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Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers

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The question of whether to reimpose usury restrictions lies at the heart of the debates over consumer-credit regulation. Advocates of interest-rate regulations argue that creditors are exploiting low-income borrowers, making huge profits while they lure these families into financial traps from which they can never emerge. Opponents of regulation note the benefits of expanding credit to low-income consumers. This debate has continued for more than two decades, but until now no one has asked the affected families for their views about access to credit or what safety features they would welcome. This Article presents original data from a study of low-income women. The findings suggest that usury regulation is an unnecessarily blunt instrument to provide protection for low-income families because low-income families themselves can identify credit-protection devices that would be more nuanced and more useful.

I. Introduction

Over the past two decades, credit cards have become increasingly available to low-income families as credit-card issuers have extended credit to riskier customers.[1] Families that would not have been able to obtain credit cards as recently as a decade ago now receive a deluge of preapproved offers in the mail. Although the credit industry hails this trend as the "democratization of credit,"[2] the effects on low-income families may not merit celebration. Despite the substantial risks to lenders that they will be unable to pay their bills on time, low-income families often pay such extraordinary rates of interest that they are among the industry's most profitable customers.[3] High interest rates and penalties can quickly multiply the original debt, so that a modest number of purchases can leave consumers deeply mired in debt.

Assuming the credit-card-debt burden of low-income families warrants intervention, a return to the historic system of usury caps is a possible solution. Many commentators have proposed imposing legislative limits on credit-card interest and fees.[4] The desirability of this legal change is largely evaluated by examining the policy implications of such legislation. While there is broad agreement that a return to usury restrictions on credit cards would make it more difficult for low-income families to obtain credit cards,[5]

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1. *See* David A. Lander, *"It 'Is' the Best of Times, It 'Is' the Worst of Times": A Short Essay on Consumer Bankruptcy After the Revolution*, 78 AM. BANKR. L.J. 201, 205 (2004) (attributing the increased profitability of higher risk consumer lending to lender consolidation and improved credit-scoring techniques); David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 336 (1999) (noting that an increasing spread in credit-card interest rates relative to other interest rates during the 1980s enabled credit-card issuers to charge risk premiums to borrowers at decreasing income levels); Joseph B. Cahill, *Where It's Due: Credit Companies Find Tough Rival at Bottom of Consumer Market*, WALL ST. J., Dec. 29, 1998, at A1 ("The credit card industry . . . is turning its direct-mail wizardry on a group it long shunned: low-income consumers.").

2. Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 37 (1998).

3. *See* RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 201–02 (2006) (observing that many lenders have switched from a business model that relies on borrower repayment to one that is more profitable when borrowers engage in behavior that allows lenders to charge penalty interest rates and fees).

4. *See, e.g.*, Vincent D. Rougeau, *Rediscovering Usury: An Argument for Legal Controls on Credit Card Interest Rates*, 67 U. COLO. L. REV. 1, 3 (1996) (arguing that interest-rate controls more fairly balance the interests of consumers and credit-card issuers than a free-market interest-rate policy); Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 38 (2004) (proposing reregulation of consumer interest rates in order to improve the financial condition of middle-class families); Javier Silva & Rebecca Epstein, *Costly Credit: African-Americans and Latinos in Debt* 11 (Dēmos, Borrowing to Make Ends Meet Briefing Paper No. 5, 2005), *available at* http://www.demos.org/pubs/Costly%20Credit%20final.pdf (advocating a floating credit-card-interest-rate ceiling indexed to a federal interest rate).

5. *See, e.g.*, David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 52 (2004) ("If the usury ceiling is set too low—or becomes too low due to inflation—many marginally risky consumers will simply be cut off from standard forms of credit."). This point applies only to a usury cap that is low enough to affect credit cards. A higher usury restriction, set

there is substantial disagreement about how those restrictions would play out. Would a reduction in credit-card availability mean freedom from debt, or would it mean the loss of a valuable tool for improving one's economic circumstances and access to a private safety net for emergencies? Commentators on both sides of the usury debate claim to represent the interests of low-income borrowers.[6] Their arguments, however, are based on untested empirical assumptions about the needs of low-income families.[7] Both sides proceed as if low-income families have little to add directly to the debate.

In order to obtain a new perspective, I conducted in-depth interviews, supplemented by documental materials, with fifty low-income women. The women interviewed for this study made it clear that they were not the rational economic actors of economic lore, but they also demonstrated considerable sophistication about the relative risks associated with various credit products and remarkable perception about their own cognitive biases. The findings suggest a more nuanced understanding of the risks and rewards of consumer credit for low-income families.

The participants articulated a profound ambivalence towards the relationship between access and usury caps. Most expressed anger toward credit-card companies, but at the same time, there was a strong sense that the recent increase in access to credit cards was a step forward. Nearly 60% of participants originally stated that it should be easier for low-income people to obtain credit cards or that the current level of accessibility was appropriate. But when I explained that maintaining or increasing access would preclude imposing usury caps low enough to affect credit cards—which many of these same participants had suggested—half of them modified their access

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above the interest rate currently charged on credit cards, would impact access only to products that charge even higher interest, such as payday loans.

6. *Compare* Christopher C. DeMuth, *The Case Against Credit Card Interest Regulation*, 3 YALE J. ON REG. 201, 240 (1986) (arguing that the "effect of interest rate controls may be regressive" because some less affluent cardholders could be forced to turn to a loan with a "considerably higher" interest rate), *with* Rougeau, *supra* note 4, at 45 (advocating the implementation of interest-rate controls as a way to "discourage the abuse [by credit-card issuers] of weaker members of society").

7. Several empirical studies have documented the effects of usury ceilings. *See* Glenn B. Canner & James T. Fergus, *The Economic Effects of Proposed Ceilings on Credit Card Interest Rates*, 73 FED. RES. BULL. 1 (1987); DeMuth, *supra* note 6; Richard L. Peterson & Gregory A. Falls, *Impact of a Ten Percent Usury Ceiling: Empirical Evidence* 15 (Credit Research Ctr., Working Paper No. 40, 1981), *available at* http://www.gwu.edu/%7Ebusiness/research/centers/fsrp/pdf/WP40.pdf, *cited in* Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 96 (2000). These studies appear to demonstrate that in many circumstances, usury caps are associated with restricted access to credit cards, *see, e.g.*, Canner & Fergus, *supra*, at 6–7, but that is the starting premise of this Article. This study addresses the follow-up question of whether restricted access is positive or negative from the perspective of low-income consumers. Another fascinating study examines the factors influencing state interest rates in 1950 in order to demonstrate the social-insurance function of usury regulation. *See* Edward L. Glaeser & José Scheinkman, *Neither a Borrower nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws*, 41 J.L. & ECON. 1, 3–4 (1998).

preferences. Conversely, 44% of the women proposed lowering credit-card interest and fees as legal changes they would like to see, but support for these measures waned when I explained that this would likely lead to a reduction in access to credit cards.

Instead of accepting this dichotomous framework, the women put forth a number of ideas for how credit products could be better designed to meet their specific needs. I expand on their suggestions to develop recommendations for modifying credit cards to enhance low-income consumers' ability to repay their debts without acquiring unaffordable penalty fees and interest. I call these alternative products self-directed credit cards. They fall into two broad categories.

The first set of self-directed cards would equip consumers to resist more effectively the temptation of credit cards, a problem nearly two-thirds of participants identified. These proposals involve enabling credit-card users to place binding restrictions on their spending and borrowing in advance of the moment they face tempting purchases.

The second group of self-directed credit cards restructure credit limits or payment plans so that credit cards present fewer risks to low-income borrowers. These ideas include: low-limit credit cards aimed at low-income consumers; fixed-fee credit cards, where issuers would present up front all the interest and fees to be charged in exchange for a specific sum of credit; and installment-payment credit cards, in which each purchase would create an installment plan that required principal and interest to be paid over a specified period of time. I also suggest a novel method of implementation modeled on the "opt-out" system, which enables consumers to opt out of receiving prescreened credit-card offers. The current system could be modified to further enhance consumer choice by allowing people to select "safe credit-card plans," wherein they would receive only those solicitations meeting their criteria for reduced credit-card risk.

These recommendations go far beyond the stale usury debates. From a new perspective based on the views of low-income families themselves, the debates over credit regulation can find fresh ideas. The ideas presented here are specifically targeted to help the acute problems of low-income consumers, but they would also benefit all credit-card users by allowing them more choice and control.

Part II explains the study's methodology. Part III discusses the reasons that access to credit cards is important for low-income families. Study participants valued them for their usefulness in emergencies, and many thought that the recent increase in access to credit cards was an advance for low-income communities. Part IV examines the risks credit cards present for this same population. Credit cards present a tempting opportunity to spend beyond one's means, and the sudden influx of spending ability is especially enticing for people who cannot usually afford consumer goods. In addition, low-income borrowers are particularly vulnerable to accumulating balances by paying only the minimum due because the financial skills low-income people develop under scarcity conditions are not well adapted to making payments that are not immediately required. Part V explores self-directed credit cards as a means of maintaining the advantages of credit cards for low-income borrowers while limiting their harm.

II. Methodology

The goal of the study was to explore the perspective of low-income consumers regarding the advantages and disadvantages of increased access to credit cards in the wake of deregulation.[8] Low-income consumers face the most difficult decisions because their primary borrowing alternatives are in the fringe-banking sector. The study consists of detailed interviews with fifty low-income women. I used residence in a public housing project or related government-subsidized housing program as a proxy for low income. I restricted the sample to women primarily because families raising children are under the greatest financial pressure,[9] and the choices they face regarding borrowing are often even more urgent than those facing their childless counterparts.[10] At this income level, women are significantly more likely than men to be the head of household.[11] Interviewing only women limits the applicability of my results because there may be gender differences in attitudes towards credit and repayment of debts, but the study did meet its goal of surveying families with children: 86% of participants had dependents in the home.

Instead of a random sample, I developed what the sociological literature terms a snowball sample—a standard technique for sampling populations that are difficult to reach through randomized methods.[12] A snowball sample is

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8. *See* Moss & Johnson, *supra* note 1, at 333–37 (describing the expansion of credit-card availability for low- and moderate-income borrowers over the past two-and-a-half decades).

9. ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 6–7 (2003).

10. *See infra* note 18 and accompanying text.

11. *See, e.g.*, Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 100 n.531 (2002) (observing that women head at least 95% of households that receive welfare benefits); Sandra J. Newman, *The Implications of Current Welfare Reform Proposals for the Housing Assistance System*, 22 FORDHAM URB. L.J. 1231, 1235 (1995) (noting that nearly all households receiving welfare assistance are headed by women).

12. *See, e.g.*, Jean Faugier & Mary Sargeant, *Sampling Hard to Reach Populations*, 26 J. ADVANCED NURSING 790, 792 (1997) (recognizing the advent of nonrandom-sampling techniques termed snowball sampling to study hard-to-reach populations); Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. L.J. 631, 643 (1994) (observing the popularity of snowball samples in social-science research). For examples of research using snowball samples to study legal issues, see José B. Ashford, *Comparing the Effects of Judicial Versus Child Protective Service Relationships on Parental Attitudes in the Juvenile Dependency Process*, 16 RES. ON SOC. WORK PRAC. 582, 584 (2006) (using a "convenience sample" of forty subjects to study the effect of judicial and caseworker relationships on perceptions of fairness by parents in the child-protective-services process); Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 561 (2002) (investigating "the emerging role of compliance specialists in large law firms" using a snowball

established by beginning work with one person or a small group of people who are members of the target population.[13] Those initial participants then invite other people who meet the study criteria to participate. When the researcher meets the next cohort of participants, she asks them for further referrals. Participants were paid $20 for their time. I recorded the interviews with a digital voice recorder and had them transcribed by a professional service.[14]

The interviews began with closed-ended questions on demographic data and financial information, such as bank-account status and bill-paying habits. I then took detailed credit histories and asked participants to evaluate each form of borrowing to which they had access. The final section of the interviews consisted of open-ended policy questions. I analyzed the transcripts using content analysis, a method frequently applied to interview transcripts.[15] For a detailed discussion of the study methods and a description of the sample, please see the Appendix on Methodology following the Article.

III. Advantages of Increased Access to Credit Cards

A. Usefulness in Emergencies

The primary reason usury caps low enough to reduce access did not have broad support among study participants is that credit cards provide distinct advantages for low-income borrowers. The most common explanation study participants gave for wanting to maintain access to credit cards was

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sample); Mariano-Florentino Cuéllar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT'L L. 583, 586 & n.6 (2006) (using a snowball sample to obtain one of three sets of interviews on "the legal, political, and bureaucratic dynamics affecting refugees' physical security"); Rosanna Hertz, *The Contemporary Myth of Choice*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 232, 243–44 (2004) (reviewing a study in which researcher Phyllis Moen used a snowball sample to locate women who left full-time careers when they had children). The difficulty and expense of reaching low-income populations for empirical work is well documented. *See, e.g.*, Michael S. Barr, Detroit Area Study on Financial Services (Overview), http://www-personal.umich.edu/~msbarr/detroit_area_study.html (detailing an extensive process for obtaining a low- and moderate-income data sample for a banking study).

13. I knew twelve population members from previous work in the community.

14. The recordings and transcripts of the interviews, to which I refer throughout this Article, are on file with the author. The interviews are designated by the code assigned to the respondent; the dates and locations of the interviews are not included in the citations in order to protect the privacy and anonymity of the interviewees. The quotes throughout the Article are from my recordings of the interviews, and with respect to some matters of punctuation, do not conform to the transcriptions made for content analysis.

15. *See* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY 11 (2d ed. 2004) ("Psychologists began to use content analysis in four primary areas. . . . [One] application was the use of verbal data gathered in the form of answers to open-ended interview questions . . . ."); *see also* ROBERT PHILIP WEBER, BASIC CONTENT ANALYSIS 9 (2d ed. 1990) ("Content analysis can be used for many purposes . . . . [This includes] cod[ing] open-ended questions in surveys . . . .").

their usefulness in emergencies.[16] Credit cards provide a fast, easy, stigma-free[17] way of obtaining funds that can be applied to almost any financial emergency.[18]

Chronic poverty dramatically increases a family's chances of acute material crisis, and very low-income families are subject to frequent, unpredictable financial catastrophes.[19] Relatively common events, such as interruptions in food stamps, quasi-routine threats of eviction from public-housing authorities,[20] or administrative issues with state-funded health insurance, can escalate to threaten a family's health or even survival. Occurrences that a middle-class family can easily weather, such as a car breakdown, can send a low-income family into crisis. Timing is especially crucial for low-income families. A family may eventually be reimbursed for a medical expense or receive back payment of food stamps, but by that point, it may be too late to avert disaster. One of these delays could force a family to deprive itself of basic necessities—for example, by not seeking treatment for a medical emergency.

The inability to control for these events poses serious health consequences. Depression and other stress-related illnesses have reached epidemic proportions among low-income women, and a major contributing factor is living in the shadow of threatening financial events.[21] Mental-health

16. Forty percent of participants mentioned emergency usage as an advantage of credit cards. The next most cited advantage of having credit cards was their purchasing power, at 34%. Twenty percent of participants said that credit cards were a good way to improve one's credit history, and another 12% obtained a credit card to see if they could get one.

17. Credit cards are stigma free at the moment of borrowing. *See infra* note 34 and accompanying text.

18. Unfortunately, the study was unable to obtain documentation on whether or not participants actually used credit cards predominantly for emergencies. The vast majority of participants who provided credit-card statements had only the most recent available, and these tended to be bills for accounts past due rather than recent purchases. The discussion in Part IV indicates that participants spent more on nonemergency expenditures than they intended when they applied for credit. One of the central goals of this Article's policy proposals, discussed in Part V, is to provide tools that enable consumers to limit more effectively their spending to emergencies, in accordance with their stated long-term preferences.

19. *See* Deborah Belle & Lisa Dodson, *Poor Women and Girls in a Wealthy Nation*, *in* HANDBOOK OF GIRLS' AND WOMEN'S PSYCHOLOGICAL HEALTH 122, 123 (Judith Worell & Carol D. Goodheart eds., 2006) ("Poor women experience more threatening and more uncontrollable life events than does the general population . . . ."); Deborah Belle & Joanne Doucet, *Poverty, Inequality, and Discrimination as Sources of Depression Among U.S. Women*, 27 PSYCHOL. WOMEN Q. 101, 102 (2003) (same).

20. In public housing, being late with rent generates an automatic eviction notice, which if not immediately addressed, can quickly lead to administrative action against a resident. While these notices do not usually result in eviction, they still require immediate action. Accordingly, when asked how they handle months where they do not have enough money to pay their bills, 70% of study participants said they paid some bills late or negotiated a later payment date. However, most emphasized that they did not use this process with their rent.

21. *See* Belle & Doucet, *supra* note 19, at 102 ("High levels of depressive symptoms are common among those with low incomes . . . ."); *see also* Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J.L. MED. & ETHICS 560, 560–64 (2002) (surveying a number of studies showing a correlation between indebtedness and poor health).

issues can prevent women from breaking the cycle of poverty, degrading their physical health[22] and interfering with their ability to keep a job.[23] In addition, depression can have a significant impact on parenting, negatively affecting the cognitive development of the next generation.[24]

The credit card's function as a private safety net, then, can play an essential role in a family's short-term and long-term well-being. A low-income mother's knowledge that she has a tool that will enable her to survive—for example, a food-stamp interruption—can go a long way towards ameliorating the mental-health consequences of financial instability.[25]

1. Ease of Obtaining Funds.—Credit cards have three major features that make them a valuable source of emergency funds. First is the ease of obtaining money immediately. In an emergency, the principal alternatives to borrowing[26] are seeking aid from government programs,[27] private charities,[28] and friends or family. Credit cards have an ease-of-use advantage over these options. Government programs and many charities have strict requirements for proof of need.[29] Families must provide extensive documentation to

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22. *See* Belle & Dodson, *supra* note 19, at 124 (discussing the impact of poverty on physical health).

23. Angela Browne, Amy Salomon & Shari S. Bassuk, *The Impact of Recent Partner Violence on Poor Women's Capacity to Maintain Work*, 5 VIOLENCE AGAINST WOMEN 393, 397–98 (1999); *see also* LADONNA PAVETTI ET AL., DESIGNING WELFARE-TO-WORK PROGRAMS FOR FAMILIES FACING PERSONAL OR FAMILY CHALLENGES: LESSONS FROM THE FIELD (1996), http://www.urban.org/url.cfm?ID=407338 (surveying the literature addressing barriers that women on welfare would face when seeking employment and identifying mental-health issues as one of eight major barriers).

24. *See* Stephen M. Petterson & Alison Burke Albers, *Effects of Poverty and Maternal Depression on Early Childhood Development*, 72 CHILD DEV. 1794, 1794–95 (2001) (discussing the link between parental depression and children's cognitive development).

25. In their current form, however, the association of credit cards with the stress of accumulating debt may eclipse the stress-relieving benefits discussed here. One participant described the stress-related effects of mounting interest and finance charges on her mother, who accumulated credit-card debt before becoming disabled and now cannot pay it:

> And she has high blood pressure, and if she's worried about something, that puts up her blood pressure. That puts up her diabetes, and now she's getting glaucoma because of the pressure on her eyes. And she can't control diabetes because she can't control the high blood pressure because she can't control the problems. So it's all a ripple effect.

Interview with Respondent G88.

26. In this Article, I compare credit cards only to nonborrowing alternatives for raising funds. For a comparison of credit cards with other forms of borrowing, see Angela Littwin, Comparing Credit Cards: An Empirical Examination of Borrowing Preferences Among Low-Income Consumers (Sept. 17, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014460.

27. Two examples are emergency food stamps or rent assistance.

28. Eight participants described receiving emergency rent or utility assistance from the Salvation Army.

29. *See* Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. ON POVERTY L. & POL'Y 13, 18 (2005) (noting the difficult burden of collecting documentary evidence to satisfy welfare-eligibility requirements); *see also, e.g.*, Massachusetts

demonstrate an emergency, and there is a large chance of denial even for qualified families.[30]

While not all private charities have strict documentation requirements, they have related limitations. A family is still required to demonstrate need according to the agency's criteria rather than its own, and it may need assistance for an emergency that falls outside the scope of any government or private agency's criteria. In addition, agency aid can take so long to receive that its usefulness is limited.[31]

Seeking help from friends and family suffers from a different kind of transaction difficulty: unreliability. Low-income people are more likely to have low-income friends and families, so the networks of people from whom they could borrow are often resource deprived.[32] In addition to limiting a low-income person's borrowing options, these networks can actually exact a toll. The mutual-aid networks that many low-income women develop usually require reciprocity and also can make it difficult for a woman to extricate herself from a difficult or abusive relationship.[33] Participants in the current study discussed lending money to friends and relatives nearly as frequently as they discussed borrowing it. Despite these complexities, 92% of participants had borrowed from friends and family. Some participants had friends and family who were relatively financially secure, while others knew people who were willing to lend even when it strained their finances. Both of these situations create new stresses, mainly in the form of stigma.

Coalition for the Homeless, Eligibility Requirements for Emergency Assistance Family Shelter, http://mahomeless.org/faq/facts/factseligibility.html (outlining the proof-of-need requirements for eligibility for families seeking access to homeless shelters and stating that families who meet these requirements may still be denied access); Salvation Army of Tulsa, Christmas Assistance, http://www.salvationarmytulsa.org/christmasassistance.asp (outlining the proof-of-need requirements to receive Christmas assistance from the Tulsa Salvation Army); Texas Health and Human Services Commission, Application for Assistance Part B: Information We Need to Know, http://www.dads.state.tx.us/forms/h1010-b/h1010-b.pdf (listing the extensive documentation required to apply for a variety of government assistance in Texas).

30. Many agencies engage in "bureaucratic disentitlement" by using procedural hurdles to delay or deny benefits to eligible low-income clients. Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 20 (1984). This practice has intensified since the welfare reform of 1996 put pressure on agencies to reduce their services. *See, e.g.*, Randal S. Jeffrey, *The Importance of Due Process Protections After Welfare Reform: Client Stories from New York City*, 66 ALB. L. REV. 123, 167 (2002) (providing an example of administrators denying eligible clients benefits); Lens, *supra* note 29, at 50 (arguing that welfare reform provided new methods of disentitlement through misapplication of work requirements).

31. *See, e.g.*, Interview with Respondent 283 (describing how charities often fail to deliver aid by the date promised); Jeffrey, *supra* note 30, at 161 (recounting the experience of a woman who sought aid from a food pantry on a Thursday and was unable to get food until the following Monday).

32. Deborah Belle, *Social Ties and Support*, *in* LIVES IN STRESS 133, 142–43 (Deborah Belle ed., 1982); *see also* Belle & Dodson, *supra* note 19, at 124 ("[Members of a low-income person's social network] are themselves likely to be poor and stressed and in need of assistance.").

33. Belle & Dodson, *supra* note 19, at 124.

2. Lack of Stigma at Time of Borrowing.—The second advantage credit cards have over other sources of emergency funds is a lack of stigma at the moment of borrowing.[34] Government benefit programs are highly stigmatized.[35] Using private charity can be similarly shaming.[36] Seeking help from friends and family carries its own stigma. While several of the participants described comfortable relationships with friends and relatives to whom they could turn in emergencies, others discussed asking for money in terms of shame. Seeking to borrow money either meant admitting that one was doing less well than a friend or relative, which was embarrassing, or it meant that the loan might cause the creditor hardship, which was a source of guilt. In both cases, seeing the person could be awkward, and participants felt obligated to end the debtor–creditor relationship as quickly as possible.

3. Versatility.—The third advantage of credit cards as a form of private insurance is also closely related to ease of use. Emergency funds from government programs or charities can generally be used only for a specified purpose.[37] A family has to prove, for example, a housing emergency or a food emergency. Often, the form of the aid limits its use, as with the receipt of food from a food pantry or utility assistance paid directly to the utility company. Some needs that may seem urgent to the family—such as car repairs—can fall outside the scope of all agency services. Moreover, it is a rare program that disperses funds that allow families to address crises before they reach emergency level. Many study participants described imposing similar constraints upon themselves when borrowing from friends and family. They were often so worried about social pressures and the other

34. There is, of course, stigma associated with other aspects of credit-card use. One of the major bankruptcy debates concerns the operation of stigma in consumer filings. *Compare* Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 180 ("In our view, the evidence now available tends to suggest that the recent rise in personal bankruptcies has been significantly influenced by a decline in the personal shame and social stigma traditionally accompanying bankruptcy . . . ."), *with* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 254 (2006) ("The data are also inconsistent with the hypothesis that the declining stigma of bankruptcy has encouraged millions of debtors to file 'bankruptcies of convenience' that, in earlier times, they would not have filed."). This stigma, however, attaches to a later stage in the cycle of credit-card use. Here, I am concerned only with the stigma at the moment of loan origination.

35. *See, e.g.*, A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 250–52 (2001) (discussing the role of stigma in deterring applications for welfare benefits); Pearson Liddell, Jr., Stevie Watson & William D. Eshee, Jr., *Welfare Reform in Mississippi: TANF Policy and Its Implications*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1107, 1108 (2003) (discussing negative characterizations of welfare recipients).

36. *See, e.g.*, M.H. Hoeflich & John E. Thies, *Rethinking American Housing Policy: Defederalizing Subsidized Housing*, 1987 U. ILL. L. REV. 629, 647 (arguing that private charity can be more stigmatizing than public assistance because the former is charity whereas the latter is an entitlement).

37. *See* Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 230 (2004) ("First, generally speaking, in-kind subsidies are thought of as less efficient than cash subsidies because the recipient may only use the in-kind subsidy for specified purposes.").

person's financial constraints that they would seek help only when a situation had escalated to an emergency.

4. Comparison to Credit Cards.—Obtaining emergency funds from a credit card, on the other hand, is often as simple as making a purchase. Accessing the credit and paying for the emergency expense occur simultaneously. The borrowing function is anonymous at the point of dispersal in the sense that nobody else knows whether the user can pay for the bill at the end of the month.[38] There is no stigma associated with credit cards at the point of purchase—quite the opposite. Many participants reacted positively when asked whether there was status associated with credit cards, describing the way people treated them better in stores.[39] Credit cards can be used for emergencies not covered by available services. They can be used to prevent a situation from becoming a crisis. In short, credit cards put the decision about what constitutes an emergency and how to address it squarely in the family's own hands.[40]

B. A Payment Card for the Unbanked

Another benefit of increased access to credit cards is that they are the only general-use payment card to which many low-income people have access. This is crucial because cards are becoming an increasingly dominant payment mechanism. Currently, the United States has a card-usage rate of 115 transactions per person per year.[41] As Ronald Mann points out in his book *Charging Ahead*, this trend is only likely to grow more pronounced.[42] Mann cites the convenience and safety of carrying cards instead of cash.[43] The latter may be of even greater importance for low-income people than the population as a whole due to higher crime rates in low-income neighborhoods.[44] He also notes that payment-card transactions are now processed more quickly than checks and may soon be processed even faster

38. This is not an inherent feature of credit cards. In Japan, consumers declare at the time of purchase whether or not they will revolve a balance. Ronald J. Mann, *Credit Cards and Debit Cards in the United States and Japan*, 55 VAND. L. REV. 1055, 1074 (2002).

39. *See infra* notes 65–66 and accompanying text. In comparison, when asked about the status associated with pawnshops or rent-to-own stores, the most frequent response was laughter.

40. Of course, their ease of use, lack of stigma, and versatility make credit cards attractive in nonemergency situations as well, but the study participants tended to view these characteristics in a negative light outside the emergency context.

41. MANN, *supra* note 3, at 75–76.

42. *See id.* at 16 (noting that the use of checks and cash drops yearly as noncash payment systems proliferate).

43. *See id.* at 10 ("[Cash] is difficult to transport and to use securely."); *see also* Zywicki, *supra* note 7, at 85 (discussing the many drawbacks of cash transactions and the emergence of credit cards as a substitute).

44. *See, e.g.*, Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 519–22 (1993) (describing high rates of both violent and nonviolent crime in public housing projects).

than cash.[45] The advent of Internet processing offers even more benefits for card users, especially as a way of paying bills. It is far more cost-effective than the one dollar per transaction charged by the check-cashing and money-order outlets that 52% of participants used to pay their bills.

Cutting credit-card access for low-income families may cause them to fall further out of the financial mainstream. Approximately 22% of households with incomes below $25,000 do not have bank accounts,[46] and that figure grows higher further down the income distribution.[47] A Federal Reserve study found that 7.7% of low- and moderate-income families without bank accounts held bank-issued credit cards,[48] but the study included only consumers with incomes of up to 80% of the median, representing 45% of the national population, and did not make the rates for low-income consumers available.[49] In the current study, on the other hand, 75% of participants without bank accounts had used credit cards at some point and 67% were still using them at the time of the study.

Families with low-enough incomes to qualify for this study usually receive government benefits, which in the vast majority of states are distributed through electronic-benefit-transfer (EBT) cards.[50] These cards, however, are poor substitutes for general-use payment cards.[51] EBT cardholders often are not able to make essential purchases due to missing or broken point-of-service machines, and they encounter fees when seeking to withdraw EBT funds from ATMs.[52]

A specific application of credit cards as payment cards arose in the context of car rentals. In a population where car-ownership rates are low, car

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45. MANN, *supra* note 3, at 12. Already, a television commercial for Visa Check Card shows an embarrassed man bringing lunch service at a fast-paced sandwich shop to a grinding halt by paying with cash instead of a card. Visa Advertising, http://www.usa.visa.com/personal/visa_brings_you/advertising/ (follow "View 'Food Court' TV Commercial" hyperlink).

46. Barr, *supra* note 37, at 123.

47. *See, e.g.*, *id.* at 189 (citing a study that found that only 24% of households receiving government benefits through electronic-benefit-transfer programs had bank accounts). About half of the participants in the current study had bank accounts.

48. Jeanne M. Hogarth & Kevin H. O'Donnell, *Banking Relationships of Lower-Income Families and the Governmental Trend toward Electronic Payment*, 1999 FED. RES. BULL. 459, 463 tbl.4.

49. *Id.* at 460.

50. *See* Barr, *supra* note 37, at 188 & n.315 (noting that over forty states, the District of Columbia, and Puerto Rico use EBT (citing BARBARA LEYSER, NAT'L CONSUMER LAW CTR., SELECTED CHARACTERISTICS OF STATE EBT SYSTEMS (2001), *available at* http://www.consumerlaw.org/issues/electronic_benefits/content/ebt_summary_table.pdf and NACHA, EBT IN THE STATES: SURVEY RESULTS, 2002 ELECTRONIC PAYMENTS REVIEW AND BUYER'S GUIDE 43–44 (2002))).

51. *See id.* at 189 (discussing the financial incentives for states to use a prime-contractor model instead of EBT direct transfers).

52. *See* BARBARA LEYSER, NAT'L CONSUMER LAW CTR., FINDINGS FROM THE FIRST MULTI-STATE SURVEY OF EBT RECIPIENTS (2001), http://www.consumerlaw.org/issues/electronic_benefits/multi_state.shtml (reporting fees at ATMs and recipients' difficulty in finding compatible or properly serviced machines).

rentals are important for special occasions, such as weddings and funerals. Several participants mentioned the ability to rent cars as an advantage of access to credit cards. One participant even obtained a credit card for the purpose of renting a car to transport her children to her brother's wedding.[53]

Policies designed to shift unbanked consumers into bank accounts and provide them with access to debit cards would also meet the goal of providing low-income consumers with payment cards.[54] In addition, because debit cards do not actually provide credit, they do not enable the temptation and overspending problems discussed in Part IV of this Article.[55] For the same reason, they also do not provide a credit cushion on which low-income families can draw in emergencies. But a movement towards debit cards could encourage consumers to use debit cards for their transactional needs and have a credit card in reserve for emergency circumstances. This would probably lead to lower debt levels than if these consumers continued to use credit cards as their sole payment card. Debit cards with MasterCard or Visa logos even address the car-rental issue.[56] However, this movement of low-income consumers towards debit cards is far from complete. In the current study, approximately half of participants had bank accounts, and fewer than half of those used debit cards. Until more low-income families obtain bank accounts with debit cards, it is important to keep in mind that many see credit cards as their main payment-card option and to account for this reality when considering regulatory proposals.

C. Access to a Financial Tool of the Middle Class

For many women in the study, credit cards have become symbols of access to mainstream American society. This symbolism expressed itself partly on a practical level, with several participants detailing the goods and services they could finally buy, especially for their children. Fourteen percent of the women mentioned credit cards as allowing them to purchase Christmas presents for family members.[57] As one participant explained, "you can't just take credit away from poor people. Sometimes [it's] the only way

53. Interview with Respondent G88.

54. *See* Barr, *supra* note 37, at 129 ("State EBT programs—focused on welfare recipients and other beneficiaries of state-run benefit programs—should shift away from electronic benefit cards towards provision of debit-card based bank accounts that could be used to receive all forms of income transfer as well as privately earned wages.").

55. *See also* MANN, *supra* note 3, at 29 ("[T]here is good reason to think that debit cards are less likely to contribute to the excessive spending and financial distress that makes credit cards so troublesome.").

56. *See, e.g.*, Avis, Credit and Debit Card, http://www.avis.com/AvisWeb/JSP/global/en/rentersguide/policies/us/US_Credit_and_Debit_Card.jsp (stating that most—but not all—locations accept debit cards for credit-identification purposes); Budget, Common Questions, http://www.budget.com/budgetWeb/html/en/customer/commonquestions (noting that most of their locations accept debit cards at the time of pickup and that all locations accept them as payment for rental).

57. The salience of this issue may have been due to the fact that the study's interviews were conducted from late November to mid-January.

they can get Christmas for their kids."[58] Another participant described the pervasiveness of the need for credit cards throughout several sectors of the economy: "I mean, when you rent a car, that's the first thing they ask you, do you have a credit card? . . . When you reserve a motel, they want a credit card. And when you go to the video store, for God's sake, they want a credit card."[59]

Credit cards have taken on a more abstract symbolism as well. As one participant described her reason for wanting a credit card, "I think it was like just to have a credit card . . . ."[60] The women described the first time they got a credit card in terms of strong emotion. Many of them expressed shock that they had received a credit card at all. As one participant said, "So I sent it in, and they actually sent it to me, and I was in shock. I was like, 'Who the hell would give me a credit card?'"[61] Twelve percent said that they applied for a credit card in part to see if they could get one. The act of applying for a credit card has become a test, a way of assessing one's status.

These factors may explain why some participants viewed access to credit cards as a civil rights issue. Nearly one-third of the women interviewed mentioned the theme of discrimination in access to credit cards. This theme usually emerged when the study asked whether credit cards should be easier or harder for low-income people to obtain. Those who thought it should be easier to get a credit card expressed concern that credit-card issuers were discriminating on the basis of race and class. As one participant put it, "[T]hey're forgetting about our people."[62]

Surprisingly, many women who thought that credit cards should be harder to obtain were also concerned about credit-card companies discriminating against their community. Moreover, an additional group who thought that access to credit cards should be restricted was concerned about sounding discriminatory for saying so.

At some point the reasoning for this concern about discrimination becomes circular. The participants give the companies' decisions about creditworthiness this weight because credit cards have become symbolic of the American economic mainstream, but at the same time, participants implied that one reason credit cards have this symbolism is their exclusivity, i.e., that until very recently, low-income people had difficulty accessing them. Untangling this knot is beyond the scope of this Article, but for now, two important points emerge. First, regardless of the reason, credit cards carry this symbolism, and any initiative that reduces their availability to low-income people must account for the perception of discrimination. Second, the illusion of exclusivity confers power. At this moment in economic

58. Interview with Respondent 283.
59. Interview with Respondent 9JK.
60. Interview with Respondent 22B.
61. Interview with Respondent 2AU.
62. Interview with Respondent 334.

history, access to credit cards has increased dramatically,[63] but the perception of access has not caught up to the reality. Some consumers still obtain credit cards in the belief that their access is limited and they should seize the opportunity while they can, even though this understanding is no longer accurate. Thus, for those seeking to reduce credit-card-debt levels, changing the perception that credit cards are still difficult to obtain may be an important goal in and of itself.

On the other hand, external indicators of the credit card's status are still alive and well.[64] A small number of participants found credit cards to be a tool for trumping other forms of discrimination. One woman described how using a credit card countered the racial discrimination she might otherwise experience: "No matter where you go, if you black . . . only when they saw [a] credit card, then they smile at you."[65] Another participant described the other side of the phenomenon, explaining that people sometimes looked down on her when she paid with cash: "When you go into certain stores and places where people look at you, and it made me think you're not as good. Like 'I should be before you, and I've got the money.'"[66]

IV. Temptation and Advance Commitment

Most academics, particularly economists, seem to think that all credit-card features are a matter of nothing more than interest rates and fees. In some macro sense that may be true, but for card users themselves, the central issues are less about those specific cost items and more about the way credit cards influence their spending and borrowing patterns. The credit-card problem participants cited most frequently was temptation. Nearly two-thirds described credit cards as tempting or enticing, whereas only 42% argued for a reduction in interest rates.[67] Participants felt enticed to apply for credit cards against their better judgment, and once they had them, they found it undesirably easy to spend money they did not have. This characterization of credit cards aligns perfectly with emerging theories of psychology and behavioral economics. These theories provide a framework that validates the women's concerns about temptation and helps to pinpoint the precise features of credit cards that are problematic in this respect.

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63. *See* Sommer, *supra* note 2, at 37–38 (discussing the democratization of credit as credit cards have become available to lower income people).

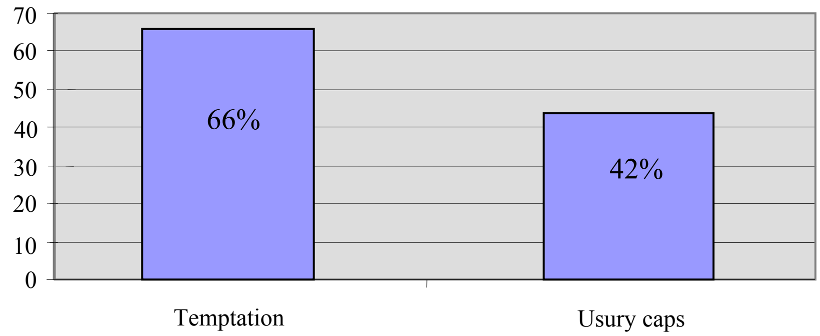
64. *See, e.g.*, Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 189 (2001) ("One gains social status from using a gold card . . . .").

65. Interview with Respondent CX4.

66. Interview with Respondent 657.

67. *See infra* Figure 1.

Figure 1: Percentage of Participants Mentioning Temptation and Usury Restrictions



Legal writers, such as Oren Bar-Gill, have applied a behavioral framework to credit-card borrowing by discussing mechanisms that dispose consumers to borrow more on their credit cards than they may prefer.[68] I take that analysis one step further to explore how credit cards interfere with the attempts of even sophisticated consumers—which includes the majority of study participants under the definition of "sophisticated" I explain below—to limit their borrowing to their preferred levels.

A. *Hyperbolic Discounting*

An explanation for high credit-card spending that has significant support in the empirical literature is hyperbolic discounting or, more generally, present-biased preferences.[69] These terms refer to the finding that people tend to be poor predictors of their future preferences. Specifically, we habitually underestimate the intensity of our reactions to future costs and benefits.[70] In economic terms, a hyperbolic discounter applies a larger discount rate to events that will take place in the near future and a smaller

68. *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1374–76 (2004).

69. *See, e.g.*, Shane Frederick, George Loewenstein & Ted O'Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 366–67 (2002) (reviewing the literature on hyperbolic discounting); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443 (1997) (developing a model of hyperbolic discounting that suggests that the decline in U.S. savings rates may be due to financial innovation); Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 103, 111 (1999) (explaining people's general preference for delaying unpleasant activities and accepting immediate rewards often in spite of their knowledge that the delay will lessen potential future rewards or increase potential future unpleasantness).

70. Frederick, Loewenstein & O'Donoghue, *supra* note 69, at 360.

discount rate to events that seem further off.[71] The empirical literature has found hyperbolic discounting to be a more accurate model of human behavior than the neoclassical discounted-utility model, which assumes that humans apply an equal discount rate to future costs and benefits, no matter when they will occur.[72]

An important implication of hyperbolic discounting is that in a delayed-consequences situation, a person may experience a "preference reversal"[73] during the time between her decision and her experience of the consequences. For example, when offered the choice between $100 today and $110 tomorrow, a hyperbolic discounter will choose the $100 today because she discounts tomorrow's reward heavily compared to today's. Because her discount rate is much smaller when comparing two rewards that take place further in the future, she will also prefer $110 in thirty-one days to $100 in thirty days. But as time passes, and she arrives at day thirty, her preference will reverse, and she will again prefer the $100 to be distributed on the new "today." In other words, "people's preferences have a bias for the 'present' over the 'future' (where the 'present' is constantly changing)."[74]

Oren Bar-Gill has elegantly demonstrated how this framework applies in the credit-card setting.[75] A consumer may underestimate her future borrowing when she applies for a credit card because at that time, both borrowing money on the credit card and repaying that money appear close together in the relatively distant future—much like the $100 and the $110 offered thirty and thirty-one days from the present. She is able to compare the benefit of borrowing to the cost of repaying with minimal cognitive distortion. Thus, the option of borrowing on the credit card does not look unduly appealing. But as the consumer advances to the moment when she has a credit card and is considering borrowing, the immediate benefits of spending appear larger than the still-distant costs of repaying the borrowed amount. In short, her borrowing preference reverses.[76]

Many of the women in the current study described experiences that fit neatly within this framework. A common story was that a participant obtained a credit card with no intention of borrowing on it. She wanted to have it in case of emergency or to build her credit,[77] but she would quickly find herself charging on it with regularity. As one participant explained when asked why she wanted a credit card, "I thought this would be good for

71. *See, e.g.*, *id.* (documenting the results from several studies demonstrating that "the implicit discount rate over longer time horizons is lower than the implicit discount rate over shorter time horizons").

72. *Id.*

73. *Id.* at 361.

74. O'Donoghue & Rabin, *supra* note 69, at 106 n.7.

75. *See* Bar-Gill, *supra* note 68, at 1396–97.

76. *See id.* at 1398 fig.1 (demonstrating preference reversal in credit-card borrowing).

77. An additional common, nonborrowing reason for applying for a credit card was to see if one qualified. *See supra* note 61 and accompanying text.

emergencies. Well, you know emergencies. I mean, you think that's the goal. . . . [T]hen you get carried away, 'okay, well this is kind of an emergency,' you know what I mean, and then it's like, 'oh, okay, I want that.'"[78]

Another participant described her experience after obtaining a store credit card for the 10% discount: "So [what do] I do[?] I charge, and I charged because I needed—you know, you go, 'Oh, I need clothing. Oh, I need a birthday present.' And I've been 'needing.' As you can see, I 'needed' too much."[79]

B. Advance Commitment

Hyperbolic discounters differ in the degree to which they recognize their tendencies towards preference change, but awareness is not enough to change behavior. As economists Ted O'Donoghue and Matthew Rabin explain, a hyperbolic discounter "could be sophisticated and know exactly what her future selves' preferences will be. Or, a person could be naive and believe her future selves' preferences will be identical to her current self's . . . ."[80] The 66% of study participants who reported temptation qualify as sophisticated consumers under this framework. They understood that credit cards could "tempt" them in the short term to borrow more than they preferred in the long term.[81] Of course, temptation applies to consumers of all income levels,[82] but the more financially constrained the borrower, the more severe the consequences. A low-income borrower can accumulate unmanageable debt by succumbing to seemingly minor temptations. The speaker who chastised herself for "need[ing] too much" in the previous subpart was referring to purchases that included cleaning supplies and items for a three-year-old niece she was temporarily supporting.[83]

This framework highlights two major problems with the current credit-card system. First is the process by which a consumer moves from being

78. Interview with Respondent B63.

79. Interview with Respondent 76C.

80. O'Donoghue & Rabin, *supra* note 69, at 106 (emphases omitted).

81. Of course, analyzing the preferences of people whose preferences vary over time can be problematic. Which "self's" preference is the correct one? I adopt what O'Donoghue and Rabin call the "'long-run perspective'—what you would wish now (if you were fully informed) about your profile of future behavior." *Id.* Another way to view this issue is through the lens of Thaler and Shefrin's "planner/doer" model. This is a model that conceptualizes each individual as an organization in which "[a]t any point in time the organization consists of a planner and a doer. The planner is concerned with lifetime utility, while the doer exists only for one period and is completely selfish, or myopic." Richard H. Thaler & H.M. Shefrin, *An Economic Theory of Self-control*, 89 J. POL. ECON. 392, 394 (1981). Because the study interviewed participants in a reflective moment, when they were not spending or borrowing, it can be seen as a way of giving a voice to the planners.

82. *See* Bar-Gill, *supra* note 68, at 1373–77 (discussing U.S. consumers' behavioral biases and high levels of borrowing).

83. Interview with Respondent 76C.

naïve to sophisticated. Fourteen percent of participants developed a sophisticated perspective about their likely consumption habits with a credit card without obtaining one,[84] but the majority of the sophisticated participants acquired this knowledge the hard way, as described in section V(D)(1). As one respondent stated, "I think that young people, they all make the mistake of borrowing money, and they don't know better. But now I have experience because I went through freaking hell."[85]

The second major problem is that even sophisticated consumers do not have adequate means of protecting themselves from temptation. The major way of preventing short-term behavior that undermines long-term preferences is to commit to another course of action ahead of time, usually through what psychologists and behavioral economists call commitment devices.[86] The prototypical commitment device derives from Greek mythology, in which Odysseus ordered his crew to tie him to the mast of his ship when passing the island of the Sirens. He knew that otherwise he would be unable to resist the Sirens' song and would wreck his ship by steering it onto nearby rocks.[87] Modern-day life abounds with examples—from magazine articles advising dieters to request that half their restaurant meal be served in a doggie bag[88] to alcoholism-recovery brochures that advise avoiding situations where alcohol may be present.[89]

Financial institutions offer an array of commitment devices as well. Two employed participants used Christmas and vacation clubs; their credit union garnished each paycheck and deposited a sum in an account that could be accessed only for Christmas or vacation purposes. Another participant consolidated her credit-card debt through a credit union and repaid her loans at a lower interest rate by having the funds withdrawn from her paycheck.[90] Middle- and upper-class consumers have access to a greater number of financial commitment devices, ranging from participating in 401(k) plans to investing in illiquid assets, such as homes.[91] Indeed, the vast majority of

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84. For a discussion of this finding, see *infra* note 207 and accompanying text.

85. Interview with Respondent 76C.

86. *See, e.g.*, O'Donoghue & Rabin, *supra* note 69, at 105 (stating that "commitment devices" are "smoking guns" that cannot be explained by time-consistent preferences).

87. HOMER, THE ODYSSEY 276 (Robert Fagles trans., Penguin Books 1996).

88. *See, e.g.*, Delicious Meals for Half the Fat - Yale-New Haven Hospital Nutrition Advisor, http://www.ynhh.org/online/nutrition/advisor/dining_out.html (last revised Mar. 10, 2005) (suggesting that diners who continue to eat after they are full ask servers to wrap up half of the meal before serving it); Dr. Tim Says: 10 Quick Tips for Eating Healthy, http://www.drgourmet.com/column/dr/071706.shtml (last updated July 17, 2006) (advising diners to put half of the serving in a doggie bag immediately upon receiving it).

89. *See, e.g.*, National Institute on Alcohol Abuse and Alcoholism, How to Cut Down on Your Drinking, http://pubs.niaaa.nih.gov/publications/handout.htm (last updated May 28, 2001) (suggesting avoiding people who drink and situations involving drinking as among ways to decrease one's drinking).

90. Interview with Respondent D11. She reported satisfaction with this arrangement. *Id.*

91. *See* Laibson, *supra* note 69, at 444–45 (mentioning retirement plans and illiquid assets as commitment instruments).

assets held by United States households can be characterized as commitment devices, even if they were not purchased for that reason.[92]

There is strong evidence for a preference for precommitment devices in humans.[93] In one powerful experiment, students in an MIT executive-education class were assigned three short papers.[94] The experimenters gave students in one section of the class three evenly spaced deadlines.[95] They allowed students in the other section to select their own deadlines, requiring them to submit binding deadline schedules during the second week of class.[96] There was no advantage, such as feedback, to turning in papers earlier than the last day of class, and there was a grade penalty for late papers in both conditions.[97] Less than one-third of the students chose to take advantage of the full time available to them.[98] The rest chose to bind themselves in advance even though they risked a penalty and gained no reward other than the external commitment to avoid procrastinating.[99]

In other words, more than two-thirds of the students demonstrated a preference for a system that provided an external punishment (in the form of grade penalties) for procrastination when they could have set the same deadlines for themselves without risking their grades. They recognized in advance, whether consciously or not, that at the moment they faced the short-term costs of writing the papers, their long-term preferences for spacing the papers evenly throughout the semester would not provide enough incentive to complete the papers earlier than the external deadline required. They chose the procrastination-prevention device, even though the only concrete "benefit" it offered was the possibility of a lower grade.

This study also demonstrated an advantage of advance-commitment devices. Students whose paper deadlines were evenly spaced throughout the semester—whether by choice or by assignment—received significantly better grades on the papers than the students who chose a more concentrated

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92. *See id.* at 444–45 (stating that illiquid assets, such as retirement plans and home equity, comprise the overwhelming majority of assets held by U.S. households).

93. The early, groundbreaking work demonstrated such preferences in pigeons. In the first phase of the studies, pigeons were given a choice of pecking two buttons, one which dispensed a smaller reward sooner and another which gave a larger reward later. They invariably chose the former. In the second phase, they were given a third option ahead of time. By pecking this third button in advance, they could prevent the smaller-reward-sooner button from activating when the time came, thus limiting themselves to the larger, later reward. After learning the new system, several pigeons chose this route, committing themselves to withstanding the temptation and receiving the larger reward. *See* G.W. Ainslie, *Impulse Control in Pigeons*, 21 J. EXPERIMENTAL ANALYSIS BEHAV. 485 (1974); Howard Rachlin & Leonard Green, *Commitment, Choice and Self-control*, 17 J. EXPERIMENTAL ANALYSIS BEHAV. 15 (1972).

94. *See* Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-control by Precommitment*, 13 PSYCHOL. SCI. 219, 220 (2002).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 221.

99. *Id.* at 219–24.

deadline distribution.[100] Indeed, commitment devices are generally seen as positive choices. Anecdotally, they appear to enable people to eat more healthily and manage addiction.[101] And both the popular and academic literature about savings laud commitment devices as essential for boosting savings rates.[102]

Credit cards, on the other hand, are the antithesis of a commitment device. They exacerbate the effects of hyperbolic discounting by allowing consumers to receive benefits long before they internalize the costs. With a traditional loan, a consumer typically begins making installment payments soon after the loan originates.[103] If the loan is unaffordable, it will quickly become apparent to a low-income borrower. With credit cards, the size of the minimum payment does not reflect the ultimate affordability of the loan. It is easy for a consumer to continue purchasing on credit without a reality check from her pocketbook. Many of the study participants accumulated large balances before understanding the effect of the minimum-payment system on the amount that appeared to be due each month.

Compounding this problem is the ability to borrow in extremely small increments. The amount of the loan increases with each purchase a consumer makes. Some commentators have criticized credit cards as enabling increasingly large levels of consumer debt through incremental borrowing,[104] but the mechanism behind the connection has not been explored. Hyperbolic discounting provides one answer. Research has shown that humans discount small outcomes more heavily than large ones,[105] so the incremental nature of credit-card loans compounds consumers' hyperbolic-discounting tendencies.

Not only have credit cards removed the precommitment element of other lending products, the device makes it difficult for consumers to develop their own personal systems of advance commitment in their credit-card usage. One troubling finding from this study is that even a consumer who is fully aware of her propensity to accumulate debt and wants to bind herself to a specific borrowing level lacks good options.

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100. *Id.* at 222.

101. *See supra* notes 88–89.

102. In fact, economist David Laibson argues that the increasing ability to borrow against illiquid assets—and therefore the decreasing effectiveness of these assets as commitment devices—is responsible for the declining savings rates. Laibson, *supra* note 69, at 460–65; *see also* Paul J. Lim, *Birthday Bash!*, U.S. NEWS & WORLD REP., Jan. 16, 2006, at 38, 40–41 (discussing the positive impact of 401(k) plans on an individual's savings rate).

103. For low-income borrowers, the traditional loans are rent-to-own stores and pawnshops. Rent-to-own stores typically require weekly payments, and pawnshops force the borrower to internalize the costs of the loan up front through the surrender of collateral. Jim Hawkins, *Renting the Good Life* 3 (Univ. of Tex. Sch. of Law, Law and Economics Research Paper No. 111, 2007), *available at* http://ssrn.com/abstract=1003784.

104. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 111–12 (2000) (referring to people who incrementally accrue debt and slide towards bankruptcy as sliders).

105. *See* Frederick, Loewenstein & O'Donoghue, *supra* note 69, at 363 (reviewing several studies on the topic).

C. Participants' Attempts at Advance Commitment in Credit-Card Usage

The participants in this study developed creative strategies for limiting their future borrowing, but most were suboptimal and required the consumer to forgo benefits of credit cards. As described in Figure 2, 52% of all participants, or 79% of those who reported temptation, attempted to implement at least one strategy. In the remainder of this subpart, I analyze the three major points at which consumers make decisions about credit-card borrowing. At each point, I describe the attempts of the study participants to impose advance limits on their borrowing and discuss the limits of these strategies. These decision points are: (1) the time when a consumer decides to obtain a credit card, (2) the time she purchases with the credit card, and (3) the time she borrows on it.[106] The participants' strategies are summarized in Figure 3.

106. My decision points are similar to those used by Bar-Gill in *Seduction by Plastic* but with one important difference. He defines $t = 0$ as the moment when a consumer decides whether to obtain a credit card, $t = 1$ as the time when she decides to purchase or borrow on her credit card, and $t = 2$ as the time when the bill is due. Bar-Gill, *supra* note 68, at 1396. Because his focus is on application and purchasing decisions, his third time period, $t = 2$, represents the time when a consumer experiences the consequences of her prior decisions rather than a time for additional decision making. *Id.* In his model, the decision to purchase and the decision to borrow occur simultaneously, at $t = 1$. In contrast, I separate the purchasing and borrowing moments, to better reflect the reality that a consumer may purchase using her credit card without deciding whether to borrow. Instead, the borrowing decision comes later when she receives the bill and decides whether to pay it in full. Thus, I use the same three time points as Bar-Gill but modify the second and third ones, so that the second reflects only purchasing decisions and the third reflects only borrowing decisions. Of course, for consumers with limited means, the decision to purchase with a credit card often is in effect a decision to borrow. On the other hand, at the moment of purchase, credit-card users are often unaware that they are spending beyond their monthly budget. Ronald Mann has used the same framework I do. *See* MANN, *supra* note 3, at 129, 141.

Figure 2: Participants Employing Anti-temptation Strategies

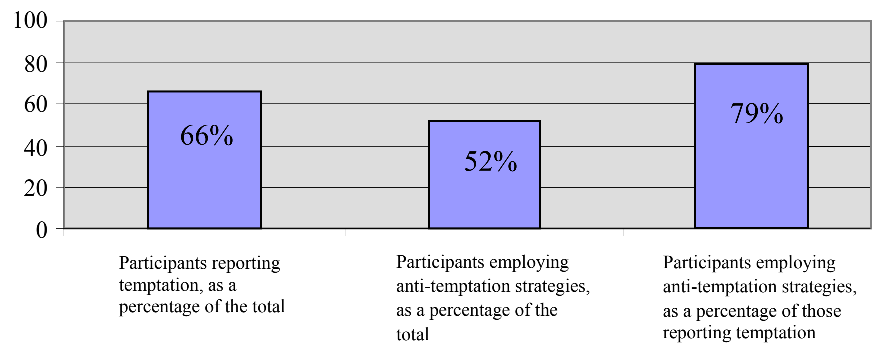
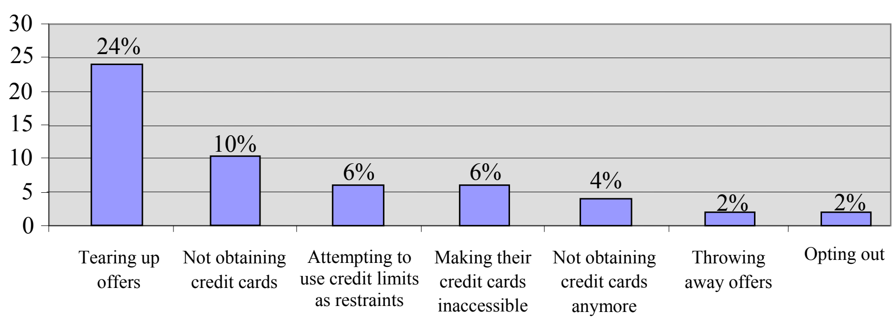


Figure 3: Participants' Anti-temptation Strategies, by Percentage of Participants' Use



A consumer's most effective opportunity for advance commitment is the moment of applying, or not applying, for a credit card. Ten percent of the women in the current study chose not to apply for credit cards because they suspected that they would spend more than they wanted. As one explained, "Because I know how I am. There's always something I want more than I need. So I already know, if I start putting things on there, I'm going to like add . . . I can just add another like . . . another 100 bucks won't matter."[107] This strategy is not without consequences. These women were unable to take advantage of the benefits of credit cards discussed in Part III.

107. Interview with Respondent 12R.

The moment of applying for a credit card is not just an opportunity to constrain future behavior; it presents a temptation itself. Under the current system, there is no way to precommit to living without a credit card (or with a limited number) for a specified period of time. Moreover, consumers are constantly faced with temptation in the form of preapproved mail and telephone offers. Over 90% of participants said they received credit-card offers on a regular basis, with several claiming to receive more than one a day.[108] It should be remembered that 52% of the study participants lived in public housing, and the rest lived in Section 8 housing, which tends to be available largely in low-income neighborhoods.[109] These mailings suggest that credit-card issuers see low-income people as a targeted portion of their customer base.[110]

In response, 24% of the participants described tearing up all credit-card offers without opening them in order to avoid the temptation they presented.[111] (One participant also threw hers away without looking at them.) As one woman said when asked why she tore up her credit-card offers, "[That way], I won't fill it out. I know it's done."[112] This strategy has two major drawbacks. First, it is highly imperfect as a precommitment device. The consumer must make the commitment decision repeatedly each time a new offer arrives. Further, she must expose herself to the temptation more closely in order to remove it—holding the offer in her hands and refraining from opening it as she tears it up. Second, it is a lot of work to avoid applying for a credit card. One participant described her time-consuming experience destroying these offers for identity-theft reasons:

> We have the mailing address and the residential address. So I get one from CapitalOne, they would send out both to me. . . . They know it's the same person, come on. . . . But I said to myself, that they can't lure me in again. . . . I would go through each envelope before I would trash it. And I'd tear off my name, wherever my name and

108. The data on the number of offers participants receive is imprecise because it requires detailed recall and most likely varies over time. The original study design asked participants to save the offers they received to provide exact data on this point, but after hearing a few participants describe the temptation these offers presented, I realized that this would violate my university's human-subjects protections. Several participants also described receiving telephone solicitations. Anecdotally, it appeared that women who were heavy credit-card borrowers received constant telephone offers while other women received almost none. Complete data on this point was unavailable because many participants screened out unknown telephone calls using caller identification.

109. *See* Brian Maney & Sheila Crowley, *Scarcity and Success: Perspectives on Assisted Housing*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 319, 338–40 (2000) (noting the scarcity of available housing for Section 8 tenants and reconcentration of Section 8 families in low-income neighborhoods).

110. Of course is it also possible that public-housing residents in particular receive a large number of offers simply because they tend to maintain a single address over long periods of time.

111. An additional 16% of the women described destroying these offers because of identity-theft concerns.

112. Interview with Respondent G88.

> address is on it whatever. Just rip it up because I'm most skeptical about that when I throw away the mail. . . . So that was time-consuming because you're getting these things several times a week. Virtually it's five times a week, weekdays out of the week, five days out of a seven-day week.[113]

This participant later learned of her ability to opt out of receiving credit-card solicitations and did so.[114]

The second time a consumer makes a decision about credit-card use is at the moment of purchase. For low-income consumers, this time has particular significance because they have fewer options at the time of repayment. Many study participants described themselves as purchasing more than they had intended when they applied for a credit card. Thus, women in the study developed creative ways of binding themselves in advance of these decisions. One described intentionally "losing" her credit card somewhere in her apartment, so that she would not be able to charge on it.[115] Another stated that she kept her credit cards in a lockbox, explaining:

> I didn't want to have an impulse item say 'buy me.' And I'd be like, 'I've got my card. Why can't I?' If it's put away and it's locked, I'd have to go all the way home, and I['d] realize this is a sign from God, you don't really need it.[116]

A third kept hers at home instead of in her wallet.[117] The main disadvantage of this strategy—in addition to the possibility of actually losing one's credit card in the process of intentionally losing it—is that it is counterproductive. It requires a consumer to not have her credit card with her at the times she might need it, particularly in times of emergency.

Other participants attempted to limit their spending through strategic use of their credit limit, which theoretically provides a mechanism for committing oneself to a limited amount of credit-card spending. One participant used only low-limit credit cards for this reason.[118] Another called her issuer asking to lower her credit limit, although she decided to cancel the card altogether partway through the telephone call.[119] A third sought to stop her issuer from continually increasing her credit limit. By the time of the interview, she earned approximately $25,000 per year and had a credit card that raised her limit to $10,000, an amount with which she felt uncomfortable.[120] She called the company several times, asking it to stop

113. Interview with Respondent 64F.
114. *Id.*
115. Interview with Respondent 99Z.
116. Interview with Respondent 557.
117. Interview with Respondent 76C.
118. Interview with Respondent 21U.
119. Interview with Respondent 283.
120. Interview with Respondent 777.

raising her credit limit. Company representatives said they would discontinue the credit raises, but never did.[121]

Moreover, even when a consumer has a lower credit limit, that credit limit does not cap her spending but only imposes penalties for exceeding it.[122] This system caught several participants by surprise. They thought that if they could make a purchase, they were still within their credit limit. They often learned otherwise only when they received their bill and saw that they had exceeded their credit limit and acquired several overlimit fees in the process. This distinction between commitment devices that provide real limits and those that only increase the penalties for choosing the tempting option is crucial for designing credit cards that allow consumers to better effectuate their long-term preferences. Increasing future penalties—in this case, in the form of overlimit fees—is ineffective for hyperbolic discounters because of their tendency to minimize future costs. A card with hard credit limits would be a much more effective precommitment device.

The final decision point comes when a consumer chooses whether or not to borrow, that is, whether to pay her credit-card bill in full upon receipt or whether to carry a balance into the future. Obviously, a consumer may make this determination at the point of purchase by making a purchase she does not intend to cover fully at the end of the billing cycle. And in the case of a consumer whose financial resources will not accommodate a given purchase, she makes that decision by default. She is not required, however, to face the decision about whether to borrow or to commit herself to the consequences until the moment she decides whether to pay her balance in full.[123] The women did not describe any advance-commitment devices that they had developed with respect to this decision because for them, there are none. The most likely way to commit to paying the balance in full each month is to establish an automatic withdrawal from a bank account. For a population that is inadequately banked and has limited Internet access, this is not an option.

Moreover, low-income credit-card users are at a further disadvantage at this decision point. Avoiding difficulties with credit cards requires payment habits that are in direct contradiction with the strategies many low-income families have developed to survive. Low-income women, by necessity, are experts at managing financial resources under scarcity conditions. Sixty percent of participants characterized themselves as having trouble paying their bills currently or all the time, and an additional 16% mentioned specific

121. *Id.*

122. *See infra* note 167 and accompanying text.

123. This contrasts with the Japanese system, where credit-card users must make this decision at the time of purchase. *See* Mann, *supra* note 38, at 1074–75 (noting that in approximately 85% of transactions, Japanese cardholders elect to pay the charge in full on the next month's due date, either by credit transfer or by prearranged debit).

times during the past year when they struggled to make ends meet.[124] They described a variety of strategies for coping with a chronic lack of resources—ranging from finding furniture on the street to searching for scholarships for their children's activities—but by far the most prevalent strategy was juggling bills every month. Seventy percent of the women said that when they were unable to pay their bills, they paid bills late or negotiated smaller payments for the month. They detailed elaborate systems for deciding which bills to prioritize and how delinquent a bill must be before a nonpriority bill was elevated to the "must pay now" category. They have become skilled at identifying which bills can be paid how late in order to avoid immediate catastrophe.[125]

Credit cards wreak havoc with this strategy. The financial skills low-income women have developed are maladaptive to the situation of sudden access to relatively large sums of money. Under the participants' usual strategy, credit cards make ideal bills on which to delay payment because lateness will not result in an immediate eviction notice or shutting off of the electricity. Delaying payment, however, is the precise behavior that can cause a family to become mired in debt over time.[126] As one participant explained, "I really, really don't like credit cards. I think they set people up, especially poor lower income people. When they get them in, and they are not used to having something, I think it's one big set up . . . ."[127]

V. Self-directed Credit Cards

It would be possible to develop a second generation of credit cards that would enable customers to handle their cognitive shortcomings more effectively. I term these products self-directed credit cards, but they could be marketed to consumers under more colloquial labels, such as "You're in Charge" credit cards or "Safe" credit cards. This Article describes several variations on self-directed credit cards, many of which were suggested in rough form by participants. Participants also contributed insight on topics, such as consumer education, that affect the implementation of self-directed

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124. Nationally, one in four workers suffers from financial distress. E. THOMAS GARMAN ET AL., FINANCIAL DISTRESS AMONG AMERICAN WORKERS 3 (2005), *available at* http://www.ethomasgarman.net/research/efd/efd-list-05.pdf.

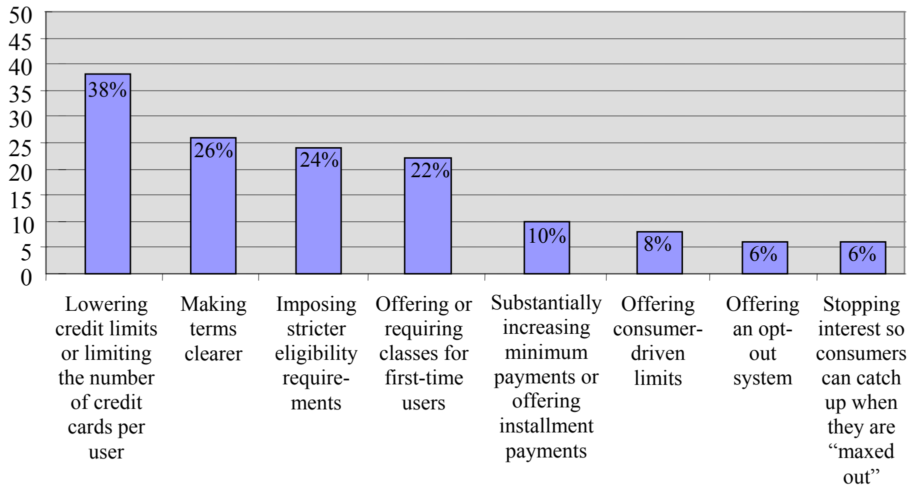
125. For example, the immediate consequences of paying rent late in a public housing project caused every participant who discussed this matter to say she was careful always to make rent payment her top priority. *See supra* note 20.

126. *See* SULLIVAN, WARREN & WESTBROOK, *supra* note 104, at 111 ("Many people slide into debt, falling a little farther behind on their cards every month until bankruptcy is the only way out.").

127. Interview with Respondent 777.

cards. Figure 4 presents the percentage of participants who suggested each proposal discussed in this Article.[128]

Figure 4: Policy Suggestions, by Percentage of Participants



All self-directed credit cards have three underlying themes. First, they permit consumers to exercise more control over their credit-card usage by precommitting to certain levels and types of credit-card spending and borrowing. The first group of self-directed cards, discussed in subpart V(B), modifies existing credit cards by allowing all customers to self-impose these constraints. The second group, discussed in subpart V(C), is new credit-card products specifically designed to meet the precommitment needs of low-income borrowers.

The second unifying feature of self-directed credit cards is that they all allow for flexible implementation. Each product has some applicability to implementation through the private market, traditional government regulation, or a hybrid system proposed in section V(D)(2). The first two implementation schemes are self-explanatory. Private-market implementation would mean encouraging competitors to offer the self-directed products, while government regulation would mean requiring issuers to offer their customers self-directed credit cards.

128. Participants offered a tremendous variety of policy suggestions. By a conservative estimate, their ideas fell into nearly thirty broad categories. Figure 4 includes all ideas proposed by at least 20% of respondents as well as the ideas that are particularly relevant for this Article.

The third option would consist of a regulatory system that consumers could enter on an individual basis, allowing them to select their preferred regulatory regime at the time they decide whether to obtain a credit card at all. Current law enables consumers to opt out of receiving prescreened credit-card solicitations in the mail.[129] There is no reason, however, why the opt-out system need be limited to an "on/off" switch where consumers simply choose to receive or not to receive credit-card offers. This system could be expanded so that consumers could not only choose *whether* they would like to obtain credit cards but also *what kind* of credit cards they would like. Consumers could then sign up for a "safe credit-card plan" that would permit issuers to send them solicitations only for self-directed cards. The regulatory menu system also has enormous potential to restructure the credit-card market to allow for vastly more consumer choice. It would enable consumers to channel demand for specific credit-card terms and force issuers to decide whether to accommodate that demand or abandon soliciting that group of consumers.

The third central feature of self-directed credit cards is that they would all move credit cards from the current model, in which the typical low-income borrower accumulates an unaffordable balance and makes the bulk of her payments as fees and interest, to one where the low-income borrower has a reasonable chance of repaying the credit that was initially extended. Ronald Mann has identified the former model as the "sweat box" of credit-card debt.[130] He explains that while most traditional lenders profit from customers who repay their loans, most credit-card issuers profit from borrowers who accumulate balances.[131] Credit-card companies charge these borrowers higher interest rates and more fees, which enable them to receive larger total payments than if the customers had paid their balances regularly.[132] Mann asserts that "[t]he successful credit card lender profits from the borrowers who become financially distressed."[133] One participant eloquently explained the model in personal terms:

> [T]hey're taking advantage of poor people, and they know what the outcome is going to be. They know that if you miss two or three payments, you're going to owe them ten times more than you originally did. When I originally took out that card, I didn't know how quickly the amount could skyrocket, till you owe them an arm and a leg. But they knew, and that's why they did it.[134]

An important goal of self-directed credit cards is to move low-income credit-card users out of the sweat box and into the realm of traditional loans.

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129. This system is discussed in detail in subpart V(A).
130. Ronald J. Mann, *The "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 384.
131. *Id.*
132. *Id.* at 386.
133. *Id.* at 385.
134. Interview with Respondent A26.

A. *Opting In and Opting Out*

The one regulatory precommitment device already available is the opt-out system, which allows consumers to opt out of receiving prescreened credit-card offers in the mail.[135] The opt-out system is incomplete and ineffective,[136] but it is suggestive of a framework that could allow for a significant expansion of consumer choice and control. The Consumer Credit Reporting Reform Act of 1996 amended the Fair Credit Reporting Act to allow consumers to opt out of receiving prescreened credit-card and insurance offers in the mail.[137] This tool would seem to allow consumers to precommit to not obtaining a credit card through this channel and alleviate the temptation the offers present. Data from the current study, however, suggest that this system is not effective. Of the fifty study participants, only one mentioned the ability to opt out of credit-card mailings. She did opt out, but it took her two attempts to do so successfully.[138] In addition, 6% of participants suggested the creation of an opt-out system as a change they would like to see. A 2004 Federal Reserve study found that only approximately 20% of consumers are aware of the opt-out list's existence.[139]

The major reasons for this lack of knowledge seem clear. The Consumer Credit Reporting Reform Act of 1996 did specify that companies sending preapproved offers must notify consumers of the right to opt out of receiving future solicitations,[140] but it was only with the passage of the Fair and Accurate Credit Transactions Act (FACTA) in 2003 that Congress directed the Federal Trade Commission (FTC) to impose visibility requirements on these notifications.[141] By 2004, fewer than 10% of people who knew of the opt-out system, or 2% of the total population, had learned of it through the notices included in their prescreened credit offers.[142] While the FTC issued comprehensive regulations regarding visibility in 2005,[143] they are unlikely to have a large effect. Under the new regulations, a consumer still must open and read the credit-card offer to find the opt-out notice,

135. 15 U.S.C. § 1681m(d) (2000 & Supp. V 2005).

136. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE 4 (2004), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/UnsolicitedCreditOffers2004.pdf [hereinafter FEDERAL RESERVE REPORT 2004] (providing data demonstrating that few consumers know about the opt-out right, fewer still exercise it, and those who do exercise it still receive offers of credit through the mail).

137. Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2411(b), 110 Stat. 3009-426, 3009-444 to -445 (codified as amended at 15 U.S.C. § 1681m(d)).

138. Interview with Respondent 64F.

139. FEDERAL RESERVE REPORT 2004, *supra* note 136, at 4. Approximately 6% of all consumers have exercised the opt-out right. *Id.*

140. *See supra* note 137.

141. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 213(a), 117 Stat. 1952, 1978–79 (codified at 15 U.S.C. § 1681m(d)(2) (Supp. V 2005)).

142. FEDERAL RESERVE REPORT 2004, *supra* note 136, at 32.

143. 16 C.F.R. §§ 642, 698 (2007).

and yet approximately 90% of consumers either do not open the solicitation envelopes or only glance at the materials inside.[144] To alert this 90% of their opt-out rights, it would be necessary to engage in a public-awareness campaign or at least to post the notice prominently on the outside of the envelope.

In addition to being unfamiliar to the vast majority of consumers, several features of the opt-out system itself limit its effectiveness. Both the telephone and Internet procedures for opting out are potentially confusing and contain information seemingly designed to persuade consumers not to opt out.[145] And once a consumer does opt out successfully, she still may receive credit-card offers. The system allows consumers only to opt out of receiving prescreened credit-card offers and only a subset of those. It technically allows a consumer to prohibit issuers from using the data in the consumer's credit report for prescreened solicitations.[146] A consumer has no ability to opt out of offers generated without the use of personal data (i.e., not prescreened) or generated with data from the issuer's corporate affiliates.[147]

Regulating data usage instead of mailings enables lawmakers to avoid the constitutional issues associated with statutes, such as the do-not-call list,

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144. FEDERAL RESERVE REPORT 2004, *supra* note 136, at 33 tbl.5.

145. Upon calling the toll-free opt-out telephone number maintained by the credit agencies, one is greeted with the message: "You've reached the consumer credit reporting industry opt-in and opt-out number." Transcript of Telephone Call to 888-5-OPT-OUT (Aug. 21, 2006) (on file with author) [hereinafter Opt-Out Transcript]. After selecting whether to continue in English or Spanish, the message continues: "On this call you can add or remove your name from receiving firm offers of credit or insurance based on your credit report with Equifax, Experian, Innovis and TransUnion." *Id.*; *see also* 15 U.S.C. § 1681b(e)(5)(A)(i) (requiring every consumer-reporting agency that furnishes consumer reports for transactions of credit or insurance not initiated by a consumer to notify consumers that they may exclude their name from such solicitation and also requiring the agencies to maintain a toll-free number to permit consumers to do so). The message does not mention stopping credit-card offers. *See* Opt-Out Transcript, *supra*. The closest it comes is with the word "opt-out," but calling it the "opt-in and opt-out number" obfuscates its purpose as an opt-out line. The telephone system is entirely automated—there is no option to speak to an agent—and requires consumers to divulge personal information, such as Social Security numbers, a prospect that may be unsettling to someone calling due to concern about identity theft. *See id.* For a further critique of the telephone system, see Anuradha Raghunathan, *No Easy Escape*, DALLAS MORNING NEWS, Feb. 26, 2004, at A1. While the opt-out Web site provides more information, it dedicates approximately one-third of its front Web page to a section entitled "What are the benefits of receiving firm offers?" OptOutPrescreen.com, http://www.optoutprescreen.com. There is no corresponding section explaining the benefits of opting out. *See id.* The site does, however, suggest benefits for opting in: "In doing so, you will soon be among the many consumers who can significantly benefit from having ready access to product information on credit and insurance products that may not be available to the general public." *Id.*

146. 15 U.S.C. § 1681m(d)(1)(D). The opt-out system is maintained jointly by the major credit-reporting agencies. OptOutPrescreen.com, *supra* note 145.

147. *See* 16 C.F.R. § 313.4(b)(1) (stating that companies need not send privacy notices to consumers if the companies "do not disclose any nonpublic personal information about the consumer to any nonaffiliated third party").

that allow consumers to directly opt out of direct-marketing advertising[148] but gives consumers less control over the direct advertising they receive. In addition, the effectiveness of the current opt-out system relies on this underutilization. If opt-outs were better known, companies might resort to more nonprescreened mail. In its 2004 study, the Federal Reserve Board argued that further "restrictions on sending prescreened solicitations are likely to cause creditors and insurers to use less-efficient techniques to market their services, including additional mailings to prospective customers and to those unqualified for the product or service."[149] This argument applies equally to a situation in which a large portion of consumers take advantage of the current opt-out system. Approximately 30% of consumers who know of the opt-out option, or 6% of the total population, use it.[150] If opting out of credit-card offers were to obtain the mass familiarity of programs such as the do-not-call list, that could, in fact, mean an increase in other types of direct marketing from credit cards.

On the other hand, an improved opt-out system could be a very effective tool for credit-card users struggling with rising debt. The 2004 Federal Reserve Board study found that consumers with higher total credit-card balances were more likely to opt out than those with lower ones.[151] Similarly, the more credit accounts a consumer has, the more likely she is to opt out.[152] The Federal Reserve attributes these findings to the possibility that consumers with more credit: "(1) are not looking for further credit or (2) are more familiar with the opt-out process or both."[153] Another explanation, suggested by the current study, is that consumers with more credit accounts and higher total balances are more likely to be concerned about mounting debt and seeking ways to prevent incurring more.[154]

148. *See* Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1236 (10th Cir. 2004) (upholding the constitutionality of the federal do-not-call list against First Amendment challenges by telemarketers).

149. FEDERAL RESERVE REPORT 2004, *supra* note 136, at 48.

150. *Id.* at 4.

151. *Id.* at 24.

152. *Id.* at 4–5.

153. *Id.*

154. Two contradictory findings from the Federal Reserve study have the potential to weaken or strengthen this hypothesis. On one hand, the Federal Reserve Board found that consumers with higher credit ratings were more likely to opt out than those with lower credit ratings. *Id.* at 26. This would suggest that individuals who have more trouble paying their current credit bills are less likely to opt out. On the other hand, the study found that both individuals with collection items and those with public-records actions in their credit files were more likely to opt out than the general population. *Id.* This finding supports my hypothesis that consumers with negative debt experience are more likely to seek a means of eliminating credit-card offers. The Federal Reserve study notes that having collection items or public-records actions in one's file is likely to lower one's credit score, *id.*, but does not attempt to reconcile the collection items and public-records actions findings with the credit-score finding. Because this portion of the study examined only credit reports, from which all personal identifiers had been redacted, *id.* at 2, the researchers could not control for consumers' education or income. These and other related variables might explain the discrepancy.

Allowing consumers to opt out of all credit-card solicitations would be a small step in the right direction. Such a system would likely pass constitutional muster, as the do-not-call list did before it.[155] It would give consumers more control over their credit-card usage by allowing them to fully precommit to not obtaining a credit card based on offers that arrive by mail.

A more comprehensive response to the underutilization difficulties that plague the opt-out system is an opt-in system. Although many legal observers are cognizant of the power of default rules,[156] almost no commentators, in either the legal literature or the popular press, have considered the possibility of an opt-in system.[157] The 2004 study by the Federal Reserve Board appears to be the only large-scale record of public preferences on opt-out issues,[158] but it asked consumers exclusively about an opt-out system and a complete ban on credit-card solicitations.[159] It did not ask about the intermediate option of an opt-in system.[160]

Substituting an opt-in system for the current opt-out regime would be a major step. The credit-card industry is heavily dependent on access to consumer data for prescreened offers. As Ronald Mann argues in *Charging Ahead*, it is America's liberal use-of-data policies that have enabled the success of the credit-card industry in the United States.[161] He compares the degree to which other countries allow credit-card companies to use consumer data for prescreened offers and finds a strong correlation between a country's data-privacy regime and its consumer-credit-card penetration.[162] In the United States, more than two-thirds of new credit-card accounts are generated through prescreened offers.[163] Thus, changing the system could have a large positive impact on consumers who struggle with the temptation of credit cards but would also devastate the credit-card industry. Detailed study of these benefits and costs would be needed before an opt-in system could be seriously considered.

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155. Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1236 (10th Cir. 2004).

156. *See, e.g.*, Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 258–59 (2006) (noting that default legal rules are unavoidable and that those default rules affect human preferences).

157. One exception is Anuradha Raghunathan. *See* Raghunathan, *supra* note 145 (noting that many consumers would prefer to opt into receiving direct mail rather than opt out).

158. *See* FEDERAL RESERVE REPORT 2004, *supra* note 136, at 15 (noting that prior to the 2004 study by the Federal Reserve Board, little information was available regarding the frequency with which consumers opted out and the characteristics of consumers who had chosen to opt out).

159. *Id.* at 38.

160. *Id.* at 28.

161. MANN, *supra* note 3, at 113–14.

162. *Id.* at 113.

163. *See* FEDERAL RESERVE REPORT 2004, *supra* note 136, at 9 (citing 2002 annual figures). The study does not differentiate between offers that were based on information obtained through credit-reporting agencies and those based on data obtained through corporate affiliates.

B. *Consumer-Controlled Credit Limits and Other General Precommitment Devices*

Allowing consumers to opt out of or opt into receiving credit-card solicitations only decreases temptation at the point of obtaining one. As explained in subpart IV(C), however, many study participants sought ways to maintain credit cards while limiting the temptation to spend and borrow on them. An opting system can support that goal by allowing consumers who already have one credit card to avoid receiving future offers, but it is a blunt instrument in this respect. The self-directed credit cards proposed in this Article can facilitate this balance more precisely.

Several of the self-directed credit cards modify the product to address spending temptation directly. One option is consumer-controlled credit limits. Credit-card companies could be required to give consumers the option of capping their credit limits or—to take this idea one step further—could be prohibited from raising a consumer's credit limit without express consent. Eight percent of participants suggested this modification. As one participant stated, "What they shouldn't do is tempt people by saying every three or four months, oh, your credit limit has been increased."[164]

Currently, issuers can increase a customer's limit at anytime, even when the customer has a significant unpaid balance. Several study participants reported receiving unwanted credit-limit raises, and as discussed in subpart IV(C), two participants attempted, with mixed results, to persuade their companies to return their limits to previous levels. The converse of this practice is that companies are not always willing to raise a credit limit when the consumer desires an increase. One participant described asking her credit-card company for an increased credit limit, being turned down, and then shortly afterwards receiving an automated letter informing her that her credit limit was being raised.[165] What this anecdote illustrates, besides the lack of internal coordination of this particular credit-card company, is that credit limits are under the exclusive discretion of credit-card issuers. The current study suggests consumers would benefit if credit limits were mutually determined.

There is a range of ways such a system could be implemented, with each alternative representing a point on the spectrum of mutuality. On one end, credit-card companies could be prohibited from issuing credit-limit raises unless consumers requested them. Companies could include a form with their monthly bills, which consumers could fill out and return when they wanted to apply for a credit-limit raise. A milder variant of this option would allow consumers to opt into or opt out of such a regime on an individual basis by checking a box in the initial credit-card contracts. On the other end of the spectrum, credit-card companies could issue credit-limit raises as they currently do but would be required to allow consumers to reject the raise

164. Interview with Respondent 9JK.
165. Interview with Respondent 2AU.

within a specified period of time. A compromise option would allow credit-card companies to send notifications of potential credit-limit raises but require consumers to return an acceptance form before it became effective. Further study of the trade-offs between ease of implementation and an acceptable degree of consumer consent is needed, but any of these alternatives would be a step in the right direction.

Similarly, there are a number of ways to implement the step where a consumer reactivates a credit increase she had previously declined. It could be as simple as the consumer calling her issuer and asking for the increase. At the other end of the spectrum, she could be required to mail in a form. An intermediate option would allow the transaction to take place over the telephone but require information (such as account number or exact amount of her previous purchase) that consumers would likely keep at home. That way, the consumer would need to go home to ask for the credit increase, rather than calling on her cell phone from the store. The key to this step is that it allows the consumer to precommit to a time delay before spending beyond her credit limit, much like the theory behind a "cooling off" period before purchasing a gun. For the participant described earlier, who kept her credit card in a lock box, the time delay of needing to go home would be enough. As she explained, having to "go all the way home" gave her the time for reflection to realize "this is a sign from God, you don't really need it."[166] Other consumers might need a lesser or greater delay for the credit limit to serve as an effective precommitment device.

Of course, for any of these options to be effective, the function of the credit limit would have to change. Currently, the "limit" in the term "credit limit" is illusory. Rather than actually restricting the amount a consumer can charge on a credit card, the limit simply subjects the user to additional fees and interest when it is exceeded.[167] In the language of psychology literature, the current limits provide punishments after the fact rather than actual restraints.[168] Several study participants were surprised by this system when they began using credit cards. They reported having used their credit limits to keep track of how much they were spending and were unpleasantly surprised to find, upon receiving their bills, that they had exceeded their credit limits. A system in which a credit limit prevented a user from charging beyond the specified amount would turn credit limits into effective

166. *See supra* note 116 and accompanying text.

167. *See, e.g.*, Credit Card Statement of Participant 283, Capital One, Platinum Mastercard Account (Mar. 6, 2006) (on file with author) (stating that the participant was charged a $29.00 overlimit fee for charging $64.00 when her previous balance was $641.30 and her credit limit was $500.00); *see also* MANN, *supra* note 3, at 162 (discussing overlimit fees as point-of-sale fees that penalize the cardholder for exceeding the credit limit without informing the holder that the limit is about to be breached).

168. *See* Howard Rachlin, *Self-control: Beyond Commitment*, 18 BEHAV. & BRAIN SCI. 109, 112 (1995) (explaining that self-control achieved through commitment may be enforced by punishment or actual physical restraint).

precommitment devices and enable consumers to maintain better control of their spending. Under this system, credit-card companies would be required to decline a credit-card purchase when it would exceed a user's credit limit, much like a debit-card issuer does when a consumer has insufficient funds. Alternatively, the company could inform the consumer that the purchase would put her over the limit, so the consumer has the option at the moment of purchase not to complete the transaction.[169] This option would have the additional advantage of transferring the impact of not being able to pay one's credit-card bill to the time of purchase, when the consumer has more ability to change course. Again, there are a variety of options for allowing consumers to opt out of or opt into such a system, but any of the alternatives would give consumers a path toward precommitting to a preferred level of credit-card spending.

Allowing consumers to reject credit raises may also have the effect of reducing debt. Two studies have found that consumers tend to maintain balances at a consistent percentage of their credit limit.[170] One of them used panel data to show that increases in credit limits resulted in immediate increases in debt, even for consumers who were not at the edge of their previous credit limit, although the effect was weaker for them.[171] Given the degree of control that issuers maintain over credit raises, this is unlikely to be simply a result of consumers requesting more credit when they would like to obtain more debt. It follows that if consumers were able to limit their lines of credit, their debt levels may remain at the level corresponding with the credit limits they already have.

Consumer-driven credit limits are just one way of enabling credit-card users to manage their spending before they are faced with the temptation of an immediate purchase. Credit limits are an obvious first step because they already exist and would only need to be modified. But a number of new mechanisms would allow credit-card users even greater control. Consumers could request to be "blacked out" of charging at certain stores they find particularly tempting, or conversely, they could allow themselves to charge only at stores such as supermarkets and pharmacies.[172] With their self-imposed credit limits in hand, they could budget that credit on a monthly basis,

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169. *See* MANN, *supra* note 3, at 162 (suggesting the disclosure alternative and noting that it is already technologically feasible).

170. *See* Edward Castronova & Paul Hagstrom, *The Demand for Credit Cards: Evidence from the Survey of Consumer Finances*, 42 ECON. INQUIRY 304, 317 (2004) (concluding that credit-card holders tend to "hold a certain fraction of their limits as debt"); David B. Gross & Nicholas S. Souleles, *Consumer Response to Changes in Credit Supply: Evidence From Credit Card Data* 11 (Wharton Fin. Insts. Ctr., Working Paper No. 00-04-b, 2000), *available at* http://fic.wharton.upenn.edu/fic/papers/00/0004.pdf (using panel data from industry sources to conclude the same).

171. *See* Gross & Souleles, *supra* note 170, at 20 ("We find that increases in credit limits generate an immediate and significant rise in debt. This response is sharpest for people starting near their limit, providing evidence that liquidity constraints are binding. However, even people starting well below their limit significantly respond.").

172. Telephone Conversation with David Arkush, Staff Attorney, Pub. Justice (Dec. 4, 2006).

allowing themselves to spend only a certain portion of their credit each month. Or more simply, they could "freeze" their credit-card usage altogether when their balance exceeded their comfort level. These options are particularly important for low-income consumers, whose financial security can be threatened by relatively low debt levels, but they would benefit middle- and upper-class credit-card users as well. For consumers with Internet access, all of these choices could be managed online with a time delay that would impose a "cooling off" period when a consumer sought to alter a previously established forbearance mechanism.

Consumer-driven credit limits and related variations are ideal candidates for government regulation because they would not actually regulate consumers but rather require issuers to offer consumers more choice. They avoid any paternalism concerns while allowing consumers more alternatives for imposing self-regulation on their credit-card spending. In addition, given the advanced state of issuers' current consumer-data-management practices,[173] most of these options would be technologically undemanding for issuers to implement. A statute requiring issuers to offer customers the option of a hard credit limit, for example, would be difficult for issuers to oppose on implementation-cost grounds. Similarly, because consumer-driven credit limits would pose a relatively small interruption to issuers' current practices, they would probably have a correspondingly minimal impact on access. On the other hand, the more expansive variations, such as those in which consumers could black out certain stores or freeze their credit limits, would require a greater technological investment on the issuer side and would more reasonably lead to the imposition of a fee, which might make these alternatives less attractive to consumers in the end. In the absence of regulation, there may also be a market opportunity for new entrants to offer these features and appeal to consumers who want more control over their credit-card spending.

The options to spend and borrow less are choices consumers already have, but currently they must make these decisions repeatedly and at the moment they are faced with a tempting purchasing decision. Self-directed credit cards would allow them to precommit to their longer term preferences and minimize the chances that their short-term preferences would cause them to make spending decisions they would later regret.

173. *See, e.g.*, MANN, *supra* note 3, at 40 (describing how issuers assess risk using electronic transaction processing and account-management systems); TIM WESTRICH & MALCOLM BUSH, BLINDFOLDED INTO DEBT: A COMPARISON OF CREDIT CARD COSTS AND CONDITIONS AT BANKS AND CREDIT UNIONS 3 (2005), *available at* http://www.issuelab.com/downloads/5480blindfolded intodebt_7-5-05_westrich_bush.pdf ("In today's industry, a handful of the most sophisticated credit card issuers now perform complex analyses on vast data sets that reveal the detailed patterns of their customers' financial behavior; the issuers then fine-tune their products to maximize income based on these models.").

C. *Borrowing Caps, Fixed-Fee Credit Cards, and Installment-Payment Plans*

The above proposals are ways for consumers to control their usage of existing credit cards more effectively. There are also at least three forms of self-directed credit cards that would alter the basic structure so as to make the device less risky, particularly for low-income borrowers. One intriguing idea to which the study participants returned repeatedly is that of significantly lower lending caps. Of course private lending caps do exist in the form of determinations of credit worthiness. But when asked what *changes* they would like to see to the credit-card system, 38% of participants answered that the credit they receive should be more realistically calibrated to their incomes. They emphasized that credit limits should be tied to one's ability to pay, even if the limits had to be enforced by law. A popular incarnation of this idea was to have "starter" or "trial" credit cards with limits of no more than $250 or $300. Once a consumer spent the initial funds, she would have to repay the entire amount before being issued additional credit. The credit limit would then increase gradually in direct response to the consumer's repayment of previously borrowed amounts.

This approach has several advantages. Most obviously, credit limits that were more tightly bound to a family's actual ability to pay would enable low-income consumers to use credit cards without incurring unmanageable debt. Low-income families could still use credit cards as payment cards so long as they paid enough of their balance regularly to maintain some room in their credit limit. And they would know in advance that they faced a specific, finite credit limit, which would enable them to plan more successfully and better preserve that resource for true emergencies.

Further accessibility to a smaller credit card would have two additional advantages. First, it would address the discrimination concern voiced by so many of the participants. It would be a way to make credit cards available to the entire community while still preserving the companies' obvious need to make credit determinations on the basis of income. Such a credit card might even be realistic for families who cannot obtain credit cards under the current system. Second, on a practical level, the issuance of small credit cards as a matter of course would weaken the impetus to apply for a credit card as a test of one's personal or financial status. As mentioned above, 12% of participants said that they applied for a card to see if they could obtain one.[174] Once they received a credit card, several of these women went on to borrow amounts they came to regret. Thus, lessening this motivation for credit-card applications would have a positive effect.

A related option is a credit card that offers installment-payment plans. As one participant explained, credit cards could "make an arrangement like you can pay . . . like if it's 1,000, they should let you pay maybe in ten

174. *See supra* note 61 and accompanying text.

months or fifteen months . . . . Otherwise how are you going to clear that up?"[175] Every purchase the consumer made would establish an installment-payment plan requiring payment over a specified period of months. The issuer would immediately add the installment-plan interest to the price of the consumer's purchases, but if the borrower made the installment payments promptly, she would not be charged any additional interest or fees. If she missed a payment or paid late, then the issuer would charge her a late fee and additional interest on the missing payment. An installment-payment credit card would allow consumers to internalize better the costs of their purchases at the time of spending.[176]

An analogous model has already been implemented successfully by mail-order catalogs that sell goods on credit. In the current study, for example, more participants had used catalog-installment borrowing than either of the more widely known rent-to-own stores or pawnshops. And study participants evaluated this installment-borrowing option more positively than any other borrowing type generally available to low-income people, including credit cards. In addition, this type of lending is very popular in Europe.[177] Because credit-card issuers do not sell goods and thus could not incorporate interest into the purchase price as catalog lenders do, they would need to add the installment interest separately. This small step would be the main difference between installment credit cards and the already successful catalog-lending model. The installment-payment-plan card is also similar to the Japanese system, which has a variety of installment-payment plans among which borrowers choose at the point of sale.[178]

In some ways, increasing the minimum payment is a step in the direction of installment-plan credit cards. In 2003, the interagency Federal Financial Institutions Examination Council (FFIEC)[179] issued a "guidance" effectively requiring credit-card issuers to increase the size of the minimum payment from approximately 2% to 4%.[180] A series of such initiatives would

175. Interview with Respondent 34H.

176. Credit historian Lendol Calder argues that installment-payment plans provide consumers with a framework for budgeting and financial management. *See* LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 28 (1999) ("Installment financing saddles borrowers with a strict schedule of payments. To satisfy their obligations, modern consumers are forced to commit themselves to regimens of disciplined financial management.").

177. *See* Littwin, *supra* note 26, at 43 ("Mail order credit is the most popular form of borrowing for British and German low-income consumers." (footnotes omitted)).

178. *See* Mann, *supra* note 38, at 1065 n.28 (describing the choice given to Japanese cardholders of repayment in three monthly installments, ten monthly installments, or from a semiannual bonus).

179. The FFIEC is an interagency group consisting of the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision. FFIEC Home Page, http://www.ffiec.gov (last modified Sept. 20, 2007).

180. Press Release, Bd. of Governors of the Fed. Reserve Sys. et al., FFIEC Agencies Issue Guidance on Credit Card Account Management and Loss Allowance Practices (Jan. 8, 2003), *available at* http://www.occ.treas.gov/ftp/release/2003-01.htm; *see also* Mara Der Hovanesian, *Tough Love for Debtors*, BUS. WK., Apr. 25, 2005, at 98, 98 (noting estimates by card experts that

eventually increase the size of the minimum payment until it reached that of an installment payment—with one key difference. The installment idea presented here would require issuers to include the interest of the installment payments up front so that a borrower who made all the payments on time would not incur any additional interest. Increasing the minimum payment under the current fee structure would not change the timing or the charging of interest on the unpaid balance.

Ten percent of participants suggested that issuers should increase their minimum payments or offer installment plans. But many had an important criticism of the way the minimum-payment change was implemented: they criticized the fact that it had been applied to current balances.[181] Thus, every participant who mentioned the change described it negatively, maintaining that it increased her minimum payment without warning, often to a level she could not afford. Legal changes designed to help consumers manage credit cards must keep this pitfall in mind. Initiatives that require consumers to pay more up front in order to protect them from paying even larger amounts later must either apply only to debt acquired in the future or be implemented in a gradual manner.

Implementation of small credit cards and installment-payment credit cards, however, may be complicated. It would be undesirable to use a legal mandate to effect either type of card. Requiring that credit-card companies significantly reduce the credit limits or change the payment terms they offer to their low-income customers is highly unappealing. The main difficulty lies in determining the customer base to which any such law would apply. Requiring more income-appropriate credit limits or a different payment structure for all credit-card users would be an obviously overinclusive solution, but defining an income point at which such changes should become mandatory would be problematic on both a practical and a theoretical level. Practically speaking, such a law would necessitate complex regulatory work to determine the threshold income level and the appropriate credit limits for consumers with incomes below it. The more theoretical concern is that a law mandating different credit-card terms for low-income people would not address, and indeed would arguably exacerbate, the fears about credit-card discrimination that study participants voiced. It could create mandatorily ghettoized credit cards used only by low-income people.

The intermediate option of requiring issuers to offer small-scale or installment-payment cards to all consumers in addition to the current options would resolve the issues discussed in the preceding paragraph, but it would

minimum monthly payments would increase to approximately 4% of the balance as a result of the guidance).

181. *See, e.g.*, MANN, *supra* note 3, at 133 (stating that amendments to credit-card agreements often apply to outstanding balances); Julia Lane, Student Article, *Will Credit Cardholders Default over Minimum Payment Hikes?*, 18 LOY. CONSUMER L. REV. 331, 348 (2006) (discussing the widespread practice of retroactively applying changes in terms).

create a whole new set of practical difficulties. Issuers would have little incentive to publicize products that would compete with their established offerings or even to develop them in such a way that they would meet basic standards of usability.

Small and installment credit cards, then, would need to rely on market-based implementation.[182] A threshold question is whether they could be profitable. There are fixed costs associated with offering a credit-card account, and small credit cards would limit issuers' options for recouping them. The small credit cards issued in the current market come with up-front fees that are so high as to make them nearly useless to consumers.[183] On the other hand, there is mixed evidence that credit-card profits exceed those of banks' other loan portfolios to the extent that there is room for new entrants to offer credit cards on slightly less profitable terms.[184] One advantage of small credit cards is that they are more of a financial product than a legal reform, so they are amenable to being tested in pilot programs that could assess their profitability.

Installment credit cards do not suffer from the fixed-costs limitation, but they have a related revenue-generation difficulty that impacts both ideas. Even if they were profitable, small and installment credit cards would be less profitable than those that operate under the current sweat-box model.[185] Thus, credit-card companies that currently lend to low-income consumers would likely resist adopting these cards voluntarily. That does not mean, however, that other private actors could not be persuaded to offer them. One likely candidate is credit unions, whose mission is to serve low- and

182. One exception would be if some issuers were tempted to give consumers multiple low-limit cards in hopes of confusing them into paying more late and overlimit fees. Capital One may already be engaging in this practice. *See* Robert Berner, *Cap One's Credit Trap*, BUS. WK, Nov. 6, 2006, at 35, 35 ("Cap One, [credit-card experts and counselors] contend, is simply aiming to maximize fee income from debtors who may be less sophisticated and who may not have many options because of their credit history."). My proposal for small credit cards would include a hard credit limit, so overlimit fees would not be an issue, but late fees still would be available. Some government intervention probably would be necessary to prevent credit-card companies from issuing the same consumer multiple low-limit cards.

183. *See, e.g.*, Subprime Cards Start the Debt Cycle, http://www.bankrate.com/brm/story_content.asp?story_uid=20788&prodtype=cc (Jan. 10, 2007, 11:00 EST) (offering an example of a card with a $250-credit limit and $200 in up-front fees).

184. For a discussion of this evidence, compare Elizabeth Warren, *Clean Cards* (unpublished manuscript, on file with author) (using return-on-assets data to show that issuers, such as Citigroup, record substantially higher profits from their credit-card operations than their real-estate, student, and auto-loan portfolios), with Zywicki, *supra* note 7, at 128–46 (arguing that the profitability of credit-card operations is often overstated and that an abundance of new credit-card issuers reflects a robust, competitive market).

185. *See* Mann, *supra* note 130, at 385 ("The successful credit card lender profits from the borrowers who become financially distressed. Financially secured customers or 'convenience users' do not generate any interest income, late fees, or overlimit penalties.").

moderate-income consumers.[186] Another possibility is "transactional" credit-card companies who focus on providing services to middle- and upper-income convenience users and generate their major profits through annual fees and interchange fees.[187] Self-directed credit cards would present an option for expanding their reach to low-income consumers without changing the foundation of their business model. Consumer-oriented nonprofits seeking to address the problems associated with credit cards could experiment with opening affiliates to offer these cards.[188]

Private entities offering the alternatives presented in this Article would need to undertake a public-education function as well because a company would need to educate consumers about the back-end disadvantages of its competitors' products, and back-end features tend to be less salient than those consumers will immediately use. It would be a complicated task to achieve with advertising, but this type of campaign has succeeded, however. As Ronald Mann points out, the subscription-movie-rental-company Netflix became a major industry player by highlighting that consumers were paying large late fees under the traditional movie-rental model.[189] This advertising was so successful that Blockbuster, the dominant movie-rental chain, had to announce its own "end of late fees" package to stay competitive.[190]

One final variation on the self-directed theme is a fixed-fee credit card, in which all interest and fees would be included up front with the credit limit. This type of credit card suffers from too many practical drawbacks to be a serious alternative for implementation. Rather, it provides an interesting thought experiment that further illuminates the differences between self-directed credit cards and sweat-box-model cards. With a fixed-fee card, the credit-card company would determine the ratio of interest and fees to principal ahead of time and convey this information to the consumer when it issued the card. For example, for a \$1,000 credit card, the credit-card company would specify that say, \$600 of this \$1,000 was interest and fees and \$400 of it was the actual limit on the amount the consumer could spend. The \$600 would represent the entire amount of interest and fees to be charged over the life of the loan. The consumer would not be able to spend more than \$400 on her credit card and would know in advance that this \$400 would cost her \$600 in interest and fees. Companies could set whatever interest and fee-to-principal ratio they calculated would compensate for the risks of the

186. 12 U.S.C. § 1751 (2000); *see also* Credit Union Membership Access Act, Pub. L. No. 105-219, § 2(1)–(5), 112 Stat. 913, 913–14 (1998) (instructing codification of the congressional findings of fact in 12 U.S.C. § 1751).

187. Mann, *supra* note 130, at 384.

188. For a brief historical overview of nonprofit lending in the context of pawnbroking, see JOHN P. CASKEY, FRINGE BANKING: CHECK-CASHING OUTLETS, PAWN SHOPS, AND THE POOR 13–14, 23–30 (1994).

189. MANN, *supra* note 3, at 136–37.

190. Press Release, Blockbuster, Blockbuster Announces the End of Late Fees (Dec. 14, 2004), *available at* http://blockbuster.mediaroom.com/index.php?s=press_releases&item=592.

transaction, but they would be competing directly on the total amount charged, so they would need to keep this amount within the range that consumers would be willing to pay.

This would make a significant difference from the perspective of consumers. It would allow them to grasp the real cost of the loan at the time of borrowing and therefore to make more informed borrowing decisions. Giving consumers concrete information about the total costs of the loan ahead of time would make the financial terms of credit cards much less complicated and lessen the misunderstandings associated with how credit cards work. It would also force consumers to confront the total costs at the time they apply for and use them.

Issuers currently compete on the basis of interest rates, but because this competition focuses on initial interest rates and not on the total amount that consumers will pay, it fails to give sufficient decision-making information either to consumers who literally do not understand the events that trigger higher interest rates and fees or to consumers who underestimate the likelihood that they will be faced with these rates and fees. The focus on initial interest rates can be seen in the recent success of the zero-interest credit card.[191] These cards offer interest rates of 0% on either balance transfers or for a specified period of time.[192] Consumers find these credit cards attractive at the time of application and purchase them for the obvious reason that zero interest is a very low rate, but consumers who make borrowing decisions on the basis of a 0% interest rate are, in large part, inaccurately calculating the potential interest and fees they will pay. Setting the ratio of interest and fees to principal ahead of time, on the other hand, would force issuers to compete on the basis of total costs, and it would force consumers to psychologically internalize these costs earlier in the decision-making process.

Fixed-fee credit cards would also address the problems of consumers who have stopped charging on their credit cards and are struggling to pay down the already accumulated debt that rises with mounting interest and late fees. Three study participants described this scenario with deep frustration. One participant related how she had accumulated $700 of debt on a Sears credit card when she was working, but then suffered an aneurysm and could no longer make payments.[193] Sears discontinued her line of credit, preventing her from making further charges. She has been trying to pay down the credit card since then, but approximately three years later, the balance is now $1,200. She had a similar experience with a Filene's card, where she managed to reduce her debt to $100 only to see it rise to $250 even though she had not used the card since. Her major suggestion for credit-card reform was

191. *See, e.g.*, Bruce Mohl, *Enough Already: Pay Attention to Your Credit Cards*, BOSTON GLOBE, June 1, 2003, at E1 (noting that more than 90% of the credit-card solicitations mailed out during the first quarter of 2003 came with offers of a 0% interest rate).

192. *Id.*

193. Interview with Respondent 399.

to prohibit issuers from charging interest and fees once a borrower has stopped charging on the credit card and is working to pay down her debt. As she explained, "I think that if a credit-card company cuts you off from . . . using that card anymore, give that person a chance to pay the bill off, [as] in not charging those late fees or the interest fees. At least the bill will get paid off."[194] Other participants echoed this sentiment, including one who said, "When we're all charged up, [and] we can't pay anymore, you need to stop charging us interest, fees and all that stuff. Let us pay our credit card down."[195]

From an economic perspective, it would be difficult to mandate that credit-card issuers stop the interest clock when a borrower stops charging and enters the phase of paying down her debt. Even though the borrower may not feel that she is getting a benefit during this time, the lender is still losing the time value of the funds it has already extended. A fixed-fee credit card could solve this dilemma. By definition, a consumer using a fixed-fee credit card would not incur additional interest and fees when she is not making purchases, but the lender would have taken the risk into account when determining the price of the card.

There are two major drawbacks of the fixed-fee credit card that prevent it from being a serious option. The first is that it presents a significant moral-hazard problem. One of issuers' main points of leverage in encouraging consumers to repay loans is tying repayment to offers of future credit. But with a fixed-fee card, once a consumer used the credit portion of the credit line, she would have little incentive to pay back the fee portion. This would be especially true if the fee portion was larger than the credit amount, which would usually be the case. After a consumer had spent the $400 of the $1,000 example above, she would need to pay back that $400 plus another $600 in order to borrow again. Paying back $1,000 in order to receive another credit line of $400 is likely to seem an unappealing prospect. Issuers, of course, would still have other enforcement mechanisms available, such as sending negative reports to credit agencies and contacting the borrower for payment. But the former is probably issuers' weakest tool with respect to low-income consumers who tend to have weak credit ratings anyway, and the latter would quickly become cost-ineffective when the interest and fees are capped at a predetermined level.

The second difficulty with the fixed-fee credit card is what makes the concept an interesting thought experiment. Most commentators would

194. *Id.*

195. Interview with Respondent K72. Consumers in this position would also be ideal candidates for bankruptcy. Many are probably judgment proof, but if their goal is to eliminate creditor-collection efforts and the anxiety that attends them, then bankruptcy would be an effective alternative. Consumers who then wanted to "pay [their] credit card[s] down" could do so voluntarily and without further interest accumulation. This participant sought advice from the study on how to file for bankruptcy. The study provided her with a list of nonprofit debt resources from which she selected a legal-services bankruptcy attorney.

probably agree that forcing credit-card companies to switch to fixed-fee credit cards would have a devastating effect on the industry, but the basis for these arguments is telling. There would be major transaction costs associated with making such a shift, and it would no doubt make issuers' fees "less accurate" in the sense that companies would have to predict which customers were likely to incur late fees and interest-rate increases in order to determine how much to charge each borrower. But these arguments are not the chief difficulty. Issuers have extremely sophisticated risk-analysis techniques, which would allow them to make these predictions with a high degree of accuracy.[196]

The larger reason why a switch to fixed-fee credit cards would devastate the industry is the degree to which its current business model depends on deception. The effective interest rate—the ratio of interest and fees to principal over the entire course of the loan—of credit cards is much higher than the advertised initial interest rate. It is extremely difficult to calculate the prevailing rates of credit-card interest and fees to principal.[197] But it is fair to say that the 87% of credit-card users in the study who did not understand how their credit cards worked believed that their effective interest rate would be more favorable than it was. If credit-card issuers were to disclose up front the total amount of interest payments and fees they expected each customer to accrue, credit cards would be a much less appealing product.

D. Further Implementation Issues

1. Disclosure and Debiasing.—The success of any of the self-directed credit cards discussed above would hinge on consumer education. Of the 76% of study participants who had used credit cards, 87% described themselves as not understanding how their credit cards worked before using them. As discussed in Part IV, most credit-card users who participated in the study were sophisticated about credit cards by the time of the interview, but they acquired this sophistication largely through negative experiences with credit-card debt.[198] Thus, consumers who had already experienced the negative consequences of credit cards would recognize the advantages of the alternatives presented here, but consumers who had not used credit cards would not. Without public education, these proposals would be ineffective in preventing the vast majority of low-income credit-card users from experiencing the sweat box at least once. Avoiding even one sweat-box experience

196. *See, e.g.*, MANN, *supra* note 3, at 40–41 (discussing how electronic transaction processing and account management have made it possible for credit-card companies, using statistical analysis, to subdivide customers according to a more particular assessment of risk so that they may offer each customer a targeted price based on that risk); WESTRICH & BUSH, *supra* note 173, at 10 (stating that most banks assign a margin to a customer based on that customer's creditworthiness).

197. The current study was unable to obtain anywhere near the amount of detailed documentation needed to perform these calculations for the sample.

198. *See supra* subpart IV(B).

is an important goal because for consumers with low incomes, the process of paying down one relatively large credit-card bill can last for several years.

As uncontroversial as the idea of better information sounds,[199] it would actually be a complex task to give consumers information in a manner they could use effectively. The central difficulty is that study participants wanted something beyond a literal knowledge of the workings of credit cards. They needed this literal knowledge, but they also wanted consumers like themselves to grasp on a psychological level the difficulties in using credit cards in a controlled manner.

With respect to literal understanding, almost all participants understood from the beginning that they would need to repay what they borrowed with interest. But many did not understand how high the interest would be, some because they generally did not understand how interest was applied and others because they did not realize how quickly debt would accumulate when they paid only the minimum due. A few participants did not know about late fees and financing charges ahead of time; others did not realize that their interest rate could change. None of the participants evidenced an understanding of the more complex features of credit-card billing, such as double-cycle billing and minimum-finance charges.[200] The following quote is illustrative of the confusion many participants discussed: "Well, I knew . . . it said twenty-six, but I didn't realize what that meant . . . . I didn't understand what twenty-six was and what was it causing or how was it going to be applied to my bill."[201]

And yet, while 26% of participants suggested that issuers should provide better disclosures, many did not think they were an adequate solution. They said the information they needed could not be communicated on a form, even in larger print. Many were concerned that they would not understand the standardized language available on a form contract, no matter how it was written.

Others worried that new credit-card users would have difficulty applying the disclosures to their own lives. They recalled their early experiences with credit cards and remembered that they had to experience the consequences of credit-card borrowing first hand before understanding the self-control challenges credit cards presented. Their point is echoed by Cass Sunstein in a recent article about cognitive biases and credit-card borrowing: "[T]he strategy of 'provide more information,' favored on standard economic grounds, should be helpful when people merely lack knowledge; but as a

199. Even this idea contrasts sharply with the current state of the law, which mandates financial counseling as a requirement for filing for bankruptcy, long after a family is in financial trouble. 11 U.S.C. § 109(h) (Supp. 2005).

200. One participant had a thorough understanding of the complex universal-default system and argued for its abolition. *See* Interview with Respondent 283.

201. Interview with Respondent 803.

response to biases and self-control problems, it is most likely to be inadequate."[202]

Many participants favored a more thorough form of information provision. Twenty-two percent suggested classes for new credit-card users. What the women seemed to want was a way for people to more fully understand the consequences of credit-card usage before experiencing them. This is what psychologists call debiasing. Debiasing is a form of psychological education designed to address the learner's cognitive biases and distortions.[203] In a situation like this, where some consumers begin with little information about the consequences of credit cards and have difficulty applying any information they do have to their own lives, debiasing might, as Sunstein suggests, "involve vivid accounts, by real people, of problems created by excessive borrowing."[204] Such debiasing efforts could take place through classes, as some participants advocated; through public awareness campaigns, for which Sunstein argues;[205] or through the advertising of competitor banks offering self-directed credit cards.

One counterargument to the need for debiasing stems from the finding that a small number of participants did gain an understanding of the potential negative consequences of credit cards without using them. Fourteen percent of study participants never obtained credit cards because they believed they would lead to financial problems.[206] Many of these participants acquired their sophisticated understanding by witnessing the negative experiences of friends and families. One woman learned from handling her grandfather's bills.[207] Moreover, this person-to-person education could increase as the longevity of credit-card saturation in low-income communities continues to increase. It is only in the last twenty-five years that credit cards have become easily accessible to low-income people, and that transition has occurred

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202. Sunstein, *supra* note 156, at 261; *see also* William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1736 (1999) (arguing that disclosure of complex information is useful when provided to sophisticated intermediaries but less helpful when provided directly to consumers who may be limited by intellectual understanding and cognitive biases).

203. *See* Baruch Fischhoff, *Heuristics and Biases in Application*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, 730, 741, 747 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) (explaining by example the processes of identifying bias in decision making and crafting education programs that overtly acknowledge and confront the bias); Sunstein, *supra* note 156, at 257–58 (suggesting that a legal solution to people's unrealistic optimism about credit-card offers would be to employ debiasing, a process that would seek to inform the borrowing public about the potential consequences of excessive borrowing).

204. Sunstein, *supra* note 156, at 263.

205. *Id.*

206. This percentage is higher than the percentage of participants who avoided obtaining a credit card for temptation reasons, as discussed in subpart IV(C). Four percent of participants did not obtain credit cards because they foresaw financial difficulties, but they did not consider credit cards a temptation.

207. Interview with Respondent DM1.

gradually.[208] The current study reveals evidence of this changing credit-card market. The older a participant was, the older she was when she first obtained a credit card,[209] meaning that younger women and older women were essentially obtaining their first credit cards at the same time. As credit cards become even more established in low-income communities, this will change, and people considering their first credit card will have the benefit of observing the experiences of their older friends and relatives.

These changes will not reach everyone, however, so public education with debiasing will still be an important supplement. And in the meantime, it is an essential component of implementing self-directed credit cards.

2. An Expanded Conception of Opting In and Out.—One consistent barrier to any debiasing system is that credit-card issuers frequently revise their terms. These changes mean that the learning consumers have gained about individual terms will gradually become obsolete over the long run. One solution to this problem is to standardize the credit-card-contract terms that consumers are unlikely to understand or evaluate easily, thereby focusing competition on a smaller set of more comprehensible and important terms.[210] While this proposal would be a significant step in improving consumers' ability to understand the effects of credit-card usage, it is also worth exploring an analogous alternative that would provide many of the benefits of standardized terms but allow for more individualized consumer control over the terms of their agreements: an improved and vastly expanded opt-out/in system.

The contractual nature of credit cards allows for a different kind of regulatory regime altogether, one where individual consumers could choose from a menu of legal tools to help them control their credit-card borrowing. Unlike fields such as environmental law, where everyone breathes the same air, or election law, where treating voters equally is a normative goal, with credit cards, one consumer could be subject to Regulatory System A, while her neighbor could choose Regulatory System B.

This could be achieved by expanding the opt-out system so that consumers opt into receiving only solicitations that contain certain features. The regulatory agency could offer options such as the "safe credit-card plan" that would enable consumers to exclude all offers that failed to include the anti-temptation features discussed in subpart V(B). A "small credit-card plan" could allow consumers to receive solicitations that not only offered low initial credit limits but that guaranteed that credit raises would only occur in

208. *See* Moss & Johnson, *supra* note 1, at 336, 342–43 (citing deregulation of interest rates, diminished inflation, and changes to bankruptcy laws as reasons why issuers began extending credit to low-income customers starting in the early to mid-1980s).

209. This finding was significant at the $p = 0.01$ level.

210. Ronald Mann has proposed this approach. *See* Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899, 927–28 (2006). He also points out that standardized terms are common practice in other areas of law that are dominated by complex contracts. *Id.* at 901.

specific circumstances. To help consumers avoid the trap of multiple credit cards with low limits, the small credit-card plan could enable them to select in advance how many credit cards they wanted. Companies who obtained these consumers as customers would report this to the regulating agency, which would then transfer these consumers to opt-out status when they reached their self-selected limit.

Some additional public education would be necessary, but much of it would be inherent in the system. In order to receive credit-card offers, consumers would view short descriptions of the different credit-card plans. Once a consumer selected a plan, she could be assured that she would receive only offers that met her criteria and would not need to study the fine print to be sure she understood the terms. Issuers would, in turn, be able to use these selections as borrower data in their risk calculations.

This educational screening function would benefit users of traditional credit cards as well. They could elect to receive solicitations exclusively from cards with certain interest rates guaranteed for specified periods of time. They could even exclude all offers that included controversial terms, such as mandatory-arbitration clauses or universal-default provisions. They would receive no offers at all unless an issuer decided that obtaining the accounts of those customers was worth deleting that clause from some of its contracts. This, in turn, would increase the effectiveness of government, nonprofit, or private consumer-education efforts. These groups could publicize, for example, the disadvantages of mandatory-arbitration clauses in the context of a specific action consumers could take to eliminate that term from their future credit-card contracts. In effect, this system would allow consumers to express their demand for different contract terms and put issuers in the position in which many consumers find themselves now: that of taking or leaving their offers.

VI. Conclusion

Much of the controversy over credit cards has focused on the hypothesized wants and needs of low-income borrowers, but low-income borrowers themselves have been routinely excluded from the debate. In the dozens of hearings Congress held while it considered the various iterations of the bills that eventually became the Bankruptcy Abuse Prevention and Consumer Protection Act,[211] the legislature invited testimony from credit-card issuers, judges, lawyers, academics, and all manner of professionals, but almost never from individual debtors.[212] Similarly, legal academics have

211. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

212. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 498 (2005); E-mail from Elizabeth Warren, Professor of Law, Harvard Law School, to Angela Littwin, Lecturer on Law, Harvard Law School (Aug. 9, 2006, 01:33:00) (on file with author).

been debating the merits of credit-card usury caps for decades, with one of the major premises underlying the argument being that imposing usury caps would reduce credit-card availability in low-income communities. But none of the empirical work to date has attempted to weigh the advantages and disadvantages of such regulation from the viewpoint of low-income credit-card users. This absence, both in the literature and the policy-making arena, has left commentators in favor of regulation vulnerable to charges of paternalism[213] and resulted in bankruptcy legislation that punishes distressed debtors rather than addressing the structural features of credit cards that contribute to financial failure.[214] It has allowed commentators on both sides of the spectrum to overlook subtler policy changes that could improve low-income people's ability to manage credit cards while having a less dramatic impact on access than usury regulation would.

This study is a modest step in the opposite direction. The participants generated a wealth of insights. These findings have the potential to move the debate into productive new territory. Legal scholars have not considered the possibility that some borrowers might want less credit available on their credit cards. The concept of "consumer-driven credit limits"[215] is foreign in academic circles. The initial response is often, "Credit-card companies have to be able to set limits on the amount they lend. They cannot just extend as much credit as the borrower wants."

But the reality is more subtle. Consumer-driven credit limits would allow borrowers to *limit* the amount of credit they receive, not to increase it. It is difficult to picture borrowers seeking ways to restrict their spending when policy rhetoric about the "immoral debtor,"[216] who intentionally spends beyond her means and then seeks to avoid the consequences, dominates the debate. Not surprisingly, the legislation that followed from this rhetoric addressed the perceived problem of overconsumption only after the fact, in bankruptcy, long after the debt is already incurred. But by listening instead to people who are directly affected by the threat of bankruptcy and other credit policies under consideration, academics and policy makers can develop alternatives that would give consumers the tools to curb their borrowing ahead of time. This study suggests that there is indeed a problem of overconsumption, one of borrowers whose short-term spending exceeds that which they *themselves* would prefer in the long run. Careful

213. *See, e.g.*, Zywicki, *supra* note 7, at 83 ("[I]ll-advised legislative reform proposals and confused judicial decision-making . . . will have little negative impact on the upper-middle class academics, judges, and lawyers who propound them but who also can easily escape their reach.").

214. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 119 Stat. 23; *see also* Dickerson, *supra* note 35, at 276 (cautioning that any plan reforming bankruptcy laws using means testing without addressing the underlying causes of the debtor's economic problems will be ultimately unsuccessful).

215. *See supra* subpart V(B).

216. *See* WARREN & TYAGI, *supra* note 9, at 71, 75–79, 94–95 (listing various examples of the rhetorical vilification of debtors as strategic and unethical).

consideration of the perspectives of low-income consumers can better inform credit policies that are neither punitive nor paternalistic, but that instead enable borrowers to better resist the "temptation" many associate with credit cards and thereby better effectuate their long-term borrowing preferences.

Appendix on Methodology

The study consists of detailed interviews with fifty low-income women. To qualify as "low income," participants had to reside either in public housing projects or housing subsidized through the Section 8 voucher program. There were two primary reasons for this decision. First, the population needed stable addresses over time to have access to telephone and direct-mail solicitations from credit-card companies. Traditional locations of studies of low-income populations, such as welfare offices, risked including many individuals who live in shelters or other forms of unstable housing. Because of the high demand for subsidized housing, residents of housing projects and, to a lesser extent, holders of Section 8 vouchers tend to keep a single address over several years. Study participants had resided at their current addresses for a mean of 6 years.

Focusing on public housing and Section 8 residents had the additional advantage of providing a sample with relatively fixed incomes in addition to low incomes. More than half of participants relied on government benefits, such as welfare or Social Security Income (SSI), for support. Even families whose main source of income derived from work, rather than welfare or disability benefits, had relatively fixed net incomes because any increase or decrease in their earnings triggers a corresponding increase or decrease in rent. The issue of fixed income has interesting implications for people's ability to repay loans. Their expenses may vary over time, but their income will rarely increase. This would allow the study to explore how those who do repay their credit-card debt manage to do so.

I further restricted the sample to women primarily because of the financial pressures they face in raising families.[217] This decision had an important practical advantage as well. I did the interviewing myself, and I knew from previous experience with this community[218] that potential respondents would be more likely to participate in the study if I could interview them in their homes.[219] I felt substantially more comfortable entering the homes of women I did not know than those of men.

Interviewing was the ideal methodology because the goal was to obtain a rich account of people's experiences with and opinions about credit cards. To gain a textured understanding of participants' opinions, the study needed the opportunity to push participants to make real choices about the trade-offs of increased access to credit cards and not to leave with pat, unrealistic answers, such as "credit-card companies should lower interest rates and make

217. *See supra* notes 9–11 and accompanying text.

218. I founded and directed a nonprofit project aimed at the Cambridge low-income community.

219. This is a common practice. *See, e.g.*, Barr, *supra* note 12 (favoring in-person, household surveys over telephone interviews).

them universally available." In addition, I obtained written records of participants' borrowing histories through documents, such as credit-card statements and credit reports. This was the request participants were most likely to refuse, so I needed to build trust during the interview to increase the chances that participants would agree to share their records.

The interview sample was not random. I knew from experience in the community that people would not respond to a mass mailing or phone calling,[220] especially regarding a topic as sensitive as personal financial information. Instead, I capitalized on the connections I already had in the community and developed a snowball sample.[221] I began by interviewing the twelve women I knew who met the study criteria and then asked them to talk to their friends, neighbors, and relatives about the study. When I interviewed the next cohort of participants, I asked them if they knew others who would be interested. Participants were paid $20 for their time. By the end of the interview, most women were willing to recommend family and friends. Many participants stated that they would not have agreed to meet with me if I had not come with an endorsement from someone they knew. In total, the sample consists of the twelve women I knew from my earlier work and the thirty-eight met through this referral system.[222] I interviewed the women in person, either at their homes or a relatively quiet location, such as my home, my office, or a Dunkin' Donuts.[223] I recorded the interviews with a digital voice recorder and had them transcribed by a professional service.

The interviews began with questions about demographic data. The next set of questions concerned general financial information, such as income, monthly bills, and bank-account status. I next asked each participant to list the forms of borrowing she had used, specifically inquiring about each form of borrowing not mentioned. For each form she had not used, I asked why not. The participants then described their experiences with each borrowing method in detail. At the end of each description, I asked them to identify whether the experience had been positive, negative, or somewhere in between.[224] Next, I asked participants to rank the forms of borrowing from

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220. As part of the previous work referenced in *supra* note 218, I managed the recruiting of people for workshops. Three local housing projects agreed to deliver our flier directly to each apartment in their complexes. We obtained a response rate of zero. We revised our strategy and instead successfully recruited for the workshops through word of mouth.

221. *See generally, e.g.*, Faugier & Sargeant, *supra* note 12, at 792 (discussing the use of snowball sampling when other techniques are not practicable).

222. I verified after the fact that there was no statistical difference in the demographics or the answers of the participants I had known beforehand and those I had not.

223. Six participants were native Spanish speakers who needed a translator. In four of these cases, I paid a participant with whom I had worked for several years $10 per interview to act as a translator. In the other two cases, older teenaged children of the participants offered to serve as translators, again for $10.

224. I adapted all the questions to my best estimate of each participant's comprehension level. For some participants, a question like this would become: "So are [borrowing form] good, or bad, or in the middle?"

best to worst. The results of the evaluation questions are analyzed in a separate article.[225]

The last section of the interviews focused on participants' policy ideas. I first asked whether they thought it should be easier, harder, or about the same level of difficulty for people in their community to obtain credit cards. I then asked how credit cards could be improved and what kinds of laws they would like to see regarding them. For participants who answered both that credit cards should be easier to obtain and that they should be required to charge lower interest, I explained that many people thought that if credit-card issuers had to charge less, credit cards would become harder to access. I then asked them to choose whether they would rather make credit cards harder to obtain and charge less interest or easier to obtain and charge more. This often took much explaining, and many participants were displeased with this choice, but all except one eventually made a decision. Next, I repeated the policy questions with respect to other forms of borrowing. I concluded the interviews by asking for documentation and giving participants who had expressed concern about debt a list of nonprofit resources.

I analyzed the transcripts using content analysis, a form of qualitative analysis developed for analyzing texts, such as political speeches, advertisements, or judicial opinions, that were not generated by researchers as data.[226] The methodology has frequently been applied to interview transcripts as well.[227] I began by reading the transcripts myself with a colleague trained in content analysis, and she helped me develop a codebook with which to analyze them. I then trained three law-student research assistants to code the data according to this written protocol. After testing, I adjusted the initial codebook to the actual coding and then modified it as necessary during the process.[228]

Most of the coded information consisted of answers to specific interview questions. For example, participants ranked the various forms of borrowing to which they had access. In addition, the study also coded for two themes that arose throughout the interviews: the perception of credit cards as a temptation and the concern about credit discrimination against low-income borrowers.

Description of Sample

The mean income of the participants was $1,194.57 per month, with a standard deviation of $982.51. The median monthly income was $770.

225. *See* Littwin, *supra* note 26.

226. *See generally* KRIPPENDORFF, *supra* note 15 (comprehensively introducing and elaborating the methodology of content analysis).

227. *See id.* at 21 (describing "recorded speech" as one of the "starting points" of content analysis); *see also* WEBER, *supra* note 15, at 9 (illustrating the purposes for which content analysis may be used).

228. I also employed eight undergraduate psychology-student volunteers to enter the objective data obtained in the interviews.

Participants derived their income from a variety of sources, such as work (48%), SSI (40%), child support (22%), and welfare (16%). Many households had more than one source of income, especially when they were receiving child support. Fewer than 10% of participants lived in households with more than one working earner. Sixty-four percent of participants received food stamps for themselves, their children, or both, and the same percentage had Medicaid health insurance. Nearly 80% of families received one of these two benefits. Fifty-two percent of participants lived in public housing, while 48% held Section 8 vouchers. The racial and ethnic composition of the sample was 44% black, 40% Latina, 10% white, 2% Asian, and 4% biracial.

The mean, median, and mode for education was some, but less than two years of, college. A full half of the participants fell within the range of having graduated from high school or a GED program to having completed two years of college. Participants ranged in age from 22 to 61, with a median of 45. They had a median of 2 children. That figure held constant for the number of children they were currently supporting and the number of total dependents. Fourteen percent of participants had filed for bankruptcy, 8% within the past two years. The study was able to obtain credit documentation, either credit-card statements or credit reports, from 68% of participants. An additional 14% volunteered documents, but had no credit-card records and no credit report on file with any of the three major reporting agencies.[229] Only 18% declined to provide documentation.

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229. Most of these participants had not used credit cards or any other form of bank-related borrowing.