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Females on the Fringe: Considering Gender in Payday Lending Policy

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FEMALES ON THE FRINGE: CONSIDERING GENDER IN PAYDAY LENDING POLICY

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I. INTRODUCTION

Debt impacts not only our pocketbooks, but also our emotional and relational well-being.[1] Debt may lead to bankruptcy, homelessness, and even prison time.[2] Furthermore, debt causes stress that may instigate domestic abuse, divorce, and physical illness.[3] Indeed, the Department of Defense ("DOD") has deemed debt a matter of national security. This is why it prescribes special consumer lending protections for members of the military and their families.[4] These protections include a 36% interest rate cap on small-dollar short-term consumer loans; these loans are referred to as "payday loans," because their repayment is often tied to a paycheck.[5] The DOD deemed these special protections necessary in order to guard military members from the perils of payday loans' notorious traps.[6]

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1. *See* Deborah Thorne, *Women's Work, Women's Worry? Debt Management in Financially Distressed Families*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 136, 137-53 (Katherine Porter ed., 2012) (discussing stress due to financial issues, and the impact of individual's well-being).

2. *See* Molly McDonough, *Payday Lenders Using Courts to Create Modern-Day Debtors' Prisons in Missouri, Critics Say*, A.B.A. J. (Aug. 20, 2012, 5:52 PM), http://www.abajournal.com (explaining how debtors may be arrested to answer to a civil judgment on a debt in Missouri).

3. Thorne, *supra* note 1, at 137-53 (discussing impacts of financial stress).

4. *See* U. S. Department of Defense, *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*, 5 (Aug. 9, 2006), *available at* http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf [hereinafter *DOD Report on Predatory Lending*] (noting how predatory lending harms military readiness); *Relationships and Stress*, MILITARY ONESOURCE, http://www.militaryonesource.mil/search?content_id=270175 (last visited Oct. 1, 2013) (directing means for navigating financial stress and importance with relationships).

5. This Article will refer to small-dollar short-term loans as "payday loans," as most commentators do. However, these loans are not necessarily tied to paychecks and the amounts and terms of these loans and laws' coverage vary greatly. *DOD Report on Predatory Lending*, *supra* note 4, at 1-49. *See also* Charis E. Kubrin et al., *Does Fringe Banking Exacerbate Neighborhood Crime Rates?*, 10 CRIMINOLOGY & PUB. POL'Y 437, 437-53 (2011) (exploring workings of payday loans).

6. *See DOD Report on Predatory Lending, supra* note 4, at 1-50 (also noting predatory marketing to military members).

Payday loans operate under the radar of banking regulations and trap consumers in a cycle of debt from which they often cannot escape.[7] These loans are just one example, along with title loans and rent-to-own contracts, of what are referred to in this Symposium and elsewhere as "fringe" financial products. This label flows from assumptions that only a small minority of individuals use them on a limited basis, while most people qualify for, and choose, traditional financing through bank accounts or mainstream credit cards. In reality, however, so-called fringe financial products are growing in popularity, as more consumers are unbanked or ineligible for traditional bank loans and credit cards.[8]

Indeed, payday loans have moved mainstream. "[P]ayday lenders and check cashers outnumber McDonald's restaurants and Wal-Mart stores in the United States," and consumers of all types turn to these loans for so-called "fast cash."[9] In theory, payday loans are meant to provide a safety net for individuals who need small amounts of cash to get through temporary financial setbacks.[10] Although payday loans take many forms, a typical payday debtor takes out a small-dollar loan for a "fee" and obtains an interest-only loan that is due to be paid in full in a few weeks. The problem is that when the few weeks are up, the consumer is usually unable to repay the loan. Instead, the consumer may "roll over" or take out another loan and again pay interest, fees and other administrative costs. As this cycle continues, the consumer ends up paying in excess of 400% annually in hopes of merely covering these fees and other charges.[11]

Professor Nathalie Martin, who has extensively studied payday lending, has concluded that "the debt trap *is* the business plan" of these lenders.[12] This debt trap has raised red flags for federal regulators, including the Consumer Financial Protection Bureau ("CFPB"), which was established under the Dodd-Frank Wall Street Reform and Consumer Protection

7. Protecting Consumers From Unreasonable Credit Rates Act of 2012, S. 3452, 112th Cong. § 2(3), 2(5) (2012) (noting such findings as a basis for proposing stricter rules on payday loans).

8. *See* FED. DEPOSIT INS. CORP., 2011 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 1-15 (2012), *available at* http://www.fdic.gov/householdsurvey/2012_unbankedreport.pdf; Martha Perine Beard, *Reaching the Unbanked and Underbanked*, CENTRAL BANKER, Winter 2010, http://www.stlouisfed.org/publications/cb/articles/?id=2039.

9. Jim Hawkins, *The Federal Government in the Fringe Economy*, 15 CHAP. L. REV. 23, 23 (2011).

10. Nathalie Martin, *1,000% Interest–Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 564-77 (2010) (explaining the payday lending history and development, and their real-world applications in today's economy).

11. *See id.* at 569-77 (explaining payday lenders' business plan and high profits due to repeat borrowers).

12. *Id.* at 577.

Act ("Dodd-Frank").[13] The CFPB has made payday lending awareness and reform a priority project and warns consumers on its consumer.gov website to read the fine print terms of payday loans carefully.[14] It also has expressed great concern regarding the industry and aims to issue regulations to protect consumers from the cycle of costly debt that ensnares payday loan borrowers.[15]

When examining the industry, the CFPB is poised to consider payday lending's impact on women and their children. Studies show that a disproportionate percentage of payday loan borrowers are female.[16] For example, a 2010 study reported that, on average, 64% of the visitors to 18 different Internet payday loan sites in November of that year were female.[17] Furthermore, over half of the female payday loan consumers reported having children seventeen years old or younger in their households. These reports overall suggest that a significant portion of the borrowers were single mothers.[18]

Researchers using 2007 Federal Reserve data similarly reported that a disproportionate number of households headed by women use payday loans, as compared to households headed by men or married couples.[19] Studies in Wisconsin, Illinois, and Colorado also indicated a predominance of women among payday loan consumers in those states.[20] This predomi-

13. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank].

14. *Payday Loans and Cash Advances*, CONSUMER.GOV, http://www.consumer.gov/ (last visited Feb. 9, 2013). *See also* David S. Evans & Joshua D. Wright, *How the Consumer Financial Protection Agency Act of 2009 Would Change the Law and Regulation of Consumer Financial Products*, 2 BLOOMBERG L. REP.: RISK & COMPLIANCE, Oct. 2009, at 3-4, *available at* http://ssrn.com/abstract=1491117 (critiquing the CFPA Act for advocating broad applications without adequate evidentiary basis).

15. CONSUMER FIN. PROT. BUREAU, PAYDAY LOANS AND DEPOSIT ADVANCE PRODUCTS: A WHITE PAPER OF INITIAL DATA FINDINGS, 1-43 (2013), *available at* http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf [hereinafter CFPB WHITE PAPER].

16. *See also* Michael H. Anderson, *An Economic Investigation of Rent-to-Own Agreements*, 89 CHI.-KENT L. REV. 141, 156 (2013) (observing the same phenomenon in rent-to-own agreements).

17. Nathalie Martin & Ernesto Longa, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 LOY. CONSUMER L. REV. 524, 534-35, 534 n.44 (2012) (discussing the study).

18. *Id.* at 535-46 (noting additional studies that indicate the prevalence of single mothers as among payday loan borrowers).

19. Donald P. Morgan & Kevin J. Pan, *Do Payday Lenders Target Minorities?*, LIBERTY STREET ECON. (Feb. 8, 2012), http://libertystreeteconomics.newyorkfed.org/2012/02/do-payday-lenders-target-minorities.html (finding that users of payday loans are worse off economically than non-users).

20. Martin & Longa, *supra* note 17, at 545-49 (noting statistics for Wisconsin, Illinois, and Colorado); ADM'R OF THE COLO. UNIF. CONSUMER CREDIT CODE (UCCC), PAYDAY LENDING DEMOGRAPHIC AND STATISTICAL INFORMATION: JULY 2000 THROUGH DECEMBER 2009, 1-4 (rev. ed. 2010), *available at* http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/DDLASummary2009corr.pdf (reporting predominance of women as payday loan consumers in Colorado from 2001 through 2009).

nance of female payday loan customers also appears internationally, with studies showing 25% more women than men using payday loans in Great Britain due, in large part, to marketing that targets women.[21]

The reasons why women disproportionately rely on payday loans are not clear. This reliance may be due, in part, to persisting wage gaps between women and men.[22] In addition, studies of the subprime market show that men obtain more attractive mortgages than women do, and lenders steer minorities and women toward subprime and less-desirable loan products, even when they can qualify for prime mortgages.[23] Women also are less likely than men to try to negotiate for better loans[24] and traditional lenders often hesitate to lend to single mothers or women who have failed to establish their own credit histories.[25] In addition, women in abusive relationships may end up with high loads of "coerced debt," which may lead to poor credit ratings.[26]

Under these circumstances, women may look to payday lenders for quick cash requiring little to no credit checks.[27] Multiple payday loans, in turn, may lead to cycles of debt and eventual bankruptcy. In fact, more women than men file for bankruptcy.[28] Debt loads on women often impact

21. Ruth Lythe, *How Women Are Being Seduced into Debt by Payday Parasites: 'Instant' Cash Firms with Interest Rates as High as 16,000% are Ruining Lives*, DAILY MAIL, (Jan. 31, 2012, 11:27 AM), www.dailymail.co.uk/news/article-2094115/Instant-money-loans-Payday-loan-firms-ruining-lives.html (describing advertisements airing during TV shows targeting women and payday loan websites showing young women using payday loans to make them "glamorous").

22. ELLEN YAU ET AL., COMPARING SALARIES AND WAGES OF WOMEN SHOWN ON FORMS W-2 TO THOSE OF MEN, 1969-1999, at 274, *available at* http://www.irs.gov/pub/irs-soi/99inw2wm.pdf (last updated Aug. 29, 2013) (noting wage gap).

23. *See* Carol Necole Brown, *Women and Subprime Lending: An Essay Advocating Self-Regulation of the Mortgage Lending Industry*, 43 IND. L. REV. 1217, 1217-22 (2010) (compiling and citing research regarding discriminatory lending). The article poses the question: "Why would people who could qualify for prime mortgage loans end up with subprime loans?" *Id.* at 1217.

24. *See* Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 116-20, 125-26 (2008) (discussing research regarding gender in negotiations). Alice F. Stuhlmacher & Amy E. Walters, *Gender Differences in Negotiation Outcome: A Meta-Analysis*, 52 PERSONNEL PSYCHOL. 653, 653-77 (1999) (digesting research indicating gender differences in negotiation, but noting that some studies revealed no gender differences in negotiation outcomes).

25. Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 483-502 (2013).

26. Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. PA. L. REV. 363, 363-80 (2013) (explaining how abused women may become subject to coerced debt).

27. *See* Zoë Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 SCHOLAR 63, 63-65 (2012) (highlighting how payday lenders target minorities and women suffering tough financial times).

28. *See* Nathalie Martin & Koo Im Tong, *Double Down-and-Out: The Connection Between Payday Loans and Bankruptcy*, 39 SW. U. L. REV. 785, 793-97 (2010) (noting that although the data is mixed depending on study design and focus, significant evidence suggests that payday loans contribute to debtors' need to file for bankruptcy); Leslie E. Linfield, 2008 ANNUAL CONSUMER BANKRUPTCY

not only the debtors themselves but also their children and families. Debt loads also impact the charities and social services that step in to provide food, shelter, and healthcare for these struggling families. Furthermore, women tend to suffer more from financial stress than men and often worry about caring for their families.[29] Debt may also hinder women from escaping abusive situations.[30]

Therefore, context matters with respect to debt and establishing lending policies.[31] Accordingly, the CFPB and other policymakers should include contextual analysis and consideration of the impact on women in their current study of the payday lending industry.[32] The CFPB's Director, Richard Cordray, opened the door for more nuanced analysis in noting how repeated use of these high-cost loans "by a certain subset of customers" can cause these consumers great harm.[33] In addition, Dodd-Frank directs the CFPB and the Office of Financial Education to assist consumers in moving away from fringe banking products such as payday loans.[34]

This Article explores gender with respect to payday lending. Part II discusses contextual and empirical data regarding the realities of payday lending and highlights the predominance of women among payday loan users. Part III explores possible reasons why women may be drawn toward payday loans and further contextualizes the problems associated with payday loan usage. Part IV summarizes legal mechanisms that currently regu-

DEMOGRAPHICS REPORT: AMERICAN DEBTORS IN A RECESSION 4 (INST. FOR FIN. LITERACY) (2009), *available at* http://ssrn.com/abstract=1414337 (reporting 47.2% male versus 52.8% female debtors in 2007 and 47.4% male versus 52.6% female debtors in 2008 filing for bankruptcy).

29. Victor Ricciardi, THE FINANCIAL PSYCHOLOGY OF WORRY AND WOMEN 1 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093351 (noting that more research is needed, but suggesting that women do tend to carry a disproportionate burden of worry due to finances); *Do Men or Women Worry More?*, ABCNEWS (Feb. 23, 2006), http://abcnews.go.com/GMA/Health/story?id=1653218#.UcdXV5zNkYI: (discussing a study in 2006 that showed that women worry more than men).

30. NATIONAL CONSUMER LAW CENTER, MYTHS & REALITIES ABOUT THE CARD ACT INDEPENDENT ABILITY-TO-PAY PROVISION (2012), *available at* http://www.nclc.org/images/pdf/credit_cards/ib_household_income_6_june_2012.pdf (noting how women are more at risk of violence and tied to an abusive spouse when they are unable to establish independent credit lines and histories).

31. Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217, 1219-21 (2004) (emphasizing importance of contextual analysis of fringe lending as a "powerful tool for discerning patterns of control, coercion, subjugation, resistance, and prosperity").

32. *See* Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1249-50, 1259-65 (1999) (exploring how contract law has mistakenly been deemed immune from male bias and arguing that contract law is susceptible to sexism).

33. Carter Dougherty, *Payday Loans Get U.S. Consumer Bureau Scrutiny as 'Debt Traps'*, BLOOMBERG BUSINESSWEEK (Feb. 27, 2013), http://www.businessweek.com/news/2013-02-26/payday-loans-get-scrutiny-from-consumer-bureau-as-debt-traps (discussing CFPB's interest in regulating short term loans and discussion of extending its complaint system to cover these loans in 2013).

34. Hawkins, *supra* note 9, at 25-39.

late discriminatory lending and payday loans, and Part V suggests rationale for more contextualized policymaking as well as means for reducing reliance on payday loans by women and their families. Part VI thus concludes by calling for contextualized research and consideration of this research in crafting effective policies regarding payday loans.

II. PAYDAY LENDING REALITIES

Where do people turn when they need cash, have poor credit, possibly no bank account, and no means for feeding their families until their next paycheck? One option is to get a payday loan, which may be attractive due to accessibility, relative anonymity, and independence from credit ratings.[35] These short-term loans often provide a much-needed safety net for some borrowers. However, they also have been termed "devilishly complex financial undertakings" that the government must police to save consumers from deceptively high interest rates and fees.[36] Furthermore, payday loans feed on borrowers' over-optimism regarding repayment and foster a secretive debt culture marked by financial embarrassment and stress.[37]

A. Salient Aspects of Payday Loans

Lenders advertise payday loans as small-dollar, short-term means for obtaining fast cash to get through a financial emergency. These lenders cater to consumers with little to no borrowing alternatives by offering quick cash without asking for the same proof of ability to repay that banks require. In contrast to typical banks and credit card companies, payday lenders do not usually analyze or require information regarding a potential borrower's total level of indebtedness and credit histories based on information from Equifax, Experian, or TransUnion.[38] Accordingly, these loans are usually offered by specialized non-bank firms, which are not subject to the same FDIC scrutiny as traditional banks.

As noted above, these loans are thus considered to be "fringe" financial products, operating under the radar of traditional banking rules and,

35. *See Margin Calls*, THE ECONOMIST (Feb. 16, 2013), http://www.economist.com/news/finance-and-economics/21571882-life-edges-americas-financial-mainstream-margin-calls (discussing the growing percentage of "unbanked" adults in the United States and their reliance on payday loans).

36. *See* Hawkins, *supra* note 9, at 62-63 (quoting Elizabeth Warren).

37. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 101, 155-56 (2008) (highlighting how payday lenders target vulnerable consumers with a high likelihood to roll-over their loans, thus, incurring high debt).

38. *Guidelines for Payday Lending*, FED. DEPOSIT INS. CORP., http://www.fdic.gov/news/news/financial/2005/fil1405a.html (last updated Feb. 25, 2005) (noting guidelines and best practices regarding payday lending).

theoretically, only used by the relatively few individuals who prefer or have no choice but to use these products in lieu of mainstream bank accounts and credit cards. Researchers found that payday loan users have average and median credit scores below 520, which is significantly lower than the average score of 680 in the general population.[39] They also found that payday loan applicants with at least one open credit account are reported delinquent by at least 30 days on half of their accounts.[40]

Furthermore, payday loans are particularly popular among consumers who have immediate financial needs and cannot afford to navigate a lengthy credit approval process. The promise of quick cash is a payday lender's marketing hook. Lenders promote these loans as a one-time and convenient means for obtaining short-term funds without the credit approval processes or ongoing debt commonly associated with credit cards.[41] Lured by this hook, typically optimistic consumers expect that they will pay these loans off quickly and only use the loan money to alleviate immediate needs and get back on their financial feet.

This optimal situation occurs very rarely. Instead, most payday loan borrowers use the funds for recurring expenses and continue to suffer cash shortfalls, even when they describe their financial situation as "good."[42] The PEW Charitable Trusts found in its recent study that only 14% of payday loan or bank advance borrowers could afford to repay the debt within the initial term.[43] Most borrowers renew or re-borrow, remain indebted for five months of the year, and pay more than $500 in fees over that time.[44] PEW found that 60% of payday loans go to people using at least twelve loans per year and 97% go to people taking out three or more loans per year.[45] The Centre for Financial Services Innovation similarly found that the average payday borrower takes out eleven payday loans per year.[46]

Payday lenders rely on this repeat business to ensure profitability.[47] In addition, they effectively charge annual percentage rates ("APR") upwards

39. Neil Bhutta et al., *Payday Loan Choices and Consequences* 13 (Vand. U. L. Sch. L. & Econ., Working Paper No. 12-30, 2013), *available at* http://ssrn.com/abstract=2160947.

40. *Id.* at 13-14.

41. *See* THE PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS 20-30 (2d report 2013) [hereinafter 2013 PEW REPORT].

42. *See id.* at 9-10 (adding focus group data indicating borrowers' struggles to "catch up" and their propensity to have multiple jobs in pursuit of that goal).

43. *See id.* at 13-14.

44. *See id.* at 19-21; THE PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 9-14 (2012) [hereinafter 2012 PEW REPORT].

45. *See* 2013 PEW REPORT, *supra* note 41, at 19-21.

46. *See Margin Calls*, *supra* note 35.

47. *See* 2013 PEW REPORT, *supra* note 41, at 13-14 (highlighting that payday lenders' business model and means for profiting relies on the assumption that most will not pay off their loans by the end

of 400%.[48] This is not readily apparent to borrowers when they first get payday loans, however, because they focus on the initial fees instead of understanding the APRs.[49] In turn, lenders do little to explain loan terms or clarify how fees and additional costs translate into high APRs. It is therefore not surprising that consumers find it difficult to compare lending products and to see how payday loans' true costs compare with credit cards.[50]

Consumers also mistakenly perceive that payday loans will prevent them from over-drafting their checking accounts. Evidence shows that the majority of payday loan borrowers have over-drafted in the past year.[51] Furthermore, 27% of survey respondents in PEW's payday loan study reported that lenders' withdrawals from their accounts caused the overdrafts.[52] Moreover, many borrowers end up resorting to financial tactics such as borrowing from a friend or family member, using a tax refund, or using other credit products in order to repay the loans.[53] This may be true even when borrowers could have pursued these tactics at the outset, and adds to the frustration borrowers feel as they become ensnared in a debt trap.[54]

Desperation and the ease of obtaining payday loans lure in consumers. One-third of borrowers admit that they would take a payday loan on any terms.[55] PEW found that 59% of payday loan borrowers had maxed out their credit cards and 38% had been or would be turned down for a credit card.[56] Another group of researchers similarly found that only 59% of the payday applicants they studied had general-purpose credit cards, and over 78% of all payday applicants had zero credit available on credit cards.[57] They also found that these payday loan applicants had more credit inquiries and denials relative to the general population in the time leading up to utilizing payday loans. This suggested that these applicants had searched,

date and that most borrowers will become repeat customers who continually take out more loans to cover initial obligations).

48. *See Margin Calls*, *supra* note 35.

49. *See* 2013 PEW REPORT, *supra* note 41, at 13-27 (noting misperceptions and misunderstanding of the initial fee verses the interest rate over time and the additional fees one may incur by not paying by the initial due date).

50. *See id.* at 28 (noting how borrowers mistakenly believe that bank deposit advances are safer than payday loans).

51. *See id.* at 32-34.

52. *See id.* at 6.

53. *See id.* at 36-38.

54. *See id.* at 39-41.

55. *See id.* at 19-30 (citing desperation, perception, reliance, focus on fee, trust, and temptation as six main reasons people use payday loans that they cannot afford).

56. *See id.* at 31.

57. Bhutta et al., *supra* note 39, at 13.

unsuccessfully, for alternative and cheaper forms of credit before utilizing payday loans.[58]

Accordingly, "payday loan applications occur when credit card lines are generally exhausted and when the search for credit becomes much more intense but is largely unsuccessful."[59] This drives borrowers to accept payday lenders' default loan structures and timelines, even when they have a right to opt for less expensive structure. For example, Washington state law gives payday loan borrowers a no-cost option to convert the loan into a more affordable 90- to 180-day installment loan, but only 1 in 10 borrowers take advantage of this option.[60]

The payday lending trap is not just a domestic problem; it is a far-reaching global issue. This is especially apparent when lenders pitch high-cost short-term loans through the Internet. For example, Wonga.com, an online payday lender based in the United Kingdom, has received attention as a growing "high-tech loan shark 'laughing all the way to the bank.'"[61] Wonga markets its payday loans as "simple, fast and convenient" and boasts that "[t]here are no worries about who is going to know" because one can apply "from the quiet of your own home."[62] Wonga also says that the 4,214% annual APR on its typical loans is misleading because it expects debtors to repay the loans in a month or less.[63] However, most debtors cannot repay in that amount of time and U.K. consumers complain that Wonga has preyed on them in times of financial desperation, trapping them in a "vicious cycle" of debt.[64]

58. *See id*. at 14.

59. *Id.* at 26.

60. *See* 2013 PEW REPORT, *supra* note 41, at 24-26 (confirming other research indicating that consumers are generally inert by nature).

61. Matthew Campbell & Amy Thomson, *Britain's Wonga: Payday Lender and Proud of It*, BLOOMBERG BUSINESSWEEK (Mar. 7, 2013), http://www.businessweek.com/articles/2013-03-07/britains-wonga-payday-lender-and-proud-of-it (highlighting Wonga's profit growth of $18.6 to $69 million from 2010 to 2011 and its expected debut in the United States with backing from California venture capitalists).

62. *Loans Online*, WONGA.COM, https://www.wonga.com/money/wonga-loans-online/ (last visited Apr. 26, 2013) (further boasting that Wonga does not rely on credit ratings or checks, but requires a U.K. bank account and regular employment).

63. Jill Insley, *Payday loans: the APR is sky-high, the pain is higher still*, GUARDIAN (Dec. 9, 2009, 4:04 PM), http://www.guardian.co.uk/money/2011/dec/09/payday-loans-get-cheap-credit. *See also High APR and US National Debt*, OPENWONGA.COM (Sep. 21, 2011), http://www.openwonga.com/news-and-views/view/sample; *How Your Wonga Loan Works*, WONGA.COM, https://www.wonga.com/money/how-to-wonga/ (last visited Oct. 3, 2013) (noting that costs go up if the borrower does not keep his promise and that there are additional fees if one cannot pay when the time expires).

64. *See "Don't Do It! Don't Make My Mistake!"*, MONEY.CO.UK, http://reviews.money.co.uk/review/102787-dont-do-it-dont-make-my-mistake.htm (last visited Oct. 3,, 2013) (listing scathing reviews and sad stories regarding Wonga loans).

B. Prevalence of Female Payday Loan Borrowers

Payday loan debt is problematic for all consumers who use payday loans. However, evidence shows that this debt may be especially worrisome for women, making gender relevant in payday lending debates. Traditional baseline assumptions for debate and policy-making like classical contract assumptions and law and economics theory have failed to properly address law in action, let alone gender's role in real-world contracting.[65] The reality is that individuals in the marketplace behave in various ways that often have little to do with traditional economic cost-benefit analysis. In addition, consumers usually do not have perfect information and data on bankruptcy filings suggests that women have fallen financially behind men. This impacts not only women's finances, but also their physical and emotional health—as well as that of their children and families. Contextual analysis of lending and debt is thus essential to help "expose the structural predicates to what is spoken of largely as a matter of individual failure."[66]

1. National Research

Many studies suggest that women are overrepresented among payday loan borrowers.[67] As noted above, a 2010 survey of Internet lending revealed the high prevalence of female payday loan borrowers, and studies in various states support this result.[68] The 2010 study was a follow-up to a similar 2008 study, but it utilized a larger sample size (2,228,799 unique visitors to eighteen different payday loan sites).[69] The researchers with Online-Payday-Loans.org who conducted this study found a mean of 64% of the payday loan consumers were women.[70] The site with the highest percentage of female consumers (CashOne) had 72%, while the site with

65. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN L. REV. 1471, 1476–80, 1546–47 (1998) (discussing limits of theory and indicating hope that economists and lawyers would incorporate empirical findings into their assumptions).

66. *See* Austin, *supra* note 31, at 1221 (emphasizing the importance of contextual analysis of small-dollar lending).

67. *See* AMANDA LOGAN & CHRISTIAN E. WELLER, WHO BORROWS FROM PAYDAY LENDERS? AN ANALYSIS OF NEWLY AVAILABLE DATA 1-12 (Ctr. for Am. Progress 2009), *available at* http://www.americanprogress.org/issues/2009/03/pdf/payday_lending.pdf; 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*, 51 S.C. L. REV. 589, 633-34 (2000).

68. *See* Martin & Longa, *supra* note 17, at 545-49 and accompanying text; *Payday Loan Demographics Study – December 2010*, ONLINE-PAYDAY-LOANS.ORG, http://www.online-payday-loans.org/articles/demographics-december-2010 (last visited Oct. 3, 2013) [hereinafter *2010 Payday Loan Study*].

69. *See 2010 Payday Loan Study*, *supra* note 68.

70. *See id.*

the lowest (DelawareFastCash) had 54%.[71] Furthermore, 52% of the payday loan consumers had children under age 17 in their households, suggesting that at least some of these consumers are single mothers. However, these consumers are not necessarily poor and uneducated, as some may assume. Researchers found that only an average of 26% of the payday loan customers earned less than $30,000 per year and over 50% of consumers had attained college or higher levels of education.[72]

Furthermore, studies have indicated that roughly 60% of payday loan borrowers are female.[73] "A typical borrower is likely to be a woman who earns anywhere from $18,000 to $50,000 a year."[74] Evidence also indicates that many of these borrowers are struggling mothers.[75] Stories of payday lenders' strategically targeted marketing to such borrowers prompted one computer programmer to launch a satirical website using "patent-pending Poor Finder™ technology" to locate customers who are likely to become repeat customers and continually pay exorbitant fees without ever satisfying their loans.[76]

Similarly, the Center for American Progress found in its 2009 report based on the Federal Reserve's Survey of Consumer Finances ("SCF") that 42% of families who borrowed from payday lenders were headed by single women, as compared with just 19% of households headed by single men.[77] At the same time, married couples comprised 59% of non-payday loan users in the SCF study, versus 27% for families headed by single women. Only 14% of these debtors were single men, perhaps suggesting that single

71. *See id.* Researchers noted that they would like to perform additional studies to investigate whether these demographics are representative of the number of these consumers who have access to the Internet and such websites. If more women are on the Internet, there may be more online female borrowers. *Id.*

72. *See id.* In addition, the payday loan consumers were 57% Caucasian and 30% African American. On average, payday loan website consumers were mostly younger or middle-aged. *Id.*

73. Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 2013 COLUM. L. SCH., L. & ECON. RES. PAPER SERIES 443, at 18-19, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232954 (reporting results of his own study that comported with other studies); Allison S. Woolston, *Neither Borrower Nor Lender Be: The Future of Payday Lending in Arizona*, 52 ARIZ. L. REV. 853, 860-64 (2010) (also stating that 60% of payday loan borrowers are women).

74. Megan S. Knize, *Payday Lending in Louisiana, Mississippi, and Arkansas: Toward Effective Protections for Borrowers*, 69 LA. L. REV. 317, 323-35 (2009) (also noting how many such borrowers are not informed regarding APRs and the workings of loan products).

75. *See* NAT'L ENDOWMENT FOR FIN. EDUC., THE DEBT CYCLE: USING PAYDAY LOANS TO MAKE ENDS MEET 13 (2002); Office of State Auditor Claire McCaskill, Div. of Fin. & Regulation of Instant Loan Indus., Mo., Performance Audit 3 (May 9, 2001), available at http://www.auditor.mo.gov/press/2001-36.pdf (finding that 62% of payday loan customers are women with children under the age of eighteen living at home).

76. Knize, *supra* note 74, at 324-26.

77. LOGAN & WELLER, *supra* note 67, at 1-6 (also indicating that payday loan borrowers tend to have less education, although most had at least a high school diploma and some college or a degree).

men tend to carry less debt overall.[78] However, this study also found that many payday debtors are single mothers, likely seeking a way for their families to stay afloat. "Indeed, the payday loan industry targets single mothers and women on welfare, and many lenders will accept disability payments, child support or alimony payments, and Social Security benefits as collateral."[79]

Still, there is some mixed research regarding the role of gender in payday loan usage. The PEW Charitable Trust found in its 2013 report that only a slight majority of payday loan borrowers were female, and it found that divorced men were more likely to have used payday loans than their female counterparts.[80] PEW's report nonetheless confirmed findings from other payday loan studies with respect to other demographic markers. For example, PEW's report found payday loan usage 62% higher for those earning less than $40,000 and 82% higher for those without a four-year college degree. PEW also reported that usage was 57% higher for renters than for homeowners, 103% higher for those who were separated or divorced than for those who were married, and 105% higher for African Americans than for other races/ethnicities.[81]

2. Colorado Research

The Administrator of the Colorado Uniform Consumer Credit Code ("UCCC") recently released data from its survey of users of short-term, payday loans from July 2000 through December 2011.[82] The Administrator of the UCCC, focusing on consumer contracts and loans, sought to track demographic trends of payday loans borrowers over the decade.[83] The

78. *Id.* at 5-7 (also noting that the industries own data is mixed, but has indicated that payday lenders are disproportionately female).

79. Katherine Houren, *Achieving the American Dream in Debt? Why the USA Patriot Act Puts Undocumented Immigrants at Risk for Abuse by the Payday Loan Industry*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 561, 570 (2009) (citing HOWARD KARGER, SHORTCHANGED: LIFE AND DEBT IN THE FRINGE ECONOMY 72, 74-75 (Berrett-Koehler 2005).

80. *See* 2013 PEW REPORT, *supra* note 41, at 8-15.

81. *Id.* at 9-13. It appears that although overall most payday loan customers are Caucasian, the usage rate is significantly higher for African Americans after controlling for demographics of the populations generally.

82. ADM'R OF THE COLO. UNIF. CONSUMER CREDIT CODE, COLORADO PAYDAY LENDING DEMOGRAPHICS AND STATISTICAL INFORMATION, JULY 2000 THROUGH DECEMBER 2011 (2012), *available at* http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/uccc/annual_reports/Demo%20%26%20Stat%20Info%202000-2011.pdf [hereinafter 2011 CO REPORT].

83. *Id.* at 1. *See also* ADM'R OF THE COLO. UNIF. CONSUMER CREDIT CODE, PAYDAY LENDING DEMOGRAPHIC AND STATISTICAL INFORMATION, JULY 2000 THROUGH DECEMBER 2009 1-4 (rev. 2010), *available at* http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/DDLASummary2009corr.pdf [hereinafter 2010 CO REPORT] (reporting predominance of women in payday loan consumers in Colorado from 2001 to 2009).

Administrator also aimed to explore whether Colorado's 2011 enactment of its Deferred Deposit Loan Act ("DDLA") governing payday loans in Colorado, impacted these trends or had other effects on payday lending.[84]

The data showed that the average Colorado payday loan consumer earns $2,477 per month and takes out 2.3 payday loans from the same lender over the course of a year.[85] The average gross monthly income rose approximately $300 from 2001 to 2011, and the average amount borrowed per year rose from approximately $270 to $373 during that same time.[86] In addition, from 2000 to 2011, the average consumer had been at his/her job roughly four years.[87] At the same time, the average payday loan borrower's age rose from thirty-four years old in 2001 to thirty-seven in 2011.[88]

Despite these changes in Colorado payday loan borrower demographics, payday loan customers continue to be predominately women.[89] In 2001, roughly 53% of borrowers were women, and that percentage has remained stagnant over the last decade.[90] Indeed, women have outnumbered men as payday loan consumers in Colorado despite the fact that men outnumber women in Colorado generally.[91] The breakdown of Colorado payday borrowers by gender from 2001 to 2011 is as follows:[92]

Year	**Male**	**Female**
2001	46.41%	53.59%
2002	44.80%	55.20%
2003	44.05%	55.95%
2004	45.46%	54.54%
2005	46.37%	53.63%

84. 2011 CO REPORT, *supra* note 82, at 1; Deferred Deposit Loan Act, COLO. REV. STAT. §§ 5-3.1-101-5-3.1-123 (2011).

85. *Attorney General Announces 2011 Annual Lending Data Report*, COLORADOATTORNEY GENERAL.GOV (Oct. 1, 2012), http://www.coloradoattorneygeneral.gov/press/news/2012/10/01/attorney_general_announces_2011_annual_lending_data_report (last visited June 9, 2013) [hereinafter *AG's Press Release*].

86. 2011 CO REPORT, *supra* note 82, at 6, 8.

87. *Id.* at 5.

88. *Id.* at 4.

89. *Id.* at 4-6.

90. *Id.* at 5.

91. *State and County QuickFacts, Colorado*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/08000.html (last visited Oct. 4, 2013) (according to the U.S. Census Bureau, 49.8% of Colorado's population was female in 2012).

92. This more particularized breakdown of the data beyond what was reported to the public was obtained directly from the Supervising Credit Examiner in the Colorado Attorney General's Office. E-mail from Mary Geesling, Supervising Credit Exam'r, Consumer Credit Unit, Colo. Attorney Gen. Office, to Amy J. Schmitz, Professor of Law, Univ. of Colo. Law Sch. (Oct. 11, 2012) (on file with author).

2006	46.85%	53.15%
2007	46.02%	53.98%
2008	44.60%	55.40%
2009	44.53%	55.47%
2010	46.58%	53.42%
2010	45.82%	54.18%
2011	47.56%	52.44%

At the same time, single consumers continue to outnumber married consumers among payday loan consumers in Colorado.[93] In 2001, 55% of payday loan borrowers were single and in 2011, that number jumped to just over 65%.[94] It would not be surprising to learn that a high percentage of the single borrowers are single mothers, but that data is unavailable because the Administrator of the UCCC did not gather statistics on whether payday loan consumers have children.

III. Possible Reasons Why Women Use Payday Loans

A. Lower Salaries

Despite advances women have made in the workplace, the gender gap in salaries has not dissipated.[95] Researchers have found that in the United States, women earn roughly three-fourths the amount that men earn and women hold only 2.5% of the five highest-paid company positions.[96] Women usually enter the workforce earning less than their male counterparts and the salary differentials persist as they proceed through their careers.[97]

This may partly be due to women's personal choices, but that is not the whole story. For example, the American Association of University Women ("AAUW") reported in 2012 that women earned only 82% as much as their male counterparts one year after college graduation, and only

93. *Id. See also* 2011 CO Report, *supra* note 82, at 5.

94. 2011 CO Report, *supra* note 82, at 5.

95. *See* Susan W. Coleman & Dorothy E. Weaver, *Women and Negotiation: Tips from the Field*, Disp. Resol. Mag., Spring 2012, at 12, 13-18 (discussing gender imbalances).

96. Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment*, Nat'l Bureau of Econ. Res., Nov. 2012, Working Paper 18511, at 1, *available at* http://www.nber.org/papers/w18511 (also noting research indicating that women are less likely than men to negotiate for higher salaries).

97. *See* Jeffrey A. Flory et al., *Do Competitive Work Places Deter Female Workers? A Large-Scale Natural Field Experiment on Gender Differences in Job-Entry Decisions*, Nat'l Bureau of Econ. Res., Nov. 2010, Working Paper 16546, at 1-30, *available at* http://www.nber.org/papers/w16546 (discussing salary gaps and a large scale field experiment).

69% as much as men ten years after graduation.[98] Furthermore, women's choices, such as pursuing lower-paying careers like teaching, could not account for a 7% difference in pay one year after graduation or a 12% difference ten years later.[99] "Considerable evidence suggests that women have less access to organizational resources such as pay, promotion, and status than men."[100]

Nonetheless, it is true that parenthood and competitive environments may negatively burden women's resources. Mothers are more likely than fathers to leave or limit their jobs when they have children. Furthermore, mothers often encounter penalties such as reduced salaries that fathers do not encounter.[101] Women may also be less inclined to seek jobs in competitive environments, which often pay higher salaries.[102] Field experiments have suggested that women prefer jobs with concrete rules for wage determination in which there is less expectation that one must negotiate for advancement.[103]

Furthermore, the proposed Paycheck Fairness Act failed in June 2012 to the dismay of women's advocacy groups, including the AAUW.[104] The Act would have helped close loopholes left by the Lilly Ledbetter Fair Pay Act ("Fairness Act"), which President Obama signed into law in 2009. The Paycheck Fairness Act would have shifted the burden to require employers to justify differences in pay based on qualifications, education, and other objective criteria unrelated to gender.[105] It also would have prohibited employers from retaliating against employees who discuss wages in response to a complaint or investigation. Finally, the Paycheck Fairness Act would have also subjected employers to compensatory or punitive damages for statutory violations.[106]

98. AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 8 (2013), *available at* http://www.aauw.org/resource/the-simple-truth-about-the-gender-pay-gap/ [hereinafter AAUW REPORT].

99. *Id.* at 8.

100. *See* Stuhlmacher & Walters, *supra* note 24, at 668-75 (discussing gender gap in salaries and status in the workplace).

101. AAUW REPORT, *supra* note 98, at 9.

102. *See* Flory et al., *supra* note 97, at 14-30 (discussing study results).

103. *See* Leibbrandt & List, *supra* note 96, at 2-13 (discussing field experiment and findings, and suggesting that less face-to-face interaction in the modern economy may benefit women in negotiations).

104. AAUW REPORT, *supra* note 98, at 2, 21.

105. *See* Janet Hook, *Wage-Bias Bill Killed by GOP Opposition*, WALL ST. J., June 5, 2012, *available at* http://online.wsj.com/article/BT-CO-20120605-710409.html; Jennifer Steinhauer, *Senate Republicans Again Block Pay Equity Bill*, N.Y. TIMES, June 5, 2012, *available at* http://www.nytimes.com/2012/06/06/us/politics/senate-republicans-block-pay-equity-bill.html.

106. *See* Hook, *supra* note 105. *See also* NAT'L WOMEN'S LAW CTR., HOW THE PAYCHECK FAIRNESS ACT WILL STRENGTHEN THE EQUAL PAY ACT (2012), *available at*

Such discussion of wage differentials among men and women may seem unnecessary in an article regarding payday lending. Ignoring the gender wage gap, however, overlooks the collision of context that lead individuals to seek payday loans. Lower pay means fewer resources for paying bills and qualifying for traditional and reasonable rate loans. Employment and ability to pay are chief considerations in determining whether to lend and at what interest rate. Individuals unable to obtain reasonably priced loans are those most likely to turn to payday loans to stay financially afloat. Wage gaps therefore must be considered among factors driving more women than men into the payday loan market.

B. Debt Loads and Lack of Alternatives

Fringe banking—using financial products such as payday loans and other products discussed in this Symposium—has expanded significantly in the last five years alone. This is mainly because those with poor or limited credit histories and limited financial means have been cut out of traditional banking and have been unable to obtain mainstream credit cards in the wake of the economic downturn and tighter restrictions on the extension of credit.[107] Historically, the poor had safer borrowing options to the extent that lending was based more on familial relationships, connections within a community, and local services than on rigid standards.[108] However, banking law and market forces have out-powered deals done with handshakes, giving way to the market for payday loans and other fringe products that come with high costs and fail to assist individuals in building credit histories.[109]

Credit cards are the most common means for consumers to borrow money for everyday purchases and build credit histories that may assist them in securing further credit and insurance at reasonable rates. Credit cards can plague many consumers with high debt loads and interest rates in the double digits, but at least prevailing usury laws cap these rates and preclude the type of triple-digit APRs that are common for payday loans. However, as noted above, it may be more difficult for women to obtain credit cards due to lower salaries. They may, therefore, be compelled to turn to payday loans to obtain needed cash without the financial checks

http://www.nwlc.org/sites/default/files/pdfs/broadpaycheckfairnessfactsheet.pdf (providing facts about the proposal before its failure in the Senate).

107. Baradaran, *supra* note 25, at 483-502.

108. *Id.* at 495-503.

109. *Id.* at 485-505.

required for credit cards.[110] Desperation often drives individuals to turn to payday loans for quick cash at any cost.[111]

Notably, women who work inside the home or lack sufficient independent credit histories may have particular difficulties qualifying for a reasonably priced credit card. For example, some have criticized the Federal Reserve's "ability to pay" ruling, pursuant to the Credit Card Accountability, Responsibility and Disclosure ("CARD") Act of 2009, for severely restricting women's access to credit. The seemingly neutral rule that became effective on October 1, 2011, prevents credit card issuers from continuing to consider household income when assessing creditworthiness. Instead, issuers must focus only on an individual's "independent ability" to repay a loan.[112]

In theory, these regulations can be beneficial in preventing consumers from accumulating debt they cannot repay. In reality, however, the "ability to pay" rule creates "a serious risk for women in abusive domestic partnerships" who usually do not own joint accounts with their partners and need to build credit histories to forge a path out of their abusive relationships.[113] Furthermore, these new rules may hinder stay-at-home mothers who lack independent credit histories because they too may not be joint owners of their partners' accounts.[114] Repercussions of the regulations may effectively preclude these women from establishing independent credit, which is necessary for not only obtaining credit cards and other loans, but also renting cars, making online or in-flight purchases, and accessing housing and beneficial insurance rates.[115] This is why the CFPB has proposed to reverse this rule.[116]

110. Payday loan borrowers "generally have cash flow difficulties, and few, if any, lower-cost borrowing alternatives." *Guidelines for Payday Lending*, *supra* note 38 (noting guidelines and best practices regarding payday lending; also citing the following resources: January 31, 2001, interagency Expanded Guidance for Subprime Lending Programs (FIL 9-2001) (2001 Subprime Guidance); January 24, 2000, Subprime Lending Examination Procedures (RD Memo No. 00-004); March 4, 1999, Interagency Guidelines on Subprime Lending (FIL-20-99); and May 2, 1997, Risks Associated with Subprime Lending (FIL-44-97)).

111. Bhutta et al., *supra* note 39, at 26.

112. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1736 (2009) (codified as amended at 15 U.S.C. §§ 1601-1666j); Truth in Lending, 12 C.F.R. § 226.51(a) (2011); DIVISION OF CONSUMER AND COMMUNITY AFFAIRS OF THE FEDERAL RESERVE BOARD, 12 C.F.R. Pt. 226, Supp. I, at § 226.51(a) (78 Fed. Reg. 61990, current through Oct. 10, 2013).

113. Martin Merzer, *Fed Rule Limits Credit Cards for Stay-at-Home Parents*, CREDITCARDS.COM (Oct. 1, 2011), http://www.creditcards.com/credit-card-news/stay-at-home-parent-credit-cards-household-income-1282.php (highlighting criticisms of the new regulations).

114. Note that the regulation could harm *any* partner or spouse—male or female—who is without significant outside income or the credit history necessary for building a credit score.

115. Merzer, *supra* note 113.

116. On October 17, 2012, the CFPB proposed a rule to change 12 CFR 1026.51 of Regulation Z. Truth in Lending (Regulation Z), 12 C.F.R. 1026.51 (proposed Oct. 17, 2012), *available at*

Lenders also may be at fault for steering women toward smaller and less financially attractive business loans and mortgages than their male counterparts. Study data indicates that lenders offer smaller loans to women despite evidence that women are often more reliable than men in repaying loans.[117] The National Community Reinvestment Coalition found in a 2003 field test that lenders treated black testers, especially black female testers, less favorably than white testers, although the black testers had better credit profiles.[118] The research left the author asking: "Why would people who could qualify for prime mortgage loans end up with subprime loans?"[119]

Likewise, a 2006 Consumer Federation of American ("CFA") study concluded that lenders were five times more likely to saddle upper-income black women than upper-income white men with a subprime mortgage.[120] This confirmed the CFA's 2005 study results revealing that 32% of women borrowers received subprime loans versus 24% of male borrowers.[121] Women also may bear greater student debt loads than men. Among workers in 2004 aged twenty-five to thirty-four, 23% of women with bachelor's degrees spent over 10% of their earnings repaying student loans as compared with 16% of men.[122]

C. Relational Reasons and Targeted Marketing

Cultural and relational concerns also impact negotiations and women's propensity to end up with less-advantageous financial contracts, like payday loans.[123] In the typical patriarchal culture in which men tend to

http://files.consumerfinance.gov/f/201210_cfpb_CARD-Act-proposed-rule.pdf. *See also Truth in Lending (Regulation Z)*, FEDERAL REGISTER, https://www.federalregister.gov/articles/2012/11/07/2012-26008/truth-in-lending-regulation-z (last visited Oct. 4, 2013).

117. Isabelle Agier & Ariane Szafarz, *Credit to Women Entrepreneurs: The Curse of the Trustworthier Sex*, SOC. SCI. RES. NETWORK 1-24 (Feb. 18, 2011), http://dx.doi.org/10.2139/ssrn.1718574 (concluding from a study of the Brazilian microfinance institution Vivacred that men often reap greater financial benefit than women from relationships with lenders).

118. *See* Carol Necole Brown, *Women and Subprime Lending: An Essay Advocating Self-Regulation of the Mortgage Lending Industry*, 43 IND. L. REV. 1217, 1217-22 (2010) (compiling research regarding discriminatory lending).

119. *Id*. at 1217.

120. John Sarto, *The Disproportionate Representation of Women in Subprime Lending: Cause, Effect, and Remedies*, 31 WOMEN'S RTS. L. REP. 337, 342-53 (2011); Agier & Szafarz, *supra* note 117, at 5-23 (reporting research).

121. Sarto, *supra* note 120, at 342 (reporting the finding that of these 32% of women, 11% held especially high-cost subprime mortgages versus only 7.7% of men).

122. *See* Jeremy M. Simon, *Young Women Suffer From Greater Debt*, CREDIT CARDS.COM (Oct. 17, 2006), http://www.creditcards.com/credit-card-news/young-women-suffer-from-greater-debt.php (discussing research on gender and debt).

123. *See* Uri Gneezy et al., *Gender Differences in Competition: Evidence from Matrilineal and a Patriarchal Society,* 77 THE Econometric Soc'y 1637, 1637-1664 (2009) (noting importance of culture in comparing negotiations in two distinct societies).

hold the power, society hinders women from competing or negotiating.[124] Most women therefore grow up in cultures in which they are expected to manage relationships, and place the needs of others above their personal needs.[125] Consequently, women may seek to maintain relationships and care for their families above all else in negotiations.[126] Furthermore, women may miss opportunities to negotiate due to lower expectations, confidence, and comparison standards than men enjoy. These forces may contribute to women accepting less-attractive loan contracts without questioning the terms or seeking better alternatives.[127]

Psychological and behavioral research also suggests that negotiations generally may be considered more appropriate for men, and "[s]tereotypically masculine traits (strong, dominant, assertive, and rational) are seen as more important for negotiation success than stereotypical feminine traits (weak, submissive, intuitive, and emotional)."[128] Women then may reach less favorable results in negotiations than men because they usually employ less assertive styles, while opponents may devalue women's often-cooperative communications.[129] Biases and social inequalities also may cause women to subconsciously assume lower status positions in their negotiations, contributing to less advantageous deals for women.[130] Although this may have minimal effect in any single transaction, the cumulative impact can lead to significantly lower financial outcomes for women versus men.[131]

The Internet can therefore be an equalizing factor to the extent that it allows women to break free from their tendencies to be less competitive in face-to-face negotiations "due to social roles that prescribe women to be affiliative or relationship oriented."[132] Women may feel less constrained by social norms and expectations when communicating online.[133] According-

124. *Id.* at 1647-59 (detailing a study comparing competiveness of a matriarchal versus a patriarchal society and finding men significantly more competitive than women in the patriarchal but not matriarchal society).

125. *Id.* at 1655-57. *See also* Stuhlmacher & Walters, *supra* note 24, at 653-67 (discussing gender differences in expectations and values in negotiations and some mixed results regarding these differences).

126. *See* Stuhlmacher & Walters, *supra* note 24, at 653-63.

127. *See id.* at 653-57 (discussing factors leading to less advantageous deals for women then men).

128. Alice F. Stuhlmacher et al., *Gender Differences in Virtual Negotiation: Theory and Research*, 57 SEX ROLES 329, 331. (2007).

129. *Id.* at 332.

130. *Id.* at 332-33.

131. *Id.* at 335-337.

132. *Id.* at 336.

133. *Id.* at 335-37 (discussing study results showing that women were significantly more hostile in virtual than face-to-face negotiations).

ly, online negotiations allow women more freedom to ignore social pressures and expectations in order to achieve better results. This may help explain why women achieve higher profits and better results in virtual, rather than face-to-face, negotiations.[134]

On the other hand, the anonymity of the Internet may help online payday lenders lure women to their high-cost lending products. Women in need of funds may be especially attracted to online payday loans because computer-mediated communications save them the embarrassment of having to discuss their debt or assets in person and protects them from shame of being rejected face-to-face if a loan falls through.[135] One study found that women are 13% more likely than men to lie about their borrowing behavior and suffer embarrassment when discussing debt face-to-face because the social stigma behind borrowing is more negative for women than men.[136]

Face-to-face and online lenders also appear to use a variety of means to market loans to women. For example, anecdotal evidence from Google Maps suggests that payday lenders are often clustered near nail salons, beauty parlors, and similar female-oriented businesses.[137] Furthermore, lenders bank on their ability to draw in customers by marketing on social networking sites like Facebook and Twitter, which women visit more frequently than men.[138] One technology-oriented website reported that "women rule social media" based on the data from various social media websites.[139]

These factors may help explain why 72% of CashOne's payday loan customers are female.[140] CashOne's website showcases a female payday loan representative smiling above the "member login" box, which may lure women who seek familiarity of working with another woman.[141] In addi-

134. *Id.* at 336 (discussing the study and findings).

135. Alan D. Smith & William T. Rupp, *E-Lending: Foundations of Financial and Consumer Marketing in an Information Intensive Society*, J. E-BUS. & INFO. TECH, Fall 2002, at 5, 8, *available at* http://www.csis.pace.edu/~ctappert/jebit/volume3.pdf#page=5.

136. Dean Karlan & Jonathan Zinman, *Lying About Borrowing*, 6 J. EUR. ECON. ASS'N 510, 515, 518 (2008).

137. *See* Memorandum from David Bennett to author, "Payday Lenders and Nail Salons: Anecdotal Evidence from Google Maps," and the attached maps (Oct. 8, 2012) (on file with author) (showing an anecdotal evidence for payday lenders clustering around female oriented businesses).

138. *See Report: Social Network Demographics in 2012*, PINGDOM (Aug. 21, 2012), http://royal.pingdom.com/2012/08/21/report-social-network-demographics-in-2012/ (stating that 60% of Facebook and Twitter users are female).

139. *Id.* (stating that more than two thirds of the sites in the survey had more female than male users).

140. *Payday Loan Demographics Study – December 2010*, ONLINE-PAYDAY-LOANS.ORG, http://www.online-payday-loans.org/articles/demographics-december-2010/ (last visited Nov. 4, 2013).

141. *See* CASHONE, http://www.cashone.com (last visited Nov. 4, 2013).

tion, the website depicts more female than male borrowers, and two of the three testimonials listed are women, which also may increase women's comfort in purchasing CashOne products.[142] CashOne's blog also seems geared toward women. Blog entries discuss payday loans for shopping, raising children, and caring for the elderly.[143] CashOne's marketing on Twitter similarly covers these topics, while also targeting younger consumers.[144] Its presence on Facebook is not quite as female oriented but nonetheless, may capture women due to the large number of women on Facebook. Additionally, the Facebook page provides links to shopping websites to buy wedding and prom dresses.[145]

These various factors combine with women's need to provide for their families, which they increasingly must do as the head of the household or main breadwinner.[146] Still, all women are by no means the same and these suggestions admittedly encase stereotypes, which may or may not hold true. Further study is needed to test these theories. Still, the research overall continues to highlight the need for contextual consideration in payday lending policymaking.[147]

IV. LEGAL LANDSCAPE OF PAYDAY LENDING

The law has done little to address contextual realities regarding payday loans, let alone data suggesting that these loans disproportionately burden women.[148] General contract law seeks to limit intrusion on freedom of contract or consideration of context.[149] Additionally, discrimination laws are largely ineffective in combatting more subtle discrimination via stereotyping that impacts payday lending practices.[150] Furthermore, federal banking law limits the extent to which states can regulate payday loans, and

142. *Testimonials*, CASHONE, http://www.cashone.com/testimonials.asp (last visited Oct. 4, 2013).

143. *Blog*, CASHONE, http://cashone.com/blog/ (last visited Oct. 4, 2013).

144. *CashOne-Payday-Loans*, TWITTER, https://twitter.com/paydayloanutah (last visited Oct. 4, 2013).

145. *CashOne*, FACEBOOK, https://www.facebook.com/CashOnePaydayLoans (last visited Oct. 4, 2013).

146. *See* Thorne, *supra* note 1, at 141-57 (highlighting how debt hits women harder than it hits men because women often take responsibility for paying bills and managing debt).

147. I admit that some of this is presumptuous, but I raise the issues to highlight the importance of context and need for further empirical study on the role of gender with respect to debt.

148. *See* Hawkins, *supra* note 9, at 23-25 (noting that federal law has done little to regulate fringe lending, but Dodd-Frank opens the door for new federal regulations).

149. Amy J. Schmitz, *Confronting ADR Agreements' Contract/No-Contract Conundrum with Good Faith*, 56 DEPAUL L. REV. 55, 57-69 (2006) (discussing classical theory and highlighting how it overlooks the "messiness" of real world contracting).

150. Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracts*, 19 CARDOZO J. L. & GENDER 437, 460-70 (2013) (discussing limits of discrimination laws and classical contract theories).

state laws create conflicts and confusion because of states' varied approaches toward payday lenders. Moreover, it is very difficult for regulators to police online lenders and lenders affiliated with Native American tribes who benefit from sovereign immunity.

A. Legal Restraint in Regulating Lending

1. Classical Contract Assumptions

Classical contract law aims to preserve freedom of contract and ensure promise enforcement in a presumably competitive market.[151] Furthermore, it is founded on objective theory, which presumes that purchasers, sellers, and decision-makers are rational actors with requisite information and bargaining power to make well-informed decisions.[152] Classical law's theoretically neutral actors are somehow immune from perceptions and biases and, are therefore, blind to sexism, stereotypes, and behavioral propensities that defy what may appear objectively "rational" based on economic cost/benefit analyses.[153] Classical law thus seeks to avoid interference with freedom of contract, even with respect to business-to-consumer, or "B2C" contracts, which businesses present to consumers on a take-it-or-leave-it basis. Most courts and legislators adhere to these classical notions.

Furthermore, economists who argue that the free market will promote efficiency have persuaded these courts and legislators. Law and economics theorists emphasize how strict enforcement of contracts and legislative restraint are necessary for optimal distribution of resources through market competition.[154] They argue that legislative regulation of contract terms or other intrusions on freedom of contract increases costs for enterprises and harms consumers through higher prices and lower quality goods and services.[155] Some scholars add that standardization of contracts benefits all consumers regardless of the contracts' adhesive nature because it lowers transaction costs and fosters production overall.[156]

At the same time, many subscribe to the notion that consumers remain free to reject payday loans and bear responsibility for their failures to shop

151. *See* Threedy, *supra* note 32, at 1260 (noting this is fundamental).

152. *See* DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT 208-13 (2006) (discussing objective theory of classical legal thought).

153. *See id*. at 208-212.

154. *See id.* at 208-13 (noting the efficiency basis for the objective versus subjective approaches).

155. *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293 (1975) (discussing strict enforcement under classical contract doctrine); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 429 (2002).

156. *See, e.g.*, Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1403-04, 1433-51 (2009).

for or negotiate their loan contracts. Courts and commentators then downplay harm of discriminatory contractual behavior, and remain blind to context and subtle discrimination.[157] "Free market" supporters propose that the market will cure any discriminatory contracting. They posit that sellers will remain blind to biases as they compete for customers, and this will eventually squeeze any discriminatory businesses out of the market.[158] This again assumes that sellers and buyers are economically rational actors.

In reality, however, payday lenders seeking to maximize their profits have incentive to charge high fees and costs because the consumers purchasing these loans are desperate to obtain cash regardless of cost. They also usually lack the resources to "shop around," and thereby persuade lenders to compete for business and abide by fairness norms. Of course, courts should continue to primarily enforce voluntary agreements. However, courts should not overlook the importance of biases, stereotypes, societal norms, and behavioral propensities that may affect contracts in the real world. It remains true that the real world is marked with "messiness" that impacts all aspects of life—including contracting and debt.[159]

2. Limited Regulation of Discriminatory Lending

The United States Constitution precludes state laws that discriminate against women and minorities,[160] and constitutional equal protection constraints quash quotas or other state action that provides racial minorities or women with special rights.[161] The Equal Credit Opportunity Act

157. Hila Keren, *"We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 133-41, 154-56 (2005) (emphasizing how contract law has ignored discrimination).

158. *Id*. at 156-58 (discussing market-oriented hostility toward regulating contracts).

159. *See* Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of* The Yellow Submarine, 80 TUL. L. REV. 1161, 1169-70 (2006) (advancing "new legal realism" geared to move us toward the "living law").

160. John A. Ward III, *Husband and Wife–Contracts–Married Woman Not Liable on Mercantile or Trading Contract Unless Disability of Coverture Removed–Wyner v. Express Publishing Co., 288 S.W.2d 583 (Tex. Civ. App.–San Antonio 1956, error ref'd n.r.e.)*, 34 TEX. L. REV. 1094, 1094-96 (1956) (highlighting courts' applications of covertures statutes directing that a married woman cannot enter binding contracts). It was not until 1981, however, that the U.S. Supreme Court finally held that laws allowing a husband to sell or encumber marital property without a wife's consent were unconstitutional. *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981).

161. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486 (1989) (finding Richmond's requirement that its prime contractors subcontract at least 30% of the dollar amount of each contract to minority-owned businesses was unconstitutional because it was not narrowly tailored to rectify past discrimination in the construction industry). Such action will only survive constitutional scrutiny if it is narrowly tailored to further a compelling state interest. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (upholding a law school's use of race in admissions decisions because it was narrowly tailored to further a compelling interest in obtaining a diverse student body); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (upholding a Washington state minimum wage law for women due to documented evidence) ("[E]xploitation of

("ECOA") prohibits creditors from discriminating against an applicant with respect to any aspect of a credit transaction on the basis of sex or marital status.[162] Although the ECOA ostensibly does not apply to basic check cashing, it usually applies to payday loans offered by banks.[163] It precludes these banks from offering substantially different interest rates or pricing structures for these products and aims to stop lenders from targeting or discouraging applications from protected groups.[164] Specifically, lenders may not evaluate applications on a prohibited basis or discriminate against applicants because their income comes from a part-time job, alimony, child support, veterans' assistance, or other public assistance.[165] Lenders must also notify applicants of adverse actions taken in connection with an application for credit in an accurate and timely manner.[166]

Furthermore, Arkansas, California, Colorado, Connecticut, Georgia, Missouri, Nevada, New York, North Dakota, Ohio, and Oklahoma have state statutes prohibiting discrimination in consumer credit transactions on the basis of sex or marital status.[167] California bars gender discrimination in credit contracts and letters of credit, as well as other documents.[168] Kentucky has a general statute that prohibits gender discrimination in financial practices.[169]

However, the ECOA and state discrimination laws are largely ineffective in addressing gender gaps in payday loan burdens because they generally target only clear disparate treatment and other overt and well-documented discrimination.[170] For example, a plaintiff may survive a motion to dismiss where she proves that a creditor used gender-based epithets

a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.").

162. 15 U.S.C. § 1691(a)(1) (2006).

163. ALYS COHEN ET AL., CREDIT DISCRIMINATION, 10-22 (Nat'l Consumer Law Ctr. 2009).

164. *See id.* at 13-51 (discussing discrimination laws applicable to lending); *Guidelines for Payday Lending*, *supra* note 38 (noting guidelines and best practices regarding payday lending).

165. COHEN ET AL., *supra* note 163, at 20-55.

166. *Id.* at 130-148 (noting that creditors also may not consider likelihood to have children).

167. ARK. CODE ANN. § 16-123-107(a)(4) (1995) (consumers have the "right to engage in credit and other contractual transactions without discrimination"); CAL. CIV. CODE §§ 1747.80, 1747.51 (West 2012); COLO. REV. STAT. § 5-3-210 (2008); CONN. GEN. STAT. §§ 46a-65-46a-66 (2003); GA. CODE ANN. §§ 7-6-1–7-6-2 (2012); MO. REV. STAT. § 408.550 (2012); NEV. REV. STAT. §§ 598B.010–598B.180 (2011); N.Y. EXEC. LAW § 296-a (McKinney 2012); N.D. CENT. CODE § 14-02.4-17 (2011); OHIO REV. CODE ANN. § 4112.02 (West 2008); OKLA. STAT. tit. 14A, § 1-109 (1979).

168. *See* CAL. CIV. CODE §§ 51–53 (West 2012); CAL. CIV. CODE §§ 1747–1748.95 (West 2012); CAL. CIV. CODE §§ § 1750–1784 (West 1971). *See also* CAL. GOV'T CODE §§ 12900-12906 (West 2013).

169. KY. REV. STAT. ANN. § 344.370 (West 2011).

170. *See* Schmitz, *supra* note 150, at 160-70 (noting limits of discrimination laws).

in threatening to increase a debt.[171] However, even claimants who were disparately treated often face difficulty obtaining concrete evidence to prove their allegations.[172] It is particularly difficult for claimants to overcome lenders' reliance on "discretionary pricing" as justification for more subtle discrimination.[173] This is augmented by credit scoring to the extent that women and minorities may have lower scores due to the snowball effect from historical underrepresentation of these groups in the pool of past credit recipients.[174]

Furthermore, disparate impact cases place a tough burden on claimants to: (1) establish that the defendant employed a specific policy or practice in order to discriminate and (2) demonstrate with statistical data that the policy or practice had a demonstrable adverse effect on the claimants.[175] Borrowers have launched cases against lenders that improperly target racial minority communities in marketing overpriced loans, which is often referred to as "reverse redlining." However, these actions are difficult for plaintiffs and their attorneys to recognize or learn about because they do not easily have access to companies' internal documents or marketing strategies.[176]

171. Sharp v. Chartwell Fin. Servs. Ltd., No. 99 C 3828, 2000 WL 283095, at *2-5 (N.D. Ill. Mar. 6, 2000) (finding plaintiffs survived the creditor's motion to dismiss on their ECOA and FDCPA claims where they had specific evidence of harassing threats with gender-based and racial epithets).

172. In addition, women may be able to use the FDPA to recover against debt collectors who harass them with threats against their children or negative comments about their marriages and capacity to raise children. *See, e.g.*, Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159, 162-64 (3d Cir. 2007) (affirming injunction and fines against a company that told female debtors that their children would see them "being taken away in handcuffs," and "be bringing their mommy care packages in prison."); Black v. Aegis Consumer Funding Grp., Inc., No. CIV. A. 99–0412–P–S, 2001 WL 228062, at *2-9 (S.D. Ala. Feb. 8, 2001) (awarding damages under the FDCPA where the collectors told a mother that they would take her "kids' clothing," and hounded her about whether her marriage was the reason she was not paying her debts); Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 865-75 (D. N.C. 1981) (awarding plaintiff damages under the FDCPA where a collector told her that she "shouldn't have children" due to her hospital debt).

173. *See* Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 375-76, 386-88, 433 (2010) (discussing difficulty of proving discrimination in mortgage cases, and the role of "discretionary pricing").

174. COHEN ET AL., *supra* note 163, at 133-43.

175. *See* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 256-57, 297-98 (2011) (noting the difficult burden to bring a disparate impact case and stating that it is "very rare for plaintiffs [in disparate impact cases] other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII [in the employment context.]").

176. *See* Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class*, 43 LOY. L.A. L. REV. 1339, 1339 (2010) (discussing reverse redlining claims); Pouya Bavafa, *The Intentional Targeting Test: A Necessary Alternative to the Disparate Treatment and Disparate Impact Analyses in Property Rentals Discrimination*, 43 COLUM. J.L. & SOC. PROBS. 491, 496 (2010) (discussing difficulty establishing discrimination).

Moreover, it is an arduous uphill battle to prove that a payday lender is marketing to minorities, and even more so with respect to women.[177] Lenders can easily explain away the statistics regarding minorities' or women's overrepresentation among payday loan borrowers. They may claim it is merely "coincidence" or simply due to consumers' purchasing choices.

Some have also argued that the disparate impact standard is not appropriate in these cases. With respect to Title VIII claims under the Fair Housing Act, for example, some refute disparate impact arguments because they do not require intent, and thus may punish well-meaning companies.[178] Similarly, economist Paul Rubin stated:

> It scares me because if this theory becomes widespread, if government looks intensely for disparate impact, looks for discrimination with no evidence of behavior, simply looks for cases where there are differences, then someone is going to put pressure on banks to relax their underwriting standards to make loans that they might not want to make in order to avoid being examined.[179]

At the same time, general consumer lending protections like the Truth in Lending Act ("TILA") and the Real Estate Settlement Act ("RESPA") have been criticized for disproportionately burdening women by overloading consumers with disclosures.[180] TILA requires lenders to disclose key information such as fees and interest rates, and Regulation Z implementing TILA mandates that disclosures be "clear and conspicuous." RESPA provides similar disclosure rules, which one commentator critiqued as further clouding women's borrowing decisions.[181] Nonetheless, most commentators and policymakers support clear and understandable disclosures. Furthermore, some research suggests that women may pay more attention than men to disclosures in seeking to avoid risky behavior.[182]

Concern for women's debt dilemmas has led some commentators to advocate direct gender consideration in financial reforms.[183] For example,

177. *See* Deval L. Patrick et al., *The Role of Credit Scoring in Fair Lending Law–Panacea or Placebo?*, 18 ANN. REV. BANKING L. 369, 386-89 (1999) (highlighting difficulty of proving lending discrimination, and noting that the Department of Justice had to focus its limited resources on disparate treatment cases with respect to race).

178. Andrew L. Sandler et al., *Using Disparate Impact Analysis to Establish Discrimination in Lending*, 9 J.L. ECON. & POL'Y 417, 422-30 (2013).

179. *Id*. at 432.

180. *See* Sarto, *supra* note 120, at 349 (proposing need for gender considerations in regulating lending).

181. *See id.* at 350 (noting this critique).

182. *See* Mann *supra* note 73, at 3-6; Melanie Powell & David Ansic, *Gender Differences in Risk Behaviour in Financial Decision-Making: An Experimental Analysis*, 18 J. ECON. PSYCHOL. 605, 615 (1997) (reporting results from experiments).

183. *See* Sarto, *supra* note 120, at 349-66 (discussing how reforms could address gender issues).

one commentator has proposed proactive regulations to account for women's disproportionate burdens from foreclosure, especially when they have families to support with no or low income.[184] Nonetheless, outright regulation of financial markets must be tailored to address real hurdles women face in contracting. Instead, a better approach may be to augment financial education and invest in more serious consideration of gender as an important component of context when analyzing and enforcing loan contracts.[185]

At the same time, anti-discrimination laws and policies promoting gender diversity must not cross constitutional lines by creating quotas or other special rights for any particular group. For example, Dodd-Frank requires each federal agency to create an Office of Minority and Women Inclusion ("OMWI") to promote "fair inclusion and utilization" of minorities and women in agency business. Furthermore, the CFPB is charged more generally with gathering data and creating regulations to address "abusive" tactics that financial service providers employ to take unreasonable advantage of consumers.[186] Dodd-Frank also directs the CFPB to research "access to fair and affordable credit for traditionally underserved communities" as well as effective disclosures to address consumer propensities.[187]

The government faces budgetary constraints and administrative concerns in creating education programs and lending initiatives. Government action requires allocation of limited public resources, and federal administration of programs within state boundaries is often plagued by inefficiencies and needless additional costs and confusion. Moreover, policymakers need more information through research regarding the existence and extent of gender discrimination and differences with respect to lending. There also are valid concerns about the design of any law or regulation that would address subtle gender biases and behavioral differences without reinforcing stereotypes. It would be counterproductive for the government to promulgate programs based on improper assumptions about women and men. Policymakers also should be careful to respect voluntary agreements.

184. *See id*. (highlighting need for gender considerations in lending reforms).

185. *See, e.g.*, LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003) (providing a manual to assist women in identifying pitfalls in their negotiations and finding ways to better assert themselves).

186. *See* Michael B. Mierzewski et al., *The Dodd-Frank Act Establishes the Bureau of Consumer Financial Protection as the Primary Regulator of Consumer Financial Products and Services*, 127 BANKING L.J. 722, 723-30 (2010) (discussing the authority and duties of the CFPB).

187. *See* Hawkins, *supra* note 9, at 36-38.

B. Laws Targeting Payday Loans

The legal landscape covering payday loans is complex and confusing. To date, the federal government has enacted scant legislation covering these loans. However, Dodd-Frank now has opened the door to federal regulation by giving the CFPB power to study and regulate payday loans and other fringe lending products.[188] The current lack of federal regulation has nonetheless left the law mainly to the states, which have adopted varied and incomplete regulations that leave loopholes for payday lender abuses. States also have had difficulty regulating payday lenders due to federal law's allowance for banks to charge their home state rates to all consumers nationwide. Internet lending and lenders' collaboration with sovereign tribes also have created difficulties for state regulators.

1. Limited Federal Restrictions and Proposals

As noted previously, the federal government has largely left regulation of payday loans to the states. The United States Supreme Court has interpreted the National Bank Act ("NBA") to allow national and state chartered banks and thrifts to "export" favorable laws from their home states in order to circumvent less-favorable laws in other states where they do business.[189] This means that a bank chartered in Delaware may impose its interest rates on consumers in Colorado without worry about Colorado usury rate laws. Payday lenders use this to their advantage by affiliating with banks in states allowing for higher rates, and banks have started payday loan subsidiaries. Internet and out-of-state payday lenders seek to use the dormant commerce clause to challenge states' imposition of regulations on those who lend to their citizens. Nonetheless, some states have been successful in enforcing their laws on these lenders.[190]

Online and other payday lenders also have partnered with tribes, thereby allowing those lenders to avoid enforcement of state payday lending laws by using tribal sovereign immunity.[191] Critics of these tribal-affiliated payday lenders complain that the lenders charge usurious rates,

188. *See* Mierzewski et al., *supra* note 186, at 722-31 (explaining CFPB's duties in researching and proposing regulations regarding payday lending).

189. *See, e.g.*, Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 309-12 (1978); 12 U.S.C. § 1831d (1989); 12 U.S.C. § 1463(g) (2010); 12 U.S.C. § 1785(g) (2010) (giving state banks and certain other lenders the same preemptive powers).

190. *See* Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1304 (10th Cir. 2008) (allowing Kansas to enforce its lending laws against an internet lender).

191. Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 753, 768 (2012).

while the lenders' defenders claim that these partnerships may provide much-needed economic benefits for the tribes.[192] It is unclear, however, whether the tribes actually enjoy these benefits. Furthermore, tribal lenders have used questionable litigation tactics against state attorney generals who have tried to curb lenders' payday lending practices.[193]

In Colorado, for example, tribal-affiliated lenders have stymied enforcement actions. In *State ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, tribes associated with payday lenders secured dismissal based on sovereign immunity of the Colorado Attorney General's enforcement action against the lenders for violations of state usury laws.[194] In dismissing the action, the district court applied the three-factor 'arm of the tribe' test that the Colorado Supreme Court established earlier in the litigation. This test focused on (1) whether the tribes created the entity pursuant to tribal law; (2) whether the tribe owns and operates the entity; and (3) whether the entity's immunity protects the policies of tribal sovereignty.[195] The Attorney General argued that the lenders did not deserve protection because a single owner in Nevada was using the tribes for commercial purposes. The court rejected that argument, however, and emphasized that tribes are free to work with non-native persons to further economic development.[196] Still, this litigation continues with respect to unresolved issues.[197]

Some have thus proposed federal regulations in light of the complications for state lawmakers' attempts to regulate payday loans. These proposals have included a bill that would amend TILA so that no storefront or online payday lender may charge a rate of interest or a fee that exceeds 36%.[198] The bill broadly defines "fees" and "interests rates" to include "payments compensating creditors for cash advance fees."[199] It also gives individuals rights to sue lenders who violate the law, and to collect the

192. *See id.* at 766-67.

193. *See* State ex rel. Suthers v. Cash Advance and Preferred Cash Loans, 205 P.3d 389, 394-403 (Colo. App. 2008).

194. State v. Cash Advance, No. 05CV1143, at 27, 2012 WL 3113527 (Colo. Dist. Ct. Feb 18, 2012).

195. Cash Advance and Preferred Cash Loans v. State, 242 P.3d 1099, 1110 (Colo. 2010).

196. *Id*. *See also,* State v. Cash Advance, No. 05CV1143, at 21, 2012 WL 3113527.

197. The State of Colorado has appealed the District Court's order in State v. Cash Advance, No. 05CV1143, 2012 WL 3113527.

198. S. 3452, 112th Cong. (2012), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s3452is/pdf/BILLS-112s3452is.pdf.

199. The bill defines what encompasses fees and interest rates as: 1) fees for extending credit; 2) fees born-out of default (late fees, overdraft fees, limit fees, etc.); 3) fees defined as a "finance charge;" 4) credit insurance premiums; and 5) all charges and costs for ancillary products sold in connection with the payday loan. *Id.* at § 141(b).

greater of three times the amount of the total accrued debt associated with the violating transaction or $50,000.[200] Violators also would be subject to criminal punishment, including one year in prison and a fine amounting to the greater of three times the amount of the total accrued debt associated with the transaction or $50,000.[201]

This proposed amendment to TILA has not yet advanced in Congress, and it seems doubtful that it will become law.[202] TILA already tackles a host of disclosure requirements and other consumer protections, which provided plenty of fuel for lawsuits in the housing credit crisis. These lawsuits reached their peak at 159 suits in the month of May 2009, after the housing market collapsed.[203] These lawsuits have decreased significantly since that time.[204] However, the CFPB is poised to issue regulations that may go as far as the proposed bill's strict rate cap for payday loans to all individuals or that could otherwise protect consumers from payday lenders' abusive practices.[205] Moreover, the CFPB issued a White Paper on payday lending in spring 2013 and indicated its interest in taking regulatory action to protect consumers from getting caught in the cycle of high-cost payday loan debt.[206]

Nonetheless, the federal government has gone further in protecting military members from perils of payday lending in the interests of national security. The Military Lending Act ("MLA") sets a strict 36% rate cap with respect to consumer loans, including payday loans, to regular or reserve active duty military and their dependents.[207] The MLA also prohibits lenders from securing these loans with checks, electronic access to bank accounts, vehicle titles, or allotment of military pay.[208]

200. *Id.* at §§ 141(h)-141(i).

201. *Id.* at §§ 141(i)(1)-141(i)(2).

202. *Bill Summary & Status, 112th Congress (2011 - 2012), S.3452*, THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.03452: (last visited Oct. 6, 2013) (noting that the bill is in committee).

203. *See Truth in Lending Federal Lawsuits Continue to Decline*, TRACREPORTS, http://trac.syr.edu/tracreports/civil/323/ (last visited Oct. 6, 2013).

204. *See id.* (noting that the number of lawsuits has fallen by 89% to as few as 14, 25, and 16 in March, April, and May 2013, respectively).

205. *See infra* notes 221-233 and accompanying text (discussing CFPB's charge).

206. CFPB WHITE PAPER, *supra* note 15.

207. *See* JEAN ANN FOX, THE MILITARY LENDING ACT FIVE YEARS LATER: IMPACT ON SERVICEMEMBERS, THE HIGH-COST SMALL DOLLAR LOAN MARKET, AND THE CAMPAIGN AGAINST PREDATORY LENDING 4-6 (Consumer Federation of America 2012), *available at* http://www.consumerfed.org/pdfs/Studies.MilitaryLendingAct.5.29.12.pdf.

208. *Id.* at 4.

The MLA also preserves individuals' access to the judicial system for asserting claims related to their payday loans.[209] This precludes lenders from imposing arbitration clauses on individuals through payday loan contracts to prevent them from suing the lenders in court. Nonetheless, the MLA does not cover other forms of fringe lending, such as bank overdraft loans, unsecured installment loans, or rent-to-own transactions.[210] Furthermore, the CFPB and FTC are not empowered to enforce the MLA and some high-cost lenders, most notably online lenders, have found ways to evade the MLA.[211]

Reports indicate that the MLA has been largely successful in curbing predatory loans to active-duty service members and their dependents.[212] The CFA reported a significant drop in payday loans to military persons five years after the MLA's enactment, as well as an overall 70% drop in payday lender storefronts in California after the MLA took effect.[213] Nonetheless, some criticize the MLA for not covering inactive personnel, retirees, or veterans, thereby often leaving young service members returning from Iraq and Afghanistan susceptible to predatory lending. The CFA and others have, therefore, urged lawmakers to extend the MLA's coverage.[214] Professor Creola Johnson argues that the MLA's 36% interest rate cap should protect all individuals in order to stop payday lenders from targeting their marketing at those most vulnerable to being caught in a debt trap resulting from confusion about payday loans' complex cost structures. Furthermore, she adds that a 36% cap would not freeze needed access to credit, as evidenced by banks' and credit unions' continued willingness to offer short-term loans to military members even after the MLA's enactment.[215]

At the same time, Congressional representatives have proposed the Military Savings Act ("MSA") to extend the MLA by directing the Comptroller of the Currency to develop a pilot program aimed to decrease military members' need for payday loans by generating new financial products for service members and encouraging savings and wealth-creation.[216]

209. *See* William Woodward, *Legal Uncertainty and Aberrant Contracts: The Choice of Law Clause*, 89 CHI.-KENT L. REV. 197, 211-15 (2013) (discussing the use of arbitration in fringe economy lending contracts).

210. *Id.* at 31-83.

211. *Id.* at 25-82 (providing detailed findings and analysis).

212. *Id.* at 1-25.

213. *Id.* at 9.

214. *See* Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 649-51 (2012); FOX, *supra* note 207, at 9-25 (adding that at the least, the MLA's coverage should be extended to cover retirees and veterans).

215. Johnson, *supra* note 214, at 663-70.

216. Military Savings Act, H.R. 5946, 112th Cong. (2012).

However, the bill does not provide specifics on these new financial products or how the Comptroller will accomplish the MSA's goals.[217] It instead leaves flexibility, and allows the Undersecretary to expand or extend the pilot program if such actions would "decrease the need for service members and their families to rely on payday lenders without exacerbating credit overextension."[218] The bill was last in the Subcommittee on Military Personnel.[219]

As noted above, Dodd-Frank specifically authorizes the CFPB to study and promulgate regulations regarding payday loans, and the CFPB has made clear its interest in curbing payday loans and deposit advance products.[220] Furthermore, the CFPB is empowered to monitor fringe lenders and investigate their practices. It also may restrict "unfair, deceptive, or abusive acts" that are "likely to cause substantial injury to consumers which [are] not reasonably avoidable by consumers" where this injury "is not outweighed by countervailing benefits to consumers or to competition."[221] Dodd-Frank defines "abusive" to include a subjective dimension which allows for contextual considerations that may include gender.[222] This opens the door to new protections and programs such as those discussed below.[223]

Dodd-Frank allows for double-barrel federal/state regulation. The Act mandates that the CFPB must coordinate with states in regulating payday lenders, and preserves states' power to provide greater protections than those provided by federal law. This furthers federalism by allowing states

217. *Id.* at §§ 2(a)-(b). The bill also seeks to increase rate of savings among service members. *Id.* at § 2(b)(1). With respect to cash advances, it would encourage "insured depository institutions" to offer service members cash advances, without excess fees and high interest rates, etc. Nonetheless, the bill is vague regarding how the Comptroller could create this incentive. *Id.*

218. *Id.* at § 2(g).

219. *Bill Summary & Status, 112th Congress (2011 - 2012), H.R. 5946*, THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR05946:@@@L&summ2=m& (last visited Oct. 6, 2013) (noting that the bill is in the Subcommittee on Military Personnel).

220. *See* Steve Cocheo, *Tug of War With Banks in the Middle*, ABA BANKING JOURNAL (June 1, 2013), http://www.ababj.com/cfpb/item/3760-tug-of-war-with-banks-in-the-middle/3760-tug-of-8/30/2013. Banking groups have resisted the CFPB's fierce statements against deposit advances and have criticized the FDIC for contradicting itself by guiding banks to provide small-dollar loans based on simple proof of recurring income while simultaneously rebuking banks for inadequate underwriting. *Id.*

221. Dodd-Frank Wall Street Reform And Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1031, 124 Stat. 1375, 2005-2006 (2010); Dodd-Frank, 12 U.S.C.A. § 5624 (West 2012). Dodd-Frank includes payday lending within its references to small-dollar lending, and has expressed its concern with payday lending. CFPB WHITE PAPER, *supra* note 15.

222. *See* Mark Totten, *Credit Reform and the States: the Vital Role of Attorneys General after Dodd-Frank*, 2013 LEGAL STUD. RES. PAPER SERIES no. 11-02, at 19-42, IOWA L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207726 (noting the ambiguity but proposing broad reading of the Act).

223. *See infra* notes 294-317 and accompanying text (discussing proposals such as expanded loans through the postal service and micro-financing).

to enforce their own consumer protection laws for the benefit of their citizens.[224] Dodd-Frank also empowers states' attorney generals to enforce the Act's prohibitions and any rules the CFPB promulgates.[225] A broad reading of Dodd-Frank also gives State Attorney Generals the power to investigate potential federal violations.[226]

Dodd-Frank nonetheless limits federal regulation of payday loans by precluding the CFPB from establishing a federal usury prohibition.[227] Furthermore, some have criticized Dodd-Frank as favoring large lenders over smaller businesses that cannot shoulder the costs of increased regulation.[228] Some also note that the addition of federal regulations regarding payday and other non-bank lending may unnecessarily add to regulations that states currently impose on these lenders.[229] In addition, groups have challenged the CFPB's constitutionality and the appointment of its Director, Richard Cordray.[230]

At the same time, a group of Congressional Representatives introduced a bill to move regulation of payday loans from the CFPB to the Office of the Comptroller of Currency ("OCC"), and allow for newly chartered non-depository creditors ("Credit Corporations") to offer financial products and services such as payday loans.[231] The bill would direct the OCC to charter these non-bank Credit Corporations to offer payday loans without worrying about likely CFPB regulations or adhering to states' separate payday loan regulations.[232] However, many have resisted this bill, making it unlikely to succeed.[233] Yet, it evidences the pushback the CFPB will encounter as it seeks to regulate payday lending.

224. *See* Hawkins, *supra* note 9, at 54-56.

225. Totten, *supra* note 222, at13-21.

226. *See id.* at 19-42 (noting the ambiguity but proposing broad reading of the Act).

227. *See* Mierzewski et al., *supra* note 186, at 722-30 (noting restrictions on the CFPB's authority).

228. *See* Hawkins, *supra* note 9, at 38-39 (noting the law's impact).

229. *Id.* at 54-59 (noting interaction with state law).

230. Mike Scarcella, *States, Private Plaintiffs Press Suit Against Wall Street Reform Law*, THE BLT: THE BLOG OF LEGAL TIMES (Feb. 28, 2013, 3:03 PM), http://legaltimes.typepad.com/blt/2013/02/states-private-plaintiffs-press-suit-against-dedd-frank.html.

231. *Bill Summary & Status, 112th Congress (2011 - 2012), H.R.6139*, THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR06139:@@@D&summ2=m& (last visited Oct. 6, 2013).

232. Consumer Credit, Access, Innovation, and Modernization Act of 2012, H.R. 6139, 112th Cong. §§ 3(e)(2)(G), 3(j-k) (2012) (also specifying that Credit Corporations are not subject to any state law affecting their ability "to provide financial products and services to underserved consumers and small businesses" and precluding states from discriminating against these creditors or their agents).

233. *Examining Consumer Credit Access Concerns, New Products, and Federal Regulations: Hearing on H.R. 6139 Before H. Subcomm. on Fin. Inst. & Consumer Credit*, 112th Cong. 7-8 (2012) (statement of Grovetta Gardineer, Deputy Comptroller, OCC). Policymakers and consumer advocates oppose this bill as allowing online and other payday lenders to create these Credit Corporations as

2. Colorado's Measured Regulations

States struggle with regulating payday lending in light of federal law allowing banks to export their rates, and the jurisdictional complexities of regulating online lending and lenders affiliated with sovereign Native American tribes. Furthermore, the payday lending industry has wielded great power in state legislatures.[234] That may explain why it has been reported that only eighteen states and the District of Colombia have been proactive in outlawing high-cost payday loans.[235]

Colorado does not outlaw payday loans, but has been somewhat proactive in regulating these loans with an aim toward balancing consumers' and lenders' interests.[236] Colorado's DDLA, noted above, sets a maximum loan amount at $500 and adds provisions aimed to hinder consumers from getting trapped in the usual payday loan roll-over cycle. DDLA thus limits consumers to one renewal or rollover of their payday loans, and requires a 30-day period between loans to the same consumer.[237] Consumers may also cancel a payday loan transaction by 5:00 p.m. the next day.[238] Furthermore, consumers may choose to repay loans in one sum or pay the full amount within six months.[239]

DDLA also seeks to curb costs of payday loans. Accordingly, it caps the interest rate for these loans at 45%.[240] However, that rate limit does not include fees and other costs, which add significantly to the effective APRs and true expenses that payday loan customers bear. Typical lenders collect interest, along with set-up fees, not exceeding 20% of the first $300 and up to 7.5% of amounts over $300.[241] Lenders also may collect monthly

means for evading state laws. *See* H.R. 6139, 112th Cong. § 3(i) (2012). "The OCC's fundamental concern is that H.R. 6139 would provide special status and federal benefits to companies and third-party vendors that would primarily engage in offering credit products and services that the OCC has previously found to be unsafe and unsound and unfair to consumers." *Hearing on H.R. 6139*, 112th Cong. 119 (2012).

234. Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 132 n.717 (2002) (citing and quoting other authorities); THE STATE PUB. INTEREST RESEARCH GRPS. & CONSUMER FED'N OF AM., SHOW ME THE MONEY!: A SURVEY OF PAYDAY LENDERS AND REVIEW OF PAYDAY LENDER LOBBYING IN STATE LEGISLATURES 1 (2000), *available at* http://www.uspirg.org/sites/pirg/files/reports/Show_Me_The_Money_USPIRG.pdf: (emphasizing the power of the payday and rent-to-own industries' lobbying efforts).

235. *See Margin Calls*, *supra* note 35.

236. COLO. REV. STAT. §§ 5-3.1-101 to 5-3.1-123 (2010).

237. *Id.* at §§ 5-1.3-105-106.

238. *Id.* at § 5-1.3-106(2).

239. *Id.* at §§ 5-3.1-101-106.

240. *Id.* at § 5-3.1-105.

241. *Id.*

maintenance fees of up to $30 after a loan remains unpaid for 30 days.[242] Payday borrowers may recoup part of the fees if they pay back the debt early, and are not liable for additional set-up or maintenance fees if they renew or rollover the loan.[243]

DDLA seems to have had some impact on the payday lending industry in Colorado. The dollar amounts of payday loans in Colorado have fallen almost 60%, and the number of loans fell from 1,110,224 loans in 2010 to 444,333 in 2011 after DDLA's enactment.[244] The data also indicates that the enactment may have contributed to the drop in the average effective APR from 338.90% to 191.54%.[245] In addition, the average number of payday loans consumers have taken out per year has fallen from 8.53 loans to 2.3 loans.[246] As expected given the six-month repayment option, the average loan period has risen from 18 days to 188 days.[247]

Nonetheless, the average contract finance charge has risen from $60 to $237.[248] Furthermore, the average amount financed went up in 2011 to $373, which is higher than it had been in the previous ten years.[249] There also has been an increase in "same-day-as-payoff" transactions, meaning the lender makes a new loan to a consumer on the same day the consumer pays their previous loan in full. This is effectively the same as a rollover or refinance for the consumer but allows the lender to bypass DDLA limitations on rollovers. However, the demographics of payday loan borrowers have remained roughly constant despite the changes in the law, and women still outpace men in payday borrowing in Colorado.[250]

V. CALL FOR CONTEXTUALIZED POLICYMAKING

Policymakers would be wise to consider gender and other contextual factors in determining lending policy. Context matters.[251] Empirical re-

242. Maintenance fees are up to $7.50 per $100 loaned with a maximum fee of $30 per month. § 5-3.1-105.

243. §§ 5-3.1-105-106.

244. 2011 CO REPORT, *supra* note 82, at 1. *See also* Heather Draper, *Payday-Loan Amounts Drop 60 Percent in Colorado*, DENVER BUSINESS JOURNAL (Oct.1, 2012), http://www.bizjournals.com/denver/news/2012/10/01/payday-loan-amounts-drop-60-percent-in.html (reporting results of the study).

245. 2011 CO REPORT, *supra* note 82, at 12-13. *See also AG's Press Release*, *supra* note 85.

246. 2011 CO REPORT, *supra* note 82, at 13-14. *See also AG's Press Release*, *supra* note 85.

247. 2011 CO REPORT, *supra* note 82, at 11.

248. *See AG's Press Release*, *supra* note 85.

249. 2011 CO REPORT, *supra* note 82, at 8.

250. *Id.* at 5.

251. Ethan J. Lieb, *What is the Relational Theory of Consumer Form Contract?*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 259, 259-83 (Jean Braucher et al. eds., 2013); Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44

search aids policymakers in crafting regulations to proactively perform their functions, instead of simply acting to "clean up" in a reactionary way.[252] Furthermore, all exchanges, including loan contracts, have relational and social aspects that influence individuals' choices and behaviors.[253] This Article thus invites policymakers to consider gender among the many contextual factors in creating policies and programs to address the perils of payday lending.

A. Need for Contextual Consideration

Gender is among the contextual factors that play an important role in what I term "*contracting culture.*"[254] This conception of culture builds on relational and behavioral theories to view exchanges in light of a wide range of economic and non-economic factors that impact parties' contracts.[255] Loan contracts are particularly tied to contextual considerations due to the significance of debt with respect to not only our pocketbooks, but also our relationships, emotions, and health. Financial negotiations contribute to individuals' "mental health, employment opportunities, pay, status, and a multitude of other tangible and intangible outcomes."[256]

Although all women are by no means the same, female consumers' financial transactions may be particularly tied to non-economic contextual factors.[257] Women may have unique interests, understandings, and styles with respect to borrowing money, purchasing products, and making other

(2003), *reprinted in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 35, 35-46 (Jean Braucher et al. eds., 2013).

252. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 115-194 (2010) [hereinafter Schmitz, *Legislating in the Light*].

253. Fred Block, *Relational Work and the Law: Recapturing the Legal Realist Critique of Market Fundamentalism,* 40 J. L. & SOC'Y 27, 28-40 (2013).

254. Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123, 125 (2007) [hereinafter Schmitz, *Contracting Culture*]. I have proposed a continuum analysis of contracting cultures ranging from "intra communal" to "extra communal" based on parties' relations, understandings, and values. I place contracts that businesses offer to consumers—business-to-consumer, or "B2C" contracts—at the extra communal end of the continuum due to consumers' lack of connections or shared interests with companies that employ these adhesive contracts.

255. *Id*. *See also* LARRY A. DIMATTEO ET AL., VISIONS OF CONTRACT THEORY 7-8 (Carolina Acad. Press 2007) (noting works in this area by Professor Blake Morant); Jeffrey Z. Rubin & Frank E. A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOT. J. 249, 250-53 (1991) (highlighting the importance of considering cultural differences relating to ethnicity, nationality, race, gender, and age).

256. Stuhlmacher et al., *supra* note 128, at 336.

257. *See supra* notes 123-127 and accompanying text (discussing women's propensities toward relational contracting).

contract decisions.[258] For example, women are more likely than men to make financial decisions based on family and child-rearing responsibilities.[259]

Women also report more worry about finances than men with respect to keeping their families afloat.[260] The Consumer Federation of America and Visa USA found in a 2005 study that 71% of the women surveyed said they had worried about their personal finances in the past year, and 66% cited unexpected expenses as a cause for those worries.[261] The study further found that financial worry caused women to suffer health issues, including lost sleep. Women also lost job productivity. Moreover, one-half of the younger women reported that they had less than $500 in emergency savings.[262] Gender-related data thus has salience in determining policy and should be considered in addressing the gender gap in payday lending and female debt loads.[263]

It is also important to consider the extent of debt's ripple effects. It is no surprise to say that debt causes stress, but this stress can become a documented disorder called "Money Sickness Syndrome."[264] This emotional disorder produces extreme anxiety about a loss of control that may impede every aspect of one's health and ability to make rational decisions.[265] Studies also have shown that children in families concerned with financial obligations report higher levels of "perceived poor health" and college students report significant negative impacts from concern regarding education debt.[266]

Studies also show that access to payday loans does not usually save consumers from relying on public resources. Instead, the community bears burdens derived from short-term fringe lending.[267] A researcher testing the effects of payday loans on food stamp participation and child support pay-

258. Laura Kray & Linda Babcock, *Gender in Negotiations: A Motivated Social Cognitive Analysis*, *in* NEGOTIATION THEORY AND RESEARCH 203-11 (Leigh L. Thompson ed., 2006) (noting scarcity of investigation regarding gender's role in negotiating behavior).

259. Vickie L Bajtelsmit & Alexandra Bernasek, *Why Do Women Invest Differently Than Men*, 7 FIN. COUNSELING & PLANNING (1996), *available at* http://ssrn.com/abstract=2238.

260. Ricciardi, *supra* note 29, at 34-35 (gathering and citing other studies indicating anxiety regarding debt).

261. *New Survey Finds Insufficient Savings for Emergencies Major Cause of Financial Worry Among Younger Women*, PRACTICALMONEYSKILLS.COM (Apr. 27, 2005), http://www.practicalmoneyskills.com/about/press/releases/042705.php.

262. *Id.*

263. *See* Kray & Babcock, *supra* note 258, at 203-13.

264. Ricciardi, *supra* note 29, at 7-10 (discussing the syndrome).

265. *Id.* at 7-11.

266. *Id.* at 11-13 (discussing studies and results).

267. Brian T. Melzer, *Spillovers From Costly Credit*, 2013 U.S. CENSUS BUREAU CTR. FOR ECON. STUD. No. CES-WP-11, at 2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235766.

ments found that households with local access to payday loans are 20% more likely to use food stamps and 10% less likely to make court-ordered child support payments.[268] Households in these areas also experienced a 16% increase in economic hardship related to utilities, rent, and medical bills.[269] The researcher concluded that high-cost credit has "spillover" effects on children, those adults to whom child support payments are owed, and taxpayers who indirectly fund such households through food stamp and other government assistance programs.[270]

This nonetheless raises questions: Does access to payday loans augment cycles of debt that lead to greater need for public assistance, or do payday lenders choose to locate in low-income areas where there already is greater need for public assistance? Either way, the data suggests that payday loans do not live up to lenders' marketing promises—these loans do not appear to rescue individuals from cycles of debt or poverty. Moreover, it may be reverse-redlining to target areas already in financial peril to sell high-cost and risky payday loans.

Indeed, the United States is not alone in its concerns regarding payday lending. At a government-sponsored summit organized by British consumer minister Jo Swinson, it was decided that certain limitations would have to be enacted to respond to payday lenders' irresponsible practices, namely in terms of advertising techniques.[271] The British Office of Fair Trading found that payday lenders "focus on speed rather than price when competing for customers," and employ irresponsible advertising practices such as using cartoon characters and Facebook marketing using animals.[272] They also use seemingly intentional misdirection, such as stating a 1,918% APR as "nineteen-eighteen."[273] Proposed solutions included banning these advertisements on college campuses and ensuring that advertising contains a "health warning" about the risks of high-cost credit compared to affordable, long-term alternatives.[274]

268. *Id.* at 3.

269. *Id.* at 13-14.

270. *Id.* at 7-16.

271. Rupert Jones & Hilary Osborne, *Crackdown on Payday Loans Advertising*, THE GUARDIAN (July 1, 2013), http://www.guardian.co.uk/money/2013/jul/01/crackdown-payday-loans-advertising?INTCMP=SRCH.

272. *Id.*

273. *Id.*

274. *Id. See also* Sam Lister, *Warning Issued to Payday Loan Firms*, THE YORK PRESS (July 1, 2013), http://www.yorkpress.co.uk/uk_national_news/10517616.Warning_issued_to_payday_loan_firms/?ref=rss (announcing that government ministers "are due to warn" payday lenders that they are living up to neither the spirit nor the letter of codes imposed on them to protect vulnerable consumers); *Payday Firms 'Fail to Keep Promises'*, THE HERALD SCOTLAND (July 1, 2013), http://www.heraldscotland.com/news/home-news/payday-firms-fail-to-keep-promises.21481034 (reporting concerns

Accordingly, payday loan and other high-cost debt is a significant issue that must be addressed. It is nonetheless unclear what precise policies or regulations should prevail with respect to payday loans. As discussed above, the current fabric of laws contains many holes and misaligned patches.[275] Furthermore, the unconstrained nature of online payday lending presents additional challenges for state regulators seeking to protect their consumers. Jurisdictional complications also create difficulties for lenders who may not be able to collect from debtors in states that outlaw or severely restrict payday lending.[276] Moreover, it is unclear that cutting all access to high-interest small-dollar loans will improve consumers' welfare.[277]

B. Call for Creativity

States should be free to regulate payday loans offered by non-banks as a matter of federalism and states' prerogatives to protect the health and safety of their people. Furthermore, state regulations have been somewhat successful in curbing payday lending. They also provide examples of strategies that other policymakers may employ in balancing various needs and interests to craft sound reforms.

PEW found in its 2012 report that payday loan usage was far lower in states that bar payday loans or set fairly low interest rate caps on payday loans as compared with states with no or lax restrictions on payday lending.[278] Moreover, it found that in states that restrict storefront payday lending, 95 out of 100 would-be borrowers elect not to use payday loans at all.[279] Eighty-one percent of the payday loan borrowers in the PEW's focus groups similarly reported that they would cut back on expenses if payday loans were not available and most said they would not turn to, or likely qualify for, credit cards.[280]

about the £2 billion industry, rollover entrapment, speed over cost, and skimping on affordability checks).

275. *See supra* Part IV and accompanying text.

276. *See* Mark Huffman, *Consumers Turning Tables on Payday Lenders,* CONSUMERAFFAIRS (June 7, 2013), http://www.consumeraffairs.com/news/consumers-turning-tables-on-payday-lenders-060713.html (reporting how consumers in states that outlaw payday loans are simply refusing to repay payday loans they acquire on the Internet).

277. Dean Karlan & Jonathan Zinman, *Expanding Credit Access: Using Randomized Supply Decisions to Estimate the Impacts*, 23 REV. FIN. STUD. 433, 461 (2010). *See also* Anderson, *supra* note 16, at 146-47 (suggesting that the rent-to-own paradigm adds value to the lives of credit poor consumers).

278. 2012 PEW REPORT, *supra* note 44, at 18-25.

279. *Id.* at 20-13.

280. *Id.* at 16-20.

However the wide divergence in state regulations and the difficulties of regulating Internet lending suggest that the federal government should set a baseline for payday lending fairness to protect all consumers, regardless of where they reside. This is why the CFPB is poised to initiate such regulations in the area of payday loans.[281] Furthermore, as noted above, some urge the federal government to establish a strict 36% rate cap for all payday loan consumers that would mimic MLA in place for military members.[282] The DOD found that this cap was necessary to address declines in job performance and welfare of military personnel who used payday loans. One therefore may argue that such protections should extend to cover all consumers.[283]

Critics of such regulations argue that these measures would deny consumers much-needed access to credit and possibly force individuals to borrow from loan sharks, turn to crime, or lose ability to keep their families afloat.[284] They argue that such fringe lending products are integral to the social safety net, especially for those who live on the margins beyond formal lending mechanisms such as those provided through standard banks.[285] Critics note that payday loan borrowers are often those without access to traditional loans and may prefer the "cash-and-carry" nature of payday loans to avoid the credit checks and commitment commonly associated with traditional lending products. In addition, payday loan borrowers may seek the seeming intimacy and informality of these loans.[286] Such desires may help explain why payday loan borrowers reported preference for increased transparency and education instead of loan preclusions in PEW's 2013 follow-up to its 2012 payday lending report.[287]

281. Johnson, *supra* note 214, at 663-70.

282. *Id.* at 654-90 (arguing for extension of the MLA but noting that the CFPB may not go that far in its regulations); Creola Johnson, *America's First Consumer Financial Watchdog Is on a Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 CATH. U. L. REV. 381, 396-427 (2012) (proposing that the CFPB ban certain payday-loan practices, like usury rates on loans, balloon payments, short maturity dates, and allowing borrowers to rollover there loans); *see also supra* notes 214-219 and accompanying text (discussing proposals).

283. Scott E. Carrell & Jonathan Zinman, *In Harm's Way? Payday Loan Access and Military Personnel Performance*, 2008 FED. RES. BANK OF PHILA., Working Paper No. 08-18, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269414; *supra* notes 4-6 and accompanying text (discussing DOD research).

284. *See* Karlan & Zinman *supra* note 277, at 458-61 (finding in their study that "consumers who borrowed at 200% in [their] experiment benefited from doing so, at least relative to their outside options"); Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap*, 34 J. BANKING & FIN. 546, 552-55 (2010).

285. *See* Austin, *supra* note 31, at 1226-40 (discussing the social safety net and various components of the informal economy).

286. *See id.* at 1243-49.

287. 2013 PEW REPORT, *supra* note 44, at 43-45.

Still, evidence indicates need for greater protections from perils of payday loans and the CFPB has the opportunity to provide needed protections. This could include disclosure requirements aimed to address consumers' misunderstanding of payday loan costs and the impacts of repetitive use of these loans.[288] Such disclosures could be provided in a clear grid with numerical calculations of true costs based on a borrower's initial loan amount, coupled with simple explanations of how this amount will increase if the borrower rolls over the loan at the end of the initial term.[289] Additionally, Professor Christopher Peterson highlighted consumers' unrealistic optimism, underestimation of long-term drawbacks, and distorted understanding of "quick-fix" loans in proposing a model ordinance mandating that any lender who charges interest rates exceeding 45% must post signs warning the public that it is a "Predatory Lender."[290]

The CFPB also may look to how states such as Colorado aim to curb payday loan rollovers. This seems reasonable in light of evidence from Colorado that such measures may be somewhat successful in curbing payday loans. Nonetheless, some argue that restrictions on rollovers leave gaps and may lead to more same-day-as-payoff transactions. Furthermore, such regulations to date have not addressed the demographics of payday loan users, and the impact of payday loans on women and children.[291]

At the same time, it is unclear that attempted limits on rollovers and added disclosures alone would protect women and their families, or all consumers, from the perils of payday loans. Professor Mann at Columbia Law School found in his study that most payday loan borrowers are fairly accurate in predicting their repayment and do not expect that they will repay the loan by the end of the first loan term.[292] Families and women in particular, desperate to care for their children, will take out payday loans at any cost, even when they know the costs are exorbitant. They also will seek needed funds elsewhere if unable to roll over their payday loans.

288. *See* Mann, *supra* note 73, at 3-6.

289. *See* Schmitz, *Legislating in the Light*, *supra* note 252, at 165-72 (proposing simple disclosures for arbitration clauses).

290. Christopher L. Peterson, *"Warning: Predatory Lender"—A Proposal for Candid Predatory Small Loan Ordinances*, 69 WASH. & LEE L. REV. 893, 933-72 (2012) (detailing his intriguing proposal).

291. *See* Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 WASH & LEE L. REV. 979, at 1023-47 (2012) (noting inadequacies of payday loan regulations, but concluding that payday loans can "carry borrowers through short-term financial shocks").

292. *See* Mann, *supra* note 73, at 4-6, 18-33 (finding race and gender had little impact on accuracy of repayment predictions, and that roughly 60% of borrowers predicted the final repayment within a 14-day window).

Accordingly, regulations should go beyond the usual disclosures and limits on rollovers. They should be crafted in light of more contextual analysis and take into account broader considerations of the human proclivities and financial problems that push consumers to desperately seek short-term loans.[293] As the FDIC has noted, there is need for deeper consideration of how payday lending may harm communities as a whole:

> [Q]uestionable payday lending practices, while not specifically prohibited by law, may be inconsistent with helping to meet the convenience and needs of the community. For example, payday loans to individuals who do not have the ability to repay, or that may result in repeated renewals or extensions and fee payments over a relatively short span of weeks, do not help to meet credit needs in a responsive manner.[294]

Communities should build and strengthen social safety nets and their commitments to communal welfare. This was noted in recent proposals to improve the success of the MLA in curbing predatory lending to service members by increasing the availability of emergency assistance from charities that serve each branch of the Services.[295] Moralistic trust and communal sense of responsibility for our neighbors create social norms that breed honest dealings and means for assistance for those who are in need.[296] One researcher, for example, tested the idea that social capital breeds a more affluent and equitable society by comparing the level of trust with the level of payday lending activity in the states studied using data from 2008 to 2010.[297] As hypothesized, she found that as the level of trust increased, the level of payday lending activity decreased, all other factors being held constant.[298]

Admittedly, it is difficult to increase communal responsibility and trust. However, regulations could advance this objective by requiring payday lenders to contribute to a community fund used to assist deserving families seeking to survive particularly tough financial times. Perhaps these lenders also could be required to provide customers with financial education materials that may assist them in repaying debt quickly. Some commentators also have argued that federal law should mandate that

293. *See supra* Part II (discussing possible reasons for the gender divide); *See also* Mann, *supra* note 73, at 3-6, 33-38 (highlighting how regulations should be premised on assumptions that consumers misperceive their ability to repay, but instead should encompass assessment of the problems with the social safety net).

294. *Guidelines*, *supra* note 38 (noting guidelines and best practices regarding payday lending).

295. FOX, *supra* note 207, at 105.

296. Alyssa Curran, Does a Weak Social Fabric Fuel the Predatory Lending Industry? The Link Between Payday Lending Activity and Community Trust (May 2013) (unpublished Masters of Arts in Applied Economics Capstone submission, Illinois State University) (on file with author).

297. *Id.* at 9-30.

298. *Id.* at 10-30.

mainstream banks expand their current lending offerings for low-income individuals.[299]

Nonetheless, requiring banks to expand these loan offerings places awkward burdens on banks to expand their lending to those with limited means without violating rules requiring them to verify ability to repay the loans. Some also have questioned whether strict federal lending regulations and requirements backfire by leading to "harmful products or manipulation of regulatory loopholes."[300] For example, Arizona's 36% rate cap on payday loans left loopholes for high-cost prepaid cards, "credit service organizations" that charge high fees for brokering loans from third parties beyond the scope of the cap, and open-ended loans that often function like payday loans.[301]

Instead, the situation warrants a creative solution. For example, Professor Baradaran has proposed "post office banking," which would enlist the post offices to enter the market currently dominated by fringe lenders. Through post offices, "[t]he government could step into this sector and offer lower costs credit options to the poor by only taking into account the actual cost of credit and forgoing large profit margins."[302] In this way, the government could increase competition and drive costs down closer to actual lending costs, while repurposing the failing Postal Service to meet a public need.[303] Professor Baradaran further argues that this could be accomplished without adding to overloaded government regulators' burdens.[304] The Post Offices already sell money orders, and such a program could prevent postal employees from losing jobs due to decreased demand and office closures. Moreover, such proposals show the type of creativity necessary for developing contextualized and successful policies.

Micro-financing (offering small-dollar loans aimed to boost new businesses or community projects) also has shown some promise in promoting communal commerce and easing need for payday loans for some borrowers with sufficient means to qualify for these lending programs. In Britain, where payday loans interest rates are as high as 4,214%, the government has encouraged creation of firms that specialize in micro-loans for low-income borrowers.[305] Some evidence suggests that these programs allow

299. *But see* Baradaran, *supra* note 107, at 535 (noting that such requirements may "inevitably lead to inadequate loans and disgruntled bankers").

300. *Id.* at 536.

301. Woolston, *supra* note 73, at 877-80.

302. *Id.* at 545.

303. *Id.* at 545.

304. *Id.* at 544.

305. Insley, *supra* note 63.

borrowers to avoid higher cost lending products and that these borrowers tend to pay back the loans on time.[306]

Nonetheless, these lenders require more robust credit checks than typical payday lenders and charge an APR of 69.5%.[307] Rates may be lower, however, if these micro-loans were offered through non-profit organizations, such as Kiva, which works with microfinance institutions around the world to promote local business and provide loans to people who do not have access to traditional banking systems.[308] Furthermore, more micro-financing programs could be developed specifically to boost communal businesses and projects developed by struggling single mothers and other low-income women.[309]

Group-based lending also may encourage responsible borrowing and financial literacy. For example, researchers studied the advantages that women have in rural Bangladesh by participating in group-based lending programs in which each group member receives an individual loan.[310] Social pressures promote repayment because the entire group loses the line of credit if any member defaults, while the group dynamic also encourages financial literacy among the group.[311] Furthermore, this team-centered approach eases social stigmas, therefore adding to benefits for women seeking to gain financial strength.[312] Such lending models could be offered

306. Nitin Bhatt & Shui-Yan Tang, *Determinants of Repayment in Microcredit: Evidence from Programs in the United States*, 26 INT'L J. URBAN & REGIONAL RESEARCH 360, 360-61 (2002), *available at* http://www.microfinancegateway.org/gm/document-1.9.26438/18141_Determinants_of_Repayment_in_Microcredit.pdf (suggesting that "the strongest appeal of microcredit is the well-known success of some third-world programs in achieving high repayment records").

307. Insley, *supra* note 63.

308. *About Us*, KIVA, http://www.kiva.org/about (last visited Oct. 6, 2013). Since Kiva was founded in 2005, there have been 989,267 Kiva lenders. $472,452,650 has been provided in loans and the repayment rate is 98.76%. Kiva has also received the highest ratings on Charity Navigator. *Kiva*, CHARITY NAVIGATOR, http://www.charitynavigator.org/index.cfm?bay=search.summary&orgid=12978 (last visited Apr. 10, 2013).

309. Some micro-financing projects do seek to boost women's business endeavors. Furthermore, there are grant programs aimed to assist women, in particular. For example, Wal-Mart has partnered with a global non-profit, Enactus, in a project aimed to empower female entrepreneurs. This Women's Economic Empowerment Project has been criticized by some as merely part of a public relations campaign to combat Wal-Mart's image problems in the wake of sex-discrimination lawsuits, but the project has provided hundreds of women with workforce training and assistance in creating new businesses or strengthening existing businesses in the United States alone. *Program Overview*, WOMEN'S ECONOMIC EMPOWERMENT PROJECT PARTNERSHIP, http://www.walmartempowerswomen.org/overview/ (last visited Oct. 6, 2013).

310. Mark M. Pitt & Shahidur R. Khandker, *The Impact of Group-Based Credit Programs on Poor Households in Bangladesh: Does the Gender of Participants Matter?*, 106 J. POL. ECON. 958, 959 (1998).

311. *Id.* at 962.

312. *Id.* at 957-63 (focusing more on group dynamics than proven statistics).

on the Internet, given that they are properly administered and monitored to ensure safety, legitimacy, and best practices.

In Britain, Justin Welby, the Archbishop of Canterbury, encouraged credit unions to use church facilities and their parishioners to assist them in providing alternatives to payday loans offered through "church halls and other properties."[313] The church also plans an in-house credit union for members of its clergy so that it can build its own knowledge of how the lending process works. These proposed Church of England actions took place before the payday lending responsibility summit, but have gained traction in the wake of summit media coverage.[314] They come with their own controversies and drawbacks, but may provide the type of familiarity that some borrowers crave in seeking payday loans from storefront lenders in their neighborhoods.

Expansion of payday lending alternatives is important for aiding individuals to break free from debt and qualify for loans at reasonable rates. The CFPB also could encourage lenders' best practices by issuing guidelines and bolstering consumer education initiatives through social media.[315] Professor Johnson has proposed that the CFPB could run a contest for the creation of consumer-generated advertising for its initiatives, and utilize crowdsourcing to select the best advertisements.[316] She also has suggested that smartphone application technology could be used to develop an easy way for consumers to find affordable, low-cost loans.[317]

Targeted financial resources could augment consumer awareness and understanding of credit programs and alternatives to high-cost and risky fringe lending. However, this is not a call for more general financial education. Such programs already exist, and the extent of their efficacy is unclear.[318] Nonetheless, more refined resources regarding payday loans may have some impact.[319] M*powered*, for example, offers free debt management, credit education, and bankruptcy counseling in Denver, Colorado

313. Simon Bowers, *Archbishop Promotes Payday Loan Alternatives*, THE GUARDIAN (June 30, 2013), http://www.guardian.co.uk/money/2013/jul/01/payday-loans-archbishop-justin-welby?INTCMP=SRCH.

314. *Id.*

315. Johnson, *supra* note 214, at 680-715.

316. *Id.* at 720.

317. *Id.* at 724.

318. *See* Lauren E. Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, 46 SAN DIEGO L. REV. 415, 421-34 (2009) (critiquing studies supporting efficacy of financial literacy).

319. *See id.* at 427-34 (noting optimism regarding fine-tuned and supplemental education despite critiques of generalized financial education).

Springs, and across Colorado.[320] Currently, the program does not address payday and fringe lending, or needs of women in particular. However, it does collaborate with twenty-two of the world's largest foundations and financial institutions and the program could be refined to add such resources.[321]

Programs directed toward women's financial issues have already developed and could be expanded to cover fringe lending. For example, the Women's Bureau of the Department of Labor collaborated with Texas AgriLife Extension Service out of Texas A&M to create Wi$eUp software.[322] The Wi$eUp curriculum has eight modules: Money for Life, Money Math, Money Basics, Credit in a Money World, Savings Basics, Insurance & Risk Management, Becoming an Investor, and Achieving Financial Security.[323] The software includes interactive components, and covers things like budgeting, understanding credit in the real world, and seeking trustworthy assistance. Such resources may not specifically curb fringe lending, but they at least provide resources made for women and could be expanded to address payday loans.[324]

These are merely initial ideas to open the conversation about how policymakers should think beyond the usual interest rate caps and disclosure regulations to create contextualized policies. Moreover, the ultimate goal for contextualized policymaking should be to help alleviate demand for payday loans by assisting individuals out of poverty and into the middle class. Individuals need means to escape reliance on payday loans that are not merely additional mechanisms for borrowing. Swapping payday loans for other loans is not an enduring solution.

Expansion of credit options should be coupled with augmented educational and housing programs. For example, some communities have created joint high school/trade school programs that allow students to get Associ-

320. *What We Do*, MPOWERED, http://www.mpoweredcolorado.org/About-Us/What-We-Do.aspx (last visited Oct. 6, 2013); *DOSP Collaboratives—Financial Empowerment Centers*, DENVER OFFICE OF STRATEGIC PARTNERSHIPS, http://www.denvergov.org/strategicpartnerships/DenverOfficeofStrategicPartnerships/PartnershipsConnections/DOSPCollaboratives/FinancialEmpowermentCenters/tabid/436573/Default.aspx (last visited Oct. 6, 2013).

321. *Who We Are*, LIVING CITIES, http://www.livingcities.org/who-we-are/ (last visited Oct. 6, 2013).

322. *About Wi$eUp*, WI$EUP, http://wiseupwomen.tamu.edu/about-us.php (last visited Oct. 6, 2013).

323. *Welcome to Wi$eUp!*, WI$EUP, http://wiseupwomen.tamu.edu/index.php (last visited Oct. 6, 2013).

324. *Id. See also About Us*, WISER, http://www.wiserwomen.org/ (last visited Oct. 6, 2013) (Wiser is a similar program, but is a non-profit that does cover financial assistance in urgent situations); *WISER's "Too Good To Be True" Checklist*, WISER, https://www.wiserwomen.org/index.php?id=147 (last visited Oct. 6, 2013).

ate's degrees, and thus gainful employment, after only one year at community colleges.[325] Some communities also have crafted rent subsidies for single mothers working to attain college diplomas, and credit union programs to help immigrants gain access to loans and establish credit.[326]

Of course, the creation of such programs is not a new concept and many such programs do exist. Furthermore, programs should help not only women—but also all individuals and families that are struggling to survive financially. Policymakers also should publicize these programs to increase consumers' awareness and access to much-needed assistance. These are but a few suggestions and are only a drop in the bucket of the ideas that may lead to broader, more encompassing strategies. Policymakers should aim to not only help alleviate need for payday loans, but also create contextualized programs that would benefit society as a whole.

VI. CONCLUSION

Payday lending may provide a safety net for some consumers in need of quick cash for emergencies. However, data suggest that most payday loan borrowers become repeat users caught in a cycle of high-cost debt. Indeed, the federal government has severely restricted these loans to military members under the MLA as a matter of national security. Furthermore, empirical evidence indicates consistent overrepresentation of women, including many single mothers, among payday loan borrowers. This takes a toll on not only these women and their families, but also society as a whole.

Many states already have restricted payday lending to various degrees and in different ways and the CFPB is poised to tackle the payday loan issue at the federal level. Some have suggested that the federal government should set a mandatory 36% rate cap on payday loans for all consumers like it has set for military, or at least increase disclosure requirements and impose roll-over limits on these loans. However, it is unclear that such measures will address women's greater reliance on payday loans or bolster the social safety net overall. It is thus time to think creatively and consider contextualized programs that aim to increase women's (and all consumers') safe borrowing options, provide education regarding those options, and

325. Sophie Quinton, *Five Cool Innovations to Lift Workers into the Middle Class*, NATIONAL JOURNAL (April 25, 2013), http://www.nationaljournal.com/next-economy/solutions-bank/five-cool-innovations-to-lift-workers-into-the-middle-class-20130425.

326. *See id.*

ultimately assist them in escaping cycles of debt and poverty. This article seeks to open the dialogue regarding such contextualized policymaking.[327]

327. Specific parameters and proposals regarding such lending programs are beyond the scope of this article. Instead, it seeks to shed light on the data in order to advance the conversation.