instituted. The authors also note: "There is significant variation across states; ten states spent less than 10 percent of their TANF/MOE funds on basic assistance in 2014." See *ibid*.

[177] See *ibid*. See also CNBC, "Why The U.S. Can't End Poverty" (7 March 2023), online (video): <https://www.youtube.com/watch?app=desktop&v=oMr5JjEOzkY&ab_channel=CNBC>.

[178] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, *supra* note 153.

[179] See *Ontario Works Act, 1997*, *supra* note 154, s 1; *Individual and Family Assistance Act*, *supra* note 155, s 1.

[180] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, *supra* note 153, s 401(a)(2).

[181] *Ibid*, s 401(b). When he announced the *Act*, then-President Bill Clinton used similar rhetoric. He stated: "Today the Congress will vote on legislation that gives us a chance […] to transform a broken system that traps too many people in a cycle of dependence to one that emphasizes work and independence, to give people on welfare a chance to draw a paycheck, not a welfare check." See "The Welfare Bill: Text of President Clinton's Announcement on Welfare Legislation", *The New York Times* (1 August 1996), online: <https://www.nytimes.com/1996/08/01/us/text-of-president-clinton-s-announcement-on-welfare-legislation.html>.

conviction, of governments and citizens, that these programs can disincentivise work and that some (or most) individuals who benefit from them are able but unwilling to work.

In 1993, under the leadership of Lawrence Townsend, the Riverside County Department of Public Social Services (a Californian social assistance department) released a 10-track album on social assistance.[182] The songs were used "in the waiting rooms of welfare offices and as hold music for phone calls."[183] The main song, from which the album also derives its name, is titled "Work Makes the Difference." The lyrics read, in part, as follows;

Will your children
Be the next generation
Or will you be—
the last

Welfare is temporary
Not a way of life
Be proud of honest labor
Have dignity and pride

Make the difference
Start a career
Success depends on you
Get into gear

Action turns your dreams
Into reality

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[182] See "The Album, 'Work Makes the Difference'" (17 August 2016), online: *Marketplace* <https://www.marketplace.org/shows/the-uncertain-hour/s01-7-album-work-makes-difference/>; "The Taxpayer-Funded Pop Album All About Welfare" (29 August 2016), online: *Marketplace* <https://www.marketplace.org/2016/04/28/world/lyrics/> ("[Larry Townsend] was head of the welfare office in Riverside County, a large suburban county east of Los Angeles. As part of a bunch of reforms in Riverside, Townsend used $2000 in taxpayer money to record a CD called 'Work Makes the Difference'").

[183] "The Taxpayer-Funded Pop Album All About Welfare", *supra* note 182.

Work for it —
Be part of the future

There is still employment
Out in the world today
We've got to show our children
That there's a better way[184]

The album begins with an introductory narrative, which states:

> One of the more significant reasons our Country became a great nation was due to the character, values and beliefs of the settlers who came to America. They sought religious freedom, opportunity, a chance to realize their full potential, and to establish a future which is based upon their efforts. They avoided charity and had a fierce pride to support themselves and their own dependents. Unfortunately, today we have many able bodied citizens who are dependent upon government and society for their support. This is the time for a process of revitalization, and a return to the basics in our beliefs. The economic success and productivity of our nation could be greatly improved if all members of society subscribed to the notion that it is essential for all employable individuals to support themselves and their dependents. In other words, to become self-sufficient. […] The music provided is intended to assist in the strengthening of work ethics and to encourage those individuals who are unemployed to be positive, have hope, and believe that they can in fact have a wonderful new future by seeking to improve and develop themselves by vigorously pursuing employment.[185]

The album helped the Riverside program attract media attention.[186] One commentator notes: "On five different occasions, Townsend testified before Congress. He came to be known as 'The Magic

[184] *Ibid*.

[185] *Ibid*.

[186] See e.g. Gorman, *supra* note 162.

Bureaucrat' and his program became known as the 'Riverside Miracle;' many program elements found their way into the welfare reform bill passed in 1996."[187]

The use of similar rhetoric can arguably be traced two additional decades back. In a 1976 campaign speech, United States President Ronald Reagan spoke of the "welfare queen" as follows: "She has eighty names, thirty addresses, twelve Social Security cards and is collecting veterans' benefits on four non-existing deceased husbands. And she's collecting Social Security on her cards. She's got Medicaid, getting food stamps and she is collecting welfare under each of her names. Her tax-free cash income is over $150,000."[188] This campaign speech may show the early

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[187] "The Magic Bureaucrat and His Riverside Miracle" (2 August 2016), online: *99% Invisible* <https://99percentinvisible.org/episode/magic-bureaucrat-riverside-miracle/> (referring to the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, *supra* note 153). See also "Welfare Reform: Committee Members Heard Testimony Concerning Programs That Encourage People to Move From Welfare Dependency to Independence Through Entry Into the Labor Force" (20 March 1994), online: *C-SPAN* <https://www.c-span.org/video/?64069-1/welfare-reform>.

[188] See "'Welfare Queen' Becomes Issue in Reagan Campaign", *The New York Times* (15 February 1976), 51, online: <https://www.nytimes.com/1976/02/15/archives/welfare-queen-becomes-issue-in-reagan-campaign-hitting-a-nerve-now.html>. See also Maya Angelou, "Momma Welfare Roll", online: *All Poetry* <https://allpoetry.com/Momma-Welfare-Roll>:

Her arms semaphore fat triangles,
Pudgy hands bunched on layered hips
Where bones idle under years of fatback
And lima beans.
Her jowls shiver in accusation
Of crimes cliched by Repetition.
Her children, strangers
To childhood's toys, play
Best the games of darkened doorways,
Rooftop tag, and know the slick feel of
Other people's property.

Too fat to whore,
Too mad to work,
Searches her dreams for the
Lucky sign and walks bare-handed
Into a den of bereaucrats for her portion.
'They don't give me welfare.

stages of the reconceptualisation of social assistance. Two decades before the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*,[189] right-leaning politicians felt that government assistance and mandates had grown unwieldy and counterproductive. They made these arguments in ways that marked the collective psyche and drove a shift in the collective perception of social assistance.

I have previously analysed similar rhetoric in the context of the criminalisation of drug possession.[190] In the 1960s and 1970s, certain social and political factors led to a wholesale shift in public opinion regarding drug possession. A quickly growing number of Americans came to believe that drug possession had become a significant problem.[191] The problem had "to be addressed with public law, using the strongest tools in the arsenal, and to their fullest extent,"

I take it.'

This poem appears to relate to Angelou's grandmother. See Linda Wagner-Martin, *Maya Angelou: Adventurous Spirit* (London: Bloomsbury, 2015) at 14, 21-22, 37-38.

See also Mick Mulvaney, "Mick Mulvaney: Trump's Budget Is One to 'Balance the Books'", *The Post and Courier* (22 May 2017), online: <https://www.postandcourier.com/opinion/commentary/mick-mulvaney-trumps-budget-is-one-to-balance-the-books/article_1ce0ddca-3f28-11e7-91a6-4f2ccd34229d.html> ("Taking money from someone without an intention to pay it back is not debt. It is theft. This budget makes it clear that we will reverse this larceny. The president's spending plan will put our country's budget back into balance and begin to reduce the size of the national debt within the first year of its enactment"). Mulvaney was President Donald Trump's Director of the Office of Management and Budget.

[189] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, *supra* note 153.

[190] See Lord, "Moral Panic and the War on Drugs" (2022) 20:2 UNH Law Review 407 at 426-27.

[191] See *ibid* at 410-11 ("As drugs became more popular, especially with younger Americans, over 80

percent of Americans also developed a conviction that even possession of lower-level drugs should be criminalized" at 411). See also David Farber, "The War on Drugs Turns 50 Today. It's Time to Make Peace", *The Washington Post* (17 June 2021), online: <https://www.washingtonpost.com/outlook/2021/06/17/war-drugsturns-50-today-its-time-make-peace/>.

through the offensive which became known as the War on Drugs.[192] The War on Drugs targeted the production, distribution, and consumption of drugs through a series of laws that imposed harsh criminal penalties.[193] I have argued that the War on Drugs is an example of a moral panic: a social phenomenon defined by "a collective component in the reaction to an actual or perceived threat, and the disproportionality and reactionary nature of the reaction."[194] Moral panics involve the personalisation and vilification of a group of individuals[195] – much like Reagan's "welfare queen," which personifies purported abuses of social assistance.[196]

More importantly, rhetoric is a key aspect of moral panics which lead to legal reforms. I have noted: "As objects of human psychology, [moral panics] are rhetorical and constitutive

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[192] *Ibid* at 411.

[193] See *ibid* at 411 ("Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, which rescheduled certain ('harder') drugs. Just over a decade later, as the offensive intensified, Congress passed the Anti-Drug Abuse Act of 1986, which introduced mandatory minimum criminal sentences (including for lower-level drugs) and generally targeted drug dealers" [references omitted]).

[194] *Ibid* at 417. In most moral panics, the perceived threat is either significantly exaggerated or non-existent. The data does not support the assertion that welfare fraud was ever a significant problem, or that the cost of monitoring and prosecuting welfare fraud exceeds the benefits. Additionally, criminal penalties seem to effectively deter fraud. See Kaaryn S Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York: New York University Press, 2011) at 155-180; Kaaryn Gustafson, "The Criminalization of Poverty" (2009) 99:3 J Crim L & Criminology 643; Martin Tunley, "Need, Greed or Opportunity? An Examination of Who Commits Benefit Fraud and Why They Do It" (2011) 24 Security Journal 302; Stephanie Ben-Ishai, "The Gendered Dimensions of Social Insurance for the 'Non-Poor' in Canada" (2005) 43:3 Osgoode Hall LJ 289 at 315 ("Further, the emphasis on the word 'fraud' in welfare discourse has criminalized poverty and the act of legally claiming welfare when in need") [Ben-Ishai, "Gendered Dimensions of Social Insurance"]; David J Kennedy, "Due Process in a Privatized Welfare System" (1998) 64:1 Brook L Rev 231 (calling this phenomenon "verification extremism" at 242); Littwin, *supra* note 151 at 1995 (highlighting that most offences created by social assistance statutes are criminal offences). But see CNBC, "How Medicare And Medicaid Fraud Became A $100B Problem In The U.S." (9 March 2023), online (video): <https://www.youtube.com/watch?app=desktop&v=OqK_6Nor98U&ab_channel=CNBC>.

[195] See *ibid* at 418-19. The group that is vilified is often already marginalised. The same can be said of the very poor. See *ibid* at 427-28.

[196] See "'Welfare Queen' Becomes Issue in Reagan Campaign", *supra* note 188. On analogous issues in the context of bankruptcy, see Donald R Korobkin, "Bankruptcy Law, Ritual, and Performance" (2003) 103:8 Colum L Rev 2124.

events. While they are sparked by fear and anxiety, they propagate and intensify through rhetoric. This rhetoric is in turn (re)constitutive. […] [R]hetoric on the War on Drugs is not merely a lens into the War on Drugs, as it is not 'exogenous.' It is the War on Drugs. Rhetoric spreads and redefines the fear and anxiety that drive moral panics. It legitimates – and therefore constitutes – the legislative enactments which have defined the War on Drugs. And these legislative enactments are, in turn, constitutive. They fuel the underlying moral panic and define a shared identity."[197]

Reagan's rhetoric on the "welfare queen" impacted public opinion regarding social assistance.[198] Such social and political rhetoric eventually led to a shift in public opinion which was embodied in and constituted by the legislative enactments cited above. It helps explain why social assistance programs now strongly emphasise employment and self-sufficiency. In light of this analysis, it is unsurprising that this rhetoric and these legislative changes have also affected the way in which the very poor see themselves. The pervasiveness of the consensus that social assistance is at odds with self-sufficiency and work has led many individuals who experience poverty to *choose* not to rely on social assistance and other government programs for which they are eligible.[199] Drawing upon 71 detailed semi-structured interviews with the very poor, Prof. Sara

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[197] Lord, "Moral Panic and the War on Drugs", *supra* note 190 at 421 [references omitted]. See also James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985) 52:3 U Chi L.Rev 684. White argues that the law is best understood as a branch of rhetoric. It formed and reshaped through rhetoric, as lawyers argue that certain statutes do or do not apply, should or should not apply, and as we engage in fundamental debates about what the law should or should not be, about how it ought to be changed. Rhetoric is constitutive of the law, and this constitutive process presumes a shared language and an audience indicative of a community (albeit a fluid one), which the law shapes.

[198] See "'Welfare Queen' Becomes Issue in Reagan Campaign", *supra* note 188.

[199] See Greene, *supra* note 152. On identity construction as a result of socioeconomic status, see Josh Curtis, "Social Mobility and Class Identity: The Role of Economic Conditions in 33 Societies, 1999–2009" (2016) 32:1 European

Greene identifies a chasm in how the very poor see themselves.[200] Some individuals have internalised the self-sufficiency social and political conception as detailed above.[201] They feel that relying on social assistance is inconsistent with self-sufficiency and feel guilty about relying on social assistance programs (that were specifically conceived to assist them).[202] Others have internalised what she calls a "deserving recipient" narrative.[203] She describes it as follows: "Several of these parents expressed the belief that public benefits programs existed to help them, and they were entitled to take advantage of these benefits because they had been hit with hard times through no fault of their own."[204] Those who have internalised the former narrative often act

Sociological Review 108; Marco HD van Leeuwen & Ineke Maas, "Historical Studies of Social Mobility and Stratification" (2010) 36:1 Annual Review of Sociology 429; Pamela Foohey, "A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy" (2019) 60:8 Boston College L Rev 2297 [Foohey, "A New Deal for Debtors"].

[200] See Greene, *supra* note 152 at 264.

[201] See *ibid* at 263-285.

[202] See *ibid*. See also Jason DeParle, "How Poverty Programs Aided Children From One Generation to the Next", *The New York Times* (12 September 2022), online: <https://www.nytimes.com/2022/09/12/us/politics/child-poverty-families-west-virginia.html> ("While critics of government aid often warn that it fosters a sense of entitlement, what is striking in the case of Ms. Jackson, the Head Start worker, is how little entitlement she seems to feel. She apologizes constantly about being in need and describes the help as something she appreciates more than deserves.

'I'm not entitled to it, the assistance,' she said. 'I never wanted someone else to raise my kids. I need to take responsibility, and I try'").

[203] See Greene, *supra* note 152 at 279-283.

[204] *Ibid* at 280-81. She quotes one interviewee as stating: "I needed all the help I could get. I looked into everything. Shane was so sick. So sick. I asked everyone, what kind of programs are available for us? I thought there must be more help. […] I needed help before the government decided it was going to step in. […] One worker, a food stamps girl, was a bitch and a half. But I have a sick child, so what's her problem? It's not like I wanted this. My babies have to eat[.]" See also DeParle, *supra* note 202 ("The depression lasted more than a year, but with the help of medication Ms. Jackson got better. She got a job at a Head Start center that 'makes my heart happy.' But after nearly five years, she earns only $11.28 per hour for the 10-month school year, with summers unpaid. Working for a government program leaves her needing government aid. Without it she would be raising her children about $11,000 below the poverty line (about $31,200 in Huntington for a family of five). 'We work really hard, but we appreciate the help,' she said"); Peter Edelman & Barbara Ehrenreich, "Why Welfare Reform Has Failed", *The New York Times* (6 December 2009), online: <https://www.washingtonpost.com/wp-dyn/content/article/2009/12/04/AR2009120402604.html> ("Mulugeta Yimer, for example, is a 56-year-old Alexandria cabdriver who escaped poverty and persecution in Ethiopia 20 years ago only to be clobbered by the

against their best interests. They unnecessarily and detrimentally rely on predatory credit to survive.[205] Quite saliently, *both* narratives are underlain by a self-sufficiency paradigm. Both assume that work and self-sufficiency define a noble existence.[206] Those who have internalised the "deserving recipient" narrative explain, to themselves and others, how their reliance on social assistance furthers their self-sufficiency.[207]

As others have remarked, the erosion of social assistance programs and the other social and political factors analysed above have led the very poor to rely on alternative financial services providers to survive.[208] The reconceptualisation of the role of the state has driven the privatisation

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recession. Business is way down, and he's facing possible foreclosure on his home. He says he is averse to government handouts, but when he contemplates what might be in store for his wife, who works part-time at a convenience store, and their two young children, he muses wistfully, 'There's always welfare, isn't there?'").

[205] See *ibid*.

[206] Prof. Stephanie Ben-Ishai has advanced a similar argument in the Canadian context. See Ben-Ishai, "Gendered Dimensions of Social Insurance", *supra* note 194 at 295 ("Privatization of government services in Canada has increased significantly in recent years. As in other Western democracies, social spending has been limited and an emphasis on self-reliance has been promoted as an appropriate response to poverty and inequality").

[207] Significantly, the social safety net benefits the children of the very poor. Arguments as to the "deservingness" of welfare recipients cannot extend to their children. Child poverty significantly contributes to inadequate social mobility in developed countries. See Jacob Goldin & Ariel Jurow Kleiman, "Whose Child Is This? Improving Child-Claiming Rules in Safety Net Programs" (2022) 131:6 Yale LJ 1719; DeParle, *supra* note 202; Miles Corak, "Divided Landscapes of Economic Opportunity: The Canadian Geography of Intergenerational Income Mobility" (2017) University of Chicago Human Capital and Economic Opportunity Working Paper No 2017–043; Miles Corak, "Do Poor Children Become Poor Adults? Lessons from a Cross Country Comparison of Generational Earnings Mobility" in John Creedy & Guyonne Kalb, eds, *Dynamics of Inequality and Poverty* (Binley: Emerald, 2006) 143 (Volume 13 of the Research on Economic Inequality series); Richard V Reeves, *Dream Hoarders: How the American Upper Middle Class Is Leaving Everyone Else in the Dust, Why That Is a Problem, and What to Do About It* (Washington: Brookings, 2017); "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", online: *Employment and Social Development Canada* <https://www.canada.ca/en/employment-social-development/programs/poverty-reduction/backgrounder.html#h2.1>.

[208] See Regina Austin, "Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions" (2004) 53 Am U L Rev 1217; Abbye Atkinson, "Borrowing Equality" (2020) 120:6 Colum L Rev 1403; Abbye Atkinson, "Rethinking Credit as Social Provision" (2019) 71:5 Stan L Rev 1093; Greene, *supra* note 152.

of the social safety. The very poor, often without access to the traditional banking system,[209] have turned to the predatory credit provided by alternative financial services providers (described in the previous chapter). As will be discussed at the end of this chapter, the state has not adequately responded to this erosion of social assistance or to the growing importance of alternative financial services providers.

2. Other Social Programs Involving Credit

As detailed in the next part of this chapter, the state has done very little to regulate alternative financial services providers. Private, unregulated credit has therefore in part replaced social assistance. However, the state has intervened in the provision of credit to groups other than the very poor – mainly middle-class individuals. While the state's intervention through these government programs generally involves various forms of guarantees of credit risk, the programs

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[209] See "The Underbanked Canada: February 2016", online: *Mintel* <https://store.mintel.com/the-underbanked-canada-february-2016?_ga=2.150848245.2126905070.1570466499-1705706870.1570466499>. In the United States, 38 percent of the population is estimated to be unbanked or underbanked; Mehrsa Baradaran, "It's Time for Postal Banking" (2014) 127:4 Harv L Rev F 165 at 168; Mehrsa Baradaran, "How the Poor Got Cut Out of Banking" (2013) 62:3 Emory LJ 483 at 485-86; Mehrsa Baradaran, "Credit, Morality, and the Small-Dollar Loan" (2020) 55:1 Harv CR-CLL Rev 63 [Baradaran, "Small-Dollar Loan"]; Catherine Martin Christopher, "Mobile Banking: The Answer for the Unbanked in America?" (2015) 65:2 Cath U L Rev 221; Michael S Barr, "Banking the Poor" (2004) 21:1 Yale J Reg 121; John P Caskey, *Fringe Banking Check-Cashing Outlets, Pawnshops, and the Poor* (New York: Russel Sage, 1994); AARP Foundation, "A Portrait of Older Underbanked and Unbanked Consumers Findings from a National Survey", online: *AARP* <https://assets.aarp.org/rgcenter/ppi/econ-sec/underbank-economic-full-092110.pdf>; Joe Fantauzzi, "Predatory Lending: A Survey of High Interest Alternative Financial Service Users" (December 2016), online: *Canadian Centre for Policy Alternatives* <https://policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2016/12/CCPA-ON%20predatory%20lending%20Dec%201.pdf>; Creola Johnson, "Payday Loans: Shrewd Business or Predatory Lending?" (2002) 87:1 Minn L Rev 744; Aaron Huckstep, "Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits" (2007) 12:1 Fordham J Corp & Fin L 203.

have direct and indirect costs for the state, just like the government programs which seek to assist the very poor. Through these credit programs, the state invests significant financial resources that otherwise could be dedicated to assisting those in greater need. Additionally, as the alternative government program I set out in the next chapter involves credit, the analysis of these programs aimed at the middle class helps refute arguments that the state does not, should not, or is not competent to get involved in the provision of credit.

In both Canada and the United States, state entities guarantee credit risk for individuals who seek to purchase a home.[210] These entities insure against the risk of default for riskier mortgages, generally those involving a lower down payment.[211] As a result, lenders are willing to lend funds that they otherwise would be unwilling to lend at low interest rates (or at all). Similarly,

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[210] See Mehrsa Baradaran, "Rethinking Financial Inclusion: Designing an Equitable System with Public Policy" (2020) Roosevelt Institute Working Paper ("This new government buffer opened the floodgates for an unprecedented amount of private capital and mortgage loans; it fueled a worldwide market in mortgages, created the middle class, and produced a stable and profitable banking sector" at 16) [Baradaran, "Rethinking Financial Inclusion"]; "Mortgage Loan Insurance: CHMC Purchase", *Canada Mortgage and Housing Corporation* (2020), online: <https://www.cmhc-schl.gc.ca/-/media/sites/cmhc/finance-investing/mortgage-loan-insurance/mortgage-loan-insurance-homeownership-programs/mortgage-loan-insurance-quick-reference-guide/cmhc-programs-fact-sheets.ashx>; "Let FHA Loans Help You", online: *US Department of Housing and Urban Development* <https://www.hud.gov/buying/loans>. See also A Mechele Dickerson, "The Myth of Home Ownership and Why Home Ownership is Not Always a Good Thing" (2009) 84:1 Ind LJ 189 ("The Federal Housing Administration (FHA) was created during the Depression to help stimulate the housing market. The FHA encourages lenders to originate residential mortgages by insuring traditional long-term loans that meet certain underwriting standards and warranting to lenders who make these loans that they will be repaid in full even if the borrower defaults and the lender is forced to sell the house at a loss. Congress also chartered Government-Sponsored Entities (GSEs) to help stabilize U.S. residential mortgage markets, ensure the efficiency and liquidity of the mortgage market, and generally expand opportunities for home ownership. Two GSEs, Fannie Mae (the Federal National Mortgage Association) and Freddie Mac (the Federal Home Loan Mortgage Corporation), are publicly traded corporations that purchase conventional mortgages from lenders then pool or bundle the mortgages and sell them to private investors"). See also Charles W Calomiris, "An Incentive-Robust Programme for Financial Reform" (2011) 79:2 Papers in Money, Macroeconomics, and Finance 39; Christopher K Odinet, "Modernizing Mortgage Law" (2021) 100:1 NCL Rev 89.

[211] See Baradaran, "Rethinking Financial Inclusion", *supra* note 210; "Mortgage Loan Insurance: CHMC Purchase", *supra* note 210; "Let FHA Loans Help You", *supra* note 210.

governments guarantee the credit risk of student loans.[212] In both cases, credit is provided by private actors. But this characterisation is misleading. The state takes on the full credit risk, and private actors profit from interest payments without the correlative risk.[213] In other words, the state essentially socialises losses but not profit.[214]

The underlying rationale for this state intervention is likely that higher education and housing are important in favouring social mobility.[215] However, as others have remarked, these

[212] See Baradaran, "Rethinking Financial Inclusion", *supra* note 210; "Canada Student Grants and Loans – What Student Grants and Loans Offer", online: *Government of Canada* <https://www.canada.ca/en/services/benefits/education/student-aid/grants-loans.html>. Student loans can also be forgiven for those with low incomes. See Bruce Chapman, "Income Contingent Loans for Higher Education: International Reforms" in E Hanushek & F Welch, eds, *Handbook of the Economics of Education* (Amsterdam: North-Holland, 2006). In the United States, the *Servicemen's Readjustment Act of 1944* (Pub L 78-346, 58 Stat 284 (1944); informally known as the GI Bill) funds educational expenses for veterans. Similar arguments can be made regarding other government programs, such as those that provide grants to individuals who purchase electric vehicles or renovate their home. These programs analogously benefit higher-income individuals. See e.g. "Home Renovation Tax Credits in Canada" (last updated 6 May 2022), online: *WOWA* <https://wowa.ca/home-renovation-tax-credit>; "Zero-Emission Vehicles" (last updated 11 July 2022), online: *Government of Canada* <https://tc.canada.ca/en/road-transportation/innovative-technologies/zero-emission-vehicles>; "New Vehicle Rebate", online: *Quebec* <https://vehiculeselectriques.gouv.qc.ca/english/rabais/ve-neuf/programme-rabais-vehicule-neuf.asp>; "Federal Tax Credits for New All-Electric and Plug-in Hybrid Vehicles" (last updated 25 August 2022), online: *US Department of Energy (Office of Energy Efficiency and Renewable Energy)* <https://www.fueleconomy.gov/feg/taxevb.shtml>.

[213] To limit credit risk, the state often limits the dischargeability in bankruptcy of these loans. See "Discharge in Bankruptcy", online: *Federal Student Aid (US Department of Education)* <https://studentaid.gov/manage-loans/forgiveness-cancellation/bankruptcy>; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178(1)(g), which makes certain federal and provincial student loans non-dischargeable.

[214] On this issue, see generally Phil Lord & Lydia Saad, "Tackling the COVID-19 Pandemic" (2020) 43:2 Man LJ 1; Phil Lord, "Incentivising Employment during the COVID-19 Pandemic" (2020) 8:3 The Theory and Practice of Legislation 355; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 209 at 518. The sources discuss how government responses to the COVID-19 pandemic adopted a similar model. The authors argue that this approach is unsustainable and favour greater, yet more conditional, state intervention.

[215] See Dickerson, *supra* note 210. One might argue that the state has an interest in individuals increasing their income through education, as higher incomes increase tax revenue. Additionally, some scholars have argued that the state may want to incentivise home ownership because it acts (often indirectly) as the principal way for middle-income households to save for retirement. See Margaret Ryznar, "Tax Reform on Homeownership" (2018) 73:1 U Miami L Rev 227; Margaret Ryznar, "Homeownership as Savings" (2018) 159:8 Tax Notes 1145; Peggy D Hamilton, "Why the Check Cashers Win: Regulatory Barriers to Banking the Unbanked" (2007) 30:1 W New Eng L Rev 119 at 131. Home ownership can therefore act as the main solution to inadequate retirement saving in most developed countries. See Phil Lord, "COVID-19 and the Future of Work" [2021] Denv UL Rev Forum; Ben-Ishai, "The Gendered

programs disproportionately benefit the middle-class, not the very poor.[216] The very poor attend higher education institutions at disproportionately low rates,[217] and they do not have the capital to purchase a home.[218] The programs were not necessarily (or likely) designed specifically to benefit

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Dimensions of Social Insurance", *supra* note 194 at 299; Baradaran, "Rethinking Financial Inclusion", *supra* note 210 at 17; Makoto Nakajima & Irina A Telyukova, "Home Equity in Retirement" (2020) 61:2 International Economic Review 573; Statistics Canada, *Incomes of Retirement-Age and Working-Age Canadians: Accounting for Home Ownership*, by W Mark Brown, Amélie Lafrance & Feng Hou, Catalogue No 11F0027M (Ottawa: Statistics Canada, July 2010).

216 See Baradaran, "Rethinking Financial Inclusion", *supra* note 210; Baradaran, "It's Time for Postal Banking", *supra* note 209 at 173; Atkinson, "Borrowing Equality", *supra* note 208 at 1419; Atkinson, "Rethinking Credit as Social Provision", *supra* note 208 at 1127; Ben-Ishai, "The Gendered Dimensions of Social Insurance", *supra* note 194 at 296.

217 See Statistics Canada, *Do Youth from Lower- And Higher-Income Families Benefit Equally from Postsecondary Education?*, by Marc Frenette, Catalogue No 11F0019M (Ottawa: Statistics Canada, 26 April 2019) [Statistics Canada, *Postsecondary Education*]; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 209 at 483; Kathryn Fritzdixon, Jim Hawkins & Paige Marta Skiba, "Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets" 2014:4 U Ill L Rev 1013; Baradaran, "Small-Dollar Loan", *supra* note 209; Paul Bowles et al, "Urban Aboriginal Use of Fringe Financial Institutions: Survey Evidence from Prince George, British Columbia" (2011) 40:6 Journal of Behavioral and Experimental Economics 895; Michael S Barr, Jane K Dokko & Benjamin J Keys, "Borrowing to Make Ends Meet" in Michael S Barr, ed, *No Slack: The Financial Lives of Low-Income Americans* (Washington: Brookings, 2012); Laura Lamb, "Financial Exclusion and Financial Capabilities in Canada" (2016) 8:2 Journal of Financial Economic Policy 212 [Lamb, "Financial Exclusion and Financial Capabilities"].Lamb, "Financial Exclusion and Financial Capabilities", *supra* note 18.

218 The same is true of certain tax exemptions relating to residential properties. For instance, in Canada and the United States, the sale of a principal residence is generally exempt from capital gain taxation. See "Disposing of your Principal Residence (18 January 2022), online: *Canada Revenue Agency* <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/personal-income/line-12700-capital-gains/principal-residence-other-real-estate/sale-your-principal-residence.html>; "Topic No 701: Sale of Your Home" (7 October 2022), online: *Internal Revenue Service* <https://www.irs.gov/taxtopics/tc701>; 26 USC § 121; *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 54. In the United States, taxpayers can also generally deduct the cost of mortgage interest from their income. See Ryznar, "Tax Reform on Homeownership", *supra* note 215; Ryznar, "Homeownership as Savings", *supra* note 215; "Publication 936 (2022), Home Mortgage Interest Deduction" (14 December 2022), online: *Internal Revenue Service* <https://www.irs.gov/publications/p936>.

In Canada, governments also incentivise home ownership by permitting prospective home owners to temporarily withdraw funds from their Registered Retirement Savings Plan (RRSP) accounts and by providing various tax credits for first home purchases. See "How to Participate in the Home Buyers' Plan (HBP)" (16 May 2023), online: *Government of Canada* <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/rrsps-related-plans/what-home-buyers-plan/participate-home-buyers-plan.html>; *Income Tax Act*, *ibid*, s 146.01; "Land Transfer Tax Refunds for First-Time Homebuyers" (6 April 2022), online: *Ontario* <https://www.ontario.ca/document/land-transfer-tax/land-transfer-tax-refunds-first-time-homebuyers>; "First-Time Home Buyers' Tax Credit (HBTC)" (27 January 2023), online: *Government of Canada* <https://www.canada.ca/en/revenue-agency/programs/about-canada-

higher-income groups. Unlike social assistance, they are programs of broad eligibility, and individuals can notionally access them regardless of their income.[219] However, the inherent characteristics of poverty make the very poor ineligible for these programs.

3. The State's Response to Alternative Financial Services Providers

Over the past several decades, the state has also sought to respond to the growing role and significance of alternative financial services providers. Through this response, the state has again sought to alleviate poverty. Regulating alternative financial services providers can be construed as a more reactive measure – in contrast to the more proactive, direct forms of poverty alleviation described in the first part of this chapter. Nonetheless, regulation is, like social assistance, a public law tool that the state can use to seek to alleviate poverty.

Governments have been extremely reluctant to regulate alternative financial services providers throughout their emergence. Prof. Baradaran notes: "It is both true that people need these

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revenue-agency-cra/federal-government-budgets/budget-2022-plan-grow-economy-make-life-more-affordable/first-time-home-buyers-tax-credit.html>.

These programs and exemptions divert exceptional resources that could otherwise be dedicated to social assistance and the very poor. Take the capital gains exemption upon the sale of a principal residence. If we assume a marginal tax rate on capital gains of 50 percent, the state foregoes 125 000 dollars of taxation revenue upon the sale of a 500 000 residence. It is fair to assume that this exemption saves the average homeowner at least 100 000 dollars in taxes. Likely because this exemption is not directly reflected in government budgets, it seems to alarm few voters. However, it costs them far more than social assistance does.

[219] In contrast, social assistance has strict maximum income and asset eligibility limits. See "New Benefit Amounts: Social Assistance Program and Social Solidarity Program", *supra* note 155; "Working and Earning While on Ontario Works", *supra* note 159; "Employment and Income Assistance: For Single Parents", online: *Manitoba* <https://www.gov.mb.ca/fs/eia/eia_single_parents.html>.

loans and that these loans are harmful. […] On the one hand, payday loans are the only credit option for many households. Cutting off access to a loan that can help a family make it from one paycheck to the next can result in severe financial distress. On the other hand, these loans are too costly and can lead to a debt trap."[220] Government have undoubtedly been acutely aware of this reality. They have been concerned that excess regulation could have devastating consequences and make the financial situation of the very poor even more precarious.

As noted above, the traditional form of regulation of predatory lending are usury provisions, which limit the total cost of borrowing (generally including all lending fees). In Canada, the *Criminal Code* sets the limit at 60 percent per year.[221] The very concept of usury

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[220] Baradaran, "Small-Dollar Loan", *supra* note 209 at 107. See also Paige Marta Skiba, "Regulation of Payday Loans: Misguided?" (2012) 69:2 Wash & Lee L Rev 1023; Todd J Zywicki, "Consumer Use and Government Regulation of Title Pledge Lending" (2010) 22:4 Loy Consumer L Rev 425; Ronald J Mann & Jim Hawkins, "Just Until Payday" (2007) 54:1 UCLA L Rev 855; Brian Dijkema & Rhys McKendry, "Banking on the Margins Finding Ways to Build an Enabling Small-Dollar Credit Market" (February 2016), online: *CARDUS* <https://www.cardus.ca/research/work-economics/research-report/banking-on-the-margins/>; Nakita Q Cuttino, "The Rise of 'Fringetech': Regulatory Risks in Earned-Wage Access" (2021) 115:6 Nw U L Rev 1505 at 1544 ("[M]any policymakers, scholars, and consumer advocates fear payday loans create more harm than good. Over the past two decades, legal academics and other researchers have studied the effects of payday loans with varying conclusions. Some find that payday loans are a 'better than nothing' liquidity solution with some positive effects despite their risks. Others find that payday loans have net-neutral effects on borrowers. Still, a significant body of work finds that payday loans exacerbate the financial woes of many borrowers"); *Re The Cash Store Financial Services Inc*, 2009 MBCA 1 at para 5 ("The significant growth of the payday loan industry has drawn increased attention to it and its practice of charging high rates of interest compared to the more traditional lenders, such as banks or credit unions. Some critics have called for the outright prohibition of payday loans. Proponents, however, have pointed to the growth of the industry as evidence that it appeared to be fulfilling an unmet need for short-term credit, whether by reason of convenience to consumers or otherwise").

[221] See *Criminal Code*, RSC 1985, c C-46, s 347. See also Jacob S Ziegel, "Bill C-44: Repeal of the Small Loans Act and Enactment of a New Usury Law", Legislative Comment on *An Act to amend the Small Loans Act and to provide for its repeal and to amend the Criminal Code*, SC 1980-83, c 43, (1981) 59:1 Can Bar Rev 188 at 192 ("Loan-sharking is said to be rampant in Montreal and other major Canadian cities and the usury provision was apparently requested by the Montreal police to assist them in their fight against the underworld"). See also House of Commons, Standing Committee on Health Welfare and Social Affairs, *Evidence*, 30-2, No 8 (28 January 1977) (where Deputy Chief TE Welsh, Chairman of the Law Amendments Committee of the Canadian Association of Police Chiefs, states before a Parliamentary committee: "The main objective of this bill is to provide a blueprint for the elimination of

unsettles a jurist's common sense. The state chooses to regulate what is essentially a consumer product – however predatory – through the criminal law. As detailed below, other financial services providers are regulated through more typical legal regimes that are not rooted in the criminal law. Indeed, even the provincial statutory regimes that apply to alternative financial services providers are modelled on consumer protection regimes, and some are enacted within or pursuant to broader consumer protection laws.[222] There are, of course, some benefits that explain why the criminal law can be preferable. Its sanctions are different, and it is enforced more

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loansharking and usurious practices by finance companies and organized criminal type money lenders" at 256; "We foresee problems arising from the mixing of civil procedures and the criminal law" at 257; "It is the experience of the larger police forces in this country that criminal lenders make [1000 dollars] on a single loan and that, in effect, the fines listed in this bill simply cover the licensing of their criminal activities" at 258; "the protection of the debtor may be such that that the reputable institutions will not readily lend to any but the most credit-worthy customers" at 258). It seems this policeperson had the foresight Parliamentarians lacked. He argued for a criminal provision to deal with usury, but also for distinct regimes to deal with traditional lenders and criminal organisations. The Deputy Chief goes on to describe graphic instances of criminal loan "collections" and state that the typical interest rate is 20 per cent per week (*ibid* at 264). See also House of Commons, Standing Committee on Health Welfare and Social Affairs, *Evidence*, 30-2, No 24 (25 February 1977) ("Je crois, que par *loan sharking*, il faut de toute façon englober tous les prêts qui sont faits à des taux d'intérêt qui, selon notre expérience, dépassent tout au moins 100 p. 100 annuellement […] [L]es pratiques qui visent à collecter de l'argent ou le repaiement impliquent des méthodes non usuelles dans le marché traditionnel de l'argent. C'est-à-dire que cela implique de la violence, des menaces et toutes sortes de procédés qui sont pour le moins que l'on puisse dire, criminels. […] 80 p. 100 de ces personnes connues sont des gens à faible revenu qui n'ont pas d'autre alternative pour emprunter de l'argent que de s'adresser à ce système de prêt. Dans 20 p. 100 des cas, par contre, nous admettons que les clients sont issus de toutes les classes de la société, même du monde des affaires, hommes d'affaires et professionnels et cela comprend évidemment les joueurs professionnels" at 896; "Nous parlons de ces gens qui doivent recourir à ce système de prêts parce qu'ils n'ont pas d'autre possibilité pour obtenir de l'argent à court terme pour financer des obligations journalières, pour financier des dépenses de la vie courante, pour financer des accidents de la vie courante. Il s'agit de dépenses inattendues, de dépenses qui n'étaient pas prévues ou qui sont, de toute façon, mal supportées par un budget qui est déjà très limité" at 900; "Ils sont dans l'impossibilité d'obtenir des prêts sur le marché conventionnel parce que leur cote de crédit ou leur réputation financière n'est pas bonne. Souvent, il faut l'admettre aussi, je crois qu'il est bon de l'ajouter, c'est par ignorance du fait qu'ils pourraient peut-être" at 901).

[222] See generally Micheline Gleixner, "Consumer Credit in Canada: Regulatory Patchwork" (2020) 43:2 Dal LJ 697. Some statutes are titled in a way that furthers my earlier assertion regarding the importance of rhetoric in our conception of poverty. See *An Act to End Predatory Lending*, SA 2016, c E-9.5; *A Better Deal for Consumers and Businesses Act*, SA 2017, c 18. (Of course, provinces lack constitutional authority to enact criminal legislation pursuant to section 92 of the *Constitution Act, 1867* ((UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5)).

systematically by the state – instead of private parties who face cost and other constraints.[223] However, usury statutes are not even applied as criminal laws. Section 347 of the *Criminal Code* provides that "[n]o proceedings shall be commenced under this section without the consent of the Attorney General."[224] I could find no recent Canadian criminal proceeding invoking the usury provision and know no other scholar who has.[225] In a peculiar, likely unique way, civil courts apply the usury provision as if it were a civil provision – often through general contract enforcement exceptions such as unconscionability and other rules that relate to public order.[226]

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[223] See Phil Lord, "'It Doesn't Work!': The Symbolic Aspect of Law, From the Criminal Law to Bill 21" (2020) 9:6 Directions 1 at 7.

[224] See *Criminal Code*, *supra* note 221, s 347(7).

[225] But see Jessica Silver-Greenberg, "New York Prosecutors Charge Payday Loan Firms With Usury", *The New York Times* (11 August 2014), online: <https://archive.nytimes.com/dealbook.nytimes.com/2014/08/11/new-york-prosecutors-charge-payday-lenders-with-usury/>.

[226] See e.g. *Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7 (discussing judicial discretion and contractual remedies); *Garland v Consumers' Gas Co*, 2004 SCC 25; *Boyer v Légaré*, 2017 QCCQ 14335; *Pépin v B2B Alliance inc*, 2016 QCCS 852; *Awanda v AMBC Ventures Inc*, 2022 QCCA 1133, leave to appeal to SCC refused, 40425 (20 April 2023). See also Philippe Teisceira-Lessard, "'Un taux d'intérêt criminel' reproché à une syndique du Barreau", *La Presse* (22 December 2017), online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/actualites-judiciaires/201712/22/01-5148085-un-taux-dinteret-criminel-reproche-a-une-syndique-du-barreau.php>; Jacob Ziegel, "Pass the Buck: Ottawa Has Paramount Jurisdiction Over Interest Rate Regulation", *The Financial Post* (10 November 2006), online: *University of Toronto* <https://www.law.utoronto.ca/news/article-ziegel-pass-buck> ("Section 347 may also cost the Consumers Gas Company (subsequently bought out by the Enbridge Corporation) some $20-million to settle a class action brought on behalf of consumers in Southern Ontario alleging Consumers violated the interest ceiling, even though the company's payment terms had been approved by the Ontario Energy Board. […] [A]t least half a dozen class actions are pending in Alberta, British Columbia and Ontario, seeking to recover millions of dollars in borrowing costs that exceed the permissible ceiling in section 347 […] Even more surprising is the near total apathy of the federal government and many provincial governments in the face of this quite blatant violation of section 347"); John D Skees, "The Resurrection of Historic Usury Principles for Consumption Loans in a Federal Banking System" (2006) 55:4 Cath UL Rev 1131 at 1138 (discussing similar issues in the United States).

As noted, Canada's *Criminal Code* sets the interest rate limit at 60 percent per year.[227] However, in 2007, an additional provision was added to allow payday lenders to charge an interest rate that exceeds the limit.[228] It applies where "the amount of money advanced under the agreement is $1,500 or less and the term of the agreement is 62 days or less" and the lender is "licensed or otherwise specifically authorized under the laws of a province to enter into the agreement."[229] Since then, most provinces have, as they can, enacted alternative regulatory schemes.[230] Professor Stephanie Ben-Ishai and others have surveyed the provincial regulatory regimes and noted: "Though the structure of each province's regulatory framework is generally the same, containing caps on rates, terms of repayment, disclosure obligations, and prohibitions on lender conduct, the specific requirements can vary widely, especially with regards to online payday lending. There are

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227 See *Criminal Code*, *supra* note 221, s 347.

228 See *ibid*, s 347.1. It seems obvious that the government felt that the usury provision would make alternative lending non-viable. I further dicuss why alternative financial services providers are likely only moderately profitable, even with such high fees, in note 571, below. The explanation mostly relates to their extensive and far-reaching network of branches. It does not mean that there is no alternative business model, and the government's assumption was (and remains) empirically thin.

229 *Ibid*.

230 See Phil Lord, "Ending Poverty: A Step in the Right Direction" [2021] Ottawa Law Review Blog, online: <https://rdo-olr.org/2021/ending-poverty-a-step-in-the-right-direction/> [Lord, "Ending Poverty"]. See also Stephanie Ben-Ishai, "Regulating Payday Lenders in Canada: Drawing on American Lessons" (2008) 23:2 BFLR 323; Stephanie Ben-Ishai, Saul Schwartz, Alina Butt & Megan Linton, "Bankruptcy Lessons for Payday Lending Regulation" (2021) 72 UNBLJ 173 [Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation"]; Nathalie Martin, "1,000% Interest - Good While Supplies Last: A Study of Payday Loan Practices and Solutions" (2010) 52:3 Ariz L Rev 563 (discussing regulatory reform in New Mexico and Ohio).

In the United States, municipalities sometimes regulate alternative financial services providers. See Fritzdixon, Hawkins & Skiba, *supra* note 217 at 1015, 1022; Barr, Dokko & Keys, *supra* note 217 at 140; Christopher L Peterson, "'Warning: Predatory Lender'—A Proposal for Candid Predatory Small Loan Ordinances" (2012) 69:2 Wash & Lee L Rev 893. On the same phenomenon in Canada, see Ricardo Tranjan, "Swimming with the Sharks: Poverty, Pandemics and Payday Lenders" (April 2020), online: *Canadian Centre for Policy Alternatives* <https://policyalternatives.ca/publications/reports/swimming-sharks> ("Municipalities (including Hamilton and Toronto) have created caps on the number of payday business licences and minimum distance limits for new outlets. This is a clever use of municipal power and it may have a positive impact, especially on land use and development").

some notable gaps in disclosure requirements and prohibitions[.]"[231] All provinces provide guidance on the terms that need to be included in a payday lending agreement, allow for early repayment without penalties, and "explicitly prohibits rollover loans (i.e., the same lender giving a second loan before the first has been paid off), tied selling, and wage assignment."[232] Most provinces prohibit harassment by lenders, including at the borrower's workplace, or otherwise and limit contact between lenders and borrowers.[233] Most provinces allow for a cancellation period of two business days and require disclosure of the annual percentage rate and otherwise regulate the disclosure, display, and presentation of relevant information.[234] There appears to be convergence toward a maximum cost of borrowing of 15 dollars per 100 dollars borrowed and a maximum non-repayment fee of 20 dollars.[235] Many provinces attempt to regulate online and out-province lending.[236] Scholars have decried the lack of uniformity of regulation, argued in favour of national

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[231] Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation", *supra* note 230 at 176. See also Gleixner, *supra* note 222.

[232] Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation", *supra* note 230 at 188, 191. See also Gleixner, *supra* note 222.

[233] See Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation", *supra* note 230 at 189. See also Gleixner, *supra* note 222 at 744.

[234] See Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation", *supra* note 230 at 191. See also Gleixner, *supra* note 222. As noted above, the various and complex ways in which fees are charged and calculated can create unique peril for unsophisticated and financially vulnerable borrowers. See e.g. Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 209 at 483; Fritzdixon, Hawkins & Skiba, *supra* note 217; Baradaran, "Small-Dollar Loan", *supra* note 209; Bowles et al, *supra* note 217; Barr, Dokko & Keys, *supra* note 217 at 136-37; Lamb, "Financial Exclusion and Financial Capabilities", *supra* note 217; Statistics Canada, *Postsecondary Education*, *supra* note 217. See also Martin, *supra* note 230 at 590-91 ("Ultimately, whenever payday lending legislation passes, the industry finds a way to charge even more for loans than they did prior to the legislation").

[235] See *ibid* at 189.

[236] See generally *ibid*.

guidelines, and noted the limited enforcement of the relevant statutes and regulations by provincial governments.[237]

In Ontario, for example, lenders can charge an annualised interest rate of 390 percent, or 3,786 percent with compounding at each borrowing period.[238] Others have noted that, with the exception of Quebec, this is the lowest rate in Canada.[239] The cost of borrowing is similar in most US states.[240] Unlike banks, which are subject to significant and complex regulatory regimes,[241]

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[237] See generally *ibid*. They have also noted that similar problems exist in the United States and argued in favour of tailored regulation that can be amended more promptly and easily than general consumer protection regimes. On analogous issues regarding municipal regulation, see Paul Cormier, "Moncton Pawn Shops Seek Better Regulations of Their Industry", *Global News* (18 July 2016), online: <https://globalnews.ca/news/2832373/moncton-pawn-shops-seek-better-regulations-of-their-industry/> ("'There's just no regulations in the industry. We apply for a license but there's no teeth behind the licensing that we apply for. There are some rules but they're not being enforced… you can do whatever you want more or less,' Bill Daigle, manager of Parlour Pawn said. The city bylaw states that every pawnbroker shall keep a permanent record of information such as: an accurate and detailed description of each item taken as a pledge or pawn and all markings, serial numbers, make or model of the property. The problem is, that's rarely done").

[238] See Lord, "Ending Poverty", *supra* note 230. This is pursuant to the *Payday Loans Act, 2008*, SO 2008, c 9, s 32; O Reg 98/09, s 23 and O Reg 358/16, s 4.

[239] Tranjan, *supra* note 230. Quebec has limited total cost of borrowing to 35 percent for all loans (including payday loans). The author calculates rates (without compounding) of 391 percent for Alberta, British Columbia, New Brunswick, and Ontario; 443 percent for Manitoba and Saskatchewan; 495 percent for Nova Scotia; 548 percent for Newfoundland; and 652 percent for Prince Edward Island. See also Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation", *supra* note 230; Gleixner, *supra* note 222. See also Dijkema & McKendry, *supra* note 220 at 43 ("[I]n Quebec and a number of US states where an interest-rate cap of 36 percent or lower (35 percent in Quebec) has resulted in markets void of licensed payday lenders. Although many opponents of payday loans view this as a victory for consumers, the effective impact is complex and likely harmful to a significant segment of consumers").

[240] See Nick Bourke, "Payday Loan Facts and the CFPB's Impact" (14 January 2016), online: *The Pew Charitable Trusts* <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/payday-loan-facts-and-the-cfpbs-impact>.

[241] Mehrsa Baradaran, "Banking and the Social Contract" (2014) 89:3 Notre Dame L Rev 1283; Mehrsa Baradaran, "Reconsidering the Separation of Banking and Commerce" (2012) 80:2 Geo Wash L Rev 385; *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, 124 Stat 1376 (2010) (codified through 12 USC § 5301 et seq); Julie Andersen Hill, "Transaction Account Fees: Do the Poor Really Pay More than the Rich?" (2012) 15:1 University of Pennsylvania Journal of Business Law 65; Donald JS Brean, Lawrence Kryzanowski & Gordon S Roberts, "Canada and the United States: Different Roots, Different Routes to Financial Sector Regulation" (2011) 53:2 Business History 249; Sana Mohsni & Isaac Otchere, "Does Regulatory Regime Matter for Bank Risk Taking?

alternative financial services providers remain exempt from even the most elementary forms of financial regulation. Indeed, one can reasonably conclude that *deregulation* was the state's preferred solution to increase access to credit for the very poor.

4. Bankruptcy

The state also responds to poverty through bankruptcy law. This form of state intervention is significantly different from the ones presented throughout this chapter in that bankruptcy law (1) shifts cost of private actors (instead of the state) and (2) provides relief to indebtedness once it becomes unsustainable. Nonetheless, bankruptcy law is a tool used by the state to combat poverty, and, as detailed below, it can be understood as either a substitute for or a part of the social safety net.

Lending and debt have deep religious and moral underpinnings.[242] Contemporary bankruptcy law is the culmination of a major shift in societal perception of debt. The inability to

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A Comparative Analysis of US and Canada" (2018) 53 Journal of International Financial Markets, Institutions and Money 1.

[242] See e.g. *Holy Bible: New Testament: New Living Translation* (Carol Stream: Tyndale, 2018) ("If someone borrows an animal from a neighbor and it is injured or dies when the owner is absent, the person who borrowed it must pay full compensation" at Exodus 22:14; "The wicked borrow and never repay" at Psalm 37:21; "Just as the rich rule the poor, so the borrower is servant to the lender" at Proverbs 22:7); Donald R Korobkin, "Bankruptcy Law, Ritual, and Performance" (2003) 103:8 Colum L Rev 2124; Wayne AM Visser & Alastair Macintosh, "A Short Review of the Historical Critique of Usury" (1998) 8:2 Accounting, Business & Financial History 175; Skees, *supra* note 226 at 1140-42 ("Usury laws, such as the current state laws discussed *supra*, are rooted in the morals of the Old Testament. Under Hebrew law, a lender was expected to lend money as an act of charity rather than as an interest-producing investment. The righteous in the Old Testament have a duty to protect and care for the poor and needy, not to profit from their misfortune. […] As a whole, the Old Testament understanding of usury reflects a concern for the potential exploitation of the poor by the wealthy through usury, primarily as a way of preventing poverty"; Skees provides a

pay one's debts is now both decriminalised and partially normalised.[243] Contemporary bankruptcy law is predicated upon the "fresh start principle."[244] Prof. Thomas H. Jackson, in providing the seminal account of the theoretical context of the fresh start principle, has described it as follows:

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comprehensive account of the characterisation of debt in the Christian tradition, from the Old Testament to today); Peterson, *supra* note 230 at 896 ("The American public's skepticism has at least in part grown out of a moral view, grounded in the prevailing Christian faith of most Americans, that the taking of excessive interest is a grave and punishable sin"); Mohammed Akacem & Lynde Gilliam, "Principles of Islamic Banking: Debt versus Equity Financing" (2002) 9:1 Middle East Policy 124 (discussing how transactions are structured to respect the Islamic prohibition on interest-bearing loans). See also Pamela Foohey, Robert M Lawless, Katherine Porter & Deborah Thorne, "Life in the Sweatbox" (2018) 94:1 Notre Dame L Rev 219 (arguing that indebted individuals unnecessarily and detrimentally wait before filing for bankruptcy because they wish to pay back creditors and are ashamed of indebtedness); Foohey, "A New Deal for Debtors", *supra* note 199 ("Most people—both consumer debtors and the general public—also probably think that creditors will be present during these hearings and will have the right to cross-examine debtors, similar to what people see on television shows involving the criminal justice system. People consequently may believe that creditors will hear debtors' stories. Those households that file bankruptcy may anticipate—perhaps fear—what their creditors may ask or say in response" at 2317); Stephanie Ben-Ishai, "Reaffirmation of Debt in Consumer Bankruptcy in Canada" (2015) 56:2 Can Bus LJ 238 at 246 ("[The exception regarding payments made by a bankrupt to an individual related to the bankrupt] recognizes that a discharged bankrupt may feel a moral obligation to repay family members despite the absence of a legal obligation"). See also "President Obama Remarks on Consumer Protection and the Economy" (26 March 2015), online (video): <https://www.c-span.org/video/?325030-1/president-obama-remarks-consumer-protection-economy> at 23m:31s ("You've got some very conservative folks here in Alabama who recognize – they're reading their Bible, they're saying, well, that ain't right. Right? I mean, they're saying the Bible is not wild about somebody charging $1,000 worth of interest on a $500 loan. Because it feels like you're taking advantage of somebody").

[243] On related issues, see F H Buckley & Margaret F Brinig, "The Bankruptcy Puzzle" (1998) 27:1 J Leg Stud 187 (arguing that increased bankruptcy rates in the late 1980s in part resulted from changing social perceptions of bankruptcy); Samir D Parikh, "A New Fulcrum Point for City Survival" (2015) 57:1 Wm & Mary L Rev 221 at 242 (discussing the destigmatisation of municipal bankruptcies in the United States). See also Dalié Jiménez, "Ending Perpetual Debts" (2018) 55:3 Hous L Rev 609; 18 USC §§ 151-58 (criminalising conduct relating to bankruptcy).

[244] See e.g. Abbye Atkinson "Consumer Bankruptcy, Nondischargeability, and Penal Debt" (2019) 70:3 Vand L Rev 917; Ben-Ishai, "Gendered Dimensions of Social Insurance", *supra* note 194; Ben-Ishai, "Reaffirmation of Debt in Consumer Bankruptcy in Canada", *supra* note 242; Stephanie Ben-Ishai, Saul Schwartz & Jeremy Barretto, "The Role of Government as a Creditor of the Disadvantaged" (2010) 35:2 Queen's LJ 539; Thomas H Jackson, "The Fresh-Start Policy in Bankruptcy Law" (1985) 98:7 Harv L Rev 1393; Korobkin, *supra* note 242; Melissa B Jacoby, "Collecting Debts From the Ill and Injured: The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay" (2001) 51:2 Am U L Rev 229. See also Ronald J Mann, "Bankruptcy Reform and the 'Sweat Box' of Credit Card Debt" [2007] U Ill L Rev 375 (arguing that the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (Pub L No 109-8, 19 Stat 23 (2005) (codified throughout 11 USC)) fundamentally altered the existing paradigm of bankruptcy law to favour creditors); Jean Bracher, "Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill" (2004) 44:4 Santa Clara L Rev 1065 (discussing how European countries adopt a different view of bankruptcy which is less favourable to debtors); Micheline Gleixner & Michael J Bray, *La gestion des risques des créanciers et la réhabilitation des débiteurs surendettés : objectifs contradictoires ou complémentaires?* (Halifax: Bureau du surintendant des faillites, 2013) (also discussing how European countries adopt a different view of bankruptcy).

"Discharge 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. For these reasons, discharge is viewed as granting the debtor a financial 'fresh start.'"[245] Discharge permits indebted individuals to begin to fully participate in the economic system once again.[246]

In both Canada and the United States, bankruptcy law provides a process through which individuals who are unable to pay their debts can be released. Bankruptcy is available to both individuals and corporate entities, but I focus here on "consumer" bankruptcy. Bankruptcy law is codified. It is governed by the *Bankruptcy and Insolvency Act*[247] in Canada and title 11 of the United States Code in the United States.[248] Both regimes provide a similar process through which an individual who is unable to pay their debts can request bankruptcy relief ("file for bankruptcy"). An independent third party assesses their liabilities and assets and uses eligible assets to pay liabilities. Then, the remaining liabilities are discharged. Bankruptcy regimes in Canada and the United States also provide an alternative through which individuals can retain their assets. In the United States, they can file a "Chapter 13" (in contrast to "Chapter 7") bankruptcy and retain their

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[245] Jackson, *supra* note 244 at 1393.

[246] See e.g. Jacoby, *supra* note 244; Jackson, *supra* note 244; Foohey, "A New Deal for Debtors" at 2300 ("The bankruptcy system is an integral part of the American legal system. About one million people file consumer bankruptcy every year. Cumulatively, these cases seek to discharge billions of dollars in debts and to grant a 'fresh start' to the individuals and families who file that hopefully will allow them to regain their financial footing and re-enter the credit economy. Based on the number of petitions filed each year, the consumer bankruptcy system is by far the part of the federal court system with which people most often come into contact").

[247] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

[248] 11 USC. This section of the United States Code is sometimes referred to as the United States Bankruptcy Code.

assets pursuant to a plan to repay all or part of their debts over a three- to five-year period.[249] In Canada, debtors can achieve a similar outcome through a "consumer proposal."[250]

Ostensibly because of its historical underpinnings, the fresh start principle remains predicated upon an assumption that the debtor has done nothing *wrong* – and, conversely, that debtors who have should be ineligible for bankruptcy. As Prof. Jackson put it, "Most explanations of bankruptcy law insist that discharge should be available only to the 'honest but unfortunate' debtor."[251] As a result, bankruptcy regimes provide for several exceptions to dischargeability, making certain debts non-dischargeable in bankruptcy. Exceptions include situations where assets are diverted or hidden to frustrate creditors,[252] destruction or falsification of relevant records,[253] various forms of dishonest conduct,[254] student loans,[255] family law obligations,[256] and criminal justice debt.[257] These provisions serve to make bankruptcy unavailable to "underserving" debtors

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[249] 11 USC chap 13. (The nomenclature refers to two chapters of 11 USC.)

[250] See *Bankruptcy and Insolvency Act*, *supra* note 247, ss 66.11-66.4.

[251] Jackson, *supra* note 244 at 1440. See also Atkinson "Consumer Bankruptcy, Nondischargeability, and Penal Debt", *supra* note 244; Emily Kadens, "The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law" (2010) 59:7 Duke LJ 1229 ("The idea behind creating a greater equilibrium between debtors and creditors has long been that if debtors see an advantage in disclosing their assets to their creditors, they will be less inclined to try to cheat, and if debtors cheat less, creditors will be repaid more" at 1433-34).

[252] See 11 USC §§ 727(a)(2), 727(a)(5), 727(a)(6), 727(a)(7), 1328(c); *Bankruptcy and Insolvency Act*, *supra* note 247, s 178(1)(f).

[253] See 11 USC §§ 727(a)(3), 727(a)(7), 1328(c).

[254] See USC §§ 727(a)(4), 727(a)(7), 1328(c); *Bankruptcy and Insolvency Act*, *supra* note 247, ss 178(1)(d), 178(1)(e).

[255] See *Bankruptcy and Insolvency Act*, *supra* note 247, ss 178(g), 178(g.1).

[256] See *Bankruptcy and Insolvency Act*, *ibid*, ss 178(b), 178(c).

[257] See 11 USC § 1328(a)(3); *Bankruptcy and Insolvency Act*, *supra* note 247, s 178(a). See also Stephanie Ben-Ishai & Arash Nayerahmadi, "Over-Indebted Criminals in Canada" (2019) 42:4 Man LJ 207; Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 New Criminal Law Review 73; Jessica M Eaglin, "Improving Economic Sanctions in the States" (2015) 99:5 Minn Law Review 1837; Torie Atkinson, "A Fine Scheme: How

and, as a corollary, to disincentivise dishonest conduct.[258] Although bankruptcy releases the debtor from their financial obligations, it creates a set of consequences which persist over at least six and often over ten years. Their credit is adversely affected,[259] and they may be unable to file for bankruptcy again before a period has elapsed.[260]

Many have remarked that bankruptcy functions as either a substitute for or a part of the social safety net.[261] First, bankruptcy may function as a form of social insurance. Prof. Adam Feibelman has provided a detailed theoretical framework for how we can understand bankruptcy

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Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons" (2016) 51:1 Harv CR-CLL Rev 189; Neil L Sobol, "Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses" (2017) 88:4 U Colo L Rev 841.

[258] But see Jackson, *supra* note 244 at 1441 ("Section 727 does not deny discharge to debtors who commit arson or murder, although these acts are more egregious than fraud. […] Moreover, there is no reason to believe that denying debtors discharge is the exclusive or necessarily best way to deter their misbehavior toward creditors"); Jackson, *supra* note 244.

[259] See *Fair Credit Reporting Act*, Pub L No 91-508, 84 Stat 1114-2 (1970) (codified through 15 USC § 1681 et seq), § 605(a)(1); Financial Consumer Agency of Canada, "How Long Information Stays on Your Credit Report" (3 May 2023), online: *Government of Canada* <https://www.canada.ca/en/financial-consumer-agency/services/credit-reports-score/information-credit-report.html>; "What Is a Credit Report?", online *TransUnion* <https://www.transunion.ca/credit-report>; "Knowledge Center: What is Bankruptcy and What Happens to My Credit?', online: *Equifax* <https://www.equifax.com/personal/education/personal-finance/what-is-bankruptcy/>.

Poor credit is part of what drives individuals to resort to alternative financial services providers that do not require access to credit reports. See Cuttino, *supra* note 221; Greene, *supra* note 152; Richard R W Brooks, "Credit Past Due" (2006) 106:4 Colum L Rev 994; Lamb, "Financial Exclusion and Financial Capabilities", *supra* note 217 at 213; CNBC, "The Big Problem With Credit Scores" (11 October 2022), online (video): <https://www.youtube.com/watch?v=QNa-4LSuN-s&ab_channel=CNBC>. The situation of the very poor already limits their ability to build credit. For instance, timely payment of rent is not reflected on credit reports, unlike timely payment of a mortgage. Additionally, because the credit products provided alternative financial services providers are not reported to credit agencies, they cannot serve to build a credit history which would help the very poor gain access to the mainstream banking system.

[260] See 11 USC §§ 727(8), 727(9), 1328(f).

[261] See e.g. Adam Feibelman, "Defining the Social Insurance Function of Consumer Bankruptcy" 13:1 American Bankruptcy Institute Law Review 129; Jean Bracher, "Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill" (2004) 44:4 Santa Clara L Rev 1065; Jacoby, *supra* note 244; Foohey, "A New Deal for Debtors", *supra* note 199.

as social insurance.[262] He first notes: "[Bankruptcy] satisfies the basic economic definition of insurance. It transfers risk from a debtor (the insured) to his or her creditor (the insurer), for which the creditor seeks compensation in the form of an increased interest rate."[263] Only recently have legal scholars begun to relate bankruptcy to other forms of social insurance, noting, among other things, that bankruptcy can function as residual insurance when other social insurance programs – such as unemployment, health, and disability insurance.[264] Prof. Feibelman argues that bankruptcy helps debtors face the same risks of "wage interruption, medical-related expenses, disability, and negative financial effects of marital dissolution" as other social insurance programs.[265]

Prof. Feibelman draws an operative distinction between social insurance and social assistance.[266] To him, the programs he analogises to bankruptcy (unemployment, health, and disability insurance) are not social assistance programs.[267] They require those who benefit from the insurance to pay into the insurance system – through premiums that are generally paid as

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[262] See Feibelman, *supra* note 261.

[263] *Ibid* at 130.

[264] See also Jacoby, *supra* note 244 at 236, 238 (noting that almost half of bankruptcies in the United States relate to the healthcare system).

Feibelman further notes that bankruptcy is available more generally to all debtors with excessive indebtedness. Therefore it functions as a broad substitute (or complement) to all of these social insurance programs. See Feibelman, *supra* note 261 at 160.

[265] Feibelman, *supra* note 261 at 132.

[266] See *ibid* at 138.

[267] See also *ibid* at 184 ("As a general rule, countries that tend to have generous social safety nets also tend to grant relatively weak protections under bankruptcy law").

payroll taxes.[268] The insurance is "social" because it is provided by the state instead of the private sector. For instance, private health insurance does exist in the United States; it becomes social insurance when it is provided by the state. Similarly, bankruptcy insurance might be provided by the private sector if it were not provided indiscriminately and mandatorily by the state.

Bankruptcy can also be conceptualised as social assistance, as a part of the social safety net. (The relevance of this alternative framework turns largely on whether you agree with Prof. Feibelman that creditors fully pass the cost of bankruptcy on to debtor,[269] or with me that they may not.) Bankruptcy differs from social assistance and other forms of state assistance provided to the very poor in that it is cost-neutral to the state. However, it does constitute a form of state intervention. It is the power of the state that makes certain debts dischargeable in bankruptcy. And this power is exercised for reasons that closely resemble those invoked in earlier portions of this chapter. Bankruptcy serves to protect vulnerable individuals who are overly indebted. It provides them assistance by releasing them from their obligations.

Bankruptcy is a distributive process – like social assistance. Social assistance redistributes wealth from taxpayers (disproportionately wealthier ones given progressive taxation)[270] to

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[268] See *ibid*. See also Lord & Saad, *supra* note 214; Lord, "Incentivising Employment during the COVID-19 Pandemic", *supra* note 214 (contrasting unemployment insurance and other government programs that are funded through general tax revenue).

[269] See Feibelman, *supra* note 261 at 130.

[270] See generally Emmanuel Saez & Gabriel Zucman, "The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts" (2020) 34:4 Journal of Economic Perspectives 3; Emmanuel Saez & Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (New

beneficiaries of social assistance. The redistributed funds come from the state, which, in turn, is funded by taxation.[271] In contrast, bankruptcy redistributes wealth from creditors to their debtors. The process does not directly involve the state's funds (general taxation revenue).

Additionally, bankruptcy is a form of *ex post* intervention. It occurs *after* a problem has materialised – here, excessive indebtedness. In contrast, social assistance can be a form of *ex ante* intervention. Giving the very poor money can prevent excessive indebtedness. Bankruptcy can also serve as a partial remedy to inadequate regulation. If the state does not create a regulatory regime for alternative financial services providers that prevents excessive indebtedness, it can intervene *ex post* to mitigate some of the consequences of excessive indebtedness.[272]

Under both frameworks, bankruptcy is not a perfect substitute for other forms of social assistance or social insurance.[273] It involves a unique set of consequences. For instance, where bankruptcy is employed as a substitute for another social assistance or social insurance program, it may not be used as widely because some individuals will lack the funds to pay filing and

York: WW Norton, 2020); Emmanuel Saez & Gabriel Zucman, "Progressive Wealth Taxation" (2019) Brookings Papers on Economic Activity 437; Phil Lord, "COVID-19 and the Future of Work" [2021] Denv UL Rev Forum; Herbert Hovenkamp, "The First Great Law & Economics Movement" (1990) 42:4 Stan L Rev 993 at 1002-05.

[271] Recall Feibelman's argument that the costs of bankruptcy are reallocated to debtors through higher interest rates (Feibelman, *supra* note 261 at 130). If you agree with this statement, social assistance may be preferable because it shifts cost to wealthier third parties, whereas bankruptcy shifts costs to debtors generally (including the individual debtor who benefits from bankruptcy).

[272] If we assume that the products and services provided by alternative financial services providers are only harmful to some customers or in particular circumstances (I don't), this form of intervention would be sufficient.

[273] Regardless of the framework you prefer, understanding bankruptcy and other social and legislative programs as related can help the state make more intentional choices about who it helps and who bears the cost.

professional fees,[274] fear the stigma of bankruptcy,[275] or have internalised a self-sufficiency paradigm that is inconsistent with bankruptcy.[276] Furthermore, because bankruptcy is only available to those who are insolvent, a social insurance or social assistance system that heavily relies on bankruptcy will necessarily entail that many individuals will bear the consequences of excessive indebtedness without being eligible for bankruptcy.[277] These consequences are both personal and financial, and they affect individual wellbeing and social participation.

This chapter has discussed how the state has responded to poverty. In doing so, it significantly developed the theme of rhetoric introduced in chapter II – and which undergirds this project. The next chapter provides a sustained case study of the most analogous alternative to my proposed government program: postal banking. It uses a recently announced partnership between Canada Post and the Toronto-Dominion Bank to assess the potential role of the postal service in providing banking and credit. Although it relates to the rest of my argument, and provides

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[274] See e.g. Stephanie Ben-Ishai & Saul Schwartz, "Bankruptcy for the Poor?" (2007) 45:3 Osgoode Hall LJ 471; Ronald J Mann & Katherine Porter, "Saving Up for Bankruptcy" (2010) 98:2 Geo LJ 289; Chrystin Ondersma, "Small Debts, Big Burdens" (2019) 103:5 Minn L Rev 2211; Littwin, *supra* note 151; Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation", *supra* note 230; Pamela Foohey, Robert M Lawless, Katherine Porter & Deborah Thorne, "'No Money Down' Bankruptcy" (2017) 90:5 S Cal L Rev 1055.

[275] See generally Feibelman, *supra* note 261; Jerzy Eisenberg-Guyot et al, "From Payday Loans To Pawnshops: Fringe Banking, The Unbanked, And Health" (2018) 37:3 Health Affairs 429 at 430-431; Katherine Porter & Deborah Thorne, "Life in the Sweatbox" (2018) 94:1 Notre Dame L Rev 219.

[276] See generally Greene, *supra* note 152.

[277] In turn, indebtedness has the significant negative social and individual consequences discussed throughout this project. See e.g. "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 206; Jiménez, "Ending Perpetual Debts", *supra* note 243 at 638; Eisenberg-Guyot et al, *supra* note 275 at 430-31 (on health consequences).

To the extent that you agree with my claim in the main text, bankruptcy may also be less equitable than social assistance, which provides the same support to all beneficiaries.

historical context for it, Chapter V was conceived and written as internally coherent and free standing (and submitted for publication as an article). Therefore, it comprises its own abstract, and its first portions may appear somewhat redundant with earlier chapters.

V. <u>The Return of Postal Banking</u>

In July 2021, Canada Post announced a partnership with the Toronto-Dominion Bank. The two organisations undertook the ambitious mission to "expand access to financial services for Canadians." They would start with a "personal loan product." Since then, post offices nationwide have offered personal loans at interest rates that exceed those of traditional bank loans but are significantly lower than those of payday loans and other financial products available to the segment of the population that lacks access to the banking system. Although this would surprise most Canadians, Canada Post, and similar postal services across the world, have a long and rich history of providing various financial services to their citizens. This paper provides the first comprehensive account of the emergence, growth, and eventual decline of Canada's historical federal postal bank. It unearths more than one hundred original archival sources from the last two centuries – most of which were never cited before. This account helps us understand the significance, promise, and risks of Canada Post's – and the Canadian state's – contemporary foray into banking and credit. It raises, and contextualises, broader issues regarding the fundamental importance of banking and credit to social participation, the correlative role and potential responsibility of the state to ensure the provision of banking and credit to citizens, and the elusive and ever-relevant boundaries that delineate what we deem public and private.

In July 2021, Canada Post[278] announced a partnership with the Toronto-Dominion Bank (TD). The two organisations undertook the ambitious mission to "expand access to financial services for Canadians."[279] They would start with a "personal loan product."[280] In the following months, Canada Post and TD launched the Canada Post MyMoney Loan in some 200 post offices across Canada.[281] The pilot project provided loans of between $1,000 and $30,000 with terms ranging between one and seven years.[282] A year later, in October 2022, after this "extensive market test confirmed strong consumer demand for more accessible lending products," MyMoney Loans were made available nationwide.[283] The terms of the loans currently offered pursuant to the

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[278] The Canada Post Corporation is a Crown corporation which exists pursuant to the *Canada Post Corporation Act*, RSC 1985, c C-10. Its main function is to "operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada" (*ibid*, s 5(1)(a)). I refer to it as "Canada Post."

Canada Post partly or wholly owns several subsidiaries. It owns 91 percent of Purolator. See Françoise Bertrand et al, "Canada Post in the Digital Age: Discussion Paper 2016" (September 2016), online: *Government of Canada* <https://www.tpsgc-pwgsc.gc.ca/examendepostescanada-canadapostreview/rapport-report/consult-eng.html> at 15.

[279] "Canada Post and TD Enter Strategic Alliance to Expand Access to Financial Services for Canadians: Drawing on Strengths of Both Organizations, Pilot to Launch This Fall", *Canada Post* (29 July 2021), online: <www.canadapost-postescanada.ca/cpc/en/our-company/news-and-media/corporate-news/news-release/2021-07-29-canada-post-and-td-enter-strategic-alliance-to-expand-access-to-financial-services-for-canadians> ["Strategic Alliance"]. This joint press release was also published on TD's website. See "Canada Post and TD Enter Strategic Alliance to Expand Access to Financial Services for Canadians", *TD Stories* (29 July 2021), online: <https://stories.td.com/ca/en/news/2021-07-29-canada-post-and-td-enter-strategic-alliance-to-expand-access>. See also "Building Together: 2021 Annual Report", online: *TD Bank Group* <https://www.td.com/document/PDF/ar2021/ar2021-Complete-Report.pdf> at 3, 7, 32.

[280] "Strategic Alliance", *ibid*.

[281] See "Introducing Canada Post MyMoney Loan Delivered with TD to Help Expand Access to Financial Services for Canadians", *TD Stories* (28 October 2021), online: <https://stories.td.com/ca/en/article/introducing-canada-post-mymoney-loan-delivered-with-td-to-help-expand-access-to-financial-services-for-canadians> ["Introducing Canada Post MyMoney Loan"].

[282] See *ibid*.

[283] See "Canada Post and TD Delivers Simple and Affordable Loans for More Canadians", *TD Stories* (12 October 2022), online: <https://stories.td.com/ca/en/news/2022-10-12-canada-post-and-td-delivers-simple-and-affordable-loans-for> ["Simple and Affordable Loans for More Canadians"]. Shortly after its launch, in November 2022, the program was temporarily paused due to unspecified "processing issues." See Philippe de Montigny & Pete Evans,

program mirror those of the pilot project.[284] As of March 2023, interest rates ranged from 10 percent to 21 percent – 4 to 14 percentage points above the TD Prime Rate.[285]

Why would a government entity[286] partner with Canada's largest bank[287] to provide credit? Why would the state get in the business of providing financial services – or sanction and support the activities of a private corporation? Why would it help provide loans at interest rates that significantly exceed those of personal lines of credit and mirror those of credit cards[288] – ostensibly encouraging Canadians to obtain high-cost and potentially dangerous credit? For one, there is a need. And, as we will see, this credit might in fact be far more attractive, and safer, than the other options available to MyMoney Loan borrowers.

MyMoney Loans fill a gap in market offering by bridging the divide between the products offered by traditional banks and those offered by alternative financial services providers.

"Only Weeks After Launch, TD Hits Pause on Loan Program Partnering With Canada Post", *CBC News* (24 November 2022), online: <https://www.cbc.ca/news/business/td-bank-canada-post-pause-1.6662813>.

284 See "Canada Post MyMoney Loans: Flexible Loans that Work for You", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/mymoney/loan.page> ["Canada Post MyMoney Loans"].

285 See *ibid*. See also "Today's Rate: TD Prime", online: *TD* < https://www.tdcanadatrust.com/customer-service/todays-rates/td-prime/prime-rate.jsp>.

286 See *Canada Post Corporation Act*, *supra* note 281.

287 On most indicators, the Toronto-Dominion Bank is the largest bank in Canada. See David Feliba & Rehan Ahmad, "The World's 100 Largest Banks, 2021", *S&P Global Market Intelligence* (23 April 2021), online: <https://www.spglobal.com/marketintelligence/en/news-insights/research/the-worlds-100-largest-banks-2021>. It is also on the 25 largest banks in the world.

288 See e.g. Financial Consumer Agency of Canada, "Credit Card Comparison Tool", online: *Government of Canada* <https://itools-ioutils.fcac-acfc.gc.ca/CCCT-OCCC/SearchFilter-eng.aspx>; "Comparing Lines of Credit in Canada", online: *WOWA* <https://wowa.ca/line-of-credit-canada>.

Traditional banks offer credit at lower interest rates.[289] Those who cannot or do not engage with banks are forced to rely on non-bank lenders which provide credit at significantly higher interest rates – routinely reaching hundreds or thousands of percentage points per year. Canada's *Criminal Code* prohibits interest rates exceeding 60 percent per year.[290] (This and analogous provisions are often referred to as "usury" provisions.[291]) However, if provincial legislatures adopt legislation regulating private lenders, they can exempt alternative financial services providers from the usury provision.[292] Using Ontario as an example, I have previously noted that these lenders can charge an annualised interest rate of 390 percent.[293] The prescribed fee is per two-week period, and borrowers often rollover their loan, paying the fee with new credit.[294] It is therefore more accurate

289 See e.g. Financial Consumer Agency of Canada, *supra* note 288; "Comparing Lines of Credit in Canada", *supra* note 288.

290 *Criminal Code*, RSC 1985, c C-46, s 347.

291 The history of usury is closely intertwined with the (de)criminalisation of debt holding. See generally Mehrsa Baradaran, "Credit, Morality, and the Small-Dollar Loan" (2020) 55:1 Harv CR-CLL Rev 63 [Baradaran, "Small-Dollar Loan"]; Micheline Gleixner, "Consumer Credit in Canada: Regulatory Patchwork" (2020) 43:2 Dal LJ 697; Tamar R Birckhead, "The New Peonage" (2015) 72:4 Wash & Lee L Rev 1595; John D Skees, "The Resurrection of Historic Usury Principles for Consumption Loans in a Federal Banking System" (2006) 55:4 Cath U L Rev 1131 at 1140-1148.

292 See generally Phil Lord, "Ending Poverty: A Step in the Right Direction" [2021] Ottawa Law Review Blog, online: <https://rdo-olr.org/2021/ending-poverty-a-step-in-the-right-direction/> [Lord, "Ending Poverty"]; Gleixner, *supra* note 291; Stephanie Ben-Ishai, "Regulating Payday Lenders in Canada: Drawing on American Lessons" (2008) 23:2 BFLR 323.

293 See Lord, "Ending Poverty", *ibid*. This is pursuant to the *Payday Loans Act, 2008*, SO 2008, c 9, s 32, which prohibits cost of borrowing that exceeds the "prescribed limit" and O Reg 98/09, s 23 and O Reg 358/16, s 4, which define the "prescribed limit."

294 See Mehrsa Baradaran, "How the Poor Got Cut Out of Banking" (2013) 62:3 Emory LJ 483; Regina Austin, "Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions" (2004) 53 Am U L Rev 1217; Baradaran, "Small-Dollar Loan", *supra* note 291 at 91.

to assume interest compounding at each period, which brings the annualised interest rate to 3,786 percent.[295] To state the obvious, such credit often traps individuals in unescapable indebtedness.[296]

A meaningful segment of the population relies on these alternative financial services providers by necessity. These individuals are either unbanked (completely shut off from the banking system) or underbanked (lack adequate access to banking or credit products). A recent report finds that 6 percent of Canadians are unbanked,[297] while in the United States, 38 percent of the population is estimated to be unbanked or underbanked.[298] Unbanked and underbanked individuals are highly diverse – in nationality, ethnicity, and cultural belonging.[299] Importantly,

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[295] See Lord, "Ending Poverty", *supra* note 292. In other words, expressing an annual interest rate is essentially meaningless when a short-term loan is used for long-term borrowing. Compounding exponentially increases the stated annual interest rate.

[296] See e.g. Baradaran, "Small-Dollar Loan", *supra* note 291 at 123; Guiseppe Coco & David De Meza, "In Defense of Usury Laws" (2009) 41:8 Journal of Money, Credit and Banking 1691; Austin, "Of Predatory Lending", *supra* note 294; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294; Mehrsa Baradaran, "Banking and the Social Contract" (2014) 89:3 Notre Dame L Rev 1283; Oren Bar-Gill & Elizabeth Warren, "Making Credit Safer" (2008) 157:1 U Penn L Rev 1. These individuals also generally use the loan proceeds to pay for current expenses, not property or services that might increase their income or wealth over time (such as a house or higher education). See "Payday Lending in America: Report 2: How Borrowers Choose and Repay Payday Loans" (February 2013), online: *The Pew Charitable Trusts* <https://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf>.

[297] See "The Underbanked Canada: February 2016", online: *Mintel* <https://store.mintel.com/the-underbanked-canada-february-2016?_ga=2.150848245.2126905070.1570466499-1705706870.1570466499>.

[298] See Mehrsa Baradaran, "It's Time for Postal Banking" (2014) 127:4 Harv L Rev F 165 at 168. See also Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294 at 485-86; Baradaran, "Small-Dollar Loan", *supra* note 291; Catherine Martin Christopher, "Mobile Banking: The Answer for the Unbanked in America?" (2015) 65:2 Cath U L Rev 221; "How America Banks: Household Use of Banking and Financial Services" (17 December 2021), online: *Federal Deposit Insurance Corporation* <www.fdic.gov/analysis/household-survey/index.html>; Michael S Barr, "Banking the Poor" (2004) 21:1 Yale J Reg 121; John P Caskey, *Fringe Banking Check-Cashing Outlets, Pawnshops, and the Poor* (New York: Russel Sage, 1994); Joe Fantauzzi, "Predatory Lending: A Survey of High Interest Alternative Financial Service Users" (December 2016), online: *Canadian Centre for Policy Alternatives* <https://policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2016/12/CCPA-ON%20predatory%20lending%20Dec%201.pdf>.

[299] See e.g. Paul Bowles et al, "Urban Aboriginal Use of Fringe Financial Institutions: Survey Evidence from Prince George, British Columbia" (2011) 40:6 Journal of Behavioral and Experimental Economics 895; Kathryn Fritzdixon,

these individuals are not unbanked or underbanked because servicing them is unprofitable. Traditional banks often choose not to service them even when doing so would be profitable.[300] Banks choose to dedicate their resources to more profitable customers. The costs of marketing and originating loans are mostly fixed, so banks prefer to open branches in areas where they can originate higher-amount loans.

Even those with access to traditional banking services often *choose* to rely on alternative financial services providers due to what has repeatedly been termed a "façade of informality."[301] This preference, which is now central to academic research on access to credit, appears to have first been introduced by scholars Michael A. Stegman and Robert Faris, who noted that, in focus groups, these individuals identified "five ways in which check cashers were superior to banks: (a)

Jim Hawkins & Paige Marta Skiba, "Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets" 2014:4 U Ill L Rev 1013; Baradaran, "Small-Dollar Loan", *supra* note 291; "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", online: *Employment and Social Development Canada* <https://www.canada.ca/en/employment-social-development/programs/poverty-reduction/backgrounder.html#h2.1>; Joan Kendall, "Circles of Disadvantage: Aboriginal Poverty and Underdevelopment in Canada" (2001) 32:2 American Review of Canadian Studies 43. In Canada, Indigenous individuals are significantly more likely to experience poverty.

[300] See Iain Ramsay, "Consumer Credit Law, Distributive Justice and the Welfare State" (1995) 15:2 Oxford J Leg Stud 177 at 187; Christopher, "Mobile Banking", *supra* note 298 at 225-26 ("Banks, for their part, believe there is little financial incentive to offer traditional banking products specifically to the unbanked. Because unbanked individuals make such small transactions and carry small balances, banks do not expect significant profit from these customers"); Christopher Choe, "Bringing in the Unbanked off the Fringe: The Bank on San Francisco Model and the Need for Public and Private Partnership" (2009) 8:1 Seattle Journal for Social Justice 365 at 367 ("A third barrier is the low prevalence of banks and credit unions in low-income areas. […] [A] fourth barrier is that banks tend to find low-income consumers to be less profitable and do not believe it is worth the time, effort, and money to market to them"); Caskey, *supra* note 298; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294 at 528; Richard RW Brooks, "Credit Past Due" (2006) 106:4 Colum L Rev 994 at 995, 996, 1006 ("Banks chose to focus on more profitable sectors of the credit industry, most of which involved substantially larger loans. There is a positive correlation between profitability and loan size since many of the costs of consummating a loan are fixed regardless of the amount of money being borrowed" at 1006); Lisa Blaylock Moss, "Modern Day Loan Sharking: Deferred Presentment Transactions & the Need for Regulation" (2003) 51:4 Ala L Rev 1725 at 1732.

[301] See e.g. Austin, "Of Predatory Lending", *supra* note 294 at 1229; Baradaran, "Small-Dollar Loan", *supra* note 291 at 89; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294 at 495.

easier access to immediate cash; (b) more accessible locations; (c) better service in the form of shorter lines, more tellers, more targeted product mix in a single location, convenient operating hours, and Spanish-speaking tellers; (d) more respectful, courteous treatment of customers; and (e) greater trustworthiness."[302] Alternative financial services providers can provide loans much faster than traditional banks. Customers can access their locations without an appointment, apply for a loan far more quickly and with less documentation, and receive the funds almost instantly.[303] In contrast, banks generally require a pre-set appointment and extensive documentation and take days or weeks to approve and disburse loans.

Although this would surprise most Canadians, Canada Post, and similar postal services across the world, have a long and rich history of providing various financial services to their citizens.[304] This paper traces the emergence, growth, and eventual decline of Canada's historical

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302 Michael A Stegman & Robert Faris, "Payday Lending: A Business Model That Encourages Chronic Borrowing" 17:1 Economic Development Quarterly 8 at 13. See also Austin, "Of Predatory Lending", *supra* note 294 at 1247; Christopher, "Mobile Banking", *supra* note 298 at 225; Sara Sternberg Greene, "The Bootstrap Trap" (2017) 67:2 Duke LJ 233 at 303; Caskey, *supra* note 298; Ben-Ishai, "Regulating Payday Lenders in Canada", *supra* note 292 at 330. Some 13 percent of unbanked households cite "Bank Locations Are Inconvenient" and "Bank Hours Are Inconvenient" as a reason for not holding a bank account, while some 2 percent cite these as their main reason for not holding a bank account. See "How America Banks: Household Use of Banking and Financial Services", *supra* note 298 at 17. Scheduling flexibility is particularly important to the very poor, as the positions they hold afford little such flexibility.

303 Analogously, 36 percent of unbanked households cite greater privacy as a reason for not holding a bank account (with 7.1 percent citing it as the main reason). See "How America Banks: Household Use of Banking and Financial Services", *supra* note 298 at 17. See also Austin, "Of Predatory Lending", *supra* note 294 at 1247 ("Among the features that customers find desirable are better locations and more favorable operating hours than top-tier firms; less stringent risk-screening procedures; and swifter approvals. All of these factors increase the cost of the credit").

304 See Nils Clotteau & Bsrat Measho, "Global Panorama on Postal Financial Inclusion 2016" (September 2016), online: *Universal Postal Union* <https://www.upu.int/UPU/media/upu/publications/globalPanoramaOnPostalFinancialInclusion2016En.pdf> ("Posts in 87 countries hold some 2 billion current or savings accounts on behalf of around 1 billion customers"); US, National Monetary Commission, *Notes on the Postal Savings-Bank Systems of the Leading Countries, 61st Congress* (C Doc

federal postal bank. Doing so helps us understand the significance, promise, and risks of Canada Post's – and the Canadian state's – contemporary foray into banking and credit. It raises, and contextualises, broader issues regarding the fundamental importance of banking and credit to social participation, the correlative role and potential responsibility of the state to ensure the provision of banking and credit to citizens, and the elusive and ever-relevant boundaries that delineate what we deem public and private.

1. The History of Canada's Postal (Banking) System

To understand the scope and significance of postal banking, we must first consider the historical significance of *postal services*. In 1517, Henry VIII appointed Brian Tuke the first Governor of the King's Posts.[305] It was "a belated recognition of the fact that the dispatch of letters had been treated for too long as a matter of little importance."[306] Tuke was vested with growing authority – and accrued growing prestige. He oversaw a systematisation of the dispatch of letters.[307] One historian writes:

> One of the best pieces of evidence as to the success of the Master of the Posts in establishing the posts on a regular footing is the complaints of irregularities and delays which were sent to the Privy Council. People were beginning to expect the post to run regularly, and to

No 658) (Washington, DC: US Government Printing Office, 1910) [National Monetary Commission, *Notes Postal Savings-Bank Systems*].

305 See George Walker, *Haste, Post, Haste!: Postmen and Post-Roads Through the Ages* (New York: Dodd, Mead & Company, 1938) at 37.

306 *Ibid*.

307 See *ibid* at 37-44.

> blame the Master for the faults of his officials. That which had once been accepted with complaisance as inseparable from the difficulties of communication was now resented, and the success of Sir Brian Tuke can be read in the complaints of his critics.[308]

Tuke served until his death in 1545.[309] The office lived on.

On June 9, 1657, the *Act for settling the Postage in England, Scotland and Ireland*[310] vested the duties of the Governor of the King's Posts in the office of Postmaster General of England. It provided: "[H]enceforth there be one General Office, to be called, and known by the name of the Post-Office of England: And one Officer from time to time to be nominated and appointed by His Highness the Lord Protector, and his Successours, and to be constituted by Letters Patents under the Great Seal of England, under the Name and Stile of Postmaster General of England, and Comptroller of the Post-Office[.]"[311] The Postmaster General was a member of the British Cabinet until 1969, when the *Post Office Act 1969* abolished the office and created a public corporation (instead of a government department) to administer the postal service.[312]

The *Post Office Savings Banks Act 1861*[313] created the world's first postal savings bank. It grew to offer "government stocks and bonds in 1880; insurance and annuities in 1888; and war

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[308] *Ibid* at 44.

[309] See *ibid* at 45.

[310] *Act for settling the Postage in England, Scotland and Ireland*, 10 Ed VI.

[311] *Ibid*.

[312] *Post Office Act 1969* (UK), c 48. See also UK, HC, *Business and Enterprise Committee: Eighth Report: Post Offices – Securing their Future* (Cm 9, 2008).

[313] *Post Office Savings Banks Act 1861*, 24 & 25 Vict, c 14.

savings certificates […] in 1916."[314] The *Post Office Act 1969* abrogated the postal service's banking jurisdiction.[315] The responsibilities were transferred to the Director of Savings, within Treasury (a separate government department).[316] A few years later, Treasury created the National Savings Bank.[317]

Canadian postal banks – and the postal service – trace their history to the same period. The Canadian postal service was first significantly developed from 1763, when Hugh Finlay came to North America. Finlay left Glasgow, Scotland with the assurance that he would become the colonial postmaster.[318] Shortly upon arrival, he was appointed the postmaster at Quebec – with

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[314] HC, *Business and Enterprise Committee: Eighth Report: Post Offices – Securing their Future* (Cm 9, 2008), *supra* note 312. See also National Monetary Commission, *Notes Postal Savings-Bank Systems, supra* note 304; *Post Office Savings Banks: Reports, Minutes, and Memoranda Explanatory of the Origin and Progress of the System of Post Office Savings Banks* (London: George E Eyre and William Spottiswoode, 1871); EW Griffiths, *Post Office Savings Banks: Who Originated the Scheme, and When?: Three Letters to the Chancellor of the Exchequer, With the Replies Thereto, &c.* (London: Mann Nephews, 1862); Arthur Scratchley*, The New "Post-Office Savings Bank" System, and the Five Millions Deficiency in Savings Banks Securities* (London: Longman, Green, Longman, and Roberts, 1862); William Lewins, *A History of Banks for Savings in Great Britain and Ireland, Including a Full Account of the Origin and Progress of Mr. Gladstone's Financial Measures for Post Office Banks, Government Annuities, and Government Life Insurance* (London: Sampson Low, Son & Marston, 1866); Martin Campbell-Kelly, "Data Processing and Technological Change: The Post Office Savings Bank, 1861-1930" (1998) 39:1 Technology and Culture 1.

[315] *Post Office Act 1969*, *supra* note 312, s 94.

[316] *Ibid*, ss 108-114. See also HC, *Business and Enterprise Committee: Eighth Report: Post Offices – Securing their Future*, *supra* note 312.

[317] *National Savings Bank Act 1971* (UK), c 29. The present entity provides a wide range of financial services, including "mortgages, current accounts, credit cards, savings accounts, insurances and foreign currency services." See Reena Sewraz, "Post Office Unites Its Financial Services Under One Brand to Take on Major UK Banks", *Love Money* (26 January 2015), online: <https://www.lovemoney.com/news/43964/post-office-launches-post-office-money-challenger-brand>.

[318] IK Steele, "Finlay, Hugh" in *Dictionary of Canadian Biography: Volume 5* (Toronto: University of Toronto Press, 2003), online: <http://www.biographi.ca/en/bio/finlay_hugh_5E.html>. Some of Finlay's success described above has been attributed to his bilingualism.

Benjamin Franklin and John Foxcroft then acting as joint Deputy Postmasters General.[319] A historian describes his contributions as follows:

> Local merchants, with the support of Governor Murray, had petitioned as early as 1762 for a regular postal service. Finlay soon built a weekly postal service between Quebec and Montreal via Trois-Rivières and a monthly post south through Skenesborough (N.Y.) and Albany to meet the mail packet service between New York City and Falmouth, England. […] The posts were unexpectedly successful, returning a profit to the British Post Office Department and giving Finlay a good income of one-fifth of the receipts. In less than a decade the system was profitable enough to support a twice-weekly service on the colony's post roads, and two posts a month to New York.[320]

He was named to the Council of Quebec, the colony's governing body[321] – ostensibly an early recognition of the importance of the emerging postal service to social and political life. In 1774, he replaced Benjamin Franklin as joint Deputy Postmaster General.[322]

Parallel postal services were developed in the provinces of New Brunswick and Nova Scotia by Joseph Peters and Christopher Sower – the former with greater success and to greater acclaim.[323] In 1784, Finlay was appointed Deputy Postmaster General for the Province of Quebec,

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[319] See *ibid*. "Postmaster at Quebec" was Finlay's official title. He was stationed in Quebec City.

[320] *Ibid*.

[321] See *ibid*.

[322] See *ibid*.

[323] Judith Fingard, "Peters, Joseph" in *Dictionary of Canadian Biography: Volume 4* (Toronto: University of Toronto Press, 2003), online: <http://www.biographi.ca/en/bio/peters_joseph_4E.html> ("As postmaster Peters' main innovation was to initiate a regular courier service from Halifax to Annapolis Royal, where the mail was carried by water down-river to Digby, across the Bay of Fundy, and into the jurisdiction of his New Brunswick counterpart, Christopher Sower. By 1788 a regular service to Quebec was established to coincide with the visits of the New York-Falmouth packet at Halifax for eight months of the year."); J Russell Harper, "Sower, Christopher" in *Dictionary of Canadian Biography: Volume 4* (Toronto: University of Toronto Press, 2003), online: <http://www.biographi.ca/en/bio/sower_christopher_4E.html> ("As deputy postmaster-general Sower was

and two years later, in 1786, he was given authority over the Deputy Postmasters General for New Brunswick and Nova Scotia (Peters and Sower).[324] Notwithstanding Finlay's appointment, Canada's early postal service evolved as three distinct, eventually interconnected, yet largely independent postal services.[325]

Quebec's postal service would come to face financial challenges, which also personally affected Finlay. As a result of his growing debt to the imperial administration, he was dismissed in 1799.[326] He nonetheless remained highly respected in the community.[327] In 1800, George Heriot was appointed his replacement.[328] He "worked hard to establish the mails on a better footing," modestly expanding the infrastructure he inherited.[329] His more ambitious expansion plans involved using funds from operations in more densely populated – and profitable – areas to expand into more remote ones.[330] These plans were "dampened by the inflexibility of postal regulations [which required a self-sustaining service] and by the lack of interest and understanding of the postmaster general in London."[331] His relationship with the Quebec colonial government was more

continually involved in controversy. He condemned private mail couriers, was accused of opening official mail, and conducted a fierce but unsuccessful campaign to make Saint John the overseas mail packet terminal").

[324] See Steele, *supra* note 318.

[325] As noted, Canada was then composed of three provinces: Nova Scotia, New Brunswick, and Quebec.

[326] See Steele, *supra* note 318.

[327] See *ibid*.

[328] See Gerald E Finley, "Heriot, George" in *Dictionary of Canadian Biography: Volume 7* (Toronto: University of Toronto Press, 2003), online: <http://www.biographi.ca/en/bio/heriot_george_7E.html>.

[329] *Ibid*.

[330] See *ibid*.

[331] *Ibid*.

tense than his predecessor's. He unsuccessfully sought a seat on the Legislative Council, yet he also complained of undue political intervention in the administration of the service.[332] The latter portions of Heriot's tenure were marked by complaints regarding postal delays.[333]

In early 1816, Heriot resigned and returned to Europe.[334] Daniel Sutherland, a former postmaster for Montreal, succeeded him.[335] Historians highlight the growing tensions with the imperial administration:

> Throughout his tenure as deputy postmaster general, Sutherland was obliged to walk a tightrope between the demands by colonists for expansion of what they considered an imperial service and those of the British government for restraint of expenditures on what it considered an instrument of taxation. From 1816 to 1827 Sutherland increased the number of post offices in Lower Canada from 10 to 49 and in Upper Canada from 9 to 65. Nevertheless, the Upper Canadian House of Assembly in particular complained that the number and distribution of post offices was inadequate. […] Dissatisfaction with the postal service led the assemblies of the two provinces to contest the deposit of postal revenues from the colonies in the British exchequer and to agitate for provincial control of the mails.[336]

The imperial administration saw the postal service as source of revenue and required it to be self-sustaining in all regions. The colonial administration, on the other hand, saw it as a public good,

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[332] See *ibid*.

[333] See *ibid*.

[334] See *ibid*.

[335] Myron Momryk, "Sutherland, Daniel" in *Dictionary of Canadian Biography: Volume 6* (Toronto: University of Toronto Press, 2003), online: <http://www.biographi.ca/en/bio/sutherland_daniel_6E.html>.

[336] *Ibid*.

to be expanded in remote regions regardless of profitability. Sutherland's relationship with the colonial administration was more analogous to Finlay's.[337]

These issues aptly illustrate the unique role, both socially and politically, of the Deputy Postmaster General. The Postmaster was a member of the colonial community, and a key interlocutor on its political scene. He administered a system that was needed by and benefitted the colony. Nonetheless, he was ultimately answerable to the imperial administration – which confirmed his tenure and profited from the postal service.

In that sense, the postal service was at the actual and symbolic crossroads of the diverging interests of the colony and the imperial government. It acted as a vessel for demands that had much wider roots. We also see the singular status of the postal service as a *public* good – a characterisation that remains contemporary and which will find echoes in the debate about the public nature of credit and banking.[338]

Just over a decade later, in 1827, Sutherland transferred his responsibilities as Deputy Postmaster General to his daughter's husband, Thomas Allen Stayner.[339] The colonial uproar over

[337] See *ibid*.

[338] Interestingly, and in further support of that position, Sutherland would go on to work for a bank, whose activities he would defend in political fora.

[339] See André Martineau, "Stayner, Tomas Allen," in *Dictionary of Canadian Biography: Volume 9* (Toronto: University of Toronto Press, 2003), online: <http://www.biographi.ca/en/bio/stayner_thomas_allen_9E.html>.

control and funding of the postal service had only grown.[340] Although the provinces regularly asked for full control, Stayner significantly escalated the dispute. He grew both the number of post offices and the regional reach of the postal service without authorisation from the Postmaster General of England.[341] Stayner also struggled to meet the diverging and competing demands of the colonial and imperial administrations. He was successively criticised and disliked by both.[342] The most significant expansion period came between 1845 and 1851, as "the speed of service [...] increased and hundreds of post offices [were] opened" – to a total of 853.[343] By 1851, postal banks existed through the postal services of the founding provinces – the provinces of Canada, New Brunswick, and Nova Scotia.[344] (I mentioned above the province of Quebec. It was split into the

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[340] By funding, I refer both to the fixing of postage rates and the use of profits.

[341] See Martineau, *supra* note 339.

[342] See *ibid*.

[343] *Ibid*. As further potential support of the issues discussed in note 338, above, Stayner also became a bank director and executive upon his retirement.

It was not until 1874 that mail would be delivered directly to citizens' homes. See Bianca Gendreau, "Home Delivery" in Chantal Amyot, Bianca Gendreau & John Willis, *Special Delivery: Canada's Postal Heritage* (Fredericton: Goose Lane Editions, 2000). Several years ago, Canada Post was significantly criticised for phrasing out door-to-door delivery for about a third of residential addresses. See e.g. "Canada Post's Five-Point Action Plan: Our Progress to Date" (March 2015), online: *Canada Post* <https://web.archive.org/web/20150816003346/https://www.canadapost.ca/cpo/mc/assets/pdf/aboutus/5_en.pdf>; Christina Commisso, "Critics Blast Canada Post's Plan to Phase Out Door-To-Door Delivery", *CTV News* (11 December 2013), online: <https://www.ctvnews.ca/business/critics-blast-canada-post-s-plan-to-phase-out-door-to-door-delivery-1.1584625>. These customers still receive home delivery through community (shared) mailboxes. Most Canadians continue to prefer door-to-door delivery, even when told the cost is 2.5 times higher. See Bertrand et al, *supra* note 278 at 36.

[344] See Dan Bunbury, "The Public Purse and State Finance: Government Savings Banks in the Era of Nation Building, 1867-1900" (1997) 78:4 Canadian Historical Review 566 [Bunbury, "Government Savings Banks in the Era of Nation Building"]. We lack sufficient historical sources to delineate how and why these banks were created.

provinces of Lower Canada and Upper Canada by the *Constitutional Act 1791*.[345] They were combined to form the province of Canada by the *Act of Union 1840*.[346])

The provinces were ultimately successful in their demands to control their postal services. The imperial parliament adopted the *Colonial Inland Post Office Act 1849*,[347] which enabled the North American provinces to seek full control over their postal services. The *Act* provides:

> That it shall be lawful for the Legislatures or proper Legislative Authorities of Her Majesty's Colonies […] to make such Provisions as such Legislatures or Legislative Authorities may think fit for and concerning the Establishment, Maintenance, and Regulation of Posts or Post Communications within such Colonies respectively, and for charging Rates of Postage for the Conveyance of Letters by such Posts or Post Communications, and for appropriating the Revenue to be derived therefrom.[348]

The provinces quickly passed comprehensive legislation governing their postal services.

In April 1850, the province of New Brunswick passed *An Act for the establishment and regulation of Inland Posts within this Province*.[349] It provides for the appointment and salaries of a Postmaster General and postmasters for the major post offices.[350] It also provides for a public monopoly over postal services.[351] As further support of the significance of the postal service in the

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[345] *Constitutional Act 1791*, 31 Geo III, c 31.

[346] *Act of Union 1840*, 3 & 4 Vict, c 35.

[347] *Colonial Inland Post Office Act 1849* (UK), 12 & 13 Vict, c 66.

[348] *Ibid*, s 1.

[349] *An Act for the establishment and regulation of Inland Posts within this Province*, 13 Vict, c 49.

[350] See *ibid*, s 19.

[351] See e.g. *ibid*, ss 26-27.

colonies, it creates a number of serious offenses and requires each postal officer to sign the following affidavit:

> I ____________________ do solemnly and sincerely depose and swear, that I will not wittingly or willingly open or delay, or cause or suffer to be opened or delayed, contrary to my duty, any letter, or any thing sent by the Post, which shall come into my hands or custody, by reason of my employment relating to the Post Office, except by consent of the person or persons to whom the same shall be directed, or except in such cases where the party or parties to whom such letter, or any thing sent by the Post, shall be directed, or who is or are chargeable with the payment of the postage thereof, shall refuse or neglect to pay the same, and except such letters, or other thing sent by the Post, as shall be returned for want of true directions, or when the party or parties to whom the same shall be directed cannot be found; and that I will not in any way embezzle any such letter, or any thing sent by the Post, as aforesaid; and I make this solemn oath, conscientiously intending to fulfil and obey the same, and by virtue of "The Post Office Act."[352]

The *Act* was further fleshed out by *An Act in addition to the Law relating to inland Posts* in 1851 (mainly regarding the cost of postal services),[353] which was repealed by *An Act in amendment of the Law relating to Inland Posts* in 1853.[354]

In August 1850, the province of Canada passed *An Act to provide for the transfer of the management of the Inland Posts to the Provincial Government, and for the regulation of the said Department*.[355] It similarly provides for the appointment of a Postmaster General,[356] a monopoly

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[352] *Ibid*, Schedule 10.

[353] *An Act in addition to the Law relating to inland Posts*, 14 Vict, c 1.

[354] *An Act in amendment of the Law relating to Inland Posts*, 16 Vict, c 31.

[355] *An Act to provide for the transfer of the management of the Inland Posts to the Provincial Government, and for the regulation of the said Department*, 13 & 14 Vict, c 10.

[356] See *ibid*, ss 4-5.

over postal services,[357] and a number of offenses.[358] In August 1851, the *Act* was further detailed by *An Act to amend The Post Office Act*.[359]

In March 1850, the province of Nova Scotia adopted *An Act to enable the Governor in Council to make Orders for establishing an Uniform Rate of Postage in Nova-Scotia, and regulating a Postal Arrangement with other Countries*,[360] which empowered the Governor in Council to make binding "Orders[, …] Directions and Instructions as may be deemed necessary for carrying into effect" the legislative regime.[361] Subsequent regulation appears as Chapter 23 of the Revised Statutes of 1851.[362] Like the other provincial acts, it provides for a monopoly,[363] pricing,[364] and a number of offenses.[365] The *Act* differs from its provincial counterparts in an interesting way. It serves as enabling legislation and is, as a result, less comprehensive. It allows

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[357] See *ibid*, s 9. See also *An Act for the establishment and regulation of Inland Posts within this Province*, *supra* note 349, ss 26-27.

[358] See e.g. *ibid*, s 16.

[359] *An Act to amend The Post Office Act*, 14 & 15 Vict, c 71.

[360] *An Act to enable the Governor in Council to make Orders for establishing an Uniform Rate of Postage in Nova-Scotia, and regulating a Postal Arrangement with other Countries*, 13 Vict, c 16.

[361] *Ibid*, s 1. The province had formally asserted control over the postal service in April 1848 through *An Act to enable the Governor in Council to make Orders and Regulations towards establishing an uniform Rate of Postage throughout British America*, 11 Vict, c 20. However, the *Act* did not set out a regulatory regime and was only in force for one year (*ibid*, s 3).

[362] See *Of the Post Office*, RSNS 1851, c 23.

[363] *Ibid*, ss 1, 4, 33.

[364] See e.g. *ibid*, ss 11-18.

[365] See e.g. *ibid*, ss 30-32, 40-44.

the Postmaster and the Governor in Council to make binding decisions and issue binding guidelines on many issues.[366]

By April 1851, all provinces had finally assumed full control of the postal service.[367] The three postal services were not merged. Rather, each province simply assumed full independence from the imperial administration. That year, James Morris was appointed the first Canadian Postmaster General.[368] He quickly adopted policies that his predecessors had hoped for, reducing postage rates and expanding the reach of the postal service in less densely populated – and less profitable – areas.[369] He also oversaw the design of Canada's first postage stamps.[370] In 1863, John Dewé compiled the first *Canadian Postal Guide*, which included relevant legislation, regulations, and other information.[371] This booklet, aimed at a broad audience, has been updated several times per year since.

As I noted above, to understand the scope and significance of postal banking, we must consider the historical significance of postal services. The development of postal banks is

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[366] See *ibid*.

[367] See AW Currie, "The Post Office Since 1867" (1958) 24:2 Canadian Journal of Economics and Political Science 241 at 241.

[368] That is, in contrast to Deputy Postmaster General. See PG Cornell, "Morris, James," in *Dictionary of Canadian Biography: Volume 9* (Toronto: University of Toronto Press, 2003), online: <http://www.biographi.ca/en/bio/morris_james_9E.html>.

[369] See *ibid*. As noted, this was formerly prohibited by the imperial administration.

[370] See *ibid*.

[371] John Dewé, *Canadian Postal Guide* (Toronto: R&A Miller, 1863).

intertwined with the development of postal services, and both bear the same characteristics. Postal services played a key role in social participation, reaching all citizens and empowering them to participate in public and political discourse and in trade and commerce. As detailed below, postal banks served analogously public aims. By ensuring equitable access to banking, they helped citizens fully participate in society.

Canada's historical *federal* postal bank was actually two distinct institutions, the Post Office Savings Banks and the Dominion Government Savings Banks. The *Constitution Act, 1867* provides that postal services are of federal jurisdiction.[372] As a result, control of provincial postal services needed to be transferred to the newly formed federal government. On December 21, 1867, Canada's First Parliament enacted *The Post Office Act, 1867*.[373] As the bill was being debated, some Senators noted that the Bank might "have the effect of swallowing up all the other savings banks in the Dominion,"[374] while others responded that may be "the best feature of the whole bill."[375] The *Act* came into force on April 1, 1868.[376] At some 143 pages (with its regulations), the *Act* is significantly more comprehensive than its provincial predecessors.[377] It repeals and replaces

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[372] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(5), reprinted in RSC 1985, Appendix II, No 5.

[373] *An Act for the regulation of the Postal Service*, SC 1867, c 10.

[374] *Senate Debates*, 1-1, No 1 (6 December 1867) at 79 (Hon Mr Tessier). See also *Senate Debates*, 1-1, No 1 (5 December 1867) at 68 (Hon Mr Odell).

[375] *Senate Debates*, 1-1, No 1 (6 December 1867) at 79 (Hon Mr Ferrier).

[376] See *An Act for the regulation of the Postal Service*, supra note 373, s 91.

[377] See *ibid*; *An Act for the establishment and regulation of Inland Posts within this Province*, *supra* note 349; *An Act to provide for the transfer of the management of the Inland Posts to the Provincial Government, and for the regulation of the said Department*, *supra* note 355.

prior provincial legislation.[378] Unlike prior legislation, it expressly – and exhaustively – provides for a postal banking system, the Post Office Savings Banks. 81 initial branches were opened at existing post offices.[379]

Existing provincial postal banking systems that were transferred to the federal government were referred to as Dominion Government Savings Banks.[380] In contrast, newly formed branches (directly subject to federal jurisdiction) were labelled Post Office Savings Banks.[381] In Parliament in 1909, after answering questions regarding the management of the St. Polycarpe post office and a complaint regarding the Black Lake postmaster, Rodolphe Lemieux, then Postmaster General of Canada, confirmed that the two systems are "distinct."[382] He added:

> There is no substantial difference. What are known as Dominion Government Savings Banks are the remains of an old system which began in some provinces prior to confederation. This system is being gradually abolished. Whenever vacancies occur in the management of Dominion Government Savings Banks through death, resignation or other cause, the business is transferred to the Post Office Department, it being the policy of the government that the whole savings system be managed by that department. Since the 1st

[378] See *An Act for the regulation of the Postal Service*, supra note 373, s 2. Regulations and departmental orders are only repealed to the extent of their inconsistency with the *Act*. See *ibid*, s 5. Interestingly, the Postmaster General had extensive rule-making power. See e.g. *ibid*, ss 10-11.

[379] See "Canada's Postal Savings Banks (1868–1968)" (29 March 2021), online: *Government of Canada* <https://parks.canada.ca/culture/cseh-twih/202113>.

[380] See Bunbury, "Government Savings Banks in the Era of Nation Building", *supra* note 344.

[381] *An Act for the regulation of the Postal Service*, supra note 373. See also "Dominion Government Savings Bank (Public Notice)", *Mainland Guardian* (5 December 1872) (on the opening of a branch in British Columbia).

[382] *House of Commons Debates*, 11-1, No 2 (26 April 1909) at 4894-4798 (Hon Rodolphe Lemieux).

> June, 1888, thirty-two agencies of the Dominion Government Savings Bank have been abolished and the business transferred to the Post Office Department.[383]

It is worth noting that these early postal banks provided banking services and, more specifically, savings accounts. The phrase postal banking has been used, especially in more contemporary proposals, to encompass a broad range of credit and banking product and services. In recent proposals by United States scholars, predominantly Prof. Mehrsa Baradaran, postal banking is advanced as a solution to service the relatively broad segment of the population that is unbanked or underbanked – that has limited or no access to the banking system.[384] These individuals lack access to the whole range of products and services provided by traditional banks. They resort to alternative financial services providers to meet their needs. *Services* provided by alternative financial services providers replace bank accounts and ancillary operations, such as cashing a cheque or depositing funds. Credit *products* offered by alternative financial services providers replace traditional lending. These products and services include payday lending, earned wage access programs, cheque cashing, pawnbroking, automobile title lending, refund anticipation lending, and rent-to-own schemes.[385] I have previously noted: "Together, these products and services fully replace the traditional banking system […] The only component missing from that

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383 *Ibid* at 4798.

384 See "The Underbanked Canada: February 2016", *supra* note 297; Baradaran, "It's Time for Postal Banking", *supra* note 298 at 168; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294 at 485-86; Baradaran, "Small-Dollar Loan", *supra* note 291; Christopher, *supra* note 298; "How America Banks: Household Use of Banking and Financial Services", *supra* note 298; Barr, "Banking the Poor", *supra* note 298; Caskey, *supra* note 298; Fantauzzi, *supra* note 298.

385 See Phil Lord, "Ending Poverty" (22 November 2022), online *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4385865> (extended monograph proposal).

alternative financial system is, saliently, a savings product."[386] This undoubtedly contributes to the further social and financial marginalisation of unbanked and underbanked individuals.

In contrast, Canada's early federal postal banks only provided savings accounts. Section 62 of *The Post Office Act, 1867* empowers the Postmaster General to establish a new postal banking system, the Post Office Savings Banks (through the existing postal infrastructure). It reads:

> To enlarge the facilities now available for the deposit Postmaster of small Savings, and to make the Post Office available for that purpose, and to give the direct security of the Dominion Office Savings to every Depositor for repayment of all moneys deposited by him, together with the Interest due thereon: the Postmaster General may, with the consent of the Governor in Council establish a system of Post Office Savings Banks, in connexion with a central Savings Bank established as a branch of the Post Office Department at the seat of Government. [387]

(These terms are not defined in the first section of the *Act*.[388]) The Postmaster General is empowered to designate the postmasters who will be entitled to receive and remit deposits.[389] Postmasters must provide a secured bond to guarantee the performance of their duties[390] and swear an oath similar to the one excerpted above.[391] Deposits must be registered in the Depositor's Book,

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[386] *Ibid*.

[387] *An Act for the regulation of the Postal Service*, supra note 373, s 62.

[388] See *ibid*, s 1.

[389] See *ibid*, s 64.

[390] See *ibid*, s 46. In the following articles, the *Act* sets out a stringent supervisory regime. See also *General Regulations for the Guidance and Government of the Officers and Other Persons Employed in the Postal Service of the Dominion of Canada*, SC 1867, c 10, ss 8-14 [*1867 General Regulations*].

[391] *1867 General Regulations*, *supra* note 390, ss 2-3.

which is attested to by these designated postmasters.[392] The term of the deposit is automatically renewed for the same 10-day period when it ends,[393] and withdrawal request are made through a form.[394] The minimum deposit is set at one dollar, and deposits can only be made in whole dollar amounts (multiples of one dollar). The interest rate on deposits is four percent per annuum – calculated through a somewhat complex formula.[395] Interestingly, the funds are exempt from "demand, seizure, or detention […] under legal process against the depositor thereof,"[396] and the identity of the depositor is protected.[397] The Postmaster General transfers the funds to the Receiver General of Canada.[398] When the cash balance exceeds 500 dollars, excess funds are invested in federal or provincial treasury securities.[399] The federal government is essentially financially liable for deposits and interest.[400] The Postmaster General is required to produce monthly reports. Section

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[392] See *An Act for the regulation of the Postal Service*, supra note 373, s 64. Detailed rules on record-keeping and the Depositor's Book are set out in the 1868 Regulations. See *Regulations of the Post Office Savings Banks Canada* (1868). These regulations do not appear to have been indexed and seem to have been promulgated directly by the Postmaster General (with approval of the Governor in Council). See also *An Act to provide Additional Facilities for Depositing Savings at Interest with the Security of the Government, and for the Issue and Redemption of Dominion Notes*, 39 Vict, c 6.

[393] See *ibid*.

[394] See *ibid*, s 65. The form is found in the 1868 Regulations. See *Regulations of the Post Office Savings Banks Canada* (1868), *supra* note 392.

[395] See *ibid*, s 68 ("The Interest payable to the Parties making such Deposits shall be at the Rate of Four Dollars per Centum per Annum, but such Interest shall not be calculated on any Amount less than Three Dollars or some Multiple thereof, and not commence until the First Day of the Calendar Month next following the Day of Deposit, and shall cease on the First Day of the Calendar Month in which such Deposit is withdrawn") and s 69 ("On the thirtieth day of June in every year the interest on deposits shall be added to and become part of the principal money").

[396] *Ibid*, s 64. This provision proved particularly controversial as the bill was being debated. See *Senate Debates*, 1-1, No 1 (9 December 1867) at 83.

[397] See *ibid*, s 66.

[398] See *ibid*, s 67.

[399] See *ibid*, s 73.

[400] See *ibid*, s 75. Profits and losses are credited to the Consolidated Revenue Fund. The federal government is therefore liable for the full amount of the loans.

72 of the *Act* provides: "As soon as possible after the end of each month, the Postmaster General shall make a return to the Auditor of Public Accounts of all monies received and paid during the preceding month, and of the total amount in deposit at the end of each month, and the auditor shall cause such monthly statement to be inserted in the *Canada Gazette*."[401] An annual report, which also includes an accounting of expenses, is presented to the House of Commons and the Senate.[402]

The *Act* creates the Post Office Department, which is run by the Postmaster General "during pleasure," and provides for a monopoly.[403] As was the case in the United Kingdom,[404] the postal service was operated through a government department and the Postmaster General was, as a result, a government minister with a seat in Cabinet. Approximately one decade later than in the United Kingdom,[405] the position was abolished in 1981, when management of the postal service was transferred to a Crown corporation pursuant to the *Canada Post Corporation Act*.[406] Yet,

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[401] *Ibid*, s 72.

[402] See *ibid*, ss 74, 76.

[403] *Ibid*, ss 7, 8, 32, 79. Like its provincial predecessors, the *Act* creates a number of offences (at articles 77 and following).

The *Act* also appears to be the first one to provide for parcel delivery. See *ibid*, s 37; *1867 General Regulations*, *supra* note 390, ss 163-176. It begins to phase out the earlier practice of remunerating postmasters on a percentage basis. See *ibid*, s 50.

The astute reader of this increasingly digressive footnote will undoubtedly also want to know that "[a] bar-room or public room in a tavern is never to be made use of as a Post Office, nor should the entrance to a Post Office be through a bar-room" and that "Postmasters should caution persons posting Letters for the East or West Indies, or other warm climates, not to seal them with sealing wax – as serious injury might be occasioned to such letters from the melting of the wax" (*1867 General Regulations*, *supra* note 390, ss 20, 400).

[404] See notes 312-313, above, and accompanying text.

[405] See *Post Office Act 1969*, *supra* note 312, s 94.

[406] *Canada Post Corporation Act*, *supra* note 278, s 4.

unlike in the United Kingdom, the corporation remains under the jurisdiction of a minister, defined as "such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Act."[407] Most recently, these responsibilities were held by the Minister of Public Services and Procurement.[408]

In a recent archival commemoration, the Government of Canada has explained the need for Post Office Savings Banks as follows:

> The Bank of Montreal, founded in 1817 and chartered in 1822, was the first of dozens of commercial banks to be founded in the colonies that became Canada in 1867. These banks, which issued notes, bought and sold commercial paper, provided short-term loans or credit facilities, and took deposits, were primarily used by merchants to grow their commerce. The colonial governments sought to fill this gap and encourage thrift by ensuring the availability of safe and affordable access to financial institutions.[409]

This justification echoes those provided to justify postal banking in other jurisdictions. When discussing the advantages of the United Kingdom's emerging postal bank, one commentator similarly noted: "[W]e were prepared to point out the expediency of measures for the removal of inconveniences and of grounds of distrust, and for encouraging the making of deposits for the

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[407] *Ibid*, s 2. Of course, the minister does not directly administer the corporation. The corporation is run by a Board and a President. See *ibid*, ss 6-12.

[408] See Justin Trudeau, "Minister of Public Services and Procurement Mandate Letter" (13 December 2019), online: *Prime Minister of Canada Justin Trudeau* <https://pm.gc.ca/en/mandate-letters/2019/12/13/archived-minister-public-services-and-procurement-mandate-letter>.

[409] "Canada's Postal Savings Banks (1868–1968)", *supra* note 379. See also Edwin Chadwick, "Post Office Savings' Banks" (1861) 24:4 Journal of the Statistical Society of London 519 at 520 ("the whole of the deposits in the Savings' Banks [may have] belonged to the labouring classes (and a larger proportion of them than is commonly supposed are from the middle classes)"). The "gap" identified is the provision of banking services to physical persons instead of mainly to merchants.

promotion of the habit of banking."[410] He lauds its promise to promote "frugal habits" with the "highest possible security" and to further "the convenience of depositors of all classes, without any reservation or distinction."[411] Users deposit small sums that otherwise would remain uninvested.[412] They may prefer not to be "made a source of profit for local private officers, with only limited and imperfect responsibility," instead choosing to entrust these sums to a "more responsible public agency."[413]

Canadian Parliamentary debates support this hypothesis. One Senator noted that he "understood the spirit of the bill in so far as it referred to the Savings Bank proposed to be established, it was to afford to the working people a safe means of placing their savings, and for this purpose it provided that sums of $1 would be received [… and that he] was aware that the Government contemplated the introduction of another measure, under which the wealthier classes would have the opportunity of investing larger sums, but as this bill was designed for the labouring orders he thought that the limit of $200 was quite high enough."[414] Another Senator added that the institution "would exist in our property to the people themselves" and that deposits would be lent "on the best of all possible securities, the faith of their own Government."[415] When the first yearly

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410 *Ibid* at 521.

411 *Ibid*. See also J Cunningham Stewart, *Post-Office Savings Bank System of Canada (Provinces of Ontario and Quebec): Its History and Progress* (Montreal: Gazette Printing Company, 1884); Dan Bunbury, "Safe Haven for the Poor?: Depositors and the Government Savings Bank in Halifax, 1832-1867" (1995) 24:2 Acadiensis 25.

412 *Ibid*.

413 *Ibid*.

414 *Senate Debates*, 1-1, No 1 (9 December 1867) at 83 (Hon Mr Macpherson).

415 *Senate Debates*, 1-1, No 1 (6 December 1867) at 79 (Hon Mr Ferrier).

report was tabled in Parliament, one Member noted: "He considered it a moral obligation on the part of the Government to provide facilities to the working classes for a safe investment of their small savings. Nothing was more calculated to promote the moral welfare of the community than to provide means to the less wealthy classes for the investment of their surplus earnings, which might otherwise be worse than thrown away."[416] After a single year of operation, the Bank had already expanded to 213 branches.[417]

In 1871, the federal government adopted the first *Bank Act*,[418] pursuant to its constitutional authority to regulate "Banking, Incorporation of Banks, and the Issue of Paper Money"[419] and "Savings Banks."[420] It was the first comprehensive regulatory regime for financial institutions in Canada, and its successor remains in force today.[421] The *Act* only applies to private banks – it never applied to postal banks. It renews the charters of certain existing banks and applies to all subsequently created banks.[422] Although the original *Bank Act* is dwarfed by its successor – which contains almost 1,000 provisions and enables dozens of regulations,[423] it is surprisingly

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[416] *House of Commons Debates*, 1-2, No 1 (7 May 1869) at 201 (Hon Mr Rose). Early Parliamentary debates are not transcribed – they are reported in the third person.

[417] See *ibid*.

[418] *An Act relating to Banks and Banking*, SC 1871, c 5.

[419] *Constitution Act, 1867*, *supra* note 372, s 91(15).

[420] *Ibid*, s 91(16).

[421] See *An Act respecting Banks and Banking*, SC 1991, c 46.

[422] See *An Act relating to Banks and Banking*, *supra* note 418, ss 1-2, 73, Schedule. See also Roeliff Morton Breckenridge, *The Canadian Banking System 1817-1890* (Pittsburgh: American Economic Association, 1895).

[423] See *An Act respecting Banks and Banking*, *supra* note 421.

sophisticated. It regulates most aspects of a bank's existence, including minimum capital requirements,[424] Parliamentary reporting,[425] directors,[426] and insolvency.[427] The *Bank Act*[428] is the first significant assertion of government power over banks, which had until then been seen as purely private institutions. The *Act* stakes a significant *public* interest in the activity of banking, which requires and justifies an extensive regulatory regime – other private businesses do not warrant similar regulation. The rules found in the *Act* are public order rules: they cannot be derogated from.[429] Like the postal legislation mentioned above,[430] the *Act* creates serious penal offenses for certain types of misconduct by directors and officers.[431] The postal legislation asserts a public interest more strongly, by providing that the state monopolises *and* operates the postal service. In contrast, the state does not see a need to be the sole provider of banking services. It is content with providing that no bank can operate without state permission[432] and stringently

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[424] See e.g. *An Act relating to Banks and Banking*, *supra* note 418, ss 7, 10. The capital requirement of 500 000 dollars would equate to roughly 7 283 400 dollars today. See "Value of $1 from 1800 to 2023", online: *CPI Inflation Calculator* <https://www.officialdata.org/us/inflation/1800?amount=1>. (This calculator uses US data, as Canadian consumer index data is only available from 1914. US data generally mirrors Canadian data.)

[425] See *An Act relating to Banks and Banking*, *supra* note 418, ss 12, 13.

[426] See *ibid*, ss 28-34.

[427] See *ibid*, ss 57-59.

[428] *Ibid*.

[429] See e.g. *ibid*, s 33.

[430] See *An Act for the establishment and regulation of Inland Posts within this Province*, *supra* note 349; *An Act to provide for the transfer of the management of the Inland Posts to the Provincial Government, and for the regulation of the said Department*, *supra* note 355; *Of the Post Office*, *supra* note 362.

[431] See *An Act relating to Banks and Banking*, *supra* note 418, ss 61-63. It also makes directors and officers personally liable in certain circumstances.

[432] See e.g. *ibid*, s 68. See also Morgan Ricks, "Money as Infrastructure" [2018] Colum Bus L Rev 757.

regulating banks.[433] Interestingly, section 71 of the *Act* directly states: "The Bank shall always be subject to any general provisions respecting Banks which Parliament may deem necessary for the *public interest*" [emphasis added].[434] Banks are also required to hold a significant portion of their reserves in Dominion Notes (government bonds).[435]

I have included as an appendix to this paper the first comprehensive aggregation of yearly data regarding the Post Office Savings Bank.[436] As noted, enabling legislation mandated periodic reporting of relevant data.[437] The appended table includes yearly information on the number of branches, deposits and withdrawals (in number and dollar value), and net assets of the Bank at year end. This information was retrieved from original archival sources.[438] It spans the entire existence of the Bank, from the initial 81 branches mentioned above to the Bank's demise a century later.[439] The data shows sustained expansion of the Post Office Savings Bank through to the early 1900s. The number of accounts peaks in 1904 at 168,572, and net assets peak at 45,736,488.51

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[433] See also Baradaran, "Banking and the Social Contract", *supra* note 296; Mehrsa Baradaran, "Reconsidering the Separation of Banking and Commerce" (2012) 80:2 Geo Wash L Rev 385; *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, 124 Stat 1376 (2010) (codified through 12 USC § 5301 et seq); Donald JS Brean, Lawrence Kryzanowski & Gordon S Roberts, "Canada and the United States: Different Roots, Different Routes to Financial Sector Regulation" (2011) 53:2 Business History 249; Sana Mohsni & Isaac Otchere, "Does Regulatory Regime Matter for Bank Risk Taking? A Comparative Analysis of US and Canada" (2018) 53 Journal of International Financial Markets, Institutions and Money 1.

[434] See *An Act relating to Banks and Banking*, *supra* note 418, s 71.

[435] See *ibid*, ss 14-16.

[436] For comparison, one prominent commentator quoted sources (which I cannot independently verify) as valuing total banking deposits at 87,000,000 in 1884. See Stewart, *supra* note 412.

[437] See *An Act for the regulation of the Postal Service*, supra note 373, ss 72, 74, 76.

[438] To avoid citing some 100 sources in a single footnote, the underlying yearly reports from the Postmaster General providing the data are only cited in the appended bibliography.

[439] See "Canada's Postal Savings Banks (1868–1968)", *supra* note 379.

dollars in 1908. (Net assets, the rightmost column in the table, reflects the closing balance at year end – after deposits and withdrawals, including interest accrued to depositors.)

Historian Dan Bunbury has provided a detailed account of the issues which may have led to the end of this historic growth cycle – from 1867 to 1900.[440] He focuses on the Maritimes, but also discusses federal policy. He highlights growing displeasure of traditional banks with the role of postal banks, especially in more rural communities. As mentioned above, one of the key advantages of the postal banking system was its universal, unmatched reach. The system took advantage of the postal service's infrastructure, which reached every Canadian.[441] Bunbury discusses how traditional banks increasingly complained of "unfair competition" from government banks.[442] He notes:

> [T]he larger national banks moving into the region via mergers and acquisitions offered substantial advantages not just to the customers but also to the shareholders and the personnel of the local banks. Banks of national scope had more extensive services, better returns on equity, and more attractive pension plans and promising positions. What is important is that by competing strongly with local banks for the increasingly crucial personal deposit business, government banks reduced the local bank's ability to achieve the same economies of scale that their national private sector competitors were amassing. […] [I]n the rnid-1880s, each bank failure highlighted the overall fragility of the economy and added to the perception that it was systemically weak. […] Although it is impossible to state that without savings banks most of the banks that failed or were bought out would

[440] See Bunbury, "Government Savings Banks in the Era of Nation Building", *supra* note 344.

[441] As a result of this reach, the postal service could create a bank that could service Canadian in remote communities who would be expensive to service through traditional banking lacking this infrastructure. In itself, however, this reach does not necessarily provide an advantage *to depositors*, who are unlikely to deposit and withdraw at more than one branch.

[442] Bunbury, "Government Savings Banks in the Era of Nation Building", *supra* note 344 at 579.

> have survived, it is certain that this competition heightened and exacerbated their decline.[443]

As Bunbury suggests, it is unclear how founded this criticism was. It appears to assume simplistic causality within a highly complex and nuanced financial system. It is equally unclear whether the postal banking system was operated at a loss, and the extent to which it posed an “unfair” competitive threat. For one, the yearly Parliamentary reporting aggregated in the appendix does not provide a separate accounting of expenses for the postal bank – only revenue and expenses for the postal *service*. Such an accounting is only provided from 1933. (By then, the postal bank was modestly, and increasingly, unprofitable – though that may have resulted from its broader decline.[444]) Additionally, measuring profitability is inherently subjective – for historical banks and contemporary proposals. Indeed, stated or projected profitability significantly increases if one assumes “free” access to the existing infrastructure of the postal service.[445] In the absence of this assumption, an assessment of profitability turns heavily on how shared costs are allocated between the postal service and its bank.

[443] *Ibid* at 597-98.

[444] See my comment in note 438, above. Currie, *supra* note 367 provides a discussion of the costs, business model, and fluctuating revenue of the postal service. This period also coincided with the Great Depression. See e.g. James Struthers & Richard Foot, “The Great Depression in Canada” (updated 13 August 2021), online: *The Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/great-depression>.

[445] The debate regarding the profitability of postal banking is reminiscent of the colonial struggle for control of the postal service described above. See Finley, “Heriot, George”, *supra* note 328; Cornell, “Morris, James”, *supra* note 368. The colonists fought for control of the postal service so they could use funds from operations in more densely populated (and profitable) areas to expand into more remote ones.

Between 1890 and 1900, the 4 percent interest rate on deposits to the Post Office Savings Bank[446] was lowered twice – first to 3.5 percent and then to 3 percent. Bunbury attributes these decreases to lobbying from commercial banks.[447] This plausible hypothesis is somewhat supported by a review of the Parliamentary debates. In 1898, the Minister of Finance argued that commercial banks had been put in a "forced position" and that the government was "paying a little more than the fair value of money."[448] The adjustment was made "after careful consideration […] in the interest of the business of the country."[449] The Minister stressed that the decreases were focussed on fair competition and that the second decrease was only adopted after the government was reassured that significant withdrawals did not ensue.[450] In justifying his decision, the Minister repeatedly noted that the postal bank may have drifted from its mission to provide accounts principally to the poor.[451] He proposed to further reduce the rate to 2.5 percent to match the government's borrowing rate. This was vehemently (and successfully) opposed by the other parties. One Member argued: "I have no doubt that the only reason, or the principal reason, why this is done, is because the banks of this country have brought great pressure to bear upon the Government to do this."[452] He framed the issue as an assault on the most vulnerable, adding that

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[446] See *An Act for the regulation of the Postal Service*, supra note 373, ss 68-69.

[447] See Bunbury, "Government Savings Banks in the Era of Nation Building", *supra* note 344.

[448] *House of Commons Debates*, 8-3, No 1 (5 April 1898) at 3124 (Hon Mr Fielding).

[449] *House of Commons Debates*, 8-3, No 1 (5 April 1898) at 3125 (Hon Mr Fielding).

[450] See *ibid*.

[451] See *ibid* at 3122-3126.

[452] *House of Commons Debates*, 8-3, No 1 (14 April 1898) at 3435 (Hon Mr Craig).

banks "are looking after themselves" and "do not think of the poor people."[453] Another member reiterated the greater safety of the Bank, calling commercial banks "wildcat concerns" and "worthless monetary institutions."[454] Opposition Members noted that the average deposit was 238.55 dollars, an amount consistent with the Savings Bank's mission to serve the lower classes.[455] The most sophisticated argument advanced in response to this opposition was that, while the government rate may have led commercial banks to raise their own rates, this was ultimately detrimental because it meant commercial banks would recoup the money through higher interest on loans they make to other vulnerable community members.[456]

Whatever the cause(s), the appended data does show a slow, consistent decline of the federal postal banking system from the early 1900s to its extinction in 1968 – punctuated by a marked temporary increase in the metrics as the Second World War unfolded. The postal banking

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[453] See *ibid* at 3435-37.

[454] *House of Commons Debates*, 8-3, No 1 (19 April 1898) at 3719-20 (Hon Mr Maclean). See also *House of Commons Debates*, 8-3, No 1 (19 April 1898) at 3735 (Hon Mr Wallace); *House of Commons Debates*, 8-3, No 1 (19 April 1898) at 3743 (Hon Mr Sproule) (noting that "widows and orphans are crying out").

[455] *House of Commons Debates*, 8-3, No 1 (15 April 1898) at 3555 (Hon Mr Sproule). This equates to approximately 3475 dollars in today's currency. See "Value of $1 from 1800 to 2023", *supra* note 424. See also US, National Monetary Commission, *supra* note 304 at 12.

[456] *House of Commons Debates*, 7-4, No 1 (22 May 1894) at 3193 (Sir Richard Cartwright).

We lack historical data to delineate the extent to which users of postal banks also relied on private financial institutions. As noted, postal banks focussed on providing loans, so citizens ostensibly had to rely on private financial institutions for other banking services. This contextualises and unsettles certain assumptions of political actors regarding postal banks and their mission.

legislation was never formally repealed. The 1955 – latest – version of the regulations remains in force in Canada today.[457]

As noted, in 1981, management of the postal service was transferred to a Crown corporation by the *Canada Post Corporation Act*.[458] The *Act* essentially repeals *The Post Office Act, 1867*.[459] Like the Postmaster General,[460] the President and other officers of the Canada Post Corporation serve "during pleasure."[461] The *Canada Post Corporation Act* renews the state's monopoly over postal services (subject to limited exceptions).[462] Although the postal service is now operated through a Crown corporation, the federal government essentially remains liable for operational deficits.[463] Perhaps an indication of the slow yet marked decline of the importance of the postal service (and its bank) in daily life, the *Canada Post Corporation Act* is significantly

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[457] See *Post Office Savings Bank Regulations*, CRC 1955. Its enabling statute is the *Canada Post Corporation Act*, *supra* note 278.

[458] *Ibid*.

[459] *An Act for the regulation of the Postal Service*, supra note 373.

[460] See *ibid*, s 8.

[461] *Canada Post Corporation Act*, *supra* note 278, ss 6(2), 7(1), 8(1).

[462] See *ibid*, ss 14-15. See also *An Act for the establishment and regulation of Inland Posts within this Province*, *supra* note 349, ss 26-27; *An Act to provide for the transfer of the management of the Inland Posts to the Provincial Government, and for the regulation of the said Department*, *supra* note 355, s 9; *An Act for the regulation of the Postal Service*, supra note 373, ss 32, 79. The monopoly applies to letters weighing fewer than 500 grams (subject to a residual exception for expedited delivery costing a minimum amount). See Bertrand et al, *supra* note 278 at 16.

[463] See *Canada Post Corporation Act*, *supra* note 278, ss 29, 31; *An Act for the regulation of the Postal Service*, supra note 373, s 75.

thinner than its 1867 counterpart.[464] Unlike its predecessors,[465] the *Act* does not include an oath that employees must swear. It merely provides that "[t]he Corporation may, in any case or class of cases approved by the Governor in Council, empower any officer of the Corporation to administer oaths and take and receive affidavits, declarations and affirmations for any purpose relating or incidental to the administration or enforcement of this Act or the regulations."[466]

2. A Surprisingly Familiar Idea

In light of this history, Canada Post's contemporary foray into the provision of credit appears surprisingly familiar. The Canada Post MyMoney Loan[467] is a different and far more modest iteration of the role of the postal service – and the Canadian state – in the provision of banking and credit to its citizens. There is nothing new about this form of state intervention.

The history of the postal service is intimately intertwined with the history of Canada. The postal service emerged as Canada was envisioned and formed. It witnessed the liminal stages of our struggle for independence and self-determination. It was the main, and often only, conduit through which Canadians could connect with each other across increasing distances. It reached the

[464] *Canada Post Corporation Act*, *supra* note 278. It spans some 35 pages (with the bilingual text), while its predecessor spanned 143 pages.

[465] See *An Act for the establishment and regulation of Inland Posts within this Province*, *supra* note 349, Schedule 10; *1867 General Regulations*, *supra* note 390, ss 2-3.

[466] *Canada Post Corporation Act*, *supra* note 278, s 17.

[467] See "Introducing Canada Post MyMoney Loan", *supra* note 281; "Canada Post MyMoney Loans", *supra* note 284.

furthest corners of the country, drawing in rural citizens and drawing all closer. It was a constant, key, and stable force in daily life. It sustained social life as much as political life, and formed the basis for modern commerce and media. In surprising and sophisticated ways, the postal service acted as an equalising force. It gave an equal voice to Canadians of widely diverging social, economic, and geographic backgrounds. It was there for the rich and the poor, the well-connected and the marginalised, the urban and the rural. It was a public good.

The Postmaster was a proportionately important figure. How could the individual administering such a fundamental service *not* have a seat in Cabinet? How could his employees *not* swear an oath and subject themselves to 143 pages of stringent rules?[468] The trust and stability enjoyed by the postal service were earned and earned anew. The postal service's ability to earn this trust is especially noteworthy when considering that it emerged during a period where governments were recently formed and their overall intervention in daily life was much less prevalent than it is today.[469]

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[468] See *An Act for the establishment and regulation of Inland Posts within this Province*, *supra* note 349, Schedule 10; *An Act for the regulation of the Postal Service*, supra note 373; *1867 General Regulations*, *supra* note 390. See also "Can Building a Bank Save Canada Post?", *Global News* (7 April 2016), online: <https://globalnews.ca/news/2624421/can-building-a-bank-save-canada-post/> (a video excepting a press conference where the president of the postal union states: "Even little children know that our postal workers can be depended on because we work in the hearts of our communities. We connect people, and we help people").

[469] This is sometimes referred to as the rise of the welfare state. See generally Abbye Atkinson, "Rethinking Credit as Social Provision" (2019) 71:5 Stan L Rev 1093; Abbye Atkinson, "Borrowing Equality" (2020) 120:6 Colum L Rev 1403.

Canada shares this rich history of postal banking with many other countries.[470] While Canada's historical postal banks have disappeared, similar institutions remain in operation in "87 countries [and] hold some 2 billion current or savings accounts on behalf of around 1 billion customers."[471] In recent years, some American scholars have suggested bringing back some form of postal banking to help solve persistent access to banking issues for rural and marginalised communities.[472] These proposals generally involve the postal service providing bank accounts and small loans.[473] They recently gained more mainstream support. Senators Bernie Sanders, Elizabeth Warren, and Kirsten Gillibrand voiced their support for postal banking, which was included in the Democratic Party's 2016 and 2020 election platforms.[474] Entities related to post offices in Canada and the United States have released detailed proposals on how and why postal banking could be implemented.[475] In 2018, a member of the New Democratic Party put forward a Motion for "a

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[470] See Clotteau & Measho, *supra* note 304; National Monetary Commission, *Notes Postal Savings-Bank Systems*, *supra* note 304.

[471] Clotteau & Measho, *supra* note 304 at 9.

[472] See e.g. Baradaran, "It's Time for Postal Banking", *supra* note 298; Mehrsa Baradaran, *How the Other Half Banks* (Cambridge: Harvard, 2015); Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294; Baradaran, "Small-Dollar Loan", *supra* note 291. See also "The Underbanked Canada: February 2016", *supra* note 297; Christopher, *supra* note 298; "How America Banks: Household Use of Banking and Financial Services", *supra* note 298; Barr, "Banking the Poor", *supra* note 298; Caskey, *supra* note 298; Fantauzzi, *supra* note 298.

[473] See Baradaran, "Small-Dollar Loan", *supra* note 291 at 112, 121. See also Baradaran, *How the Other Half Banks*, *supra* note 472.

[474] See Kevin Wack, "Postal Banking Is Back on the Table. Here's Why That Matters", *American Banker* (26 April 2018), online: <https://www.americanbanker.com/opinion/postal-banking-is-back-on-the-table-heres-why-that-matters>; "2016 Democratic Party Platform", online: *Democratic National Committee* <https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf>; "2020 Democratic Party Platform", online: *Democratic National Committee* <https://democrats.org/where-we-stand/party-platform/>.

[475] See "Providing Non-Bank Financial Services for the Underserved" (27 January 2014), online: *Office of Inspector General, United States Postal Service* <https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-14-007_0.pdf>; "Why Post Offices Need to Offer Banking Services: Rural Canada Is Underserved by Financial Services" (2014), online: *The Canadian Postmasters and Assistants Association* <http://cpaa-acmpa.ca/pub/files/banking_services_SEPT23Eng.pdf> ["CPAA Report"]. The Canadian report has been supported

special committee of the House [of Commons to] be appointed with the purpose of conducting hearings and proposing a plan for a postal banking system administered under the Canada Post Corporation."[476] The Motion was supported by Green Party leader Elizabeth May.[477] While the New Democratic Party has never formally supported postal banking, it issued a press release headlined "Liberals Team Up with Conservatives to Defeat Postal Banking Motion" when the motion was denied.[478]

While this (and it) may be a relic of the past, Canada Post continues to enjoy levels of trust and support that are unprecedented for a public institution.[479] 91 percent of Canadians and 83

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by many Canadian municipalities. See "Municipalities and Groups That Have Passed Resolutions or Sent Letters in Support of Expanding Services Like Postal Banking" (15 November 2015), online: *Canadian Union of Postal Workers* <https://www.cupw.ca/en/campaign/resources/municipalities-and-groups-have-passed-resolutions-or-sent-letters-support>.

[476] "M-166 Postal Banking System: 42nd Parliament, 1st Session", online: *House of Commons – Chambre des communes* <https://www.ourcommons.ca/members/en/irene-mathyssen(764)/motions/9625362>.

[477] See *ibid*.

[478] "Liberals Team Up with Conservatives to Defeat Postal Banking Motion" (24 October 2018), online: *NDP* <https://www.ndp.ca/news/liberals-team-conservatives-defeat-postal-banking-motion> ("New Democrats are disappointed that Motion 166 to study postal banking has been defeated in the House of Commons today. The Liberals were presented with a progressive and forward thinking idea, and they decided to team up with Conservatives to vote it down. […] Postal banking could provide services to Canadians in rural and Indigenous communities, who have been abandoned by big banks. […] Mathyssen's motion gained support from thousands of people across Canada who signed petitions tabled in the House of Commons. Postal Banking is also endorsed by the Canadian Postmasters and Assistants Association, Canadian Union of Postal Workers and over 700 municipalities"). The NDP member organised a press conference with members of the union which authored the CPAA Report (*supra* note 475). See "Postal Banking Debate to Heat Up in Parliament" (22 March 2018), online: *Canadian Union of Postal Workers* <https://www.cupw.ca/en/campaign/resources/municipalities-and-groups-have-passed-resolutions-or-sent-letters-support>.

[479] See House of Commons, "The Way Forward for Canada Post: Report of the Standing Committee on Government Operations and Estimates" by Tom Lukiwski (Chair), Sessional Paper, 42-1 (December 2016) at 2, 43 (which also highlights that the postal service has been key to success of many businesses). See also Baradaran, "It's Time for Postal Banking", *supra* note 298 at 169; Stegman & Robert Faris, *supra* note 302 at 13; "Providing Non-Bank Financial Services for the Underserved", *supra* note 475 ("[A] recent market survey found that 68 percent of respondents agree or strongly agree that the Postal Service is reliable and trustworthy. […] [T]rust has been identified as a critical factor in successfully implementing financial services" at i).

percent of Canadian businesses report being highly satisfied with its services.[480] The postal service also has a unique existing infrastructure that reaches each Canadian – including Canadians in remote and disadvantaged communities that have been abandoned by traditional banks.[481] It consists of over 6,200 outlets, 50,000 employees, and almost one million collection points, and delivers 8.8 billion letters and parcels to nearly 16 million addresses yearly.[482] It is in a unique position to provide financial services.[483] Canada Post's decision to partner with a large Canadian bank is questionable in several ways.[484] First, Canada Post may be imperilling its hard-earned reputation: traditional banks have a much less enviable reputation.[485] The TD partnership is also

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One report adds: "Many have fond memories of mail and parcels delivered by their letter carriers, and they have developed an emotional attachment to the [Canada Post] Corporation" (Bertrand et al, *supra* note 278 at 56).

[480] See Bertrand et al, *supra* note 278 at 1, 31. This percentage is even higher, at 96 percent, for Canadians who receive door-to-door delivery (*ibid* at 33). Additionally, 94 percent of Canadians believe that mail is highly important, and 88 percent believe that postal services will always need to be provided by the state (*ibid* at 31).

[481] See Ramsay, *supra* note 300; Christopher, "Mobile Banking", *supra* note 298 at 225-26; Choe, *supra* note 300 at 367; Caskey, *supra* note 298; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294 at 528; Brooks, *supra* note 300 at 995, 996, 1006; Moss, *supra* note 300 at 1732. The *Canadian Postal Service Charter* mandates that each Canadian have access to the postal service and that 98 percent of Canadians have a postal outlet within 15 kilometres of their home, 88 percent within 5 kilometres, and 78 percent within 2.5 kilometres. See *Canadian Postal Service Charter*, online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/our-company/about-us/financial-reports/2021-annual-report/corporate/service-charter.page>.

[482] See Bertrand et al, *supra* note 278 at 19, 23; *Canadian Postal Service Charter*, *supra* note 481.

[483] See e.g. "Providing Non-Bank Financial Services for the Underserved", *supra* note 475.

[484] The United Kingdom postal bank had also partnered with a private bank (J.P. Morgan). See "J.P. Morgan Europe Limited - Post Office Card Account", online: *J.P. Morgan* <https://www.jpmorgan.com/GB/en/solutions/post-office-card-account>.

[485] See e.g. *Bank of Montreal v Marcotte*, 2014 SCC 55; The Canadian Press, "TD Bank Agrees to Pay $1.2B US to Settle Lawsuit Related to U.S. Ponzi Schemer Allen Stanford", *CBC News* (27 February 2023), online: <https://www.cbc.ca/news/business/td-bank-allen-stanford-1.6761498>; Gillian Tan & Tom Metcalf, "TD Bank Took Epstein Money After Deutsche Bank Kicked Out Felon", *BNN Bloomberg* (20 September 2019), online: <https://www.bnnbloomberg.ca/td-took-epstein-money-after-deutsche-bank-kicked-out-the-felon-1.1319529>; Erica Johnson, "'We Do It Because Our Jobs Are at Stake': TD Bank Employees Admit to Breaking the Law for Fear of Being Fired", *CBC News* (10 March 2017), online: <https://www.cbc.ca/news/business/td-bank-employees-admit-to-breaking-law-1.4016569>.

exceedingly opaque. The public – which owns Canada Post[486] – is provided with no information regarding how the costs and profits of the MyMoney Loan are allocated. It is unclear whether TD employees or Canada Post employees are responsible for administering the program.[487] If TD retains all profits from the loans, or benefits from essentially free access to Canada Post's existing (and costly) infrastructure, the Canadian public would be entitled to seriously question the partnership.[488] Similarly, no publicly available information appears to exist regarding the profitability and user base of the MyMoney Loan. The public's trust is dependent on minimal transparency. In that respect, Canada Post would be wise to heed the lessons of its historical postal bank, which was subject to significant and frequent reporting and disclosure.[489] These issues will become particularly pressing if Canada Post expands its partnership to pursue its much broader stated mission to "expand access to financial services for Canadians."[490]

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[486] See *Canada Post Corporation Act, supra* note 278.

[487] See "Strategic Alliance", *supra* note 279 ("Canada Post employees will be trained to direct customers on how to apply to TD for this new financial product, through an online application or a toll-free number. TD will support customers through the application, decisioning and funding process, and customers will have access to customer support including financial literacy resources and online banking"); "Introducing Canada Post MyMoney Loan", *supra* note 281 ("As part of the strategic alliance between TD and Canada Post, Canada Post employees in post offices are trained to direct customers about how to apply for a Canada Post MyMoney Loan through an online application or toll-free number. TD supports customers through the application, decision-making and funding process").

[488] In an analogous context of government guaranteed loans, I have been critical of such approaches where, often for political reasons, the state ends up socialising losses and privatising profits. See Phil Lord & Lydia Saad, "Tackling the COVID-19 Pandemic" (2020) 43:2 Man LJ 1; Phil Lord, "Incentivising Employment during the COVID-19 Pandemic" (2020) 8:3 The Theory and Practice of Legislation 355.

[489] See *An Act for the regulation of the Postal Service,* supra note 373, ss 72, 74, 76.

[490] "Strategic Alliance", *supra* note 279.

Of course, the expertise developed over the century-long history of postal banking in Canada is long gone. Canada Post retains no particular expertise in the provision of financial services. As Canada Post has repeatedly pointed out, the MyMoney Loan is not, strictly, its first foray into financial services. It already allowed its customers to make "domestic and international remittances through MoneyGram, sen[d] money through Money Orders and payment options such as prepaid reloadable cards, gift cards, eVouchers and remittance payments."[491] Keeping for another day the issue of whether these constitute financial services, it is worth highlighting that, as for the MyMoney Loan, Canada Post partners with private sector actors who undertake the "financial" component of the transaction – MoneyGram for remittances and CIBC for foreign exchange.[492] Developing an internal expertise in the provision of financial services may be key to

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491 See "Introducing Canada Post MyMoney Loan", *supra* note 281. See also "Strategic Alliance", *supra* note 279; "Simple and Affordable Loans for More Canadians", *supra* note 283; "International Money Transfer", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/send-money/international-money-transfers.page>; "Postal Money Orders", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/send-money/money-orders.page>; "Foreign Currency Delivery", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/manage-money/foreign-currency-delivery.page>; "Prepaid Reloadable Cards", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/manage-money/prepaid-cards.page>. Canada Post formerly offered an online financial document management service, epost, which was phased out in December 2022. See Bertrand et al, *supra* note 278 at 18; "epost", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/receiving/manage-mail/epost.page>.

492 See "International Money Transfer", *supra* note 491; "Foreign Currency Delivery", *supra* note 491. CIBC is a large Canadian bank. See "The World's 100 Largest Banks, 2021", *supra* note 287. To the extent that these services can be provided on a cash basis, they act, in a limited sense, as a substitute for the banking system for unbanked and underbanked individuals. My above comments regarding the reputation of financial institutions apply to MoneyGram. See e.g. Department of Justice Office of Public Affairs, "Moneygram International Inc. Admits Anti-Money Laundering and Wire Fraud Violations, Forfeits $100 Million in Deferred Prosecution" (9 November 2012), online: *Department of Justice* <https://www.justice.gov/opa/pr/moneygram-international-inc-admits-anti-money-laundering-and-wire-fraud-violations-forfeits>; Jonathan Stempel & Katanga Johnson, "MoneyGram Sued by U.S., New York for Unfair Remittance Transfers", *Reuters* (21 April 2022), online: <https://www.reuters.com/business/finance/moneygram-is-sued-by-us-new-york-regulators-over-remittance-transfers-2022-04-21/>.

the growth of Canada Post's offering and pursuing its mission to "expand access to financial services for Canadians."[493]

The MyMoney Loan is a liminal stage in this broader ambition. Its potential to improve access to financial services issues for the unbanked and underbanked is limited.[494] When accessible, the MyMoney Loan may constitute an appealing, significantly cheaper (and safer) alternative for those who cannot obtain other forms of bank credit.[495] It mirrors some of the advantages of alternative financial services providers, such as prompt access to funds.[496] Funds are available within 1-5 days, and Canada Post does not conduct the extensive credit and financial verifications we normally associate with banks. However, it remains unclear how much of the unbanked and underbanked population will be able to access MyMoney Loans. Significantly, borrowers need to have a bank account – though not necessarily with TD.[497] While the press

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[493] "Strategic Alliance", *supra* note 279. A significant counterargument may be that this would subject Canada Post to costly and stringent regulation.

[494] See "The Underbanked Canada: February 2016", *supra* note 297; Baradaran, "It's Time for Postal Banking", *supra* note 298 at 168; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294 at 485-86; Baradaran, "Small-Dollar Loan", *supra* note 291; Christopher, *supra* note 298; "How America Banks: Household Use of Banking and Financial Services", *supra* note 298; Barr, "Banking the Poor", *supra* note 298; Caskey, *supra* note 298; Fantauzzi, *supra* note 298.

[495] See e.g. Baradaran, "Small-Dollar Loan", *supra* note 291 at 123; Coco & Meza, *supra* note 296; Austin, "Of Predatory Lending", *supra* note 294; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 294; Baradaran, "Banking and the Social Contract", *supra* note 296; Bar-Gill & Warren, *supra* note 296; "Payday Lending in America: Report 2: How Borrowers Choose and Repay Payday Loans", *supra* note 296.

[496] See "Canada Post MyMoney Loans", *supra* note 284.

[497] See *ibid*. As is generally the case for payday loans, funds are withdrawn directly from the account, and the borrower pays a fee if insufficient funds are available. See also Nick Bourke, "Payday Loan Facts and the CFPB's Impact" (14 January 2016), online: *The Pew Charitable Trusts* <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/payday-loan-facts-and-the-cfpbs-impact>; Fritzdixon, Jim & Skiba, *supra* note 299 at 1035; Ben-Ishai, "Regulating Payday Lenders in Canada", *supra* note 292 at 325; Michael S Barr, Jane K Dokko & Benjamin J

releases state that the program is designed "to meet the needs of a broad range of customers, including those who are new to Canada, or have not yet established credit,"[498] the current program refers to credit scores (without mentioning how they are used) and is only available to Canadian citizens and permanent residents.[499] Similarly, although the program makes eligible individuals with "a personal annual income of $1,000 or more,"[500] it is unclear what level of income is actually necessary to qualify for various loan amounts.

One can only discern a slight irony in assessing the role of the postal service in providing access to banking and credit to rural communities. As noted above, one of the main advantages of the Post Office Savings Bank was that it provided access to a savings account to Canadians in remote and rural communities which lacked adequate access to these services. As banks decided to expand into these communities, they complained of unfair competition from the state and contributed to the government's decision to lower the interest rate offered to depositors. It seems we have come full circle. As mentioned, banks have now deserted the remote communities where marginalised groups are overrepresented.[501] This is why so many Canadians are unbanked or

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Keys, "Borrowing to Make Ends Meet" in Michael S Barr, ed, *No Slack: The Financial Lives of Low-Income Americans* (Washington: Brookings, 2012).

[498] "Introducing Canada Post MyMoney Loan", *supra* note 281. See also "Simple and Affordable Loans for More Canadians", *supra* note 283 ("The market test demonstrated the potential of the MyMoney Loan to help meet the needs of many Canadians, including those who are new to credit"); Greene, *supra* note 302.

[499] See "Canada Post MyMoney Loans", *supra* note 284.

[500] *Ibid*.

[501] See e.g. Baradaran, "Small-Dollar Loan", *supra* note 291 at 119; Baradaran, *How the Other Half Banks*, *supra* note 472. See also "Canada Post Moves Toward Postal Banking Services in New Loan Program With TD Bank", *CBC News* (12 October 2022), online: <https://www.cbc.ca/news/business/canada-post-td-bank-1.6614159>.

underbanked. The return of postal banking is, in this way, an old solution to an old problem. Its significance flows from its potential to solve a problem that commercial banks created – in spite of their decades-long battle to access rural communities.

Appendix: Aggregated Postal Bank Data (1868-1967)

Year	Branches	Accounts	Deposits	Deposits ($)	Withdrawals	Withdrawals ($)	Net Assets ($)
1868	81	2,102	3,247	212,507	166	8,857.48	204,588.89
1869	213	7,212	16,653	927,885	4,787	296,754.35	856,814.26
1870	226	12,178	24,994	1,347,901	9,478	664,555.51	1,588,848.83
1871	230	17,153	33,256	1,917,576	15,148	1,093,438.86	2,497,259.65
1872	235	21,059	39,489	2,261,631	20,154	1,778,565.19	3,096,500.01
1873	239	23,526	44,413	2,306,918	23,800	2,323,299.32	3,207,051.57
1874	266	24,968	45,329	2,340,284	25,814	2,468,643.42	3,204,965.46
1875	268	24,294	42,508	1,942,346	25,954	2,341,979.04	2,926,090.48
1876	279	24,415	38,647	1,726,204	24,152	2,021,457.97	2,740,952.59
1877	287	24,074	36,126	1,521,000	22,484	1,726,082.98	2,639,937.47
1878	295	25,535	40,097	1,724,371	21,944	1,713,658.73	2,754,484.03
1879	297	27,445	43,349	1,973,243	23,226	1,733,448,79	3,105,109.80
1880	297	31,365	56,031	2,720,216	26,716	2,015,813.16	3,945,669.11
1881	304	39,605	71,747	4,175,042	28,510	2,097,389.15	6,208,226.77
1882	308	51,463	97,380	6,435,989	35,839	3,461,619.31	9,473,661.53
1883	330	61,059	109,489	6,826,266	45,253	4,730,995.39	11,976,237.31
1884	343	66,682	109,388	6,441,439	56,026	5,649,611.13	13,245,552.64
1885	355	73,322	116,576	7,098,459	59,714	5,793,031.84	15,090,540.31
1886	392	80,870	126,332	7,645,227	62,205	6,183,470.60	17,159,372.09
1887	415	90,159	143,076	8,272,041	65,853	6,626,067.51	19,497,750.15
1888	433	101,693	155,978	7,722,330	78,229	7,514,071.78	20,689,032.62
1889	463	113,123	166,235	7,926,634	84,572	7,532,145.56	23,011,422.57
1890	494	112,321	154,678	6,599,896	90,151	8,575,941.98	21,990,653.49
1891	634	111,230	147,672	6,500,372	84,963	7,878,977.57	21,738,648.09
1892	642	110,805	145,423	7,056,002	77,381	7,230,839.14	22,298,401.65
1893	673	114,275	148,868	7,708,888	73,361	6,631,578.97	24,153,193.66

1894	699	117,020	145,960	7,524,286	84,941	7,473,585.46	25,257,868,14
1895	731	120,628	143,685	7,488,028	85,588	7,310,291.97	26,805,542.47
1896	755	126,442	155,398	8,138,947	87,221	7,406,066.13	28,932,929.68
1897	779	135,737	161,151	8,223,000	91,398	7,656,086.64	32,380,829.09
1898	814	142,289	179,814	9,183,693	94,532	8,853,178.42	34,480,937.77
1899	838	142,141	174,638	8,310,630	95,090	9,021,862.56	34,771,605.17
1900	847	150,987	201,262	10,448,485	92,713	8,903,505.47	37,507,455.80
1901	895	157,368	212,217	11,091,099	102,083	9,774,694.62	39,950,812.62
1902	915	162,761	219,678	11,382,025	105,946	10,617,070.50	42,320,209.91
1903	934	167,023	231,619	12,060,825	104,393	11,379,756.94	44,255,326.93
1904	961	168,572	235,043	11,739,940	108,237	11,883,127.70	45,419,706.28
1905	989	165,518	223,281	10,503,870	110,157	12,129,101.23	45,367,760.68
1906	1,011	164,542	233,803	10,805,458	105,923	12,324,529.26	45,736,488.51
1907	1,043	167,285	186,916	8,803,233	79,338	9,330,766.39	47,452,957.75
1908	1,084	165,691	242,386	12,293,544.17	116,435	13,610,865.95	47,564,284.28
1909	1,102	155,895	199,884	9,415,569.29	115,048	13,132,239.00	45,190,484.21
1910	1,133	148,893	190,520	8,816,511.71	96,413	11,699,649.54	43,586,357.42
1911	1,151	147,478	203,196	9,957,016.17	90,664	11,470,360.24	43,330,579.19
1912	1,172	147,919	225,316	11,054,877.19	95,829	12,303,688.13	43,563,764.33
1913	1,212	146,034	230,263	11,299,963.88	96,835	13,389,966.01	42,728,941.83
1914	1,250	143,320	236,260	11,346,459.39	104,917	13,842,924.98	41,591,286.57
1915	1,269	145,477	183,515	10,154,189.07	104,816	12,925,606.20	39,995,406.40
1916	1,289	134,345	173,456	8,539,742.07	77,965	9,981,914.13	40,008,417.70
1917	1,312	135,142	205,050	11,974,434.11	68,254	10,606,900.87	42,582,478.59
1918	1,318	125,735	162,921	11,791,966.66	78,259	14,427,194.11	41,283,478.84
1919	1,328	116,541	141,627	12,593,190.06	64,390	13,604,410.70	41,654,960.26
1920	1,323	97,154	117,735	10,003,067.58	67,005	21,293,281.63	31,605,594.38
1921	1,328	88,563	80,117	6,631,684.58	42,322	10,699,748.70	29,010,619.23
1922	1,303	82,196	51,333	3,499,338.86	37,223	8,496,546.78	24,837,181.21
1923	1,307	76,111	43,223	2,606,610.61	26,373	5,764,442.11	22,357,267.55
1924	1,345	81,104	66,904	7,118,912.00	25,340	5,199,219.63	25,156,448.75

1925	1,369	80,550	66,296	4,089,058.97	42,334	5,316,583.68	24,662,000.08
1926	1,365	79,178	63,740	3,508,288.52	43,184	4,839,872.61	24,035,668.99
1927	1,367	77,580	59,452	3,178,563.92	42,197	4,493,872.21	23,402,336.95
1928	1,355	77,849	58,570	3,090,163.81	42,746	4,350,711.12	23,463,209.91
1929	1,348	85,433	53,985	2,910,146.98	43,051	4,519,506.99	28,375,769.74
1930	1,343	82,428	51,338	2,746,049.92	51,490	5,829,365.52	26,086,036.03
1931	1,347	80,098	43,051	2,535,562.84	47,973	4,604,104.72	24,750,226.97
1932	1,331	79,802	43,184	3,582,988.11	49,551	5,119,807.85	23,919,676.86
1933	1,319	79.439	39.583	3.669,427.35	54,371	4,352,002.86	23.920.915.27
1934	1,299	79.028	38,335	2,565,469.89	54,078	3,908,411.34	23,158,919.39
1935	1,272	78,821	40,297	2,223,907.40	51,692	3,346,412.39	22,547,006.38
1936	1,282	78,991	43,131	2,292,325.56	53,830	3,227,602.65	22,047,287.14
1937	1,287	80,370	49,551	2,830,193.07	59,120	3,424,421.87	21,879,593.13
1938	1,362	84,118	63,715	3,671,297.99	65,802	3,396,094.31	22,587,233.09
1939	1,572	88,621	71,873	3,812,974.36	78,099	3,800,518.02	23,045,575.64
1940	1,645	93,561	80.925	4,305,638.37	90,211	4,701,654.81	23,100,118.44
1941	1,664	98,144	81,532	3,998,091.16	102,447	5,355,477.82	22,176,632.54
1942	1,677	109,671	114,013	5,050,676.71	129,764	5,979,658.00	21,671,413.38
1943	1,726	139,103	202,042	8,386,978.73	204,058	6,123,311.05	24,373,991.48
1944	1,741	183,215	322,127	13,848,632.61	367,188	10,422,911.93	28,299,712.16
1945	1,757	222,250	376,041	18,568,005.26	499,099	13,977,025.22	33,468,799.10
1946	1,678	237,464	316,819	18,686,476.43	501,272	17,274,578.05	35,537,153.71
1947	1,634	242,874	200,810	13,834,474.44	326,768	14,288,809.37	35,764,512.33
1948	1,603	248,380	175,989	11,983,689.97	246,009	12,212,726.96	36,226,060.22
1949	1,557	269.161		12,843,954.23		12,038,638.16	37,741,388.62
1950	1,536	274,423		12,144,889.17		11,860,650.53	38,754,633.80
1951	1,531	278,595		10,368,265.52		12,194,871.84	37,661,920.55
1952	1,513	282,326		11,011,092.14		11,364,584.26	38,031,232,20
1953	1,512	287,468		11,521,742.93		10,972,699.97	39,322,229.54
1954	1,495	291,602		10,597,045.60		12,859,369.98	37,792.914.21
1955	1,457	293,840		9,402,227.13		11,127,553.80	36,780,666.17

1956	1,453	296,424	9,241,387.75	10,556,369.38	36,164,460.12
1957	1,440	298,700	9,663,773.62	10,662,846.82	35,918,498.99
1958	1,466	300,619	9,097,663.78	10,972,519.00	34,895,728.62
1959	1,477	302,349	8,611,890.27	10,172,956.18	34,155,617.31
1960	1,484	302,611	7,235,391.37	12,793,511.38	29,372,460.93
1961	1,500	302,672	6,199,420.08	7,757,737.74	28,512,786.11
1962	1,508	302,079	5,790,429.07	7,614,024.93	27,365,118.96
1963	1,521	301,277	5,072,613.01	7,199,359.87	25,880,479.18
1964	1,525	301,024	4,813,401.99	6,697,740.63	24,604,919.67
1965	1,523	299,739	4,283,949.81	6,212,491.13	23,254,957.19
1966	1,527	298,615	3,995,127.37	5,773,495.47	22,023,929.28
1967	1,549	297,676	3,987,952.23	5,772,449.72	20,755,662.77

VI. A Better Solution

This chapter sets out a proposed government program which could remedy some of the issues discussed in previous chapters. It sets forth a government program through which long-term credit would be provided directly to the very poor. The loans would be repaid through additional, progressive taxation. Individuals whose income does not reach a certain level would not need to repay the loan, whereas those with a high income would effectively repay a multiple of the loan principal amount. The loans would only exist for a set period of time. The repayment period and taxation rates would be set and adjusted to ensure that credit is not provided at a loss (as a result of the risk of default). I justify the necessity of this program with reference to the systematic failure of alternative financial services providers to provide credit to the very poor and the singular importance of credit to individual wellbeing and social participation. The program may have unique potential to alleviate persistently lower social mobility for the very poor.

The chapter reiterates certain issues discussed in earlier chapters, which help normalise and position its argument in favour of state support of the very poor. The chapter then discusses the most analogous proposals set forth in academic literature, contrasting them with my proposal.

As noted in Chapter IV, the state offers significant support to the middle class. Chapter IV also described the reconceptualisation of social assistance in Canada and the United States in the past several decades. The growing conviction of citizens and public actors that social assistance can disincentivise work and violate collective values of autonomy and self-sufficiency has led governments create more, and more stringent, conditions for eligibility. As a result, the very poor have to increasingly rely on alternative financial services providers. Meanwhile, governments –

ostensibly hoping to enhance access to credit – have responded to the growing prevalence of alternative financial services providers by exempting alternative financial services providers from usury regulation and the complex regulatory regimes that apply to banks and traditional financial services providers.

As the social safety net eroded, governments created various programs which guarantee credit risk for the middle class – generally focussing on housing and education. As noted in chapter IV, although these programs make all or most citizens eligible, the very poor are disproportionately unlikely to use them because they do not generally own houses and attend higher education institutions at disproportionately low rates. These programs differ from social assistance in that they do not provide cash payments. However, as noted, governments take on both risk and cost by choosing to guarantee credit risk. From that perspective, these is nothing that fundamentally differentiates this form of state assistance from more traditional social assistance programs.

The various sections of this chapter are structured differently and play different roles. They each help support the need for the program I propose and delineate the key features of the program that make it different from current and proposed alternatives, and uniquely responsive to the circumstances and preferences of the very poor explored throughout the project. The first section of the chapter further discusses postal banking. It focuses on the United States and presents a contemporary proposal by scholars that would use the postal service to enhance access to banking for the very poor. Through this discussion, the section on postal banking presents a contextual history of, and the contemporary justification for, state intervention. The following section provides a theoretical framework through which we can conceptualise state intervention in the private sector. It lays out, and then extends and develops, a theoretical framework that is drawn from antitrust law. This framework both explains and normalises state intervention in the marketplace that might initially appear heavy-handed. I advance an argument that state intervention is best conceptualised as falling along a spectrum, from the enactment of comprehensive, specialised regulatory regimes and obligations to the direct provision of a product or service by the state, and then to the monopolisation of an entire industry (to the exclusion of private actors). This broader framework will remain relevant to our conceptualisation of state intervention beyond my proposed program and the type of state intervention it proposes. I argue that each of these forms of intervention serves the same goal of ensuring that essential products and services are provided to citizens. I then use the spectrum I present to argue that alternative solutions to access to credit for the very poor – other than direct provision of credit by the state – have previously failed and will continue to provide an incomplete and inadequate answer to the problem. The sections on postal banking and antitrust law provide analogies to regulation and programs that were previously, or are currently, implemented. In addition to highlighting the key features of my proposed program, the sections help advance a normative argument for state intervention in the provision of credit. The following section discusses the universal basic income, a proposed program that would have significant similarities to the program I propose. Unlike postal banking and antitrust law, it has not been implemented. The comparison to a universal basic income eventually helps delineate how my proposed program is a hybrid between a loan and a grant program. Its characteristics of universal accessibility and dischargeability are best understood through this comparison, and with reference to theoretical justifications advanced to advocate for a universal basic income. The final section of the chapter circles back to my proposed program.

1. Postal Banking

Chapter V provided a comprehensive account of the emergence, growth, and eventual decline of Canada's historical federal postal bank. This account helped contextualise state intervention in the provision of banking and credit. As briefly noted in chapter V, some American scholars have argued in favour of a return of postal banking as a solution to the persisting access to credit and banking issues discussed in previous chapters.

Prof. Mehrsa Baradaran is the most prominent legal scholar to have argued in favour of postal banking. She has written extensively on access to banking for the very poor.[502] In seeking to justify the need for postal banking, she has bridged a similar gap to the one I intend to bridge.[503] She has argued that the *state* should provide banking services to those who are underbanked or unbanked, advancing a proposal as to how the United States Postal Service could provide these

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[502] See Mehrsa Baradaran, "It's Time for Postal Banking" (2014) 127:4 Harv L Rev F 165; Mehrsa Baradaran, *How the Other Half Banks* (Cambridge: Harvard, 2015); Mehrsa Baradaran, "How the Poor Got Cut Out of Banking" (2013) 62:3 Emory LJ 483; Mehrsa Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (Cambridge: Harvard, 2019); Mehrsa Baradaran, "Credit, Morality, and the Small-Dollar Loan" (2020) 55:1 Harv CR-CLL Rev 63 [Baradaran, "Small-Dollar Loan"]; Mehrsa Baradaran, "Rethinking Financial Inclusion: Designing an Equitable System with Public Policy" (2020) Roosevelt Institute Working Paper [Baradaran, "Rethinking Financial Inclusion"].

[503] On the history of postal banking in the United States, see Baradaran, *How the Other Half Banks*, *supra* note 502; Steven Sprick Schuster, Matthew Jaremski & Elisabeth Ruth Perlman, "An Empirical History of the United States Postal Savings System" (2019) National Bureau of Economic Research Working Paper No 25812; Historian of the United States Postal Service, "Postal Savings System" (July 2008), online: *United States Postal Service* <https://about.usps.com/who/profile/history/pdf/postal-savings-system.pdf>; Richard R John, "How the Post Office Made America", *The New York Times* (8 February 2013), online: <www.nytimes.com/2013/02/09/opinion/how-the-post-office-made-america.html>. Mehrsa Baradaran, "A Short History of Postal Banking: As the Debate Over Reinstituting Postal Banking Heats Up, We Should Know We Had It. And It Worked." (18 August 2014), online: *Slate* <https://slate.com/news-and-politics/2014/08/postal-banking-already-worked-in-the-usa-and-it-will-work-again.html>.

services.[504] Postal banks would provide bank accounts and small loans to the very poor.[505] This public option would compete with private entities (alternative financial services providers), as the United States Postal Service already does.[506] Prof. Baradaran argues that there is a rich history of state-supported and state-sponsored banking institutions.[507] She believes that the United States Postal Service has the requisite infrastructure to reach remote and marginalised communities, which have been deserted by traditional banking institutions.[508] This existing scope and scale would allow the United States Postal Service to offer these services much more cheaply than alternative financial services providers, without being constrained to maximise profitability.[509]

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[504] See Baradaran, "It's Time for Postal Banking", *supra* note 502; Baradaran, *How the Other Half Banks*, *supra* note 502; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Baradaran, "Small-Dollar Loan", *supra* note 502.

[505] See Baradaran, "Small-Dollar Loan", *supra* note 502 at 112, 121. See also Baradaran, *How the Other Half Banks*, *supra* note 502.

[506] See Baradaran, "Small-Dollar Loan", *supra* note 502 at 116. See also Baradaran, *How the Other Half Banks*, *supra* note 502. The United States Postal Service competes with private delivery companies, such as UPS and FedEx.

[507] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502.

[508] See Baradaran, "Small-Dollar Loan", *supra* note 502 at 119. See also Baradaran, *How the Other Half Banks*, *supra* note 502; Terri Friedline & Mathieu Despard, "Mapping Financial Opportunity: Final Report" (1 September 2017), online: *University of Michigan Center on Assets, Education, and Inclusion* <https://aedi.ssw.umich.edu/sites/default/files/publications/Mapping-Financial-Opportunity.pdf>. See also House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 42-1, No 53 (31 October 2016) at 1544 ("[A]t the end of the day, while banks have a large footprint across the country, every branch still has to be financially viable. Are there instances where a community cannot be served by a full service branch? Absolutely. This happens. Where that happens, do banks try to find alternatives to the extent that they can? Yes, but alternatives don't always present themselves"). See also TEDx Talks, "Postal Banking: An Old Solution to a New Problem | Mehrsa Baradaran | TEDxUGA" (30 March 2016) at 9m:52s, online (video): <https://www.youtube.com/watch?v=VYdNKMkBYuQ&list=WL&index=162&t=64s&ab_channel=TEDxTalks> ("In many ways, the banking landscape today more resembles that of 1910, when postal banking was initiated, than 1966, when it was abolished").

[509] See Baradaran, "Small-Dollar Loan", *supra* note 502 at 120. See also Baradaran, *How the Other Half Banks*, *supra* note 502 at 211, 217; D Daniel Sokol, "Competition Policy and Comparative Corporate Governance of State-Owned Enterprises" [2009] BYU L Rev 1713 ("[State-Owned Enterprises] are different from privately-owned firms. SOEs are not necessarily profit maximizers, they may have goals that conflict with those of their de facto owners—the government, they do not necessarily seek to maximize shareholder value, and they may be playing on an unlevel playing field relative to their private counterparts" at 1727; "Unlike private firms, SOEs do not operate under hard budget constraints. Instead, they operate under what economists term 'soft' budget constraints. These constraints are

Postal banking would match the preferences of the very poor (what scholars have called the façade of informality), who report trusting the United States Postal Service.[510] Although Prof. Baradaran has advanced this proposal in several articles and a book, she provides few specific details as to how a postal bank should be designed, what its funding model would be, or how legislation would need to be amended to enable it.

As noted in chapter V, such postal banks exist in many other countries. Postal services in 87 countries "hold some 2 billion current or savings accounts on behalf of around 1 billion customers."[511] Many postal banks are highly profitable.[512] Chapter V discussed the development of the United Kingdom's postal service – and bank – which controlled Canada's provincial postal services until 1851. The United Kingdom's postal service continues to provide a broad array of

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'soft' because another institution (in our case, another part of government) will pay the shortfall for mismanagement of the SOE" at 1738).

[510] See Baradaran, "Small-Dollar Loan", *supra* note 502 at 127-28 ("Even people who never go to their post office branch may be familiar with the mail carrier who visits their home daily. And following history's cue, the postal network can offer information in more languages than do banks and appeal to the large population of immigrants, or even undocumented people, who have money to save, but no access to banks"); Baradaran, *How the Other Half Banks*, *supra* note 502 at 219 ("Trust, especially in banking, consists of more than just a 'nice feeling.' It is a way to lower costs and reduce barriers of entry. This was the point of government deposit insurance. Banks cannot survive if their customers do not trust them to hold and lend their money. It is hard to predict whether the public will warm to postal banking, but in light of historical and international experience and the significant modern distrust of fringe banks, the public may view the post office as a safer and more trustworthy place to store funds").

[511] See Nils Clotteau & Bsrat Measho, "Global Panorama on Postal Financial Inclusion 2016" (September 2016), online: *Universal Postal Union* <https://www.upu.int/UPU/media/upu/publications/globalPanoramaOnPostalFinancialInclusion2016En.pdf>; Geoff Bickerton & Katherine Steinhoff, "Banking on a Future for Posts? A Financial Assessment of Postal Banking and Financial Services at Various Postal Administrations" (Paper delivered at the 21st Rutgers University Conference on Postal and Delivery Economics, Dublin, 28 May to 1 June 2013) [unpublished].

[512] See Bickerton & Steinhoff, *supra* note 511 ("Despite several tumultuous years for the financial sector Banque Postale has consistently been very profitable, providing over $1 Billion Euros in dividends to La Poste during the past five years. At the same time it has pursued its mandate to combat banking exclusion" at 7; "During this same seven year period the total after tax net profit of Banque Postale amounted to 3.44 Billion Euros" at 8).

financial and other services, including “passport and identity services, licences, vehicle tax, insurance (home, business, vehicle, life and pet), travel (e.g., currency exchange and travelers cheques), broadband and phone services, full agency banking services (including credit cards, remittance services, cash withdrawals and deposits from partner banks, mortgages) and pre-paid funeral plans.”[513] More peculiar services provided by postal services include lawn mowing (in Finland),[514] senior care (in Japan),[515] and public transit (in Switzerland).[516] More saliently, France’s postal service, La Poste, is responsible for the provision of social services and social assistance – further evidencing both the public nature of postal services and their role in the social fabric.[517]

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[513] See Françoise Bertrand et al, “Canada Post in the Digital Age: Discussion Paper 2016” (September 2016), online: *Government of Canada* <https://www.tpsgc-pwgsc.gc.ca/examendepostescanada-canadapostreview/rapport-report/consult-eng.html> at 27. See also Reena Sewraz, “Post Office Unites Its Financial Services Under One Brand to Take on Major UK Banks”, *Love Money* (26 January 2015), online: <https://www.lovemoney.com/news/43964/post-office-launches-post-office-money-challenger-brand>. As was the case for Canada Post, the United Kingdom’s postal service partnered with a private institution to provide certain financial services (instead of providing these services directly). See “J.P. Morgan Europe Limited - Post Office Card Account”, online: *J.P. Morgan* <https://www.jpmorgan.com/GB/en/solutions/post-office-card-account>. See also Bickerton & Steinhoff, *supra* note 511 at 28 (“The Post Office is one of the country's largest cash handlers, processing around £70 billion of cash and £636 million of coinage every year”).

[514] See Bertrand et al, *supra* note 513 at 27; Jonathan Chew, “Finland’s Postal Service Is Offering to Mow Your Lawn”, *Fortune* (29 April 2016), online: <https://fortune.com/2016/04/29/posti-finland-mow-lawn/>. This service was provided as a pilot project.

[515] See “Postal Workers to Deliver Senior Services Under Japan Tie-Up”, *NikkeiAsia* (18 November 2016), online: <https://asia.nikkei.com/Business/Postal-workers-to-deliver-senior-services-under-Japan-tie-up> (“Postal workers will pay half-hour home visits once a month to chat with the elderly residents and note any changes in their health and living conditions. The information so gleaned can be shared with family members and health care professionals with permission”).

[516] See Bertrand et al, *supra* note 513 at 27; “Home”, online: *PostBus* <https://www.postauto.ch/en>. It is unclear how a “postal” bus may differ from traditional public transit.

[517] See “Contrat d’entreprise 2018-2022 entre l’État et La Poste: Contrat relatif aux missions de service public confiées au Groupe La Poste” (7 December 2017), online: *Ministère de l'Économie, des Finances et de la Souveraineté industrielle et numérique: Le portail de la Direction générale des Entreprises*

Prior to Prof. Baradaran's first academic appointment in 2010,[518] no legal scholar dedicated a significant portion of their scholarship to postal banking or analogous proposals. Her interest in access to financial services for the unbanked and underbanked was developed at a unique time in the history of postal services. Postal services in Canada and the United States (and other countries) were disrupted by the development of the Internet, which significantly reduced usage of traditional mail.[519] Postal services were slow to react to the rise of ecommerce. As a result, much of the additional demand for postal services resulting from ecommerce accrued to private actors, such as Amazon, UPS, and FedEx.[520] The United States Postal Service appears to be structurally

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<https://www.entreprises.gouv.fr/fr/services/contrat-d-entreprise-etat-la-poste-2018-2022>. See also Bertrand et al, *supra* note 513 at 25-29.

518 See Sarah Montgomery McConkie, "Sister Act" (2010), online: *BYU Today* <https://magazine.byu.edu/article/sister-act/>.

519 See Bertrand et al, *supra* note 513 at 2, 23-24.

520 See Rachel Premack, "The US Postal Service's Volumes Tanked for the First Time in Nearly a Decade — Here's Why Insiders Say FedEx and Amazon Are To Blame", *Business Insider* (15 August 2019), online: <https://www.businessinsider.com/amazon-fedex-first-usps-volume-drop-2019-8>; Andria Cheng, "Amazon Ships 2.5 Billion Packages A Year, With Billions More Coming, In A Major Threat To UPS And FedEx", *Forbes* (12 December 2019), online: <https://www.forbes.com/sites/andriacheng/2019/12/12/how-serious-is-amazons-threat-to-ups-fedex-study-finds-it-could-soon-beat-them-in-us-package-delivery-volume/?sh=6a619e8d68f4>; Rachel Premack, "The Postal Service Is Subsidizing Jeff Bezos' Quest To Turn Amazon Into a Delivery Machine That Competes With UPS and FedEx — But USPS Can't Break Up With Bezos", *Business Insider* (6 May 2020), online: <https://www.businessinsider.com/amazon-usps-rural-packages-deliveries-2020-5> ("'This is especially true at roughly the scale of the relationship Amazon has with USPS,' Farhi added. 'Amazon is a big enough chunk of USPS revenues that, if USPS lost it, it would materially reduce their revenues without materially reducing their fixed costs'"); Damian Paletta & Josh Dawsey, "Trump Personally Pushed Postmaster General To Double Rates on Amazon, Other Firms", *The Washington Post* (17 May 2018), online: <https://www.washingtonpost.com/business/economy/trump-personally-pushed-postmaster-general-to-double-rates-on-amazon-other-firms/2018/05/18/2b6438d2-5931-11e8-858f-12becb4d6067_story.html>; "2022 Annual Report Canada Post Corporation: Financial Section", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/doc/en/aboutus/financialreports/2022-annual-financial-report.pdf> at 3-4. As noted in chapter V, the postal service had a significant role in the development and sustenance of commerce. It was also material to the development of consumerism and its legitimation. See generally Louis Hyman, *Debtor Nation: The History of America in Red Ink* (Princeton: Princeton University Press, 2012); Chantal Amyot & John A Willis, *Country Post: Rural Postal Service in Canada, 1880 to 1945* (Ottawa: University of Ottawa Press, 2003). See also CBS Sunday Morning, "The Fall of Sears" (16 December 2018), online (video): <https://www.youtube.com/watch?v=MYGOg9kUsfE&t=209s&ab_channel=CBSSundayMorning> (discussing how

unprofitable. It incurred losses of 5.5 billion dollars in 2014,[521] 5.1 billion dollars in 2015,[522] 5.6 billion dollars in 2016,[523] 2.7 billion dollars in 2017,[524] 3.9 billion dollars in 2018,[525] 8.8 billion dollars in 2019,[526] 9.2 billion dollars in 2020,[527] and 4.9 billion dollars in 2021.[528] These losses mean that the United States Postal Service continually relies on congressional appropriations. It is particularly vulnerable to a changing political and social climate. If an administration declines funding, the United States Postal Service must make immediate cuts that may run afoul of its statutory obligations and collective bargaining agreements.[529] Then-President Donald Trump

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Sears used the postal service to make consumption available throughout the country (including in remote areas) and make products that were formerly only available to the upper classes cheaper).

[521] See United States Postal Regulatory Commission, Annual Report (Form 10-K) (5 December 2014) at 31.

[522] See United States Postal Regulatory Commission, Annual Report (Form 10-K) (13 November 2015) at 13.

[523] See United States Postal Regulatory Commission, Annual Report (Form 10-K) (28 November 2016) at 13.

[524] See United States Postal Regulatory Commission, Annual Report (Form 10-K) (14 November 2017) at 16.

[525] See United States Postal Regulatory Commission, Annual Report (Form 10-K) (16 November 2018) at 18 [United States Postal Regulatory Commission, 2018 10-K].

[526] See United States Postal Regulatory Commission, Annual Report (Form 10-K) (14 November 2019) at 17.

[527] See United States Postal Regulatory Commission, Annual Report (Form 10-K) (13 November 2020) at 22.

[528] See United States Postal Regulatory Commission, Annual Report (Form 10-K) (10 November 2021) at 21 [United States Postal Regulatory Commission, 2021 10-K]. The United States Postal Service had significant net income of some 56 billion dollars in 2022. However, this was solely due to a one-time, non-cash accounting adjustment of some 57 billion dollars. The *Postal Service Reform Act of 2022* (Pub L No 117-108, 136 Stat 1127 (2022) (codified throughout 39 USC)) abrogated the United States Postal Service's obligation to pre-fund significant retirement benefits. See United States Postal Regulatory Commission, Annual Report (Form 10-K) (10 November 2022) at 17, 32. The United States Postal Service had previously defaulted on some of these payments. See Eyder Peralta, "USPS Defaults On $5.5 Billion Payment To Treasury", *NPR* (1 August 2012), online: <https://www.npr.org/sections/thetwo-way/2012/08/01/157717281/usps-defaults-on-5-5-billion-payment-to-treasury>; Eric Katz, "USPS Defaults on Billions in Mandatory Payments, Despite Scheduled Relief", *Government Executive* (29 September 2017), online: <https://www.govexec.com/management/2017/09/usps-defaults-billions-mandatory-payments-despite-scheduled-relief/141404/> [Katz, "USPS Defaults"]. See also Baradaran, *How the Other Half Banks*, *supra* note 502 at 208 (arguing that the obligation to pre-fund retirement benefits had "political roots" and contributed to the decline of the United States Postal Service).

[529] As noted, the United States Postal Service previously defaulted on its statutory retirement funding obligations pursuant to the *Postal Accountability and Enhancement Act* (Pub L No 109-435, 120 Stat 3198 (2006)). See Peralta, *supra* note 528; Katz, "USPS Defaults", *supra* note 528.

sought to privatise the United States Postal Service, but was met with bipartisan opposition from United States senators.[530] He nonetheless created a task force empowered to review its fundamental characteristics, including its “monopoly over letter delivery and mailboxes,” the “universal service obligation,” and its “role in the U.S. economy and in rural areas, communities, and small towns.”[531] He appointed the first Postmaster in twenty years that is not a career postal employee, who went on to reform the United States Postal Service’s business model.[532] Recently, some funding was provided as a loan instead of a grant, which ostensibly diminished the independence of the United States Postal Service.[533]

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530 See Joe Davidson, “Congressional Opposition to Trump’s Postal Cuts, Privatization Plan Grows”, *The Washington Post* (24 September 2018), online: <https://www.washingtonpost.com/politics/2018/09/24/congressional-opposition-trumps-postal-cuts-privatization-plan-grows/>; S Res 633, 115th (2017-2018). It is worth noting that the Senate resolution inaccurately claims that “the United States Postal Service is a self-sustaining, independent establishment that relies on revenue derived from the sale of postal services and products, not on taxpayer funds” (S Res 633, *ibid*).

531 Exec Order No 13829, 83 FR 17281 (2018). The Order also notes that “[t]he USPS is on an unsustainable financial path and must be restructured to prevent a taxpayer-funded bailout” (*ibid*). (Like Canada Post, the United States Postal Service is obligated to service all citizens. See “Canadian Postal Service Charter”, online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/our-company/about-us/financial-reports/2021-annual-report/corporate/service-charter.page>; “Universal Service Obligation”, online: *United States Postal Service* <https://about.usps.com/universal-postal-service/usps-uso-executive-summary.txt#:~:text=While%20not%20explicitly%20defined%2C%20the,service%20quality%2C%20and%20security%20of >.) See also Sokol, *supra* note 509 at 1747 (“Postal services have two potentially competing goals. One is a market correction function that serves the public interest. A country will regulate postal services to ensure service where otherwise there would not be coverage”).

532 See “Congress Urges Postal Service To Undo Changes Slowing Mail”, *AP News* (6 August 2020), online: <https://apnews.com/article/virus-outbreak-seniors-mt-state-wire-voting-steve-daines-a291ebc31c5638aa5a9adafc2ff2b430>; Eric Katz, “Looking to Cut Costs, New USPS Leader Takes Aim at Overtime and Late Trips”, *Government Executive* (15 July 2020), online: <https://www.govexec.com/pay-benefits/2020/07/looking-cut-costs-new-usps-leader-takes-aim-overtime-and-late-trips/166917/>; “Delivering for America: Our Vision and Ten-Year Plan to Achieve Financial Sustainability and Service Excellence”, online: *United States Postal Service* <https://about.usps.com/what/strategic-plans/delivering-for-america/>.

533 See Paletta & Dawsey, *supra* note 520 (“Because the Postal Service has lost money for 11 straight years, it has had to repeatedly borrow funds from the Treasury Department’s Federal Financing Bank, totaling $15 billion. Its reliance on Federal Financing Bank funds has allowed Mnuchin — one of Trump’s closest advisers — to gain a foothold in its future. One of Mnuchin’s counselors, Craig Phillips, is leading Trump’s review of the Postal Service, along with Kathy Kraninger, associate director for general government at the Office of Management and Budget. It is due in

In contrast, Canada Post is statutorily mandated to be profitable. Section 5 of the *Canada Post Corporation Act* provides that an objective of the Corporation is to "have regard to the need to conduct its operations on a self-sustaining financial basis while providing a standard of service that will meet the needs of the people of Canada and that is similar with respect to communities of the same size."[534] As a result, Canada Post has been profitable for 19 of the past 21 years.[535] However, Canada Post faces the same financial uncertainty and challenges as the United States Postal Service. While conducting a comprehensive review of Canada Post, a Parliamentary committee commissioned a report from prominent accounting firm Ernst & Young, which projected that annual losses would grow to 700 million dollars by 2026.[536]

Postal services in both Canada and the United States are characterised by strong unions representing their employees.[537] Labour relations have, at times, been acrimonious.[538] Postal

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August"); Jacob Bogage & Lisa Rein, "Trump Administration Considers Leveraging Emergency Coronavirus Loan To Force Postal Service Changes", *The Washington Post* (23 April 2020), online: <https://www.washingtonpost.com/business/2020/04/23/10-billion-treasury-loan-usps/>.

[534] *Canada Post Corporation Act*, RSC 1985, c C-10.

[535] See House of Commons, "The Way Forward for Canada Post: Report of the Standing Committee on Government Operations and Estimates" by Tom Lukiwski (Chair), Sessional Paper, 42-1 (December 2016) at 102. The main, mail delivery business line is generally unprofitable, but these losses are offset by profitable lines of business such as Purolator and SCI (which provides supply chain solutions). See e.g. "2022 Annual Report Canada Post Corporation: Financial Section", *supra* note 513; "What We Do", online: *SCI* <https://www.sci.ca/what-we-do/what-we-do/>.

[536] See *ibid* at 102-03.

[537] See United States Postal Regulatory Commission, 2018 10-K, *supra* note 525 at 5 ("Approximately 92% of employees are covered by collective bargaining agreements"); United States Postal Regulatory Commission, 2021 10-K, *supra* note 528 at 8 ("Approximately 93% of our employees are covered by collective bargaining agreements"); "2022 Annual Report Canada Post Corporation: Financial Section", *supra* note 513.

[538] See e.g. "The Great 1970 Mail Strike that Stunned the Country" (28 February 2017), online: *American Postal Workers Union* <https://apwu.org/news/great-1970-mail-strike-stunned-country>; "Negotiations Updates: CUPW Members Are Conducting Strikes Across the Country" (28 November 2018), online: *Canada Post*

services are some of the largest employers. Canada Post employs some 68,000 people,[539] while the United States Postal Service employs some 516,750 career employees and 118,600 non-career employees.[540] The United States Postal Service is the second largest civilian employer, behind only Walmart.[541] Its "Compensation and Benefits" expense consistently accounts for some 70 percent of its annual budget.[542] The analogous budget line in Canada was 72.8 percent in 2021[543] and 70.3 percent in 2022.[544]

Ostensibly aware that compensation costs make up most of the budget of our postal services, the main unions representing postal workers have taken an active role in proposing

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<https://www.canadapost-postescanada.ca/cpc/en/our-company/news-and-media/corporate-news/negotiations/2018-11-27-cupw-members-are-conducting-strikes-across-the-country>.

[539] See "2022 Annual Report: Our Size and Scope", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/our-company/about-us/financial-reports/2022-annual-report/size-and-scope.page>.

[540] See "Size and Scope", online: *USPS Postal Facts* <https://facts.usps.com/total-career-employees/>. Non-career employees are "temporary workers who do not receive the same employee benefits as career employees and are not always guaranteed a regular schedule" (Joshua D Colin et al, "Postal Service's Non-Career Employee Turnover Follow-Up" (18 April 2023), online: *United States Postal Service Office of Inspector General* <https://www.uspsoig.gov/sites/default/files/reports/2023-04/22-180-r23.pdf>).

[541] See Devin Leonard, "The End of Mail", *Bloomberg Businessweek* (30 May to 5 June 2011).

[542] See United States Postal Regulatory Commission, 2018 10-K, *supra* note 525 at 27 ("Compensation and benefits, our largest operating expense category, represented approximately 67%, 68% and 63% of our total operating expenses for the years ended September 30, 2018, 2017 and 2016, and consist of costs related to our active career and non-career employees"); United States Postal Regulatory Commission, 2021 10-K, *supra* note 528 at 29 ("Compensation and benefits, our largest operating expense category, consists of costs related to our active career and pre-career employees other than retirement costs associated with U.S. government defined benefit pension programs and retiree health costs, which are further discussed in *Retirement Benefits* and *Retiree Health Benefits*, respectively. Compensation and benefits represented approximately 61% and 59% of our total operating expenses for the years ended September 30, 2021 and 2020, respectively").

[543] See "2021 Annual Report Canada Post Corporation: Financial Section", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/doc/en/aboutus/financialreports/2021-annual-financial-report.pdf> at 38.

[544] See "2022 Annual Report Canada Post Corporation: Financial Section", *supra* note 513 at 37.

alternatives that might help postal services reinvent themselves in the face of the financial challenges and disruption described above. Canadian and American postal unions endorsed postal banking much before postal services did.[545] A particularly detailed proposal was released by the Canadian Union of Postal Workers.[546] The Union complained to Parliamentary committee that this proposal had been ignored by Canada Post,[547] while in the United States, the postal union required a pilot project as part of its collective bargaining.[548] The program eventually implemented by the United States Postal Service was extremely modest in scale, especially when compared to the MyMoney loan discussed in chapter V. It was only available in four post offices[549] and offered customers "to deposit payroll or business checks of up to $500 onto a single-use debit card for a

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[545] See "Providing Non-Bank Financial Services for the Underserved" (27 January 2014), online: *Office of Inspector General, United States Postal Service* <https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-14-007_0.pdf>; "Why Post Offices Need to Offer Banking Services: Rural Canada Is Underserved by Financial Services" (2014), online: *The Canadian Postmasters and Assistants Association* <http://cpaa-acmpa.ca/pub/files/banking_services_SEPT23Eng.pdf>; Eric Katz, "Postal Service Launches Banking Pilot With Hopes to Expand in Early 2022", *Government Executive* (4 October 2021), online: <https://www.govexec.com/management/2021/10/postal-service-launches-banking-pilot-hopes-expand-early-2022/185824/> [Katz, "Postal Service Launches Banking Pilot"].

[546] See "Why Post Offices Need to Offer Banking Services: Rural Canada Is Underserved by Financial Services", *supra* note 545.

[547] See House of Commons, *supra* note 535 at 7-9.

[548] See Katz, "Postal Service Launches Banking Pilot", *supra* note 545; David Dayen, "USPS Begins Postal Banking Pilot Program", *The American Prospect* (4 October 2021), online: <https://prospect.org/economy/usps-begins-postal-banking-pilot-program/>; "Collective Bargaining Agreement Between American Postal Workers Union, AFL-CIO and U.S. Postal Service: May 21, 2015 – September 20, 2018", online: *American Postal Workers Union* <https://apwu.org/sites/apwu/files/resource-files/_%5BMar16%2717%5D%20Online_2015-18%20APWU%20CBA_1.pdf> at 264-65. See also Adam Clark Estes, "How the Biden Administration Can Save the Postal Service", *Vox Media* (22 January 2021), online: <www.vox.com/recode/22243799/post-office-delays-postal-banking-usps-reform>.

[549] See Katz, "Postal Service Launches Banking Pilot", *supra* note 545; Eric P Coetting, "Responses of the United States Postal Service to Questions 1–2 of Commission Information Request No. 1" (14 January 2022), online: *Postal Regulatory Commission* <https://www.prc.gov/docs/120/120699/CIR%20No.%201.Responses.pdf>.

flat fee of $5.95."[550] The cheques could not be converted to cash, and the gift cards had a limit of 500 dollars. The pilot project initially received bipartisan support, with Senate Republican leader Mitch McConnel stating: "Given that experts and elected officials have been calling on the USPS to pilot postal banking for years, these pilots are long overdue."[551] However, Republicans quickly challenged both the legality and the relevance of the pilot project.[552] The program has not been a success. In just under a year, only six customers had used the program.[553] Democratic lawmakers

[550] Katz, "Postal Service Launches Banking Pilot", *supra* note 545 ("The offering is far short of the much more comprehensive suite of financial services many advocates and left-leaning lawmakers have sought for years, but still takes USPS in a surprising direction under the leadership of embattled Postmaster General Louis DeJoy"). See also Coetting, *supra* note 549.

[551] *Ibid*.

[552] See Jory Heckman, "USPS Continues Postal Banking Pilot, Despite House Republicans' Objections", *Federal News Network* (20 April 2022), online: <https://federalnewsnetwork.com/agency-oversight/2022/04/usps-continues-postal-banking-pilot-despite-house-republicans-objections/>; Patrick McHenry, James Comer & Blaine Luetkemeyer, "Letter to the Honorable Louis DeJoy" (20 April 2022), online: *Financial Services Committee* <https://financialservices.house.gov/uploadedfiles/2022-04-20_pmc_luet_comer_letter_on_postal_banking_final.pdf>. The program was implemented without specific legislative authorisation. See also Coetting, *supra* note 549 ("Postal Regulatory Commission review was considered unnecessary because the gift card product was approved in 2014 under the competitive product category of Postal Services. The current pilot is merely testing a new form of payment for an established postal product – gift cards. This did not require a change to the Mail Classification Schedule. The pilot is, moreover, simply a time-limited test that is limited in geographic scope"); James Comer & Patrick McHenry, "Letter to Postmaster General Louis DeJoy" (22 October 2021), online: *Committee on Oversight and Accountability* <https://oversight.house.gov/wp-content/uploads/2021/10/2021-10-22-DeJoy-USPS-Banking-final.pdf> ("As you know, we strongly object to the concept of postal banking, and the Postal Service lacks the statutory authority to expand its nonpostal banking services absent Congressional approval").

[553] See Eric Katz, "The Postal Service Has Provided Financial Services to Just 6 Customers Through Its Banking Pilot", *Government Executive* (14 January 2022), online: <https://www.govexec.com/management/2022/01/postal-service-has-provided-financial-services-just-six-customers-through-its-banking-pilot/360804/>.

continue to demand an expansion of the program to provide a broader array of financial services.[554] Some argue that the pilot project has been inadequately advertised.[555]

Prof. Baradaran's interest in access to financial services for the unbanked and underbanked was developed in this unique period of disruption and thirst for innovation in postal services. She has been particularly effective at disseminating her research to public and political stakeholders, including United States senators and presidential candidates.[556] The confluence of support and advocacy from Prof. Baradaran and postal unions has firmly entrenched postal banking in American progressive discourse. Postal banking has gained support from presidential candidates

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[554] See "Sen. Gillibrand Urges USPS to Expand Postal Banking Pilot Program", online: *AUSPL United* <https://auspl.com/sen-gillibrand-urges-usps-to-expand-postal-banking-pilot-program/>; "Kaptur, Pascrell, Ocasio-Cortez Lead Colleagues Demanding Support for Postal Banking" (30 April 2021), online: *U.S. Congresswoman Marcy Kaptur Serving the 9th District of Ohio* <https://kaptur.house.gov/media-center/press-releases/kaptur-pascrell-ocasio-cortez-lead-colleagues-demanding-support-postal>.

[555] See "Sen. Gillibrand Urges USPS to Expand Postal Banking Pilot Program", *supra* note 554. Senator Gillibrand also notes: "Currently, the transaction has a very high process fee of $5.95. That is nearly $2 more than Walmart charges to convert a $1,000 check onto a similar card" (*ibid*).

[556] See e.g. Dayen, *supra* note 548; Mehrsa Baradaran, "The Post Office Banks on the Poor", *The New York Times* (7 February 2014), online: <https://www.nytimes.com/2014/02/08/opinion/the-post-office-banks-on-the-poor.html>; Telis Demos, "Ex-Wall Street Lawyer Is Behind Plan to Have Post Office Compete With Banks", *The Wall Street Journal* (1 June 2019), online: <https://www.wsj.com/articles/ex-wall-street-lawyer-is-behind-plan-to-have-post-office-compete-with-banks-11559381400>; Mehrsa Baradaran, "Testimony of Mehrsa Baradaran, Professor of Law, University of California Irvine School of Law Before the United States House of Representatives Committee on Financial Services Task Force on Financial Technology", online: *Congress.gov* <https://www.congress.gov/116/meeting/house/110778/witnesses/HHRG-116-BA00-Wstate-BaradaranM-20200611.pdf>. See also Abbye Atkinson, "Wall Street vs. Workers: How the Financial System Hurts Workers and Widens the Racial Wealth Gap: Written Testimony of Abbye Atkinson, Assistant Professor of Law, University of California, Berkeley, School of Law Before the United States Senate Committee on Banking, Housing, and Urban Affairs" (4 March 2021), online: *United States Senate Committee on Banking, Housing, and Urban Affairs* <https://www.banking.senate.gov/imo/media/doc/Atkinson%20Testimony%203-3-21.pdf>.

Bernie Sanders, Elizabeth Warren, and Kirsten Gillibrand and was included in the Democratic Party's last two election platforms.[557]

To defend the necessity of my proposed government program, I will argue that the state should provide these services to those who are underbanked or unbanked, for similar reasons but in a different context. I agree with Prof. Baradaran that the private sector has failed to provide adequate access to credit and banking to the very poor.[558] This has resulted in a parallel credit system for the very poor, which contributes to their ongoing marginalisation.[559] I also agree that there is an intrinsically *public* aspect to banking and credit.[560] Credit is of fundamental importance to one's existence.[561] It empowers individuals to fully participate in society and is essential to

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[557] See Kevin Wack, "Postal Banking Is Back on the Table. Here's Why That Matters", *American Banker* (26 April 2018), online: <https://www.americanbanker.com/opinion/postal-banking-is-back-on-the-table-heres-why-that-matters>; "2016 Democratic Party Platform", online: *Democratic National Committee* <https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf>; "2020 Democratic Party Platform", online: *Democratic National Committee* <https://democrats.org/where-we-stand/party-platform/>.

[558] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Baradaran, "Rethinking Financial Inclusion", *supra* note 502; Baradaran, "Small-Dollar Loan", *supra* note 502.

[559] See Baradaran, "It's Time for Postal Banking", *supra* note 502 at 166–67; Guiseppe Coco & David De Meza, "In Defense of Usury Laws" (2009) 41:8 Journal of Money, Credit and Banking 1691; Regina Austin, "Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions" (2004) 53 Am U L Rev 1217; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Mehrsa Baradaran, "Banking and the Social Contract" (2014) 89:3 Notre Dame L Rev 1283; Oren Bar-Gill & Elizabeth Warren, "Making Credit Safer" (2008) 157:1 U Penn L Rev 1; John P Caskey, *Fringe Banking Check-Cashing Outlets, Pawnshops, and the Poor* (New York: Russel Sage, 1994).

[560] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Baradaran, "Banking and the Social Contract", *supra* note 559; Baradaran, "Rethinking Financial Inclusion", *supra* note 502. See also Austin, "Of Predatory Lending", *supra* note 559. This issue is further discussed in an eponymous section, below.

[561] See generally Abbye Atkinson, "Borrowing Equality" (2020) 120:6 Colum L Rev 1403; Abbye Atkinson, "Rethinking Credit as Social Provision" (2019) 71:5 Stan L Rev 1093; Austin, "Of Predatory Lending", *supra* note 559; Sara Sternberg Greene, "The Bootstrap Trap" (2017) 67:2 Duke LJ 233; Michael S Barr, "Banking the Poor" (2004) 21:1 Yale J Reg 121 at 134-41; Stacie Carney & William G Gale, "Asset Accumulation Among Low-Income Households" (1 November 1999), online: *Brookings* <https://www.brookings.edu/research/asset-accumulation-among-low-income-households/>.

individual wellbeing and social mobility.[562] Postal banking is well tailored to solve many of the issues discussed in previous chapters. As noted, it has a unique infrastructure that reaches the remote and marginalised communities deserted by traditional banking institutions.[563] It also meets the preferences of the very poor – what scholars have referred to as the façade of informality.[564]

Postal banking nonetheless presents several challenges which my proposed program may help solve. As noted above, contemporary proposals for a return of postal banking in the United States lack sufficient detail to be assessed for risks and to be compared to alternatives. They also do not set out the legislative basis for postal banking (which has political and social implications), or explain what other legislation may need to be amended. Most lacking is a detailed analysis of the potential costs of postal banking. While scholars and unions are quick to make revenue estimates, they do not engage in a sophisticated analysis of the cost. Prof. Baradaran stresses that the postal service could rely on its existing infrastructure, and that it could be less constrained to maximise profitability.[565] In a broad sense, that is undoubtedly correct. However, the political climate described in this section complexifies these assertions. A self-sustaining program is more likely to survive and grow. When cost estimates are prepared, scholars should not assume that the

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[562] I further discuss the fundamental importance of credit in the text accompanying notes 673 to 677, below.

[563] See e.g. Baradaran, "Small-Dollar Loan", *supra* note 502 at 119; Baradaran, *How the Other Half Banks*, *supra* note 502 at 218; Friedline & Despard, *supra* note 508.

[564] See e.g. Baradaran, "Small-Dollar Loan", *supra* note 502 at 127-28.

[565] See Baradaran, "Small-Dollar Loan", *supra* note 502 at 120. See also Baradaran, *How the Other Half Banks*, *supra* note 502 at 211, 217-18 (noting that the services would be provided "at cost" at 211): Sokol, *supra* note 509 at 1737-38, 1749, 1773, 1788.

postal service's existing infrastructure can be used for free. Yes, most postal costs are fixed, and postal banking would benefit from significant cost synergies. However, failing to account for the cost of this infrastructure prevents comparison with potential alternatives – including those discussed in this chapter. Additionally, the implementation of postal banking would undoubtedly require further human resources and infrastructure development. For instance, many post offices may not be well suited to the provision of financial services. They are located in third-party commercial spaces (such as grocery stores or drugstores)[566] and do not offer sufficient privacy or space to conduct financial transactions.

As Prof. Baradaran aptly stresses, she is proposing a "public option" in financial services.[567] The next section will contextualise this categorisation by developing a framework drawn from antitrust law. It will argue that there exists a spectrum in state intervention, from the regulation of private actors to the direct provision of products of services by the state, to the monopolisation of an entire industry. These issues were briefly introduced in chapter V, as I

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566 See Ron Nixon, "To Cut Costs, Postal Service Turns to Rural Stores", *The New York Times* (22 March 2012), online: <https://www.nytimes.com/2012/03/22/us/to-cut-costs-post-office-offers-services-at-groceries.html>; "USPS Leased Facilities Reports", online: *United States Postal Service* <https://about.usps.com/who/legal/foia/leased-facilities.htm>; "USPS Owned Facilities Reports", online: *United States Postal Service* <https://about.usps.com/who/legal/foia/owned-facilities.htm>; "Number of Canada Post Locations in Canada in 2023" (9 May 2023), online: *ScrapeHero: A Data Company* <https://www.scrapehero.com/location-reports/Canada%20Post-Canada/#:~:text=How%20many%20Canada%20Post%20locations,Canada%20Post%20locations%20in%20Canada>.

567 See Baradaran, "Small-Dollar Loan", *supra* note 502 at 116; Baradaran, *How the Other Half Banks*, *supra* note 502. Recently, Democratic lawmaker Rashida Tlaib proposed a bill which would create a legal framework for the institution of public banks (not solely related to the postal service). See HR 8721, 116th Cong (2020) (*Public Banking Act of 2020*). See also Will Peischel, "How a Brief Socialist Takeover in North Dakota Gave Residents a Public Bank", *Vox* (1 October 2019), online: <https://www.vox.com/the-highlight/2019/9/24/20872558/california-north-dakota-public-bank>.

contrasted state intervention in banking and in postal services. I noted that the state monopolises the provision of postal services because of the fundamentality of the mail to social, commercial, and political life. I argued that the *Bank Act*[568] was the first significant assertion of government power over banks. It staked a significant *public* interest in the activity of banking, which requires and justifies an extensive regulatory regime. Postal legislation asserted an analogous public interest more strongly, by providing that the state operates *and* monopolises the postal service.[569]

Prof. Baradaran "public option" means that the state will compete with private actors – the alternative financial services providers that currently service the very poor. This dynamic will be subject to criticism from those who object – on ideological or instrumental grounds – to the provision of products and services by the state.[570] More importantly, it is fraught with great risk. If the state provides products and services efficiently, its intervention can heighten competition and increase access for consumers. However, if the state provides the products and services *too* competitively, it risks annihilating the industry it sought to improve.[571] Given the ability of the

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[568] *An Act relating to Banks and Banking*, SC 1871, c 5.

[569] See *An Act for the regulation of the Postal Service*, SC 1867, c 10, ss 32, 79; *Canada Post Corporation Act*, *supra* note 534, ss 14-15.

[570] On related issues, see Baradaran, *How the Other Half Banks*, *supra* note 502 at 220-25; Sokol, *supra* note 509 ("Government ownership adds to inefficiency and increases transaction costs […] [Government-owned firms] are less efficient than private firms" at 1722; arguing that state monopolies can reduce innovation at 1750).

[571] These issues are reminiscent of the claims by private banks (cited in chapter V) that the state was unfairly competing with them. See generally Dan Bunbury, "The Public Purse and State Finance: Government Savings Banks in the Era of Nation Building, 1867-1900" (1997) 78:4 Canadian Historical Review 566. See also Sokol, *supra* note 509 at 1719 ("Predatory pricing is only one of the anti-competitive behaviors in which [State-Owned Enterprises] engage").

Alternative financial services providers charge significantly more than banks for financial services. Default rates do not justify the cost their products and services (Coco & De Meza, *supra* note 559; Iain Ramsay, "Consumer Credit Law, Distributive Justice and the Welfare State" (1995) 15:2 Oxford J Leg Stud 177 at 188; Austin, "Of Predatory Lending", *supra* note 559; Ronald J Mann & Jim Hawkins, "Just Until Payday" (2007) 54:1 UCLA L Rev 855);

state to rely on the existing infrastructure of the postal service, and the absence of concern with the value of this infrastructure, postal banking appears uniquely likely to make the business model of alternative financial services providers unsustainable. It should be weighed with proportional caution.[572]

Manitoba, Public Utilities Board, *An Economic Analysis of the Payday Loan Industry and Recommendations for Regulation in Manitoba*, by Chris Robinson (Winnipeg: Manitoba Public Utilities Board, 2016). However, alternative financial services providers must maintain the far-reaching infrastructure that makes them appealing to the very poor – including branches in remote and less populated areas. See Michael A Stegman & Robert Faris, "Payday Lending: A Business Model That Encourages Chronic Borrowing" (2003) 17:1 Economic Development Quarterly 8 at 8; Richard Hynes, "Payday Lending, Bankruptcy, and Insolvency" (2012) 69:2 Wash & Lee L Rev 607 at 613 ("Much of the roughly $50 charged for a $300 loan may be needed to cover inherent transaction costs"); Todd J Zywicki, "Consumer Use and Government Regulation of Title Pledge Lending" (2010) 22:4 Loy Consumer L Rev 425 at 459 ("Despite the relatively high cost of auto title lending, there is no indication that title lenders are earning supernormal economic profits from their activities once risk and cost are taken into account"); Brian Dijkema & Rhys McKendry, "Banking on the Margins Finding Ways to Build an Enabling Small-Dollar Credit Market" (February 2016), online: *CARDUS* <https://www.cardus.ca/research/work-economics/research-report/banking-on-the-margins/> at 28-31 ("Even with annual rates that can reach over 900 percent (APR), industry profitability is modest" at 31); Stephen J Dubner, "Episode 241: Are Payday Loans Really as Evil as People Say?" (6 April 2016) at 7m:55s, online (podcast): *Freakonomics* <https://freakonomics.com/podcast/are-payday-loans-really-as-evil-as-people-say/> (where an industry representative states: "We operate on a relatively thin margin"); Denise Barrett, *Consumer Experiences With Rent-to-Own* (Toronto: Consumers Council of Canada, 2016) at 37.

I mentioned above that proposals for postal banking should include detailed cost estimates, which do not assume that the existing infrastructure of the postal service can be used for free. It is worth acknowledging that postal banking would nonetheless provide financial products and services at a lower cost than alternative financial services providers because the United States Postal Service would benefit from cost synergies and an existing infrastructure that exceeds that of alternative financial services providers. More importantly, however, given the very limited profitability of alternative financial services providers, any competition from the state risks rendering their business model unsustainable and annihilating the industry. As noted, even with its predatory practices, the industry serves a vital need in the market. See Baradaran, "Small-Dollar Loan", *supra* note 502 at 107; Paige Marta Skiba, "Regulation of Payday Loans: Misguided?" (2012) 69:2 Wash & Lee L Rev 1023; Mann & Hawkins, *ibid*; Dijkema & McKendry, *ibid*; Nakita Q Cuttino, "The Rise of 'Fringetech': Regulatory Risks in Earned-Wage Access" (2021) 115:6 Nw U L Rev 1505 at 1544.

[572] We must be particularly cautious because the very poor are highly vulnerable. In chapter III, I cited Prof. Baradaran as stating: "[Y]ou can conclude that these loans alternatively benefit or hurt consumers. On the one hand, payday loans are the only credit option for many households. Cutting off access to a loan that can help a family make it from one paycheck to the next can result in severe financial distress. On the other hand, these loans are too costly and can lead to a debt trap" (Baradaran, "Small-Dollar Loan", *supra* note 40 at 107).

2. Antitrust Law

The state generally intervenes to ensure that essential services are provided by the private sector. This intervention has traditionally taken the form of regulation, through common carrier obligations (which require firms to provide equal access to their platforms or services)[573] or specific regulatory regimes.[574] Banks are, for example, subject to stringent, specialised regulatory regimes.[575] Similarly, the state uses both antitrust law and regulation to ensure that the private sector provides adequate access to electricity and transportation infrastructure, such as air and rail transportation.[576] These products and services are labelled "public utilities," and the industries that provide them are often "natural monopolies."[577] Industry structure creates significant barriers to

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[573] See Lina M Khan, "Amazon's Antitrust Paradox" (2017) 126:3 Yale LJ 710 at 790-802; Joseph D Kearney & Thomas W Merrill, "The Great Transformation of Regulated Industries Law" (1998) 98:6 Colum L Rev 1323; Nikolas Guggenberger, "Essential Platforms" (2021) 24:2 Stan Tech L Rev 237; Morgan Ricks, "Money as Infrastructure" [2018] Colum Bus L Rev 757. In some industries, government mandates regarding the indiscriminate provision of services are referred to as "universal service obligations." I use the phrase "common carrier obligations" to refer to both.

[574] See Baradaran, "Banking and the Social Contract", *supra* note 559; Mehrsa Baradaran, "Reconsidering the Separation of Banking and Commerce" (2012) 80:2 Geo Wash L Rev 385 [Baradaran, "Banking and Commerce"].

[575] See Baradaran, "Banking and the Social Contract", *supra* note 559; Baradaran, "Banking and Commerce", *supra* note 574; Julie Andersen Hill, "Transaction Account Fees: Do the Poor Really Pay More than the Rich?" (2012) 15:1 University of Pennsylvania Journal of Business Law 65; *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, 124 Stat 1376 (2010) (codified through 12 USC § 5301 et seq); Donald JS Brean, Lawrence Kryzanowski & Gordon S Roberts, "Canada and the United States: Different Roots, Different Routes to Financial Sector Regulation" (2011) 53:2 Business History 249; Sana Mohsni & Isaac Otchere, "Does Regulatory Regime Matter for Bank Risk Taking? A Comparative Analysis of US and Canada" (2018) 53 Journal of International Financial Markets, Institutions and Money 1.

[576] See generally Khan, "Amazon's Antitrust Paradox", *supra* note 573; Herbert J Hovenkamp, "Whatever Did Happen to the Antitrust Movement?" (2018) 94:2 Notre Dame L Rev 583; Kearney & Merrill, *supra* note 573; William Boyd, "Public Utility and the Low-Carbon Future" (2014) 61:6 UCLA L Rev 1614; Marshall E Dimock, "British and American Utilities: A Comparison" (1933) 1:2 U Chi L Rev 265; Ricks, *supra* note 573.

[577] Khan, "Amazon's Antitrust Paradox", *supra* note 573 at 797-803; Kearney & Merrill, *supra* note 573; Boyd, *supra* note 573; Dimock, *supra* note 573.

entry for prospective competitors and disproportionately rewards larger players. The state intervenes to safeguard adequate competition – or ensure that consumers can access products and services, and at competitive prices.[578] The state may also intervene to mandate that the private sector provide adequate access to public utilities. When the private sector systematically fails to provide access to a public utility, the state may directly provide the product or service to the public, either as a market participant or by nationalising an industry. I discuss these in turn.

Antitrust law provides a set of tools that address two, often cumulative issues: (1) some products and services are essential, and (2) some industries are defined by anticompetitive dynamics. The state has an interest in the provision of certain products and services because they are essential to daily life. Individuals need access to electricity and broadband services to survive and fully participate in society. As was the case for banking and credit, this need justifies and compels *some* form of state intervention in the marketplace – intervention which would not be justified for elective consumption. I discussed two forms of state intervention in chapter V. Through the *Bank Act*, the state set out an unusually complex and stringent regulatory regime to ensure the provision of banking services, requiring banks to obtain state permission to join the

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[578] See generally Khan, "Amazon's Antitrust Paradox", *supra* note 573; Hovenkamp, "Whatever Did Happen to the Antitrust Movement?", *supra* note 576; Kearney & Merrill, *supra* note 573; Boyd, *supra* note 573; Dimock, *supra* note 573. Competition is a means to ensure that consumers can access products and services at competitive prices.

marketplace.[579] The state asserted an analogous interest more strongly by monopolising the provision of postal services.[580]

Similarly, Canadian telecommunication and broadcasting providers are subject to stringent, specific regulatory regimes.[581] The Canadian Radio-television and Telecommunications Commission (CRTC) oversees some twenty statutes and regulations governing their conduct.[582] These include the *Broadcasting Act*,[583] the *Radiocommunication Act*,[584] and the *Telecommunications Act*.[585] The *Broadcasting Act* creates a licensing and penalty scheme for broadcasting – essentially requiring state permission to engage in broadcasting.[586] It provides that the CRTC can enact regulations and supervise and sanction non-compliance with the *Act*.[587] It invokes and enshrines a dizzying array of *public* objectives, including to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada," ensure freedom of

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579 See *An Act relating to Banks and Banking*, *supra* note 568 (as cited). See also *Bank Act* (SC 1991, c 46) (as currently in force). As noted in chapter V, section 71 of the original *Bank Act* specifically mentions the public interest. It reads: "The Bank shall always subject to any general provisions respecting Banks which Parliament may deem necessary for the public interest" (*An Act relating to Banks and Banking*, *ibid*); Ricks, *supra* note 573.

580 See *An Act for the regulation of the Postal Service*, *supra* note 569, ss 32, 79; *Canada Post Corporation Act*, *supra* note 534, ss 14-15.

581 On analogous regulation in the United States, see generally Boyd, *supra* note 573.

582 See "Statutes and Regulations", online: *Canadian Radio-television and Telecommunications Commission* <https://crtc.gc.ca/eng/statutes-lois.htm>.

583 *Broadcasting Act*, SC 1991, c 11.

584 *Radiocommunication Act*, RSC 1985, c R-2.

585 *Telecommunications Act*, SC 1993, c 38.

586 See *Broadcasting Act*, *supra* note 583, ss 9, 32-24. The *Act* also enables and governs the Canadian Broadcasting Corporation (*ibid*, ss 35-71).

587 See *ibid*, ss 5(1), 12-20.

expression and journalistic independence," promote diversity, and safeguard language rights.[588] Quite saliently, it specifically provides that "where any conflict arises between the objectives of the Corporation […] and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved *in the public interest*" [emphasis added].[589] The *Radiocommunication Act* similarly creates a licensing scheme (again requiring state permission to participate in the industry).[590] The *Telecommunications Act* provides that communication carriers must be Canadian-owned and operated, and licensed.[591] It grants the CRTC broad powers to prohibit conduct by market participants[592] and to enact regulations.[593] It also creates an administrative tribunal which exercises the powers and jurisdiction of a superior court.[594]

Such specific regulatory regimes are one way for the state to ensure the provision of products and services to the public. They are justified by the public's necessity to procure these products and services. Additionally, most industries where such regimes exist are subject to anticompetitive dynamics. These regulatory regimes act as either an antidote or a substitute to

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[588] See *ibid*, s 3.

[589] *Ibid*, s 3(n).

[590] See *Radiocommunication Act*, *supra* note 584, ss 4-5. The *Act* also provides that the state can nationalise radio stations: "Her Majesty may assume and, for any length of time, retain possession of any radio station and all things necessary to the sufficient working of it and may, for the same time, require the exclusive service of the operators and other persons employed in working the station" (*ibid*, s 7(1)).

[591] See *Telecommunications Act*, *supra* note 585, ss 16, 16.1. See also *Direction to the CRTC (Ineligibility of Non-Canadians)*, SOR/97-192.

[592] See *Telecommunications Act*, *supra* note 585, s 34.

[593] See *ibid*, ss 67-69

[594] See *ibid*, ss 47-57. Unusually, the *Act* provides that an appeal is brought before the Federal Court of Appeal and requires leave (*ibid*, s 64).

competition. To better understand this claim, we must briefly consider the fundamental aims of antitrust law.

Antitrust law is about competition. Fundamentally, it provides tools to ensure adequate competition. The state criminalises or outlaws certain conduct that inhibits competition and intervenes in the market to further competition. In Canada, these powers are vested in an administrative actor, the Competition Bureau, and often subject to the jurisdiction of an administrative tribunal, the Competition Tribunal. Both exist pursuant to the *Competition Act*.[595] In the United States, antitrust law is governed by the *Sherman Act*,[596] which is interpreted and applied by courts.[597] The initial *Competition Act* was enacted in 1889, one year before the *Sherman Act*.[598] The paradigmatic antitrust issue is a monopoly: a company is the sole market player. In both Canada and the United States, a monopoly is not, in itself, illegal.[599] Instead, anticompetitive conduct that can result from a monopoly is outlawed. In the absence of competition, dominant market players can engage in anticompetitive conduct, such as raising prices or selectively and temporarily reducing prices to drive an aspiring competitor out of a market.[600] This conduct is

[595] *Competition Act*, RSC 1985, c C-34. The Competition Tribunal is created by the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp). It derives its jurisdiction from the *Competition Act* (*ibid*).

[596] *Sherman Antitrust Act of 1890*, 26 Stat 209 (1890) (codified through 15 USC §§ 1–7) [*Sherman Act*].

[597] As opposed to an administrative body.

[598] See Yves Bériault & Oliver Borgers, "Overview of Canadian Antitrust Law" [2004] Antitrust Review of the Americas 76 at 76.

[599] See *ibid* at 79; Khan, "Amazon's Antitrust Paradox", *supra* note 573 at 720.

[600] See generally Thomas G Krattenmaker, Robert H Lande & Steven C Salop, "Monopoly Power and Market Power in Antitrust Law" (1987) 76:2 Geo LJ 241.

labelled an "abuse of dominant position" pursuant to the *Competition Act*.[601] Other prohibited conduct includes agreements and conspiracies between competitors – including price-fixing (an agreement between competitors regarding pricing).[602]

Although it has evolved as an independent body of rules, Canadian competition law has been influenced by United States antitrust law.[603] United States antitrust law has evolved significantly over the past several decades. Saliently, this evolution happened without any legislative reform. While Canada's *Competition Act* was detailed and amended multiple times, the *Sherman Act* essentially exists in its initial iteration.[604] Nonetheless, since 1890, courts have adopted diverging and evolving interpretations of competition principles. As noted, unlike Canada, the United States does not have a specialised tribunal tasked with enforcing the *Sherman Act*.[605] The application of the law by "generalist" judges increases judicial reliance on antitrust experts.[606]

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[601] *Competition Act*, *supra* note 595, ss 78-79. More specifically, the latter example is one of predatory pricing. In the United States, the same conduct would be conduct "in restraint of trade" pursuant to the *Sherman Act* (*supra* note 596). See 15 USC §§ 2,8.

[602] See *ibid*, s 45.

[603] Unlike United States antitrust law, which is guided by a relatively coherent set of principles laid out below, Canadian antitrust law often appears to lack coherent organising doctrines. These are issues for another day.

[604] *Competition Act*, *supra* note 595; *Sherman Act*, *supra* note 596. Two acts added sections to the *Sherman Act* (*ibid*), the *Clayton Antitrust Act of 1914* (Pub L No 63-212, 38 Stat 730 (1914) (codified through 15 USC §§ 12-27 and 29 USC §§ 52-53)) and the *Robinson–Patman Act of 1936* (Pub L No 74-692, 49 Stat 1526 (1936) (codified through 15 USC § 13)). In other words, the latest amendment is almost one hundred years old.

[605] See *Competition Act*, *supra* note 595; *Competition Tribunal Act*, *supra* note 595. See also 15 USC § 4 ("The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations").

[606] On related issues, see Hovenkamp, "Whatever Did Happen to the Antitrust Movement?", *supra* note 576; Timothy J Muris & Jonathan E Nuechterlein, "Antitrust in the Internet Era: The Legacy of *United States v. A&P*" (2019) 54 Review of Industrial Organization 651 at 658; Rohit Chopra & Lina M Khan, "The Case for 'Unfair Methods of

In the absence of legislative guidance, and because of the complexity of antitrust law, judges have been heavily influenced by the work of antitrust scholars. As we will see, this scholarship has become its own terrain of policy and ideological dispute.

Various factors relate to competition, such as industry structure, concentration, and integration. Integration refers to control by a market player of more than one entity. Vertical integration entails owning multiple points in a supply chain. For instance, a manufacturer of mobile phones could own its foreign supplier of batteries or screens and the stores where the phones are sold. Horizontal integration entails owning multiple suppliers of a product or service. For instance, a manufacturer of mobile phones might purchase a competing manufacturer of mobile phones to increase its market share. Because horizontal integration generally eliminates competitors and grows market share, it is more prone to antitrust attention. Antitrust attention when firms are merged or acquired *prevents* the antitrust issues listed above. The state intervenes to prevent market concentration before any market actor has engaged in anticompetitive conduct. The *Competition Act* provides for state intervention in some mergers.[607] In the United States, the *Hart–Scott–Rodino Antitrust Improvements Act* empowers the Federal Trade Commission and the Department of Justice to review certain proposed mergers.[608]

Competition' Rulemaking" (2020) 87:2 U Chi L Rev 357; Hillary Greene & D Daniel Sokol, "Judicial Treatment of the Antitrust Treatise" (2015) 100:5 Iowa L Rev 2039. See also Sokol, *supra* note 509 at 1810-11.

[607] *Competition Act*, *supra* note 595, ss 90.1-103.

[608] *Hart–Scott–Rodino Antitrust Improvements Act*, Pub L No 94-435, 90 Stat 1383 (1976) (codified through 15 USC § 18a). See also Robert H Lande & Sandeep Vaheesan, "Preventing the Curse of Bigness Through Conglomerate

Prior to the 1970s, United States courts were more willing to intervene in the marketplace through an analysis of industry structure, concentration, and integration. In the 1970s and 1980s, the "Chicago School" approach to antitrust analysis gained widespread adherence. It arguably simplified antitrust analysis by predominantly focussing on a single variable: consumer welfare.[609] Consumer welfare is assessed as price competitiveness. In other words, as long as corporate conduct results in lower prices for consumers, it should be shielded from antitrust enforcement. This paradigm arguably uses price competitiveness as a proxy for competition (which is the organising principle of antitrust law). It presumes that, because competitive markets create price competitiveness, price competitiveness is necessarily indicative of a competitive market. This paradigm was widely accepted and applied for decades. It has recently come under greater scrutiny following criticism from younger scholars, principally Prof. Lina Khan.[610] Prof. Khan argues that

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Merger Legislation" (2020) 52:1 Ariz St LJ 75. See also Wall Street Journal, "Why Big Tech Keeps Winning Against the FTC | WSJ Tech News Briefing" (13 July 2023), online (video): <https://www.youtube.com/watch?app=desktop&v=EdbqZ8yBeKs&feature=youtu.be&ab_channel=WallStreetJournal>.

609 See generally Richard A Posner, "The Chicago School of Antitrust Analysis" (1979) 127:4 U Pa L Rev 925; Herbert Hovenkamp, "The Invention of Antitrust" (2022) 96:1 S Cal L Rev 129; Khan, "Amazon's Antitrust Paradox", *supra* note 573; Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978); Maurice E Stucke & Ariel Ezrachi, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement" (15 December 2017), online: *Harvard Business Review* <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement>. See also Muris & Nuechterlein, *supra* note 606; Herbert J Hovenkamp, "Is Antitrust's Consumer Welfare Principle Imperiled?" (2019) 45:1 J Corp Law 101. See also Mark Glick & Darren Bush, "Breaking Up Consumer Welfare's Antitrust Policy Monopoly" (2023) 56:2 Suffolk U L Rev 201.

610 See e.g. Zephyr Teachout & Lina Khan, "Market Structure and Political Law: A Taxonomy of Power" (2014) 9:1 Duke Journal of Constitutional Law & Public Policy 37; Khan, "Amazon's Antitrust Paradox", *supra* note 573; Lina M Khan, "The Separation of Platforms and Commerce" (2019) 119:4 Colum L Rev 973; Dina Srinivasan, "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy" (2019) 16:1 Berkeley Business Law Journal 39 [Srinivasan, "The Antitrust Case Against Facebook"]; Dina Srinivasan, "Why Google Dominates Advertising Markets" (2020) 24:1 Stan Tech L Rev 55. See also Daisuke Wakabayashi, "The Antitrust Case Against Big Tech, Shaped by Tech Industry Exiles", *The New York Times* (20 December 2020), online: <https://www.nytimes.com/2020/12/20/technology/antitrust-case-google-facebook.html> (updated 28 June 2021). Khan's article on Amazon (Khan, "Amazon's Antitrust Paradox", *supra* note 573) gained widespread media and popular attention. See e.g. David Streitfeld, "Amazon's Antitrust Antagonist Has

the focus on price competitiveness "fails to capture the architecture of market power in the twenty-first century marketplace."[611] She argues that antitrust analysis should consider "the structure of a business and the structural role it plays in markets" to discern competitive harms resulting from "anticompetitive conflicts of interest," "cross-leverag[ing] market advantages across distinct lines of business," and risks of predatory conduct.[612]

Mentions of renewed antitrust enforcement were added to the 2016 and 2020 Democratic Party platforms.[613] The 2016 platform states:

> We will make competition policy and antitrust stronger and more responsive to our economy today, enhance the antitrust enforcement arms of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and encourage other agencies to police anti-competitive practices in their areas of jurisdiction. We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and

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a Breakthrough Idea", *The New York Times* (7 September 2018), online: <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>; Steven Pearlstein, "Is Amazon Getting Too Big?", *The Washington Post* (28 July 2017), online: <https://www.washingtonpost.com/business/is-amazon-getting-too-big/2017/07/28/ff38b9ca-722e-11e7-9eac-d56bd5568db8_story.html> ("Since it was published, Khan's 'note' has drawn more than 50,000 readers online — an extraordinary reach for a law review article. Her work has been cited by the Economist, the Financial Times, Forbes, Wired, the Wall Street Journal and the New York Times, and she has appeared on major broadcast media. Last spring, she was invited to join some of the most prominent academics in antitrust law to speak at an economic conference at the University of Chicago"); David Streitfeld, "Amazon Antitrust Critic Has Her Own Critics Now", *The Seattle Times* (8 September 2018), online: <https://www.seattletimes.com/nation-world/amazon-antitrust-critic-has-her-own-critics-now/>. Khan published her article while a student at Yale Law School. She was subsequently appointed to the faculty at Columbia Law School and Chairperson of the Federal Trade Commission (which applies certain antitrust provisions). See "Antitrust Scholar Lina Khan Joins Faculty" (2 December 2020), online: *Columbia Law School* <https://www.law.columbia.edu/news/archive/antitrust-scholar-lina-khan-joins-faculty>; "Lina M. Khan Sworn in as Chair of the FTC" (15 June 2021), online: *Federal Trade Commission: Protecting America's Consumers* <https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc>; *Hart–Scott–Rodino Antitrust Improvements Act*, *supra* note 608.

611 Khan, "Amazon's Antitrust Paradox", *supra* note 573 at 716.

612 *Ibid* at 717.

613 See "2016 Democratic Party Platform", *supra* note 557 at 11; "2020 Democratic Party Platform" *supra* note 557 at 19, 29, 49 (as a solution to market issues in agriculture, healthcare, and mass media).

> political power, which can be corrosive to a healthy democracy. We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce.[614]

This stance incorporates some of Prof. Khan's arguments. It aptly illustrates the recent tension in antitrust law. Emerging scholars argue that antitrust law needs to be reformed to respond to today's challenges, but they also argue – sometimes implicitly – that antitrust law should be tasked with a broader mandate.[615] They believe it is a tool that can address distributive and non-economic issues, such as labour equity and wealth inequality. More traditional scholars argue that antitrust adequately serves its inherent objective to protect and further competition. They argue that emerging scholars misconstrue the potential of antitrust law.[616] They believe that broadening

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[614] "2016 Democratic Party Platform", *supra* note 557 at 11. See also Lande & Vaheesan, *supra* note 608 at 94 ("These figures are not outliers but are representative of a growing antimonopoly philosophy among Democrats, liberals, and progressives [… including] Senators Klobuchar, Sanders, and Warren. (Former) Representative (and current Minnesota Attorney General) Keith Ellison and sitting Representative Ro Khanna established an Antitrust Caucus and called for antitrust enforcers to look beyond just consumer welfare. Alexandria Ocasio-Cortez, the Democratic representative for New York's 14th Congressional district, has repeatedly voiced concerns about the political might of large financial institutions. […] Former Colorado governor and former presidential candidate John Hickenlooper has called for a major revival in antimonopoly enforcement").

[615] See e.g. Khan, "Amazon's Antitrust Paradox", *supra* note 573; Teachout & Khan, *supra* note 610 at 70 ("Reformers have focused far less on corporate law itself, yet this Article argues that addressing market structure—or minimally viewing it as a site for political action—might help the left and right both achieve their stated goals. An explicit recognition that many corporations are political organizations opens up a new category of structural changes that might improve representative government and engagement"); Hon Maureen K Ohlhausen, "Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously" (2016) 15:1 Colo Tech LJ 119 ("Market forces and antitrust policy can not only protect competition in ISP-related markets, but also safeguard nonmonetary goals like free speech and openness, at least to the extent that consumers share those values" at 133); Eric A Posner & Cass R Sunstein, "Antitrust and Inequality" (9 February 2022), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4023365&__cf_chl_tk=E_ZbkN44Z4qa1FieAfB1Q3r.tQFtgXOaDWDdVj8EB3Q-1689307837-0-gaNycGzNEzs>. On analogous issues, see also Allan C Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Toronto: Irwin Law, 2005).

[616] See e.g. Daniel A Crane, "Antitrust and Wealth Inequality" (2016) 101:5 Cornell L Rev 1171. See also Ioana Marinescu & Eric A Posner, "Why Has Antitrust Law Failed Workers?" (2020) 105:5 Cornell L Rev 1343 (arguing that antitrust law provides tools to address monopolistic practices that harm workers, but that these tools generally remain unused).

antitrust's mandate makes antitrust unduly subjective and vulnerable to politicisation.[617] Some further respond that antitrust is poorly suited to achieve non-economic or distributive aims, and that other tools, such as taxation or labour regulation, are best suited to achieve these aims.[618]

Antitrust law encompasses a wide set of tools that can serve its overarching objective to further competition. I addressed above simpler harms to competition through a discussion of Canada's *Competition Act* and the United States' *Sherman Act*.[619] These are laws are of general applicability: they regulate all industries. They are simpler to understand because they sanction specific, generally positive anticompetitive conduct. An individual or firm engages in an action that is anticompetitive, such as fixing prices or reducing prices to drive an aspiring competitor out

[617] See Muris & Nuechterlein, *supra* note 606 ("advocates of radical change express nostalgia for 1960s antitrust, when the field had no clear objectives and cases were decided on impressionistic notions of 'fairness'" at 652; arguing that this framework made "antitrust enforcement more subjective and susceptible to charges of political manipulation" at 654); Hovenkamp, "Whatever Did Happen to the Antitrust Movement?", *supra* note 576.

Some scholars understand Prof. Khan's argument as stating or implying that higher prices are justified in certain circumstances, for instance to favour a more localised and diverse marketplace or to ensure adequate labour conditions. See e.g. Hovenkamp, "Is Antitrust's Consumer Welfare Principle Imperiled?", *supra* note 606 at 103 ("The neo-Brandeisians still face the formidable task of providing evidence that most citizens believe they would be better off in a world of higher cost smaller firms selling at higher prices, their market behavior notwithstanding. One problem is that these costs have never been calculated, and another is that they have never been effectively communicated").

[618] See e.g. Hovenkamp, "Whatever Did Happen to the Antitrust Movement?", *supra* note 576 at 624 ("[A]s a result of decades of anti-union politics and legislation, wages have been suppressed in favor of company profits. That is to say, even as profits have risen dramatically, real wages have remained constant at best and labor participation represents a steeply declining section of industry returns, even if adjusted by changes in technology that reduce the demand for labor. Most aspects of this are not an antitrust problem either, although we show later that there are strong arguments for paying more attention to labor market concentration, particularly in merger cases"); Posner & Sunstein, *supra* note 615.

[619] *Competition Act*, *supra* note 595; *Sherman Act*, *supra* note 596.

of a market.[620] The *Competition Act* and the *Sherman Act* outlaw the conduct and provide for penalties.[621]

Antitrust law plays a more important and sophisticated role in certain industries that are *inherently* prone to anticompetitive dynamics. I offered above a discussion of telecommunication providers and broadcasters, which are regulated through Canada's *Broadcasting Act*.[622] *Radiocommunication Act*,[623] and *Telecommunications Act*.[624] Why is this industry subject to such stringent and comprehensive regulation, when other industries are not? Why are competition laws, such as the *Competition Act* and the *Sherman Act*, sufficient to regulate other industries?[625] The answer is that the telecommunication industry is inherently prone to anticompetitive dynamics. It benefits from economies of scale and provides an essential service.[626] There aren't many telecommunications startups because the industry poses high barriers to entry.[627] To start a telecommunication company would require hundreds of millions of dollars in investment – to build

[620] See generally Krattenmaker, Lande & Salop, *supra* note 600.

[621] *Competition Act*, *supra* note 595; *Sherman Act*, *supra* note 596.

[622] *Broadcasting Act*, *supra* note 583.

[623] *Radiocommunication Act*, *supra* note 584.

[624] *Telecommunications Act*, *supra* note 585.

[625] *Competition Act*, *supra* note 595; *Sherman Act*, *supra* note 596.

[626] On the relevance of economies of scale and the essential character of the product or service in antitrust law, see generally Hovenkamp, "The Invention of Antitrust", *supra* note 609; Khan, "Amazon's Antitrust Paradox", *supra* note 573; Boyd, *supra* note 576; Khan, "The Separation of Platforms and Commerce", *supra* note 610; Boyd, *supra* note 573 at 1638.

[627] On barriers to entry, see generally Hovenkamp, "The Invention of Antitrust", *supra* note 609 at 166-184; Boyd, *supra* note 573 at 1638.

a nationwide infrastructure of cellular towers.[628] As a result, few competitors can think of joining the industry. Because of this structure, the industry also rewards large, existing players. Once the cellular towers are built, the incremental cost of providing service to a customer is minimal. The company has already funded the infrastructure, and the revenue from an additional cellular subscriber is essentially profit. Additionally, telecommunication companies provide an essential service. Everyone needs a cellular provider. The demand for their service is not a result of consumer choice, but of necessity. Finally, unlike in other industries, there is little that differentiates cellular providers. They provide essentially the same service.

In other words, the industry is inherently prone to anticompetitive dynamics. Its structure disincentivises competition – it incentivises companies to grow larger and monopolise the market. That is true even if no firm or individual engages in the anticompetitive conduct that is described above and provided for in *Competition Act* and the *Sherman Act*.[629] Safeguarding the interests of consumers requires additional legal responses, especially given the *public* nature of the service

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[628] See generally Shamik Bandyopadhyay et al, "Navigating the Three Horizons of 5G Business Building" (22 February 2023), online: *McKinsey & Company* <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/navigating-the-three-horizons-of-5g-business-building>; "TELUS Investing $28 Billion in Ontario Through 2027 to Support Vital Network Connectivity, Sustainability and Innovation" (23 May 2023), online: *GlobeNewswire* <https://www.globenewswire.com/news-release/2023/05/23/2674245/0/en/TELUS-investing-28-billion-in-Ontario-through-2027-to-support-vital-network-connectivity-sustainability-and-innovation.html>.

[629] *Competition Act*, *supra* note 595; *Sherman Act*, *supra* note 596.

these companies provide. Governments therefore enacted the *Broadcasting Act*.[630] *Radiocommunication Act*,[631] and *Telecommunications Act*.[632]

Many industries raise similar concerns and provide similarly essential services. Broadcasting, which is subject to the same regulatory framework, clearly does. Television broadcasters provide a service that is essential – not elective. They provide citizens access to entertainment, information, and news. As noted above, the *Broadcasting Act* specifically acknowledges that "the Canadian broadcasting system should serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[633]

Rail transportation is similarly essential. It was historically the main means of transportation of persons and freight, and its development was intimately linked with that of modern commerce.[634] In the rail industry, barriers to entry are similarly high. A new market participant would need to spend hundreds of millions of dollars to build a rail infrastructure.[635]

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[630] *Broadcasting Act*, *supra* note 583.

[631] *Radiocommunication Act*, *supra* note 584.

[632] *Telecommunications Act*, *supra* note 585.

[633] *Broadcasting Act*, *supra* note 583, s 3(1)(d)(i).

[634] See generally Matthew Esposito, ed, *A World History of Railway Cultures, 1830-1930* (New York: Routledge, 2020). For further illustration, see *Airline Deregulation Act*, Pub L No 95-504, 92 Stat 1705 (1978) (codified throughout 49 USC); John W Barnum, "What Prompted Airline Deregulation 20 Years Ago? What Were the Objectives of That Deregulation and How Were They Achieved?" (Paper delivered at the Aeronautical Law Committee of the Business Law Section of the International Bar Association Annual Meeting, Vancouver, 15 September 1998) [unpublished]. Prior to its enactment, air transportation was regulated as a utility. The United States government would notably set rates and schedules.

[635] See generally Alon Levy, "Why It's So Expensive to Build Urban Rail in the U.S.", *Bloomberg* (26 January 2018) <https://www.bloomberg.com/news/articles/2018-01-26/the-u-s-gets-less-subway-for-its-money-than-its-peers>;

The industry disproportionately rewards larger players because the cost of the infrastructure is generally fixed. Therefore, gaining additional market share disproportionately contributes to a firm's profitability.

Products and services that meet this definition are labelled "public utilities."[636] Public utilities can also be platforms: marketplaces through which other companies provide their own products or services.[637] For instance, Amazon is a platform through which third-party merchants sell products to consumers.[638] Antitrust law often regulates platforms by imposing common carrier obligations.[639] These obligations require firms to provide equal access to their platforms and prohibit price discrimination. In other words, a company like Amazon may be required to allow

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National Cooperative Railroad Research Program, *Alternative Funding and Financing Mechanisms for Passenger and Freight Rail Projects* (Washington: National Academies, 2015).

[636] See Khan, "Amazon's Antitrust Paradox", *supra* note 573 at 797-803; Kearney & Merrill, *supra* note 573; Boyd, *supra* note 573 at 1638 ("these public utilities had long been viewed as appropriate for price regulation because of their overall importance to the economy and their distinctive economic characteristics"); Dimock, *supra* note 573; Lande & Vaheesan, *supra* note 608; Ricks, *supra* note 573; Aneil Kovvali & Joshua Macey, "The Corporate Governance of Public Utilities", Yale Journal on Regulation [forthcoming in 2023], online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4394608> at 113 ("At the beginning of the twentieth century, state and federal regulators turned to public utility regulation to manage large swaths of the U.S. economy. In that period, federal agencies and state public utility commissions (PUCs) were created to oversee railroads, gas, electric, telecommunications, and airline companies").

[637] See generally Jay Pil Choi, "Antitrust Analysis of Tying Arrangements" in Jay Pil Choi, ed, *Recent Developments in Antitrust: Theory and Evidence* (Cambridge, MA: MIT Press, 2006) 61; Neil B Niman, "Platform Externalities and the Antitrust Case Against Microsoft" (2002) 47:4 Antitrust Bulletin 641; Khan, "Amazon's Antitrust Paradox", *supra* note 573; Guggenberger, *supra* note 573; Khan, "The Separation of Platforms and Commerce", *supra* note 610; K Sabeel Rahman, "The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept" (2018) 39:5 Cardozo L Rev 1621; Hon Maureen K Ohlhausen, *supra* note 615.

[638] See Khan, "Amazon's Antitrust Paradox", *supra* note 573. See also Muris & Nuechterlein, *supra* note 606. This is but one aspect of Amazon's business. It provides an array of other products and services, and sells its own products on its platform.

[639] See Khan, "Amazon's Antitrust Paradox", *supra* note 573 at 790-802; Kearney & Merrill, *supra* note 573; Guggenberger, *supra* note 573. See also 15 USC § 21; Kovvali & Macey, *supra* note 636 at 113.

any third-party merchant to sell its products on Amazon's website.[640] Amazon may also be required to charge each third-party merchant pursuant to the same pricing policy. These obligations further competition by allowing third-party merchants to openly and fairly compete on Amazon's marketplace. Conversely, they prevent Amazon from distorting competition (for its benefit or for the benefit specific third-party merchants) by denying access to its platform or pricing specific competitors out of its platform. These obligations are also underpinned by the public interest discussed throughout this section. Because some 44 percent of customers go directly to Amazon's website when they are shopping online,[641] Amazon essentially controls access to almost half of online buyers. Full access to its platform is necessary for third-party merchant to participate and compete in the market. The same argument can be made regarding the other industries mentioned above, especially where one or a handful of companies control a majority of the market.

Section 35(1) of the *Telecommunications Act* partly invokes a common carrier obligation. It provides:

> Where the Commission determines as a question of fact that a telecommunications service or class of services provided by an affiliate of a Canadian carrier is not subject to a degree of competition that is sufficient to ensure just and reasonable rates and prevent unjust

[640] The issue of whether and to what extent technology platforms such as Amazon, Google, and Facebook, should be subject to traditional antitrust duties is contested. See Khan, "Amazon's Antitrust Paradox", *supra* note 573; Guggenberger, *supra* note 573; Khan, "The Separation of Platforms and Commerce", *supra* note 610; Rahman, *supra* note 637; Ohlhausen, *supra* note 615; Muris & Nuechterlein, *supra* note 606; Srinivasan, "The Antitrust Case Against Facebook", *supra* note 610; Srinivasan, "Why Google Dominates Advertising Markets", *supra* note 610. However, the general principles laid out in this section regarding common carrier obligations have been applied for more than a century.

[641] See Fiona Briggs, "Amazon Commands Nearly Half Of Consumers' First Product Search, BloomReach Study Finds", *Forbes* (6 October 2015), online: <https://www.forbes.com/sites/fionabriggs/2015/10/06/amazon-commands-nearly-half-of-consumers-first-product-search-bloomreach-study-finds/?sh=4b75949d73a3>.

> discrimination and undue or unreasonable preference or disadvantage, the Commission may require the Canadian carrier to provide the service or class of services in any manner, to any extent and subject to any conditions determined by the Commission, if it is satisfied that it would be an effective and practical means of achieving the purposes of section 27 with respect to the service or class.[642]

The section specifically mentions the underlying objective of promoting competition.

Analogous obligations exist in banking. Under the (misleadingly) ambitious heading "Access to Basic Banking Services," the *Bank Act* creates a number of obligations of regulated financial institutions.[643] The most significant obligation is to provide banking services without discrimination. Section 627.17(1) of the *Act* provides that a "member bank shall, at any point of service or any branch in Canada at which it opens retail deposit accounts through natural persons, open a retail deposit account on the request, made there in person, of a natural person."[644] Section 627.17(3) further provides that a "member bank shall open a retail deposit account for any natural person who requests it in any prescribed manner and who meets any prescribed condition."[645] The bank must verify the identity of the individual[646] and can refer the individual to another one of its branches.[647] It cannot require a minimum deposit or account balance.[648] The only exceptions are

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[642] *Telecommunications Act*, *supra* note 585, s 35(1). The following subsection vests the converse power in the Commission. It allows the Commission to mandate that a carrier discontinue the provision of a service.

[643] See *Bank Act*, *supra* note 579, ss 627.17-627.24. See also Ricks, *supra* note 573 (proposing similar obligations in the United States).

[644] *Ibid*, s 627.17(1). See also *Ben Menashe v Canada (Attorney General)*, 2020 FC 989 (for its entertainment value).

[645] *Ibid*, s 627.17(3).

[646] See *ibid*, s 627.17(1)(a).

[647] See *ibid*, s 627.17(2).

[648] See *ibid*, s 627.17(4).

narrowly drafted and relate to misrepresentation and illegal or fraudulent conduct.[649] The bank must provide written notice of a refusal to open an account, with reference to the statutory exceptions.[650] Further regulation specifies that the following minimum features must be offered

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[649] See *ibid*, s 627.18(1). Subsection 627.18(2) provides that having declared bankruptcy is not sufficient grounds to meet these criteria (*ibid*).

[650] See *ibid*, s 627.19. There are no analogous provisions in the United States. Banks are generally permitted to refuse to open an account for a customer. Additionally, adverse information regarding a customer will almost always prevent the customer from opening an account at *any* bank, as 80 percent of financial institutions use the same system, ChexSystems, to screen customers. (ChexSystems is not a credit reporting agency: it concerns prior use of banking – not credit – products.) See "About ChexSystems", online: *ChexSystems* <https://www.chexsystems.com/about-chexsystems>; Catherine Martin Christopher, "Mobile Banking: The Answer for the Unbanked in America?" (2015) 65:2 Cath U L Rev 221 ("Most banks rely on ChexSystems, a consumer reporting 'software that records consumers with poor banking practices' or who have engaged in 'account mishandling.' ChexSystems retains information for five years, and subsequent banks use this information in their screening process, allowing them to refuse an account to flagged individuals. While this system presumably keeps 'high-risk or fraudulent consumers' out of the banking system, it also punishes those who made innocent mistakes") [Christopher, "Mobile Banking"]; "Blacklisted: How ChexSystems Contributes to Systemic Financial Exclusion" (June 2021), online: *San Francisco Office of Financial Empowerment* <https://sfgov.org/ofe/files/2021-06/Blacklisted-How%20ChexSystems%20Contributes%20to%20Systematic%20Financial%20Exclusions.pdf>. See also Peggy D Hamilton, "Why the Check Cashers Win: Regulatory Barriers to Banking the Unbanked" (2007) 30:1 W New Eng L Rev 123-24 ("If a bank report reflects bounced checks or a bank reports 'NSF' (nonsufficient funds) activity to ChexSystems, the consumer is effectively barred from banking"). See also Ricks, *supra* note 573 (arguing in favour of universal service obligations in United States banking).

Some United States banks (including large, traditional banks such as Wells Fargo) have begun offering "second chance" bank accounts to customers who have adverse information in ChexSystems. These accounts serve as "probationary" accounts – and could lead to access to traditional accounts. They generally have no monthly fees, no minimum balance, and low or no overdraft fees. (It is unclear how banks profit from these accounts.) These accounts can help the unbanked and underbanked (re)gain access to the mainstream banking system. For those who are eligible, they are a better option than prepaid, reloadable cards (which were discussed in chapter 3 – notes 132 to 135), as they improve reporting history and have lower fees. See Ben Gran & Daphne Foreman, "Second Chance Banking: Making A Fresh Start" (27 October 2022), online: *Forbes* <www.forbes.com/advisor/banking/second-chance-banking-making-a-fresh-start/>; "Wells Fargo Clear Access Banking", online: *Wells Fargo* <https://www.wellsfargo.com/checking/clear-access-banking/>. These accounts are generally "Bank On" certified. The certification requires accounts to have minimum deposits of 25 dollars or less, monthly fees of 10 dollars or less, no additional fees, and no overdraft fees (which generally means no overdraft or cheque-writing privileges). Bank On also "strongly suggests" that participating institutions only deny an account for actual instances of fraud (even when there is other adverse information in ChexSystems), accept alternative forms of identification, and make funds from trusted sources immediately available upon cashing. See "Bank On-Certified Accounts" (15 November 2021), online: *American Bankers Association* <https://www.aba.com/news-research/analysis-guides/bank-on-certified-accounts-faqs> ("As of October 31, 2021, CFE Fund has certified 161 accounts offered by regulated financial institutions, with more joining the movement every day. These accounts represent nearly 50% of bank branches in the U.S. […] How do banks handle account applicants who are homeless and do not have an address? Many homeless shelters provide a mailing address that banks can use as an address of record, as well as an address for paper statements, should the customer opt out of electronic delivery"); "Bank On-Certified Accounts", online: *Bank On* <https://bankon.wpenginepowered.com/wp-content/uploads/2022/08/Bank-On-National-Account-Standards-2023-

for 4 dollars per month, and for free for “youths, students, GIS [Guaranteed Income Supplement] recipient seniors and any RDSP [Registered Disability Savings Plan] beneficiaries”: (1) a minimum of twelve (debit) transactions per month; (2) cheque writing privileges; and (3) free deposits, debits cards, pre-authorised payments, printed statements, and cheque visualisation.[651]

The complex regulatory regimes discussed in this chapter include a wide range of stringent obligations – beyond common carrier obligations. The issue of whether they are properly characterised as antitrust law is debatable. I believe they are. Regardless, I believe this chapter persuasively shows that these statutory regimes respond to issues that are almost inevitably rooted in antitrust law. They seek to promote or safeguard competition and to ensure equitable access to essential products and services. Antitrust law provides the most apposite framework to understand why certain industries are regulated more and more stringently than others, why the state invokes aspirational social objectives in statutory text, and why it asserts the existence of a varying public interest in different ways.

2024.pdf>. Certification happens through the Cities for Financial Empowerment Fund, which, despite its name, is funded by banks. See “Funding”, online: *Cities for Financial Empowerment* Fund <https://cfefund.org/funding/>.

These modalities seem to mirror those of a successful pilot project implemented by governments in San Francisco in 2006. See Christopher Choe, “Bringing in the Unbanked off the Fringe: The Bank on San Francisco Model and the Need for Public and Private Partnership” (2009) 8:1 Seattle Journal for Social Justice 365.

[651] The obligation only applies when “these services are available to other retail customers.” See Department of Finance Canada, “2014 Low-Cost Account Guidelines” (27 May 2014), online: *Government of Canada* <https://www.canada.ca/en/department-finance/programs/guidelines/2014-low-cost-account-guidelines.html>. Financial institutions are also required to use “clear and simple language to identify the features and costs of a low-cost and no-cost account, including services included and excluded from the monthly fee that adheres to the Financial Consumer Agency of Canada (FCAC) clear language guidelines and does not mislead consumers.”

Sometimes, the state goes further. It chooses to directly provide the product or service to the public, either as a market participant or by nationalising an industry.[652] I believe these forms of state intervention are best understood through the same framework. When the state directly provides a product or service to the public, it is addressing the problems invoked in this section, and it is seeking to further the same objectives rooted in antitrust law. I also argue that, because these forms of state intervention relate to the same framework, they are best conceptualised as falling along a spectrum of state intervention in private conduct and in the marketplace.

First, the state may enter the marketplace and provide a product of service directly to the public. This form of state intervention exceeds the regulatory regimes and statutory antitrust obligations described above. The state assumes more significant responsibilities. Unlike in other examples described later in this section, the state does not monopolise the industry: it simply

[652] See generally Sokol, *supra* note 509; Ciprian V Stan, Mike W Peng & Garry D Bruton, "Slack and the Performance of State-Owned Enterprises" (2014) 31 Asia Pacific Journal of Management 473 at 474 ("SOEs represent 80 % of China's stock market capitalization, 62 % of Russia's, and 38 % of Brazil's. Even in the developed economies of Western Europe the state is a controlling shareholder in 15 % of listed firms in Austria and Finland and 10 % in Italy. SOEs represent approximately 5 % of GDP in OECD countries and 10 % of the global GDP"); Boyd, *supra* note 573; Ines Willemyns, "Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?" (2016) 19:3 Journal of International Economic Law 657 at 659 ("Where private companies are mainly focused on profit maximization, state ownership is seen as a way of correcting market failures. Governments depart from the principle of competitive neutrality with the purpose of remedying market failures. Examples can be found in cases where natural monopolies exist or where [State-Owned Enterprises] are used as agents for developmental policies"). See also Jewellord Nem Singh & Geoffrey C Chen, "State-Owned Enterprises and the Political Economy of State–State Relations in the Developing World" (2018) 39:6 Third World Quarterly 1077; "Public Goods" (21 July 2021), online: *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/public-goods/>.

competes with private actors. In other words, and to reiterate the language used in the previous section to discuss postal banking, the state chooses to provide a "public option."

Healthcare in the United States can also be illustrative example. Unlike in Canada, the provision of healthcare is not socialised.[653] (The state has not monopolised the industry, and made itself the sole legal provider of healthcare.[654]) The United States government ensures the provision of healthcare to vulnerable segments of the population through public programs. Medicare funds healthcare for the elderly, while Medicaid funds healthcare for the poor.[655] These programs are essentially insurance programs, which serve to allocate cost to the state. The state broadly funds healthcare for all eligible individuals, who otherwise would have borne the cost of healthcare.[656] Left-leaning politicians have recently proposed a "public option" for the rest of the population.[657]

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[653] Canada's healthcare system is primarily administered by provincial governments, which have jurisdiction pursuant to section 92 of the *Constitution Act, 1867* ((UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5). It is nonetheless governed by certain federal legislation, primarily the *Canada Health Act* (RSC 1985, c C-6). The *Act* sets conditions for the receipt of federal funding and sets out the fundamental principles of public administration, comprehensiveness, universality, and portability (across provinces). These requirements essentially ensure that all provincial health systems are public.

[654] This is a slight overstatement and an oversimplification. There exist private health providers in Canada, and the public health insurance system is supplemented by private insurance, notably to cover more elective services (such as psychotherapy or physiotherapy), dental and vision care, and pharmaceutical products. See generally Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, by Roy Romanow, QC (Ottawa: Commission on the Future of Health Care in Canada, 2002); Canadian Institute for Health Information, "Health Spending in Canada Reaches $264 Billion" (31 October 2019), online: *CISION* <https://www.newswire.ca/news-releases/health-spending-in-canada-reaches-264-billion-892360807.html>.

[655] See generally Drew Altman & William H Frist, "Medicare and Medicaid at 50 Years: Perspectives of Beneficiaries, Health Care Professionals and Institutions, and Policy Makers" (2015) 314:3 Journal of the American Medical Association 384; Adam Feibelman, "Defining the Social Insurance Function of Consumer Bankruptcy" 13:1 American Bankruptcy Institute Law Review 129 at 148-150.

[656] Unlike in Canada, the state is not the *provider* of healthcare. Eligible individuals receive care from private sector actors. The state simply pays for the cost of these services.

[657] See e.g. Jonathan Oberlander, "Navigating the Shifting Terrain of US Health Care Reform – Medicare for All, Single Payer, and the Public Option" (2019) 97:4 Milbank Quarterly 939; Larry Levitt, "The Language of Health Care

The state would essentially offer an insurance product competing with those of private insurance companies for individuals who do not have access to Medicare or Medicaid.

The state would be choosing to provide a service directly to citizens. Of course, healthcare meets the criteria discussed above for a public good or public utility.[658] It is a necessity and bears a public nature.[659] This justifies state intervention in the industry – which can take the various forms described throughout this section. The state's decision to offer a "public option" also relates to the overarching objective of furthering competition. By competing with private actors, the state in part hopes to increase competition and decrease prices for customers.

These healthcare policy proposals closely resemble the public option in banking proposed by Prof. Baradaran.[660] Prof. Baradaran "public option" also means that the state will compete with

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Reform" (2021) 325:3 Journal of the American Medical Association 215; Louis Jacobson, "Offer a Public Option Health Insurance Plan Like Medicare" (15 December 2021), online: *PolitiFact* <https://www.politifact.com/truth-o-meter/promises/biden-promise-tracker/promise/1558/offer-public-option-health-insurance-plan-medicare/>; Benjy Sarlin & Sahil Kapur, "The Health Insurance Public Option Might Be Fizzling. The Left Is OK With That.", *NBC News* (5 June 2021), online: <https://www.nbcnews.com/politics/joe-biden/health-insurance-public-option-might-be-fizzling-left-ok-n1269571>; Julie Tsirkin & Sahil Kapur, "Top Democrats Jump-Start Push to Offer a Health Care 'Public Option,' a Biden Promise", *NBC News* (26 May 2021), online: <https://www.nbcnews.com/politics/congress/top-democrats-jump-start-push-offer-health-care-public-option-n1268584>. 68 percent of Americans favour a public option in healthcare (Tsirkin & Kapur, *ibid*).

[658] See Khan, "Amazon's Antitrust Paradox", *supra* note 573 at 797-803; Kearney & Merrill, *supra* note 573; Boyd, *supra* note 573 at 1638; Dimock, *supra* note 573; Lande & Vaheesan, *supra* note 608; Kovvali & Macey, *supra* note 636 at 113.

[659] See e.g. Commission on the Future of Health Care in Canada, *supra* note 654 at 240 ("Canadians believe that access to health care is a fundamental human right").

[660] See Baradaran, "Small-Dollar Loan", *supra* note 502 at 116; Baradaran, *How the Other Half Banks*, *supra* note 502. See also Baradaran, "It's Time for Postal Banking", *supra* note 502; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Baradaran, "Small-Dollar Loan", *supra* note 502. In academic research, this public option is often called a state-owned enterprise, or SOE. See e.g. Sokol, *supra* note 509; Stan, Peng & Bruton, *supra* note 652; Singh & Chen, *supra* note 652; Willemyns, *supra* note 652.

private actors (alternative financial services providers). The state does have significant flexibility unavailable to the private sector, for instance in pricing its product or service below cost.[661] However, as noted, doing so is an exceptionally delicate exercise. If the state underprices too significantly, it risks annihilating the industry it sought to improve – instead of furthering competition.

Sometimes, the state goes even further. This section presented a spectrum of options available to the state to serve the broad aims of furthering competition and ensuring fair and adequate access to essential products and services. I discussed antitrust duties, common carrier obligations, various forms of industry-specific regulatory regimes, and the provision of a "public option" by the state. I believe that the theoretical framework I presented in this section, largely drawn from antitrust law, is the most apposite to conceptualise the forms of, and justification for, state intervention in the marketplace. It is hopefully plain by now that these options were presented along an intensifying spectrum. The last option on that spectrum goes even further: the state might monopolise an entire industry. (This is often also called the nationalisation of an industry.) In doing so, it becomes the direct provider of a product or service (as was the case for a "public option"),

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A further example of a "public option" is the Canadian Broadcasting Corporation (CBC). It exists pursuant to the *Broadcasting Act* (*supra* note 583) and competes with privately owned television networks.

[661] See Sokol, *supra* note 509 at 1717, 1719, 1722, 1745, 1744-48; Stan, Peng & Bruton, *supra* note 652 at 481-82.

but to the exclusion of all competition. It becomes the sole authorised provider of the product or service.

The *Radiocommunication Act*, which I discussed above, includes what is essentially a nationalisation *option.*[662] Section 7(1) of the *Act* provides: "Her Majesty may assume and, for any length of time, retain possession of any radio station and all things necessary to the sufficient working of it and may, for the same time, require the exclusive service of the operators and other persons employed in working the station."[663] The provision constitutes a hybrid between a "public option" and nationalisation. It provides that the state, in addition to competing with private actors, can appropriate private actors – including, if necessary, all market participants.

Postal services, which were extensively discussed in the previous section and in chapter V, are an example of a state monopoly.[664] As noted, the postal service in both Canada and the United States provides a range of services and competes with private actors in the provision of certain products and services.[665] However, it benefits from a statutory monopoly within its "core" mandate

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[662] See *Radiocommunication Act*, *supra* note 584.

[663] *Ibid*, s 7(1). See also Stan, Peng & Bruton, *supra* note 652 (noting that "the world's largest mobile-phone operator, China Mobile, with its 600 million subscribers" is a state-owned enterprise at 474).

[664] See also Sokol, *supra* note 509 at 1746-47 ("Postal services are among the least competitive network industries in the world. Whereas other network industries, such as telecommunications and energy, have been liberalized and opened to various levels of competition, postal services remain heavily regulated statutory monopoly providers in most countries. In nearly every country, the government has designated a postal monopoly for a portion of services that facilitate the movement of products from one location to another").

[665] Canada Post notably provides expedited and parcel delivery through Purolator and supply chain solutions through SCI. See "2022 Annual Report Canada Post Corporation: Financial Section", *supra* note 513; "What We Do", *supra* note 535. It also provides money orders and foreign exchange services. See "International Money Transfer", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/send-

to deliver traditional mail. In Canada, this monopoly extends to letters weighing fewer than 500 grams – subject to a residual exception for expedited delivery costing a minimum amount.[666] In the United States, the United States Postal Service holds a monopoly over a similar category of letters, and over the use of mailboxes.[667] I discussed at length how postal services meet the various attributes of public utilities discussed in this section – including their necessary and public nature.[668] Heating and electricity are similarly often provided by state-controlled entities, which either monopolise a market or compete with private sector alternatives.[669]

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money/international-money-transfers.page>; "Postal Money Orders", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/send-money/money-orders.page>; "Foreign Currency Delivery", online: *Canada Post* <https://www.canadapost-postescanada.ca/cpc/en/personal/money-government-services/manage-money/foreign-currency-delivery.page>. The United States Postal Service similarly provides expedited delivery services and money orders. See "Sending Money Orders", online: *United States Postal Service* <usps.com/shop/money-orders.htm>; "Priority Mail Express: Next-Day to 2-Day Guarantee & Flat Rate Pricing", online: *United States Postal Service* <https://www.usps.com/ship/priority-mail-express.htm>.

[666] See *Canada Post Corporation Act*, *supra* note 534, ss 14-15; Bertrand et al, *supra* note 513 at 16.

[667] See 39 USC §§ 101, 410-404(a); Lois M Davis et al, *The Role of the United States Postal Service in Public Safety and Security: Implications of Relaxing the Mailbox Monopoly* (Arlington: Rand, 2008) at 7-22 (this publication was funded by the United States Postal Service).

[668] See also 39 USC § 101(a) ("The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people").

[669] See e.g. Boyd, *supra* note 573 at 1617-18, 1638-40, 1640-41; Kovvali & Macey, *supra* note 636 ("Rate regulated public utilities supply one-third of the electricity in the United States and own nearly all of the transmission and distribution lines that transport electricity to meet customer needs" at 103); *Hydro-Québec Act*, CQLR c H-5; *Hydro One Accountability Act, 2018*, SO 2018, c 10, Schedule 1.

As noted above, healthcare in Canada is a further example. For most purposes, provincial health systems monopolise the provision of healthcare.

See also Stephanie Ben-Ishai & Saul Schwartz, "Credit Counselling in Canada: An Empirical Investigation" (2014) 29:1 CJLS 1 at 5 ("The current system once faced competition from an entirely public alternative. In 1972, at a time when the number of consumer bankruptcies began to rise in Canada and the supply of private bankruptcy trustees was limited, the OSB developed a publicly administered bankruptcy program, known as the Federal Insolvency Trustee

Whether through antitrust law, specific regulation, or the direct provision of products and services to the public, the state recognises that certain products and services are different. They are essential to everyday life, and there is a correlative *public* interest in ensuring that all can access them. State intervention is best construed as falling somewhere along a spectrum, from the lighter touch of regulation to the more coercive exercise of the antitrust power or the outright nationalisation of entire industries. All seek to achieve the same objective.

There might be a strong basis for conceptualising credit as a public utility. This argument relates to Prof. Baradaran's arguments regarding banking. While she uses a different conceptual framework,[670] she emphasises the public aspect of banking.[671] She notes that access to banking is

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Agency (FITA), for debtors who could not afford a private bankruptcy trustee. Despite the fact that this program was used by one-third to one-half of consumer bankrupts, the program was abandoned in 1979, at the urging of the private trustee community. The impetus from the trustees to abolish the program came from their realization that they could earn a profit on a consumer bankruptcy, even if the bankrupt had no assets").

[670] Different from the antitrust framework I developed throughout this section.

[671] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Baradaran, *How the Other Half Banks*, *supra* note 502 at 11-64; Baradaran, "Banking and the Social Contract", *supra* note 559; Baradaran, "Rethinking Financial Inclusion", *supra* note 502; Baradaran, "Banking and Commerce", *supra* note 574; Baradaran, "Small-Dollar Loan", *supra* note 502 at 113. Prof. Baradaran has exposed and detailer her conceptual framework in multiple law review articles and books. She essentially argues that a "social contract" exists as a result of the historical support of banks by the United States government – in the form of funding, liquidity, credit guarantees, and bailouts during financial crises. She believes that banks perform essential functions in society and in trade and commerce, and that their viability and profitability is built on trust by the public (which in turn depends on state support). Because banks receive significant state support, and because state support contributes to their profitability, they must at times engage in unprofitable actions in the public interest. She believes that large banks have broken this social contract, notably by failing to provide adequate access to their products and by failing to use bailout funds for their intended purposes. See also Austin, "Of Predatory Lending", *supra* note 559; Phil Lord & Lydia Saad, "Tackling the COVID-19 Pandemic" (2020) 43:2 Man LJ 1 (advancing a similar argument to Baradaran's – arguing that governments should mandate how state funds and liquidity are used by financial institutions and arguing that, during the COVID-19 pandemic, Canadian financial institutions failed to use funds and liquidity for their intended purposes); Ricks, *supra* note 573; *Emergency Economic Stabilization Act of 2008*, Pub L No 110-343, 122 Stat 3765 (2008).

Another form of state support is deposit insurance, provided by government-related entities (the Canada Deposit Insurance Corporation and the United States' Federal Deposit Insurance Corporation). See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 575, § 335; "FDIC: History of the FDIC", online: *FDIC* essential to fully participate in society. She also traces the historical financial and legal support of the banking industry by the state. Both arguments support her claim that the state should provide banking services directly to the poor through the United States Postal Service.[672] Similarly, the preceding chapters have each emphasised the fundamental importance of credit to the lives of the very poor and their ability to participate in society. Credit can be a source of opportunity and a springboard to a better life – especially for those are wealthy enough to benefit from state-guaranteed credit programs. As discussed in the chapter IV, the state dedicates significant resources to program that can help individuals purchase a home or attend higher education institutions.[673] It does so because credit can help citizens build wealth and save for retirement.[674]

<https://www.fdic.gov/about/history/>; "Your Coverage", online: *Canada Deposit Insurance Corporation* <https://www.cdic.ca/your-coverage/>; *Canada Deposit Insurance Corporation Act*, RSC 1985, c C-3; Wall Street Journal, "Why This Sign Is in Front of Banks | WSJ" (20 March 2023), online (video): <https://www.youtube.com/watch?v=69zSSx08HtU&list=WL&index=437&t=1s&ab_channel=WallStreetJournal>.

[672] See e.g. Baradaran, "It's Time for Postal Banking", *supra* note 502; Baradaran, *How the Other Half Banks*, *supra* note 502; Baradaran, "Small-Dollar Loan", *supra* note 502.

[673] See Baradaran, "Rethinking Financial Inclusion", *supra* note 502; "Mortgage Loan Insurance: CHMC Purchase", *Canada Mortgage and Housing Corporation* (2020), online: <https://www.cmhc-schl.gc.ca/-/media/sites/cmhc/finance-investing/mortgage-loan-insurance/mortgage-loan-insurance-homeownership-programs/mortgage-loan-insurance-quick-reference-guide/cmhc-programs-fact-sheets.ashx>; "Let FHA Loans Help You", online: *US Department of Housing and Urban Development* <https://www.hud.gov/buying/loans>; "Canada Student Grants and Loans – What Student Grants and Loans Offer", online: *Government of Canada* <https://www.canada.ca/en/services/benefits/education/student-aid/grants-loans.html>; Bruce Chapman, "Income Contingent Loans for Higher Education: International Reforms" in E Hanushek & F Welch, eds, *Handbook of the Economics of Education* (Amsterdam: North-Holland, 2006).

[674] See Baradaran, "Rethinking Financial Inclusion", *supra* note 502 at 17 ("By nature of these mortgages, many Americans built intergenerational wealth and social capital and gained access to other low-cost credit and services that have continued to enhance the lives of their progeny"); Margaret Ryznar, "Tax Reform on Homeownership" (2018) 73:1 U Miami L Rev 227; Margaret Ryznar, "Homeownership as Savings" (2018) 159:8 Tax Notes 1145; Peggy D Hamilton, "Why the Check Cashers Win: Regulatory Barriers to Banking the Unbanked" (2007) 30:1 W New Eng L Rev 119 at 131; Makoto Nakajima & Irina A Telyukova, "Home Equity in Retirement" (2020) 61:2 International Economic Review 573; Statistics Canada, *Incomes of Retirement-Age and Working-Age Canadians: Accounting for Home Ownership*, by W Mark Brown, Amélie Lafrance & Feng Hou, Catalogue No 11F0027M (Ottawa: Statistics Canada, July 2010).

In that sense, credit contributes to social mobility and a more equitable society. Credit can also help prevent the economic consequences of unforeseen events from turning liquidity problems into solvency problems.[675]

While credit can bear promise, debt can be a significant social problem. Excessive indebtedness negatively affects the debtor's health (and mental health)[676] and attracts social stigma.[677] Excessive indebtedness compounds many of the negative consequences of poverty. As

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[675] See Atkinson, "Rethinking Credit as Social Provision", *supra* note 554 at 1147; Cuttino, *supra* note 571. See also Chris Chhim & Sean Simpson, "Factum: Nearly Half of Canadians (48%) Are $200 or Less Away from Financial Insolvency" (28 October 2019), online: *Ipsos* <https://www.ipsos.com/en-ca/news-polls/Canadians-and-Bankruptcy-Oct-2019>; Aimee Picchi, "A $500 Surprise Expense Would Put Most Americans into Debt", *CBS News* (12 January 2017), online: <www.cbsnews.com/news/most-americans-cant-afford-a-500-emergency-expense>.

[676] See e.g. "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", online: *Employment and Social Development Canada* <https://www.canada.ca/en/employment-social-development/programs/poverty-reduction/backgrounder.html#h2.1>; Dalié Jiménez, "Ending Perpetual Debts" (2018) 55:3 Hous L Rev 609 at 638; Jerzy Eisenberg-Guyot et al, "From Payday Loans To Pawnshops: Fringe Banking, The Unbanked, And Health" (2018) 37:3 Health Affairs 429 at 430-431. See also Chris Chhim & Sean Simpson, "Factum: Nearly Half of Canadians (48%) Are $200 or Less Away from Financial Insolvency" (28 October 2019), online: *Ipsos* <https://www.ipsos.com/en-ca/news-polls/Canadians-and-Bankruptcy-Oct-2019>; Pamela Foohey, "A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy" (2019) 60:8 Boston College L Rev 2297 at 2328-2330 [Foohey, "A New Deal for Debtors"].

[677] See e.g. Feibelman, *supra* note 655; Eisenberg-Guyot et al, *supra* note 676 at 430-431; Katherine Porter & Deborah Thorne, "Life in the Sweatbox" (2018) 94:1 Notre Dame L Rev 219.

On related issues, see also Atkinson, "Borrowing Equality", *supra* note 554; Atkinson, "Rethinking Credit as Social Provision", *supra* note 554; Austin, "Of Predatory Lending", *supra* note 559; Greene, *supra* note 554; Barr, "Banking the Poor", *supra* note 554 at 134-41; Carney & Gale, *supra* note 554; Foohey, "A New Deal for Debtors", *supra* note 676 at 2328-2330; Teresa A Sullivan, "Debt and the Simulation of Social Class" in Ralph Brubaker, Robert M Lawless, Charles J Tabb, eds, *A Debtor World: Interdisciplinary Perspectives on Debt* (Oxford: Oxford University Press, 2012) 36.

See also Mann & Hawkins, *supra* note 571 at 884 ("Specifically, there is good reason to think that financial distress generates costs for society as a whole that are not borne by the parties to the transaction. Thus, the loss from financial distress does not end when a single creditor fails to obtain repayment from the loan that it has advanced. Rather, financial distress has a series of broader effects. It increases the burden on the social safety net: Those in distress are unlikely to contribute funds to support the social safety net, but are quite likely to draw on the resources others have contributed. This is particularly true if financial distress leads to illness[.] […] Those in financial distress are likely to have trouble finding gainful employment, which means that the rest of society will not receive the positive spillover effects that would otherwise accrue from the exercise of their human capital. Finally, financial distress is likely to impose costs on dependent family members").

was shown in earlier chapters, instead of alleviating extreme poverty by providing credit that can bridge short term liquidity problems and prevent periodic painful events from having permanent consequences, alternative financial services providers trap the very poor into protracted, often endless cycles of indebtedness. Without adequate access to credit the very poor face undue and often insurmountable barriers to social participation.

I noted above that banks are subject to extensive regulatory regimes[678] and that the institutions that provide credit to the very poor are much more lightly regulated. The main form of regulation are usury provisions, which limit the total cost of borrowing.[679] However, most North American jurisdiction effectively exempt alternative financial services providers from usury provisions and most other forms of regulation.[680] These lenders were ostensibly exempted from usury provisions precisely because governments thought that the cost of lending to the very poor is prohibitively high. However, even with the ability to charge astronomical fees and interest, private lenders fail to provide adequate access to credit to the very poor.[681] Neither banks nor

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[678] See Baradaran, "Banking and the Social Contract", *supra* note 559; Baradaran, "Banking and Commerce", *supra* note 574; *Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 575; Brean, Kryzanowski & Roberts, *supra* note 575; Hill, *supra* note 575; Mohsni & Otchere, *supra* note 575.

[679] See Coco & De Meza, *supra* note 559; Ramsay, *supra* note 571; Austin, "Of Predatory Lending", *supra* note 559; Nick Bourke, "Payday Loan Facts and the CFPB's Impact" (14 January 2016), online: *The Pew Charitable Trusts* <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/payday-loan-facts-and-the-cfpbs-impact>.

[680] See *Criminal Code*, RSC 1985, c C-46, s 347; Phil Lord, "Ending Poverty: A Step in the Right Direction" [2021] Ottawa Law Review Blog, online: <https://rdo-olr.org/2021/ending-poverty-a-step-in-the-right-direction/>; Stephanie Ben-Ishai, "Regulating Payday Lenders in Canada: Drawing on American Lessons" (2008) 23:2 BFLR 323; *Payday Loans Act, 2008*, SO 2008, c 9, s 32; O Reg 98/09, s 23; O Reg 358/16, s 4; Bourke, *supra* note 679; Micheline Gleixner, "Consumer Credit in Canada: Regulatory Patchwork" (2020) 43:2 Dal LJ 697.

[681] See Coco & De Meza, *supra* note 559; Ramsay, *supra* note 571 at 188; Austin, "Of Predatory Lending", *supra* note 559; Bourke, *supra* note 679. See also Stan, Peng & Bruton, *supra* note 652 at 480 ("The state can be perceived

alternative financial services providers have provided adequate access to banking and credit to the very poor.[682] The systematic failure of the private sector to provide adequate access to credit, combined with a conceptualisation of credit as a public utility, justifies state intervention in the provision of credit.

None of the alternative options on the spectrum of state intervention presented in this section appear particularly appealing. Regulatory regimes have clearly proven insufficient. Banks and alternative financial services providers have been subject to distinct, specialised regulatory regimes for decades. These regimes – many times amended – have failed to achieve the state's objective of providing adequate access to banking and credit. Similarly, banks are already subject obligations analogous to common carrier obligations. As noted, the *Bank Act* creates a number of obligations of regulated financial institutions that relate to access to banking.[683] The most significant obligation is to open a bank account for any prospective eligible customer who visits a

in some cases as an aggressive entrepreneur wanting to develop its SOEs, while in other cases as a custodian of troubled enterprises, stepping in when the private sector fails").

[682] See e.g. "The Underbanked Canada: February 2016", online: *Mintel* <https://store.mintel.com/the-underbanked-canada-february-2016?_ga=2.150848245.2126905070.1570466499-1705706870.1570466499>; Baradaran, "It's Time for Postal Banking", *supra* note 502 at 168; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502 at 485-86; Baradaran, "Small-Dollar Loan", *supra* note 502; Christopher, "Mobile Banking", *supra* note 650; "How America Banks: Household Use of Banking and Financial Services" (17 December 2021), online: *Federal Deposit Insurance Corporation* <www.fdic.gov/analysis/household-survey/index.html>; Barr, *supra* note 561; Caskey, *supra* note 559; Creola Johnson, "Payday Loans: Shrewd Business or Predatory Lending?" (2002) 87:1 Minn L Rev 744; Aaron Huckstep, "Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits" (2007) 12:1 Fordham J Corp & Fin L 203; AARP Foundation, "A Portrait of Older Underbanked and Unbanked Consumers Findings from a National Survey", online: *AARP* <https://assets.aarp.org/rgcenter/ppi/econ-sec/underbank-economic-full-092110.pdf>; Joe Fantauzzi, "Predatory Lending: A Survey of High Interest Alternative Financial Service Users" (December 2016), online: *Canadian Centre for Policy Alternatives* <https://policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2016/12/CCPA-ON%20predatory%20lending%20Dec%201.pdf>.

[683] See *Bank Act*, *supra* note 579, ss 627.17-627.24.

branch.[684] That, too, has failed to give Canadians adequate access to banking and credit.[685] Direct provision of credit, in the form of the government program I suggest, appears to be the only solution.

3. Universal Basic Income

The government program I propose has many similarities to a universal basic income. Like a universal basic income, it would be a program of universal eligibility – all individuals would be eligible.[686] Additionally, the state would not dictate how beneficiaries could use the funds they receive.[687] The main distinction, of course, is that a universal basic income provides grants, while I propose providing loans. As detailed below, the distinction is more superficial than first appears. Indeed, because a universal basic income needs to be funded, those with high incomes effectively

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684 *Ibid*, s 627.17(1). See also Ricks, *supra* note 573 (arguing in favour of universal service obligations in United States banking).

685 This is a result of the various issues discussed throughout this project. Principally, this obligation does not assist Canadians in the remote and rural areas where banks do not have branches they can visit and that can respond to their ongoing banking needs. It is also a result of the nuanced social preferences presented in chapter III. As detailed at the end of this section, my program responds to each of these issues.

686 See Miranda Perry Fleischer & Daniel Hemel, "The Architecture of a Basic Income" (2020) 87:3 U Chicago L Rev 625 at 633-34; Miranda Perry Fleischer & Daniel J Hemel, "Atlas Nods: The Libertarian Case for a Basic Income" 2017:6 Wis L Rev 1189; Tom McDowell & Mohammad Ferdosi, "The Experiences of Social Assistance Recipients on the Ontario Basic Income Pilot" (2020) 57:4 Canadian Review of Sociology 681 at 682-83. See also Anna Cameron & Lindsay M Tedds, "Gender-Based Violence, Economic Security, and the Potential of Basic Income: A Discussion Paper" (5 May 2021), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837386> at 7; Julie-Anne Lamoureux, "Du salaire minimum au salaire viable", *Radio-Canada* (9 October 2022), online: <https://ici.radio-canada.ca/nouvelle/1908182/salaire-viable-minimum-ontario>.

687 See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 634; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686; McDowell & Ferdosi, *supra* note 686 at 682-83. See also Cameron & Tedds, *supra* note 686 at 7.

receive no net benefits from the program.[688] (They pay in additional taxation an amount that is higher than the universal cash benefit.) Furthermore, while I characterise my program as a loan program, its features make it different from a traditional loan, notably because repayment is both variable and conditional.

This section discusses the key features of a universal basic income, which are compared with those of the program I propose. The section serves a slightly different purpose than the previous two. A universal basic income was never implemented in Canada or the United States.[689]

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[688] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 637-38.

[689] However, there have been multiple pilot projects in both Canada and the United States. See e.g. Jeanne Kuang, "More than 12,000 Californians Are Getting Cash from Guaranteed Income Experiments" (14 February 2023), online: *Cal Matters* <calmatters.org/california-divide/2023/02/universal-basic-income/> ("Cal Matters identified more than 40 similar pilot programs that have run, are operating or are planning to launch around the state. They are sending certain groups of low-income people regular, unrestricted cash payments ranging from $300 to $1,800 a month for periods of six months to three years, depending on the program. In all, the programs represent the largest modern U.S. experiment in unrestricted cash payments, with more than 12,000 Californians expected to receive more than $180 million in public and private funds. Nowhere else have so many guaranteed income pilot programs launched at the same pace"); Jesse Bedayn, "Universal Basic Income? California Moves to Be First State to Fund Pilot Efforts" (16 July 2021), online: *Cal Matters* <calmatters.org/california-divide/2023/02/universal-basic-income/> ("The City of Oakland's new program is the largest in the Bay Area, offering $500 monthly to 600 families making below Oakland's median household income, about $65,000 for a four-person family. San Francisco is offering $1,000 a month for 130 artists and 150 Black and Pacific Islander pregnant women. Similarly, Marin County will be supporting 135 low-income women of color with $1,000 monthly. Santa Clara County's pilot program provides $1,000 a month to 72 foster youth. The programs either randomly select eligible residents or pull from an applicant pool"); Jesse Bedayn, "Universal Basic Income? California Moves to Be First State to Fund Pilot Efforts" (16 July 2021), online: *Cal Matters* <calmatters.org/california-divide/2021/07/universal-basic-income-california/>; "Eligibility & FAQs", online: *Chicago* <https://www.chicago.gov/city/en/sites/resilient-communities-pilot/home/faqs.html#:~:text=Universal%20basic%20income%20programs%20do,per%20month%20to%205%2C000%20residents>; Jonathan Weisman, "$500 a Month, No Strings: Chicago Experiments With a Guaranteed Income", *The New York Times* (13 February 2023), online: <https://www.nytimes.com/2023/02/13/us/politics/universal-basic-income-chicago.html>; "Archived - Ontario Basic Income Pilot" (20 April 2021), online: *Ontario* <https://www.ontario.ca/page/ontario-basic-income-pilot>; Stacia West et al, "Preliminary Analysis: SEED's First Year" (2021), online: *Stockton Economic Empowerment Demonstration* <https://static1.squarespace.com/static/6039d612b17d055cac14070f/t/603ef1194c474b329f33c329/1614737690661/SEED_Preliminary+Analysis-SEEDs+First+Year_Final+Report_Individual+Pages+-2.pdf> (providing 125 individuals 500 dollars per month for 24 months); Kurtis Lee, "Guaranteed Income Programs Spread, City by City", *The New York Times* (10 September 2022), online:

The sections on postal banking and antitrust law provided analogies to regulation and programs that were previously, or are currently, implemented. In addition to highlighting the key features of my proposed program, the sections helped advance a normative argument for state intervention in the provision of credit. The section on postal banking (like chapter V) showed the history of, and the contemporary justification for, state intervention. The section on antitrust law provided a broader framework for state intervention in the marketplace – including more draconian forms of state intervention. While the program I propose may appear to exceed our traditional conception of the role of the state, the two previous sections helped show that this form of state intervention has historical precedents and contemporary cousins.

Because a universal basic income was never implemented in Canada or the United States, this section provides mainly theoretical support. The following two sections build on its foundation and provide examples of programs that resemble a universal basic income. While governments never acknowledged as much, I argue that we can discern the key aspects of a universal basic income in recent government programs that were implemented as a result of the COVID-19

<https://www.nytimes.com/2022/09/10/business/economy/guaranteed-income.html> ("More than 48 guaranteed income programs have been started in cities nationwide since 2020"); McDowell & Ferdosi, *supra* note 686.

The Alaska Permanent Fund is the closest existing large-scale analog to a universal basic income in North America. It provides unconditional cash payments to Alaskans that derive from natural resources. See *Constitution of the State of Alaska of 1956*, art IX, § 15 ("At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments"); "Historical Timeline", online: *State of Alaska: Department of Revenue Permanent Fund Dividend* <https://pfd.alaska.gov/Division-Info/historical-timeline>; "Permanent Fund Dividend", online: *State of Alaska: Department of Revenue Permanent Fund Dividend* <https://pfd.alaska.gov/> (in 2022, the yearly dividend was 3,284 dollars).

pandemic – programs that relate to employment and higher education. I then argue that my proposed program is narrower in scope than these existing programs, and that it would be more politically and financially stable.

Profs. Miranda Perry Fleischer Daniel Hemel have provided the only comprehensive account of legal arguments in favour and against a universal basic income, as well as a proposal as to how it might be implemented in the United States.[690] A universal basic income is a universal cash payment made to all citizens, with no eligibility restrictions of any kind.[691] It differs from existing social programs – including the ones I discussed in previous chapters – which limit eligibility in some way. For instance, social assistance limits eligibility on the basis on income.[692] Other social programs designed from certain marginalised groups limit eligibility on the basis of social characteristics, such as Indigeneity.[693] In contrast, a universal basic income entails direct

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[690] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686.

[691] See *ibid* at 633-34. See also Dylan Matthews, "How Many Americans Live on $2 a Day? The Biggest Debate in Poverty Research, Explained", *Vox Media* (5 June 2019), online: <www.vox.com/future-perfect/2019/6/5/18650492/2019-poverty-2-dollar-a-day-edin-shaefer-meyer>. See also Lynn D Lu, "From Stigma to Dignity? Transforming Workfare with Universal Basic Income and a Federal Job Guarantee" (2021) 72:3 SCL Rev 703 at 705 ("Crucially, a universal minimum income untethered to any work requirement is essential to break the racialized and gendered stigma that conflates economic need with welfare dependency").

[692] See generally "Social Assistance" (last updated 8 August 2022), online: *Ontario* <https://www.ontario.ca/page/social-assistance>; *Ontario Works Act, 1997*, SO 1997, c 25; "New Benefit Amounts: Social Assistance Program and Social Solidarity Program", online: *Travail, Emploi et Solidarité sociale* <https://www.emploiquebec.gouv.qc.ca/fileadmin/fichiers/pdf/Publications/00_nouv-montants-prestation_2018_A.pdf>; *Individual and Family Assistance Act*, SQ 2005, c 15; "Working and Earning While on Ontario Works" (last updated 29 April 2022), online: *Ontario* <https://www.ontario.ca/page/working-and-earning-while-ontario-works>.

[693] See Alex Smith & Nasreddine Ammar, "Federal Support for Low Income Individuals and Families" (21 November 2017), online: *Office of the Parliamentary Budget Officer* <https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Fed%20Support%20for%20Low%20Income%20Families/Fed Fede%20Support%20for%20Low%20Income%20Individuals%20and%20Families_EN.pdf>.

cash payments to all citizens, including those who are employed and those with high incomes. Additionally, the benefit is an unrestricted cash payment.[694] There are no restrictions on how beneficiaries spend the funds they receive. In this respect, a universal basic income is more similar to social assistance (which does not restrict use of funds) than to other programs I discussed in chapter IV, which make funds or credit risk guarantees available only for the specific purpose of purchasing a home or attending a higher education institution.

Most proposals and pilot projects have entailed providing cash payments of 500 or 1,000 dollars per month.[695] Under virtually all proposed programs, additional taxation would be required to fund the universal basic income.[696] This additional taxation generally matches the existing taxation regime and is progressive. Therefore, while wealthier individuals receive the same cash payment as other citizens, they receive no net benefit from the program because the additional progressive taxation is higher than the universal benefit.[697] While virtually all programs entail

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[694] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 634; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686; McDowell & Ferdosi, *supra* note 686 at 682-83. See also Cameron & Tedds, *supra* note 686 at 7; Kuang, *supra* note 689 ("[Proponents of a universal basic income] argue that unconditional cash — as opposed to typical welfare programs — gives people in poverty the freedom to address the myriad challenges that hold them back, be it high rent or a broken-down car, a lack of savings or an unexpected emergency").

[695] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 667-69; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1192-93. Fleischer and Hemel argue that 500 dollars per month is the most appropriate starting point ("The Architecture of a Basic Income", *ibid*).

[696] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 634; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1260-66.

[697] In fact, they receive a negative net benefit.

While most proposals seem to impose personal income taxation, funding would be a sociopolitical and macroeconomic decision. The state could, for instance, choose to instead fund the universal basic income through corporate taxation.

additional taxation, the extent of this additional taxation would be mitigated by the elimination of other existing social programs (which would be consolidated into the universal basic income). For instance, a universal basic income may allow for the elimination of social assistance, state retirement benefits, and other social assistance programs which limit eligibility to particular social or economic groups.[698]

Empirical data from pilot universal basic income programs has shown that a universal basic income can enhance quality of life and physical and mental health (notably through greater access to preventive healthcare), improve educational achievement, empower individuals to leave difficult social situations, and socially beneficial risk taking (for instance through business formation or career changes).[699] Those who oppose a universal basic income generally argue that

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[698] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 696-706; Smith & Ammar, *supra* note 693; Cameron & Tedds, *supra* note 686. See also Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1210, 1260-62 ("A separate concern is that officials charged with making these distinctions will inevitably bring their own biases and value judgments to the process. This will result in uneven implementation, in tension with the rule of law and potentially to the disadvantage of those already most disadvantaged by widespread implicit and explicit biases" at 1210).

[699] See West et al, *supra* note 689; Kuang, *supra* note 689 ("They also reported improved mental health and — a surprise to some — they increased their rate of employment. […] Some recipients used the money to train for better, higher-paying jobs, or they consolidated gig work into full employment"); McDowell & Ferdosi, *supra* note 686 ("Nearly every recipient indicated benefitting in some way, with many reporting transformational life changes" at 705; "Furthermore, while contemporary welfare programs are designed to push recipients back onto the labor market, our results suggest that the numerous benefits provided by basic income made participants more motivated to find a better paid job, and generally more employable by allowing them to purchase new clothes, go back to school for retraining, or to transport themselves around more easily" at 706). See also Cameron & Tedds, *supra* note 686 (arguing that a universal basic income might alleviate gender-based violence); Lamoureux, *supra* note 686; Lee, *supra* note 689; Eric Lach, "Andrew Yang's Ideas on Universal Basic Income Earned Him Fans. But Can He Win Votes?", *The New Yorker* (23 January 2021), online: <https://www.newyorker.com/news/our-local-correspondents/andrew-yangs-ideas-on-universal-basic-income-earned-him-fans-but-can-he-win-votes>; André Victor Doherty Luduvice, "The Macroeconomic Effects of Universal Basic Income Programs", Federal Reserve Bank of Cleveland Working Paper No 21-21; Mohammad Ferdosi et al, "Southern Ontario's Basic Income Experience" (March 2020), online: *McMaster University Faculty of Social Sciences School of Labour Studies*

it would disincentivise work or fundamentally redefine some aspects of our society. However, these are bald assertions that fail to cite any empirical data.[700]

Although we may intuitively associate it with progressive politics, a universal basic income is a centuries-old idea[701] that has been supported by politicians across the political spectrum (albeit for different reasons).[702] Right-leaning and libertarian politicians highlight that a universal basic

<https://labourstudies.socsci.mcmaster.ca/documents/southern-ontarios-basic-income-experience.pdf>; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1248-52.

[700] See e.g. Oren Cass, "Why a Universal Basic Income Is a Terrible Idea" (15 June 2016), online: *Manhattan Institute* <https://manhattan.institute/article/why-a-universal-basic-income-is-a-terrible-idea> ("Yet more important than the stigma is the inverse praise: Those who work to provide for themselves and their families know they are playing a critical and worthwhile role, which imbues the work with meaning no matter how unfulfilling the particular task may be. As the term 'breadwinner' suggests, the abstractions of a market economy do not obscure the way essentials are earned"); Tegan Hill & Jake Fuss, "The Expensive Truth About a Universal Basic Income" (10 September 2021), online: *Fraser Institute* <https://www.fraserinstitute.org/article/the-expensive-truth-about-a-universal-basic-income>. Some researchers even argue that we should ignore the existing empirical data from pilot projects. See e.g. Cass, *ibid* ("Unfortunately, a policy whose greatest effects are cultural lends itself poorly to pilot studies, because there is no way to take into account such society-scale shifts: A test group will do artificially well if it experiences the upside of receiving cash without the downside of the transformed cultural norms and social institutions. Better — and deeply discouraging — evidence comes from the effects wrought by the aggressive welfare-state expansions of the recent past"); Lee, *supra* note 689 ("'It's that a permanent and society-wide system to provide for everyone would destroy fundamental elements of the social contract and create the wrong incentives for people as they make choices about their life's course' [Oren Cass, executive director of American Compass] said. 'You can't pilot that'").

In addition to being empirically unsupported, arguments that a universal basic income would reduce labour force participation are conceptually unconvincing. As noted, funding for a universal basic income would happen through progressive taxation (Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 634), which is the foundation of our taxation system. Any argument that a universal basic income would disincentivise work would necessarily require that progressive taxation also disincentivise work.

[701] See Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1196.

[702] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 ("And prominent voices from across the ideological spectrum have taken up the UBI idea as well: libertarian Charles Murray, Facebook cofounder and Obama campaign strategist Chris Hughes, and former labor leader Andy Stern all have offered proposals for nationwide programs that resemble a UBI" at 627); Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1191-99, 1266-69 ("[W]hile the pieces of a winning UBI coalition are not yet in place, it is still possible to imagine how the pieces might be assembled. On the left end of the coalition is the Bernie Sanders wing of the Democratic Party, which sees a UBI as a redistributive transfer scheme that can bring an end to extreme poverty in the United States. Closer to the ideological center are technocratic think-tankers in the Daniel Patrick Moynihan mold who see a UBI as an efficient and empirically validated policy innovation. Our argument here is that right-libertarians should be part of that coalition too"). See also Lu, *supra* note 691 at 707-08.

income emphasises autonomy, justifies private property, inequality, and resource appropriation, limits the number and complexity of government programs, and limits bureaucratic, administration and enforcement costs.[703] Left-leaning politicians emphasise that a universal basic income strengthens the safety net, favours risk-taking and individual wellbeing, reduces the burden on other social programs and state resources, and prevents inequitable exclusions from traditional social assistance programs.[704] It continues to grow in mainstream appeal. 2020 Democratic Party Presidential candidate Andrew Yang campaigned almost exclusively on a 1,000-per-month federal universal basic income.[705] A recent United States federal benefit that bears similarities to a universal basic income gained bipartisan support.[706] Support for a universal basic income has also

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[703] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 ("[L]ibertarians may embrace a UBI on the grounds that it strengthens private property rights and enhances individual autonomy, freedom, and dignity. These values may be (and we think are) worth pursuing regardless of whether a UBI is less costly than the current system of redistributive transfers, whether it increases labor force participation, or whether it improves measurable outcomes related to health, education, or welfare" at 1200; "Libertarians— who are generally skeptical of the state's ability to implement social programs—should be especially skeptical of any claim that the state can distinguish the work-capable from the work-incapable without error" at 1210; "Libertarians will generally prefer cash transfer schemes rather than in-kind programs on the grounds that cash transfers promote recipients' autonomy and self-ownership, whereas in-kind transfers exemplify the type of paternalism that libertarianism abhors" at 1234). See also Cameron & Tedds, *supra* note 686; Ferdosi et al, *supra* note 699.

[704] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686. See also Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1191-99; West et al, *supra* note 689; Kuang, *supra* note 689; McDowell & Ferdosi, *supra* note 686; Cameron & Tedds, *supra* note 686; Lamoureux, *supra* note 686; Lee, *supra* note 689; Ferdosi et al, *supra* note 699.

[705] See "Policy: The Freedom Dividend", online: *Yang 2020* <https://2020.yang2020.com/policies/the-freedom-dividend/>. Yang also campaigned on a universal basic income in his subsequent New York mayoral campaign. See Lach, *supra* note 699; "A Basic Income for New York City", online: *Yang for New York* <https://www.yangforny.com/policies/a-basic-income-for-new-york-city>. Yang often referred to Martin Luther King Jr.'s support for a universal basic income. On King's position, see generally Matt Orfalea, "Martin Luther King Jr. on the Record for a Guaranteed Income" (10 January 2017), online: *Medium* <https://medium.com/basic-income/martin-luther-king-jr-on-the-record-for-a-guaranteed-income-b47b58b41e93>.

[706] See Dylan Matthews, "Mitt Romney and Michael Bennet Just Unveiled a Basic Income Plan for Kids", *Vox* (16 December 2019), online: <https://www.vox.com/platform/amp/future-perfect/2019/12/16/21024222/mitt-romney-michael-bennet-basic-income-kids-child-allowance>; "Romney Offers Path to Provide Greater Financial Security for

grown as a result of advances in generative artificial intelligence. Many argue that generative artificial intelligence will make many jobs obsolete and that generative artificial intelligence draws upon existing human knowledge (warranting public compensation).[707]

I further draw comparisons between a universal basic income and my proposed government program in the last section of this chapter. As noted at the beginning of this section, the key (and defining) difference between a universal basic income and my proposed government program is that a universal basic income provides grants, while I proposed providing loans (although, as noted, the difference may not be as salient as first appears). In this respect, a universal basic income is closer to social assistance and other grant programs. It also seeks to more directly reduce the incidence of poverty. Like taxation and grant programs, a universal basic income is a redistributive program that shifts wealth from wealthier individuals to beneficiaries. (My program does not.) If a universal basic income were implemented, the pernicious consequences of predatory credit provided to the very poor may be indirectly alleviated, as a universal basic income might reduce

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American Families" (4 February 2021), online: *Mitt Romney U.S. Senator for Utah* <https://www.romney.senate.gov/romney-offers-path-provide-greater-financial-security-american-families/>.

[707] See e.g. Connie Loizos, "We All Contribute to AI — Should We Get Paid for That?" (21 April 2023), online: *TechCrunc*h <https://techcrunch.com/2023/04/21/as-ai-eliminates-jobs-a-way-to-keep-people-afloat-financially-thats-not-ubi/>; Annie Lowrey, "Before AI Takes Over, Make Plans to Give Everyone Money" (17 May 2023), online: *The Atlantic* <https://www.theatlantic.com/ideas/archive/2023/05/ai-job-losses-policy-support-universal-basic-income/674071/>; Colin Horgan, "Will Universal Basic Income Save Us from AI?" (8 May 2023), online: *The Walrus* <https://thewalrus.ca/will-universal-basic-income-save-us-from-ai/>; Dylan Matthews, "How 'Windfall Profits' from AI Companies Could Fund a Universal Basic Income", *Vox* (28 July 2023), online: <https://www.vox.com/future-perfect/23810027/openai-artificial-intelligence-google-deepmind-anthropic-ai-universal-basic-income-meta>.

poverty and the need for predatory credit (and, conversely, enhance access to the traditional banking system).[708]

Profs. Fleischer and Hemel persuasively argue that a universal basic income *should* not be controversial.[709] As noted above, I largely agree with their position, especially as a universal basic income is funded through progressive taxation (which already defines out taxation system). In this respect, implementing a universal basic income requires no new conceptual taxation framework. Nonetheless, Profs. Fleischer and Hemel recognise that a universal basic income does remain highly controversial to some citizens.[710] As detailed in the last section of this chapter, my program is more modest. More importantly, it will *feel* more modest and politically acceptable to segments of society who might oppose a universal basic income.

4. <u>A Better Option</u>

[708] This is a form of *ex ante* intervention, unlike bankruptcy. See generally Adam Feibelman, "Defining the Social Insurance Function of Consumer Bankruptcy" 13:1 American Bankruptcy Institute Law Review 129. See also Jean Bracher, "Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill" (2004) 44:4 Santa Clara L Rev 1065 and notes 261 to 277, above.

Relatedly, Profs. Fleischer and Hemel discuss the assignability of the universal benefit. They note that borrowing against future benefit payments might reduce the prevalence of (and need for) alternative financial services providers. See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 688-90. Assignability raises the issues I mentioned in notes 99 to 107, above, when discussing earned wage access programs.

[709] See Fleischer & Hemel, "The Architecture of a Basic Income", *ibid*; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686.

[710] See Fleischer & Hemel, "The Architecture of a Basic Income", *ibid*; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *ibid*; "Briefly Podcast: December 18, 2019: Universal Basic Income", online: *The University of Chicago Law Review* <https://lawreview.uchicago.edu/uclr-online/briefly-podcast/universal-basic-income>.

We now return to the government program I briefly sketched at the beginning of this chapter. The chapter provided a theoretical framework, largely drawn from antitrust law, through which we can understand the legitimacy and scope of state intervention. In the section on antitrust law, I also explained why alternative regulatory solutions are unlikely to solve the issue discussed throughout this project and provide adequate access to credit. A "public option" in the provision of credit is both necessary and justifiable with reference to a framework we often use to assess state intervention. This chapter also provided a discussion of analogous programs and proposed programs that further contextualise the scope of state intervention I propose and helped delineate how the features of my program were specifically tailored to respond to the needs and preferences of the very poor presented in earlier chapters. In this section, I further lay out the attributes of this proposed program and respond to potential objections.

The broad aspects of the program are as presented at the beginning of this chapter. The state would provide credit to the very poor through loans repaid through additional, progressive taxation. Individuals whose income does not reach a certain level would not need to repay the loan, whereas individuals with a high income would effectively repay a multiple of the loan principal amount. Repayment would depend on income, but only for a limited period of time. The state would have flexibility unavailable to the private sector in avoiding the application of usury provisions[711] and in limiting dischargeability.[712]

The program would provide loans. I will return later in this section to the objection that I am stretching the definition of a loan beyond its natural limits. (I believe that this argument is largely spurious, especially as it relates to taxation-based programs.) My focus on loans is both salient and intentional. It makes the program fundamentally different from more traditional forms of state assistance and poverty alleviation (presented in chapter IV), where the state assists the very poor through grants. The assistance provided through my program is intended to be temporary and conditional upon repayment. As detailed below, the program incorporates a significant element of loan forgiveness, which serves to protect the very poor from being further marginalised. But it fundamentally remains a program that provides temporary, conditional assistance. I address, in turn, several more specific aspects of this framework.

First, the program differs from grant programs because of the way it is funded. Grant programs, including social assistance, generally decouple benefits and funding. There are two aspects to a grant program: the benefits it provides, and who pays for those benefits. Beneficiaries of the program are not (necessarily or generally) those who pay for the program. Take social

[711] See *Criminal Code*, *supra* note 680, s 347.

[712] See *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178(1); 11 USC § 11(a). Limiting dischargeability reduces default risk.

assistance. It provides benefits to the very poor, and the very poor do not pay for these benefits. Social assistance programs (like most grant programs) are funded through general tax revenue. Because that is the case, funding for social assistance is indistinguishable from funding for other government expenditures. Taxation is the mechanism through which we fund these general government expenditures, and it is founded on its own conceptual framework and social objectives. It is not necessary for the purposes of my argument to thoroughly present the objectives of taxation in developed countries. As noted earlier in this chapter, one key attribute of taxation systems in developed countries is progressivity.[713] Those with high incomes pay a higher rate of taxation. Say an individual earns 400,000 dollars. If the taxation rate were 20 percent, this individual would already pay more in taxes than someone making 20,000 dollars per year. (That is, 20 percent of 400,000 dollars is 80,000, while 20 percent of 20,000 dollars is only 4,000 dollars.) For a number of reasons, a progressive taxation system is based on the premise that this is not sufficient. Progressive taxation imposes a higher rate of taxation to the wealthy. The individual making 400 000 dollars per year will also pay a higher tax *rate*. For instance the marginal rate on regular

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[713] See Emmanuel Saez & Gabriel Zucman, "The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts" (2020) 34:4 Journal of Economic Perspectives 3; Emmanuel Saez & Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (New York: WW Norton, 2020); Emmanuel Saez & Gabriel Zucman, "Progressive Wealth Taxation" (2019) Brookings Papers on Economic Activity 437; Phil Lord, "COVID-19 and the Future of Work" [2021] Denv UL Rev Forum; Herbert Hovenkamp, "The First Great Law & Economics Movement" (1990) 42:4 Stan L Rev 993 at 1002-05. See also Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1192-93.

income in Ontario increases from 20.05 percent (for the first 49,231 dollars) to 53.53 percent (for the portion of income over 235,675 dollars).[714]

Social assistance and other grant programs are funded through taxation. They obey the organising principles of taxation, including progressivity. Therefore, the wealthy disproportionately fund these programs. Benefits and funding are decoupled because we conceptualise benefits and funding separately and through different frameworks. The reasons why we provide benefits are not directly related to the way the program is funded. From the broadest standpoint, this differentiates social assistance from my program. Even if you agree that my program should not be categorised as a loan program, it remains conceptually closer to a loan than to a grant program. Funding for my program is not decoupled from the provision of benefits. The program is not funded by general taxation – which would mean, as for social assistance, that it is funded by non-beneficiaries. Instead, the program is solely funded by individuals who take out

[714] See "Ontario 2023 and 2022 Tax Rates & Tax Brackets" (July 31, 2023), online: *TaxTips.ca* <https://www.taxtips.ca/taxrates/on.htm>. Some have remarked that in developed countries, and especially in the United States, various tax minimisation mechanisms make the wealthy pay a disproportionately low proportion of actually collected taxes. See generally Saez & Zucman, "The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts", *supra* note 713; Saez & Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay*, *supra* note 713; Piketty & Zucman, *supra* note 713; Shi-Ling Hsu, "The Rise and Rise of the One Percent: Considering Legal Causes of Inequality" (2015) 64 Emory LJ Online 2043; Emmanuel Saez & Gabriel Zucman, "How to Tax Our Way Back to Justice", *The New York Times* (11 October 2019), online: <www.nytimes.com/2019/10/11/opinion/sunday/wealth-income-tax-rate.html>; Emil Skandul, "There's an Easy Way to Tax Billionaires that Would Actually Work" (27 November 2021), online: *Business Insider* <www.businessinsider.com/easy-way-tax-billionaires-that-would-actually-work-tax-loans-2021-11?utm_source=facebook.com&utm_campaign=sf-bi-main&utm_medium=social&fbclid=IwAR0U8tI2eIAeAvVnvE6KkYILWvRwVLXe5tX72buAOqr8oWnFqd1HUhp3SlI>. Cost allocation for redistributive programs is therefore not as progressive as first appears, and middle- and lower-income individuals bear a significant portion of the cost of social assistance programs.

loans (beneficiaries from the program). Even if the program has an income-based repayment element that is analogous to forgiveness (those with low incomes do not need to repay the loan), the program remains funded by beneficiaries – and *solely* beneficiaries. The program is designed to be self-sustaining. The losses from lower-income beneficiaries partially or fully failing to repay the loan are offset by higher repayment from higher-income beneficiaries. Unlike for social assistance, third parties (higher-income taxpayers who are not beneficiaries) are never responsible for the cost of the program. Conceptually, this matches our conception of a loan – not our conception of a grant program.[715] As detailed below, this makes the program less politically controversial than other alternatives, such as a UBI – and therefore more likely to be enacted.

I envision loans that would be broadly and unconditionally available. I further discuss below the mechanics of how the funds could be made available to beneficiaries, as this discussion raises multiple orthogonal issues that deserve attention. Regardless of the specific method that adopted, I would necessarily prefer funding that is analogous to an ongoing line of credit. Funds would be made available to beneficiaries on an ongoing basis. They could choose to draw from these funds when, as, and to the extent necessary. Beneficiaries would not need to withdraw predetermined (or "round") amounts, and they would not be required to provide justification of need or of how they use the funds.

[715] That being said, the program is admittedly a unique reconceptualisation of credit. It challenges the fundamental characteristics of debt by partially decoupling credit (access to funds) from its corollary, debt (the obligation to repay the funds with interest).

The reasons why we may favour such unconditionality echo those advanced in support of a universal basic income.[716] They include favouring individual autonomy and seeking to avoid inequitable exclusions that inevitably result from eligibility categories and criteria.[717] More importantly, this aspect of the program significantly simplifies it, which, in turn, proportionately reduces the cost of administering it.[718] More and more complex eligibility criteria require additional human resources in program administration and enforcement. These resources are better spent assisting beneficiaries, especially if the objective is for the program to be self-sustaining.

While the program is responsive to the preferences and needs of the very poor, eligibility for it would not be restricted. (I further discuss below how the characteristics of the program respond to the needs of the very poor and to their social preferences discussed in chapter III.) In fact, there is no reason why restricting eligibility would be necessary. The basic structure of the

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[716] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 634; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686; McDowell & Ferdosi, *supra* note 686 at 682-83. See also Cameron & Tedds, *supra* note 686 at 7; Kuang, *supra* note 689.

If you took seriously the argument mentioned above that a universal basic income might disincentivise work (I did not), my program is preferable. The absence of unconditional grants eliminates this incentive. See Cass, *supra* note 700; Hill & Fuss, *supra* note 700; Lee, *supra* note 689; Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686.

[717] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686 at 696-706; West et al, *supra* note 689; Smith & Ammar, *supra* note 693; Cameron & Tedds, *supra* note 686. See also Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 at 1210, 1260-62.

[718] On similar arguments regarding a universal basic income, see e.g. See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 ("[R]ecipients will no longer have to spend time and energy navigating multiple welfare programs, each with their own forms, many requiring office visits, and which often have conflicting eligibility requirements" at 1236). On the impact of bureaucratic and administrative burdens more generally, see Cass R Sunstein, "Sludge Audits" (2022) 6:4 Behavioral Public Policy 654; Cass R Sunstein, *Sludge: What Stops Us from Getting Things Done and What to Do About It* (Cambridge: MIT, 2021).

program makes it an irrational option for wealthier individuals. Loan repayment would be based on income, and the taxation rates would be set to make individuals with high incomes repay the equivalent of a multiple of the loan principal amount. To give a solely illustrative example, let's posit that loans of 10,000 dollars are made available. Because of progressive taxation rates, an individual with an income of 100,000 dollars or more would pay 10 percent in additional taxation, while an individual with an income of 75,000 dollars would pay 5 percent and an individual with an income inferior to 50,000 dollars would not pay any additional taxation. The individual with an income of 100,000 dollars pays more both by virtue of their higher income[719] and of the higher percentage rate. Percentage rates, income brackets, and years of repayment obligation can each be modulated to ensure the program is self-sustaining. For instance, under this structure, if the repayment obligation is set at five years, the individual with an income exceeding 100,000 dollars would repay 50,000 dollars on a loan of 10,000 dollars; the individual with an income of 75,000 dollars would repay 25,000 dollars on the same loan; and the individual with an income under 50,000 dollars would repay nothing and see their loan forgiven after five years. This example illustrates that the state is essentially using funds from higher-income borrowers to forgive the loans of lower-income borrowers. Lower-income borrowers do not bear, at any point in the loan cycle, the deleterious consequences of indebtedness. Finally, those with a higher income repay a multiple of the amount they borrowed – up to five times for those with an income of 100,000 dollars or more. Of course, that example is solely illustrative, and it is difficult to predict how

[719] As noted above, 10 percent of 100,000 dollars is already a higher amount than 10 percent of 75,000 dollars.

many borrowers would fall in each income bracket, which, in turn, determines how high the taxation rates need to be.

If that is the case, why would a wealthy individual use the program? Doing so would mean voluntarily accepting to subsidise other beneficiaries.[720] These individuals will undoubtedly have much cheaper credit options. Resorting to the program would be an irrational decision. As a result, there is simply no need to limit eligibility for the program on the basis of income (or anything else).[721] This simplicity again provides the benefits I mentioned above: among other things, it reduces the administration and enforcement costs of the program and ensures that no one who would benefit from the program is inequitably excluded by the limits.[722]

The features of the proposed program are uniquely responsive to the needs and preferences of the very poor. By requiring individuals to repay a percentage of their income for a set period of time, the program would shield the very poor from some of the risk inherent to borrowing. I detailed in previous chapters how the predatory credit provided to the very poor entrenches their

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[720] In other words, the program relies on individuals whose income *grows* as a result of the loan or during the loan period. Those who already have a higher income will simply not rely on the program. The magnitude of the taxation rates will depend on how many individuals see their income grow.

[721] This argument is reminiscent of the structure of a universal basic income, discussed above. Individuals with a high income still receive the universal cash benefit, but they receive no net benefit from the program because they pay in additional taxation a higher amount than they receive. See Fleischer & Hemel, “The Architecture of a Basic Income”, *supra* note 686 at 637-38; Fleischer & Hemel, “Atlas Nods: The Libertarian Case for a Basic Income”, *supra* note 686.

[722] See West et al, *supra* note 689; Cameron & Tedds, *supra* note 686.

disadvantage and further marginalises them.[723] The proposed program provides much safer credit, while ensuring that this credit is financially sustainable. Only individuals who have the resources to repay the loan amount need to do so – and only when they have these resources.[724] The type of funding provided by the program cannot require an excessive portion of the borrower's budget. Meanwhile, the higher-than-principal repayment obligations for higher-income borrowers ensures that the program is financially sustainable. I mentioned above that while default rates do not justify the cost of the product and services provided by alternative financial services providers, alternative financial services providers require an extensive infrastructure reaching remote and rural communities (including because of the very poor's preference for informal, local transactions).[725] This infrastructure likely explains why alternative financial services providers are not highly profitable. The proposed government program would likely provide credit at a much lower cost. The program would not necessarily require this extensive infrastructure, and, if it did, it could draw

[723] See generally Baradaran, "It's Time for Postal Banking", *supra* note 502 at 166–67; Coco & De Meza, *supra* note 559; Austin, "Of Predatory Lending", *supra* note 559; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Baradaran, "Banking and the Social Contract", *supra* note 559; Bar-Gill & Warren, *supra* note 559; Caskey, *supra* note 559.

[724] The program essentially allows for the equivalent of an equity investment, which is not normally possible in physical persons. Corporate investors often make equity investments when the risk associated to debt is too high. See generally Sung C Bae, Daniel P Klein & Raj Padmaraj, "Event Risk Bond Covenants, Agency Costs of Debt and Equity, and Stockholder Wealth" (1994) 23:4 Financial Management 28. See also Emma Kerr, "Income Share Agreements: What to Know" (13 April 2021), online: *U.S. News and World Report* <https://www.usnews.com/education/best-colleges/paying-for-college/articles/income-share-agreements-what-students-should-know> (discussing income-share agreements, which reproduce some aspects of the proposed program in educational funding).

[725] See Coco & De Meza, *supra* note 559; Ramsay, *supra* note 571; Austin, "Of Predatory Lending", *supra* note 559; Mann & Hawkins, *supra* note 571; Manitoba, Public Utilities Board, *supra* note 571; Stegman & Faris, *supra* note 571 at 8; Hynes, *supra* note 571 at 613; Zywicki, *supra* note 571 at 459; Dijkema & McKendry, *supra* note 571; "Banking on the Margins Finding Ways to Build an Enabling Small-Dollar Credit Market", *supra* note 571 at 28-31; Dubner, *supra* note 571 at 7m:55s; Barrett, *supra* note 571 at 37.

upon extensive existing government infrastructure – including, potentially, the postal service. (I describe below why I believe that using the taxation system to deliver the program would further reduce cost.) The program's reliance on taxation for repayment provides a unique advantage: taxation rates can be adjusted when and to the extent necessary. They even have the flexibility to be adjusted upward to the level necessary to fund the equivalent of the cost of the existing infrastructure of alternative financial services providers. In other words, the program also shields the state from some of the risks of lending (as the rates can be adjusted to avoid credit losses). The program bears some resemblance to other government programs through which the state guarantees credit risk.[726] It is necessarily broader because the very poor do not spend their income on budget items that can effectively be targeted through specific loan programs.[727]

The proposed program would provide vital long-term credit to the very poor. As noted, the institutions the very poor rely on for credit generally extend credit for short periods of time. The very poor detrimentally rely on this short-term credit for longer-term needs.[728] The program fills

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[726] See Baradaran, "Rethinking Financial Inclusion", *supra* note 502; "Mortgage Loan Insurance: CHMC Purchase", *supra* note 673; "Let FHA Loans Help You", *supra* note 673; "Canada Student Grants and Loans – What Student Grants and Loans Offer", *supra* note 673. See also A Mechele Dickerson, "The Myth of Home Ownership and Why Home Ownership is Not Always a Good Thing" (2009) 84:1 Ind LJ 189; Charles W Calomiris, "An Incentive-Robust Programme for Financial Reform" (2011) 79:2 Papers in Money, Macroeconomics, and Finance 39.

[727] As noted above, unlike higher-income individuals, the very poor borrow to fund their daily expenses. See Atkinson, "Rethinking Credit as Social Provision", *supra* note 561 at 1133, 1152, 1157; "Payday Lending in America: Report 2: How Borrowers Choose and Repay Payday Loans" (February 2013), online: *The Pew Charitable Trusts* <https://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf>; Baradaran, "It's Time for Postal Banking", *supra* note 502 at 173; AARP Foundation, *supra* note 682; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 561 at 510-20; Atkinson, "Borrowing Equality", *supra* note 561 at 1442-43.

[728] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Austin, "Of Predatory Lending", *supra* note 559; Baradaran, "Small-Dollar Loan", *supra* note 502 at 91.

a gap in the market and would significantly alleviate the risk of the very poor falling into a debt spiral because of compounding interest.[729]

A crucial objection, of course, remains that I am contributing to disadvantage and indebtedness. I believe the analysis I just provided rebuts most of that claim. While the program is a loan program because repayment obligations lie with borrowers, each of its aspects has been designed to shield the very poor from the negative consequences of credit. Even so, I do make an intentional decision to provide credit. I am proposing a solution that will undoubtedly contribute to alleviating poverty. It will help further social mobility for those in the bottom quintile of income distribution.[730] Alternative financial services providers contribute to poverty through the products

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[729] See Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502; Lynn Drysdale & Kathleen E Keest, "The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society" (2000) 51:3 SCL Rev 589; Atkinson, "Rethinking Credit as Social Provision", *supra* note 561 at 1108; Austin, "Of Predatory Lending", *supra* note 561 at 1222; Baradaran, "Small-Dollar Loan", *supra* note 502 at 91; Bourke, *supra* note 679.

[730] See Miles Corak, "Divided Landscapes of Economic Opportunity: The Canadian Geography of Intergenerational Income Mobility" (2017) University of Chicago Human Capital and Economic Opportunity Working Paper No 2017–043; Miles Corak, "Do Poor Children Become Poor Adults? Lessons from a Cross Country Comparison of Generational Earnings Mobility" in John Creedy & Guyonne Kalb, eds, *Dynamics of Inequality and Poverty* (Binley: Emerald, 2006) 143 (Volume 13 of the Research on Economic Inequality series); Richard V Reeves, *Dream Hoarders: How the American Upper Middle Class Is Leaving Everyone Else in the Dust, Why That Is a Problem, and What to Do About It* (Washington: Brookings, 2017); "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", online: *Employment and Social Development Canada* <https://www.canada.ca/en/employment-social-development/programs/poverty-reduction/backgrounder.html#h2.1>.

and services they provide. Better credit will alleviate poverty and reduce the very poor's reliance on *ex post* relief mechanisms such as bankruptcy.[731] It will also enhance their wellbeing.[732]

By focussing on credit instead of grants, while redefining credit to make it much safer, I propose a program that is likely to be more politically and financially stable and durable. As noted, a universal basic income remains a politically controversial proposal, although it is founded on the same premises as the current taxation system and should appeal to individuals across the political spectrum.[733] Many are ideologically opposed to aid to the poor (or to aid to some segments of the group such as those they deem able to work). A credit program provides a pragmatic option that is unlikely to be met with the same ideological hostility.[734] The program will not increase the tax burden of anyone who chooses not to participate in it. Additionally, because the program is designed to be self-sustaining, it is unlikely to be dismantled by subsequent government administrations.

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[731] See generally Feibelman, *supra* note 708.

[732] See "Towards A Poverty Reduction Strategy – A Backgrounder On Poverty in Canada", *supra* note 676; Jiménez, "Ending Perpetual Debts", *supra* note 676 at 638; Eisenberg-Guyot et al, *supra* note 676 at 430-431; Foohey, "A New Deal for Debtors", *supra* note 676 at 2328-2330.

[733] See Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686; "Briefly Podcast: December 18, 2019: Universal Basic Income", *supra* note 710.

[734] In other words, just because of how it framed and labelled, the program is far more politically palatable to them.

Another potential criticism might be that I am thereby implicitly reinforcing the self-reliance paradigm I strongly criticised in chapter IV.

To harken back to the framework presented in the first two sections of this chapter, I am essentially proposing a "public option" in the provision of credit. In this respect, my proposal is analogous to Prof. Baradaran's postal banking proposal.[735] Because the state does not seek to monopolise the provide the provision of credit, it will compete with alternative financial services providers. However, it is important to acknowledge that the state might nonetheless fully displace alternative financial services providers. Whether it does will depend on how the very poor react to the proposed government program. If they conclude (as they probably should) that this form of credit is cheaper, safer, and more appealing, the demand for credit products provided by alternative financial services providers might be significantly reduced. Alternative financial services providers are not highly profitable and have a limited ability to reduce their prices in response.[736] (In other words, without that being our intent, we might drive alternative financial services providers out of business.) This, in turn, bears risk. If the program were to be terminated, the very poor would have lost a credit option that, however predatory, they desperately need.[737]

My proposed program could ensure that the very poor do not bear long-term or perpetual debt. The government has flexibility in limiting dischargeability and could make these loans non-

[735] See e.g. Baradaran, "It's Time for Postal Banking", *supra* note 502; Baradaran, *How the Other Half Banks*, *supra* note 502; Baradaran, "Small-Dollar Loan", *supra* note 502.

[736] See Stegman & Faris, *supra* note 571 at 8; Hynes, *supra* note 571 at 613; Zywicki, *supra* note 571 at 459; Dijkema & McKendry, *supra* note 571; "Banking on the Margins Finding Ways to Build an Enabling Small-Dollar Credit Market", *supra* note 571 at 28-31; Dubner, *supra* note 571; Barrett, *supra* note 571 at 37.

[737] See Baradaran, "Small-Dollar Loan", *supra* note 502 at 107; Skiba, *supra* note 572; Mann & Hawkins, *supra* note 571; Dijkema & McKendry, *supra* note 571; Cuttino, *supra* note 571 at 1544.

dischargeable in bankruptcy for a period of time.[738] However, given the structure of the loans, and how they prevent the financial consequences that generally lead to bankruptcy, it appears inappropriate to use discharge as a means of limiting debt burdens. Progressive taxation repayment already serves that purpose. It is best to simply prohibit discharge. The length of the obligation can be limited in different ways, for instance by providing that the loans only exist for a limited period of time, after which they are automatically forgiven.[739]

The program could address two distinct needs for credit depending on the amount that is made available to beneficiaries. First, and most significantly, the program help provide "small-dollar loans" to the very poor to face periodic, unexpected events.[740] This need is currently met by alternative financial services providers. If larger amounts are made available, the state could also help alleviate liquidity barriers that have negative macroeconomic effects. The program would provide funding that would supplement existing larger-amount programs such as student loan programs. These programs may be insufficient or may make certain individuals ineligible.[741] Larger amounts would allow individuals to bridge important life transitions, for instance by undertaking further education or employment training which they would otherwise be unable to

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[738] See *Bankruptcy and Insolvency Act*, *supra* note 712, s 178(1); 11 USC § 11(a).

[739] See also Jiménez, "Ending Perpetual Debts", *supra* note 676 (proposing that all consumer debt should be periodically automatically discharged).

[740] See Atkinson, "Rethinking Credit as Social Provision", *supra* note 561 at 1133, 1152, 1157; "Payday Lending in America: Report 2: How Borrowers Choose and Repay Payday Loans", *supra* note 727; Baradaran, "It's Time for Postal Banking", *supra* note 502 at 173; AARP Foundation, *supra* note 682; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 561 at 510-20; Atkinson, "Borrowing Equality", *supra* note 561 at 1442-43.

[741] As noted, this is an inevitable impact of eligibility criteria. See West et al, *supra* note 689; Cameron & Tedds, *supra* note 686.

afford because of liquidity limitations.[742] Such transitions have positive macroeconomic effects when individuals see their income grow. Similarly, the program could help alleviating structural mismatches between labour supply and labour demand (essentially providing the capital needed for certain individuals to transition from disrupted industries to growing ones).[743]

Care should be taken in designing a program that would seek to solve both of these issues because they differ. For instance, because of the ways in which beneficiaries would spend funds from the larger-amount option to increase their income, the taxation rates could likely be significantly lower.[744] An early repayment option (with a penalty that ensures adequate funding of program[745]) could be offered for both options, but would probably be more responsive to the lower-amount option. Indeed, beneficiaries of the lower-amount option might need the funds for a limited period of time and be able to repay them relatively quickly.

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742 Lower-income individuals (including the homeless) are often at a structural disadvantage: their low income and lack of assets prevent them from saving the money they need to make investments in their future or to collateralise a loan that would fund such investments. See also Eric A Latimer et al, "Costs of Services for Homeless People with Mental Illness in 5 Canadian Cities: A Large Prospective Follow-Up Study" (2017) 5:3 CMAJ Open E576 (on the cost of providing social services to the homeless).

743 Advances in productivity, including those driven by technology, further economic growth, but they cause disruptions in the labour market and long-term changes in labour allocation amongst industries. See Russell W Rumberger, "High Technology and Job Loss" (1984) 6:4 Technology in Society 263; Karim Sabbagh et al, "Digitization for Economic Growth and Job Creation" (2013), online: *World Economic Forum* <https://www3.weforum.org/docs/WEF_GITR_Report_2013.pdf>.

744 As an alternative, the rates could be the same, and one program could cross-subsidise the other.

745 Early repayment prevents the state from collecting additional, progressive taxation.

Given my discussion in earlier chapters, I would of course advocate for simple administration and delivery of the program. We should limit and eliminate, to the extent possible, all barriers to the very poor being informed of the program and benefitting from it.[746] Loan repayment would be particularly simple, as it would occur through the taxation system. The entire process would be automated. Additional taxation would be applied to beneficiaries when their yearly tax return is assessed.[747] Disbursement of funds would not be as simple, but it could be simplified to ensure maximal participation in the program. For those with a bank account, the state could disburse requested funds automatically upon a simple (non-substantive[748]) application. Alternatively, those who file tax returns could apply through their tax return and receive the funds in the same account used to receive their tax refund. (Then, repayment would be automated based on the amount borrowed.)

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[746] See generally Sunstein, "Sludge Audits", *supra* note 718; Sunstein, *Sludge: What Stops Us from Getting Things Done and What to Do About It*, *supra* note 718; Richard H Thaler & Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale, 2021).

Nothing would prevent the program from being partially administered through the extensive infrastructure of the postal service, with the advantages highlighted in previous chapters.

[747] Some individuals do not need to file a tax return because their income is low. Their income would also mean that they do not need to repay the loan. See "Do You Have to File a Return?" (24 January 2023), online: *Canada Revenue Agency* <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/you-have-file-a-return.html>; "Who Needs to File a Tax Return" (January 2023), online: *IRS* <https://www.irs.gov/newsroom/who-needs-to-file-a-tax-return>. See also Cameron & Tedds, *supra* note 686 at 32 (discussing challenges in delivering social programs through the tax system); Fleischer & Hemel, "The Architecture of a Basic Income", *supra* note 686; Fleischer & Hemel, "Atlas Nods: The Libertarian Case for a Basic Income", *supra* note 686 (arguing that a universal basic income should be delivered through the Social Security Administration in the United States).

[748] As discussed above, there would be no eligibility criteria or restrictions on the use of funds.

Given the very poor's lack of access to the banking system,[749] options should be available to obtain funds in cash or through prepaid cards.[750] These could be made available at existing government offices or, potentially, through the postal service. As long as the state has a way to keep track of cumulative amounts borrowed (which can be done with ease through a central electronic database), the means of disbursement is immaterial – and there can be multiple means of disbursement. Regardless of how funds are disbursed, repayment is cumulative and automatically administered through the tax system.

[749] See e.g. "The Underbanked Canada: February 2016", *supra* note 682; Baradaran, "It's Time for Postal Banking", *supra* note 502 at 168; Baradaran, "How the Poor Got Cut Out of Banking", *supra* note 502 at 485-86; Baradaran, "Small-Dollar Loan", *supra* note 502; Christopher, "Mobile Banking", *supra* note 650; "How America Banks: Household Use of Banking and Financial Services", *supra* note 682; Barr, *supra* note 561; Caskey, *supra* note 559; Johnson, *supra* note 682; Huckstep, *supra* note 682; AARP Foundation, *supra* note 682; Fantauzzi, *supra* note 682.

[750] Delivery of government programs through prepaid cards is discussed in note 134, above.

Obtaining funds quickly and easily is a preference of the very poor. See Stegman & Faris, *supra* note 571; Austin, "Of Predatory Lending", *supra* note 561; "How America Banks: Household Use of Banking and Financial Services", *supra* note 682. Additionally, the proposed program would meet their preference for privacy because they would not need to provide any information to apply or interact with a government agent.

VII. Conclusion

This project provided an analysis of access to credit for the very poor. It began with the ambitious aim of understanding what it means to be poor and why poverty persists in wealthy societies. It ended with a proposal for a novel government program that might bear unique promise to get us closer to eliminating poverty. Along the way, we encountered and benefitted from a discussion of much more fundamental issues: about how rhetoric shapes us and our perspective, about the promise of credit and the danger of debt, about marginalisation, disadvantage, and equity.

Chapter II defined the group I label as the very poor. It critically analysed, to eventually defend, my use of this label. This short chapter also introduced the importance of rhetoric, both in law and in defining individual and collective conceptions of poverty. The importance of rhetoric remained an important theme that undergirds many aspects of the arguments presented in subsequent chapters.

Chapter III discussed the reality of the very poor. It focussed on how the very poor access credit. The chapter argued that the very poor use credit in different ways than the rest of the society, which contributes to their disadvantage and marginalisation. It analysed how and why the very poor rely on alternative financial services providers for banking and credit. The chapter introduced the concept of a "façade of informality," which helps explain why the very poor choose to rely on alternative financial services providers even when other, cheaper options may be available – tying this social preference to other aspects of their identity. The chapter then introduced the financial services and products offered by alternative financial services providers. The services they provide usually replace bank accounts and ancillary operations, such as cashing a cheque or depositing funds, while their credit products replace traditional lending. They include payday lending, earned wage access programs, cheque cashing, pawnbroking, automobile title lending, refund anticipation lending, and rent-to-own schemes. Finally, the chapter briefly introduced the role of the state in extreme poverty by discussing how the state often becomes a creditor of the very poor through debts resulting from government programs and the justice system. The state has unique power in creating and collecting these debts and, as a result, contributes to entrenching extreme poverty.

Chapter IV further analysed the role of the state in extreme poverty. It focussed on the ways in which the state has sought to respond to the prevalence of poverty and the growing importance of alternative financial services providers. The chapter argued that the importance of credit provided by alternative financial services providers grew as the state gradually reduced the direct assistance it provides to the very poor. Social assistance programs initially provided unconditional cash payments to beneficiaries. Over the past several decades, they were reconceptualised to limit cash assistance and impose eligibility conditions relating to integration into the labour force. This discussion further emphasised the importance of rhetoric in the constitution and individual and collective identities. The chapter argued that rhetoric played a fundamental role in shaping the conception of citizens and state actors that social assistance programs disincentivise work and that some (or most) individuals who benefit from them are able but unwilling to work. As social assistance programs eroded and the safety net was privatised, the very poor grew increasingly reliant on the expensive and predatory credit provided by alternative financial services providers. The very poor have also internalised this shifting paradigm. Many choose not to claim benefits they are entitled to.

The chapter then discussed how the state has intervened in the provision of credit to groups other than the very poor – mainly middle-class individuals – through programs that incentivise home ownership and higher education. While the state's intervention through these programs generally involves various forms of guarantees of credit risk, the programs have direct and indirect costs, just like those which seek to assist the very poor. Through these credit programs, the state invests significant financial resources that otherwise could be dedicated to assisting those in greater need. Additionally, the analysis of these programs helped refute arguments that the state does not, should not, or is not competent to get involved in the provision of credit.

Finally, the chapter discussed the state's approach to alternative financial services providers, as well as how the state uses bankruptcy law to alleviate poverty. Alternative financial services providers were initially regulated through usury provisions. However, over time, governments chose to exempt alternative financial services providers from most forms of financial regulation – while subjecting banks and traditional financial services providers to increasingly stringent regulation. Each Canadian province except Quebec allows alternative financial services providers to charge interest rates of hundreds of percentage points per year. The chapter's discussion of bankruptcy law helped delineate how the state can use public law mechanisms to allocate some of the cost of social support to private actors.

Chapter V provided a sustained case study of the most analogous alternative to my proposed government program: postal banking. It used a recently announced partnership between Canada Post and the Toronto-Dominion Bank to assess the potential role of the postal service in providing banking and credit. Through this partnership, Canada Post offers personal loans at interest rates that exceed those of traditional bank loans but are significantly lower than those of alternative financial services providers. The chapter noted that Canada Post, and similar postal services across the world, have a long and rich history of providing various financial services to their citizens. Citing more than one hundred archival sources, the chapter provided the first comprehensive account of the emergence, growth, and eventual decline of Canada's historical federal postal bank. This account helped us assess the significance, promise, and risks of Canada Post's – and the Canadian state's – contemporary foray into banking and credit. It also raised, and contextualised, broader issues regarding the fundamental importance of banking and credit to social participation and the correlative role and potential responsibility of the state to ensure the provision of banking and credit to citizens.

Chapter VI was the crux of the project. It set out a proposed government program which could remedy some of the issues discussed in earlier chapters. The state would provide credit to the very poor through loans repaid through additional, progressive taxation. Individuals whose income does not reach a certain level would not need to repay the loan, whereas those with a high income would effectively repay a multiple of the loan principal amount. Repayment would depend on income, but only for a limited period of time. The program bears unique potential to alleviate persistently lower social mobility for the very poor.

The various sections of chapter VI were structured differently and played different roles. They each helped support the need for the program I propose and delineate the key features of the program that make it different from current and proposed alternatives – and uniquely responsive to the circumstances and preferences of the very poor explored throughout the project. The first section of the chapter built on chapter V and further discussed postal banking. It focused on the United States and presented a contemporary proposal by scholars that would use the postal service to enhance access to banking for the very poor. Through this discussion, the section on postal banking presented a contextual history of and assessed the contemporary justification for state intervention. The following section was central to the argument advanced in this project. It provided a theoretical framework through which we can conceptualise state intervention in the private sector. It laid out, to then develop, a theoretical framework that is rooted antitrust law. This framework both explains and normalises state intervention in the marketplace that might initially appear heavy-handed. My key contribution was an argument that state intervention is best conceptualised as falling along a spectrum, from the enactment of comprehensive, specialised regulatory regimes and obligations to the direct provision of a product or service by the state, and then to the monopolisation of an entire industry. I argued that each of these forms of intervention serves the same goal of ensuring that essential products and services are provided to citizens. This broader framework will remain relevant to our conceptualisation of state intervention beyond my proposed program and the type of state intervention I proposed. I then used this theoretical framework to argue that alternative solutions to access to credit for the very poor – other than direct provision of credit by the state – have previously failed and will continue to provide an incomplete and inadequate answer to the problem. The sections on postal banking and antitrust law provided analogies to regulation and programs that were previously, or are currently, implemented. In addition to highlighting the key features of my proposed program, they advanced a normative argument for state intervention in the provision of credit. The following section discussed the universal basic income, a proposed program that would have significant similarities to the program I propose. Unlike postal banking and antitrust law, it has not been implemented. However, as discussed in the following sections of chapter VI, existing, recent forms of state intervention also have significant similarities to a universal basic income. The comparison to a universal basic income helped delineate how my proposed program is a hybrid between a loan and a grant program. Its characteristics of universal accessibility and dischargeability were best understood through this comparison, with reference to theoretical justifications used to support universal basic income. The last section of the chapter circled back to the initial program description and provided further detail regarding my proposed government program.

This project provided a concrete solution to a specific problem. It proposed a program that could improve inadequate access to credit for those who remain unbanked and underbanked. In doing so, it raised and tackled much more fundamental issues of poverty, marginalisation, and disadvantage. Asking about how the state should address inadequate access to banking requires a defense of the importance of banking and credit to social participation, and an assessment of why the private sector has failed to provide adequate access. At least along the way, we found ourselves deeply entangled in fundamental issues of state responsibility and marginalisation. We cannot discuss poverty, or how to solve it, and sidestep these issues. Hopefully, this dissertation will have provided a faithful description of the situation of the very poor, what caused it, and what entrenches it, as well as a theoretical framework through which we can understand and justify state intervention that might alleviate it. I can only end where I began. As I mentioned in my second footnote, the issues of poor people "need a theoretical foundation because people with power said so." This dissertation was an exercise in translating their concerns into the language of academic discourse and staking their place in the important conversations it enables. It will decidedly be for others to decide whether I succeeded. I can only hope to have done them justice.

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