The Consumer Debt Crisis and the Reinforcement of Class Position

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I. Introduction

Consumers are indebted to a degree never before seen in history.[1] While consumer over-indebtedness has been many years in the making, only recently has this crisis attracted widespread public attention.[2] The

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1. To illustrate the scale of the crisis:

> Between November 1980 and November 2005, revolving "net" credit card debt has climbed fiften-fold [sic], from about $51 billion to over $770 billion at the end of 2006. Similarly, installment debt has jumped from $297 billion in 1980 to $1,520 billion today. Overall, U.S. household consumer debt (revolving, installment, student loan) has soared from $351 billion in 1980 to nearly $2,200 billion in 2006. Together with home mortgages, total consumer indebtedness is crossing the $15 trillion mark—with the vast majority—about $13 trillion—in "mortgage" debt.

Practices of the Credit Card Industry: Hearing Before the New York S. Standing Comm. on Consumer Protection, Assemb. Standing Comm. on Consumer Affairs and Protection, Assemb. Standing Comm. on Banks, 110th Cong. 18 (2007) (statement of Robert D. Manning, PhD, Research Professor of Consumer Finance and Director of the Center for Consumer Financial Services, E. Philip Saunders College of Business, Rochester Institute of Technology). Currently, 46 million households carry an average revolving credit card balance of over $11,000—which translates into $2,000 per household per year in finance charges and penalty fees. ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 119 (2001) (describing America's escalating dependence on credit). *See also* Steven Greenhouse, *Now Bringing Home the Leaner Bacon; Borrowers We Be*, N.Y. TIMES, Sept. 3, 2006, § 4, at 12 (discussing the rise of household debt as Americans embrace borrowing to maintain their living standards); DEMOS & CTR. FOR RESPONSIBLE LENDING, THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA 4–5 (2005), *available at* http://www.responsiblelending.org/issues/credit/reports/page.jsp?itemID=28012832 (discussing the growth of credit card debt in America).

2. *Credit Card Practices: Fees, Interest Rates, and Grace Periods: Testimony Before the S. Comm. on Homeland Security and Governmental Affairs Permanent Subcomm. on Investigations*, 110th Cong. 11–12 (2007) (testimony of Alys Cohen, Staff Attorney, National Consumer Law Center), *available at* http://hsgac.senate.gov/public/_files/STMTCohenNCLC.pdf [hereinafter Cohen testimony]; Susan Burhouse, Federal Deposit Insurance Corporation, Evaluating the

precipitous collapse of iconic financial institutions[3] and the corresponding seizure of the financial markets in the United States,[4] for the first time, have drawn widespread public attention to the operation of the financial system and its connection to and relationship with consumer debt.[5]

Consumer Lending Revolution (Sept. 23, 2003), http://www.fdic.gov/bank/analytical/fyi/2003/091703fyi.html ("In 2002, U.S. households added nearly $725 in debt to their balance sheets, an increase of over 9 percent from 2001. Not since the late 1980s have consumers taken on debt at so quick a pace.").

3. Recent months have seen unprecedented turmoil in the financial markets and extraordinary reaction by the Treasury Department in an effort to avert a complete collapse of the world financial system. In March 2008, Bear Stearns, the country's fifth-largest investment bank, saw its share price drop to two dollars, largely due to its exposure to sub-prime mortgage-backed securities. It was "rescued" by an absorption by JPMorgan Chase. On September 15, 2008, Lehman Brothers, the fourth-largest investment bank in the United States, filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York, in the largest Chapter 11 case in history, listing assets of $639 billion and debts of $613 billion. *See generally* Voluntary Petition, *In re* Lehman Bros. Holdings Inc., No. 08-13555 (Bankr. S.D.N.Y. Sept. 14, 2008). Lehman's bankruptcy filing was not a cause of the turmoil in the financial markets, but was, in effect, the demise of such a large and venerable financial institution that loudly reverberated throughout the financial markets. *America Catches Up*, ECONOMIST.COM, Oct. 14, 2008, http://www.economist .com/finance/PrinterFriendly.cfm?story_id=12411251.

4. As described by Federal Reserve Chairman Bernanke:

> Credit availability has also been restricted because some large financial institutions, including some commercial and investment banks and the government-sponsored enterprises (GSEs), have reported substantial losses and writedowns, reducing their available capital. Several of these firms have been able to raise fresh capital to offset at least some of those losses, and others are in the process of doing so. However, financial institutions' balance sheets have also expanded, as banks and other institutions have taken on their balance sheets various assets that can no longer be financed on a standalone basis. Thus, the capacity and willingness of some large institutions to extend new credit remains limited.

The Economic Outlook: Testimony Before the J. Economic Comm., 110th Cong. (2008) (testimony of Chairman Ben S. Bernanke) [hereinafter Bernanke testimony], *available at* http://www.federalreserve.gov/ newsevents/testimony/bernanke20080402a.htm.

5. Press Release, Mortgage Bankers Ass'n, Delinquencies & Foreclosures Increase in Latest MBA Nat'l Delinquency Survey (June 5, 2008), *available at* http://www.mbaa.org/NewsandMedia/PressCenter/62936.htm; *see Straightening Out the Mortgage Mess: How Can We Protect Home Ownership and Provide Relief to Consumers in Financial Distress?—Part II: Testimony Before the United States H. Judiciary Comm. Subcomm. on Commercial and Administrative Law*, 110th Cong. 1–2 (2007) (testimony of William E. Brewer, Jr., National Association of Consumer Bankruptcy Attorneys), *available at* http://www.nationalbankruptcyconference.org/images/Brewer%20Testimony.pdf (stating that bankruptcy legislation reform is necessary to preserve assets essential to debtors and their families); U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE RANKING MINORITY MEMBER, PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, U.S. SENATE: CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS (2006), *available at* http://www.gao.gov/new.items/d06929.pdf (describing how current credit card disclosures fail to aid in consumers' understanding of the impact of credit card use); Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Past Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, at A1 (describing the current crisis as no longer just a subprime mortgage problem); Kathy Chu, *Credit Card Rates Hustle Higher*, USA TODAY, Apr.

This public attention has resulted in initiatives launched in various directions to identify the "causes" of the debt crisis in an effort to develop effective solutions.[6] Intense scrutiny has uncovered a multitude

28, 2008, at 8A (describing how loan losses have prompted credit card issuers' search for revenue); Michael Grunwald, *The Housing Crisis Goes Suburban*, WASH. POST, Aug. 27, 2006, at B01, (describing how the affordable housing crisis is deepening and spreading beyond lower income consumers); Christine Haughney, *The Pain Spreads*, N.Y. TIMES, Apr. 25, 2008, at C1, (describing how the surge of foreclosures has spread to consumers of higher means); Ben Steverman, *American Home's Credit Crisis*, BUSINESSWEEK, July 30, 2007, http://www.businessweek.com/investor/content/jul2007/pi20070730_377632.htm (discussing how mortgage lenders delay dividends in a bid to keep themselves afloat in the face of "unprecedented" disruption); Posting of Peter Viles to L.A. Land, http://latimesblogs.latimes.com/laland/2008/04/the-coming-tida.html (Apr. 25, 2008) (predicting that one out of every eight Americans holding a mortgage will end up in foreclosure in the next five years).

6. For example, academics in recent years have been examining the consumer debt crisis from a variety of perspectives. *See generally* Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50 (1991) (examining credit card interest rates and how consumers discount the impact of the interest accrued on outstanding balances). *See also* GARY BELSKY & THOMAS GILOVICH, WHY SMART PEOPLE MAKE BIG MONEY MISTAKES AND HOW TO CORRECT THEM 151–73 (1999) (examining "behavioral economics" in the context of consumer spending and investing); CONSUMER PROTECTION IN FINANCIAL SERVICES 7–10 (Peter Cartwright ed., 1999) (citing R. Cranston, *Consumer Protection and Economic Theory*, *in* CONSUMER PROTECTION LAW AND THEORY 243 (A.J. Duggan & L.W. Darvall eds., 1980)) (critiquing the role of regulation in the protection of consumers); Michael Hudson, *Little Relief for Consumers*, *in* MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY 180, 180–96 (Michael Hudson ed., 1996) (examining America's "poverty industry"); MANNING, *supra* note 1, at 1–31 (discussing the central position consumer debt plays in the economy); CHRISTOPHER L. PETERSON, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET 112–241 (2004) (illustrating how modern, "advanced" society is far more conducive to the financial plundering of its citizens than ever before); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 1–27 (2000) (examining the financially fragile position many "middle class" consumers find themselves in); Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 33–38 (2006) (examining the prevalence of consumer misperception); Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 589–616 (2000) (examining the intersection of law, politics, morality, and economics); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505, 505 (2006) (demonstrating that informational shrouding flourishes in even highly competitive markets); Cassandra Jones Havard, *Democratizng Credit: Examining the Structural Inequities of Subprime Lending*, 56 SYRACUSE L. REV. 233, 263–69 (2006) (discussing racial and ethnic disparities in the prime and subprime lending markets); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1076–84 (2000) (examining rational choice theory in the context of credit decisions); Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 24–29 (2002) (exploring why bankruptcy and the credit crisis are not part of discussions of gender discrimination); Viviana A. Zelizer, *Beyond the Polemics on the Market: Establishing a Theoretical and Empirical Agenda*, 3 SOC. F. 614, 614–20 (1988) (discussing economic sociology and its developments throughout history); Wendy Edelberg, *Testing for Adverse Selection and Moral Hazard in Consumer Loan Markets* 1 (Feb. 10, 2004) (unpublished manuscript) *available at* http://www.federalreserve.gov/ubs/feds/2004/200409/200409pap.pdf (exploring the significance of unobservable default risk in

of structural and cultural causes of consumer over-indebtedness, with a focus on consumer behavior, lender practices, market incentives, and the public and private policies sustaining them.[7] For example, shifts in consumptive norms,[8] erosion of the value of frugality and long-term savings,[9] financial ignorance and illiteracy,[10] faulty judgment, and an increasing tolerance toward debt[11] have all been identified as consumer-driven causes of over-indebtedness.

The business behaviors and practices of front-line consumer lenders have similarly been identified as contributors to the problem.[12] Too-liberal credit solicitations,[13] confusing and exploitive lending rates and

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mortgage and automobile loan markets).

7. *See* Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 THEORETICAL INQUIRIES IN L. 323, 324 (2006) ("Structural accounts of overindebtedness focus on the system of easy credit and on insecurities in personal finances not fully covered by the social safety net. Cultural accounts range from the highly judgmental, blaming consumer irresponsibility and even dishonesty, to the more sympathetic and psychologically nuanced, stressing consumer vulnerability due to lack of knowledge and differences in mood, attitudes and behavior.") (footnotes omitted).

8. *See* GEORGE RITZER, ENCHANTING A DISENCHANTED WORLD 52 (2d ed. 2005) (analyzing new means of consumption and their transformational effects); JULIET B. SCHOR, THE OVERSPENT AMERICAN 20 (1998) (analyzing why Americans set their sights on lifestyles which they cannot afford); STUART VYSE, GOING BROKE: WHY AMERICANS CAN'T HOLD ON TO THEIR MONEY 8–13 (2008) (examining self-destructive consumer spending habits).

9. *See* VYSE, *supra* note 8, at 8 ("The numbers tell us we are living in an era when people save very little and borrow a lot."). U.S. personal savings rate fell from eleven percent of disposable income in 1982 to less than half a percent in 2008. *See* U.S. Bureau of Economic Analysis, Bureau of Economic Analysis, U.S. Department of Commerce, Personal Saving Rate, http://www.bea.gov/briefrm/saving.htm (illustrating a general decrease in savings as a percentage of Americans' disposable income).

10. In January 2008, in reaction to the high levels of consumer indebtedness, President Bush created the President's Council on Financial Literacy, and stated that "[t]o help keep America competitive and assist the American people in understanding and addressing financial matters, it is the policy of the Federal Government to encourage financial literacy among the American people." Exec. Order No. 13,455, 73 Fed. Reg. 4445 (Jan. 22, 2008).

11. *See* MANNING, *supra* note 1, at 119 (describing the ever-increasing role of bank credit cards); RITZER, *supra* note 8, at 52 (explaining how credit cards lead consumers to buy more); SCHOR, *supra* note 8, at 20 (describing how new consumerism has lead to a "mass 'overspending' within the middle class"); VYSE, *supra* note 8, at 9–10 (discussing the failure of consumers to recognize that debt requires maintenance).

12. *See generally* Center for Responsible Lending, http://www.responsiblelending.org /issues.html (last visited Feb. 21, 2009) (describing myriad harmful practices of the consumer banking industry).

13. Michael McKinstry, CardTrak.com, Targeted Mail (Dec. 4, 2007), http://www.cardtrak.com/news/2007/12/04/targeted_mail ("A new analysis of mailed credit card offers shows that households who have high balances in relation to their credit lines are the most targeted for new cards. Direct mail credit card solicitations during the third quarter hit 1.29 billion, up 20 million from the prior quarter. U.S. households are expected to receive about 5.3 billion credit card offers this year, compared to 5.76 billion offers mailed in 2006.").

terms,[14] and inadequate underwriting standards[15] have all contributed to the current high levels of indebtedness.

Finally, taking advantage of new technologies, the globalized financial markets have fallen prey to the lure of new opportunities for immense profits, which served to increase tolerances for ever-higher levels of risk.[16] The past two decades have seen the financial markets' record growth and markedly creative (and in hindsight, catastrophic) transformation, fueled in large part by a steady and growing stream of consumer debt.[17]

An appraisal of these "causes" offers a chilling picture of how we got to this point of crisis. Limiting consideration to these apparent and obvious causes of over-indebtedness, however, results in an incomplete picture. A comprehensive map sketching the full measure of factors contributing to the collapse of consumers' "debt-supported house of cards" reveals that the fundamental underlying cause of the consumer debt crisis is found in the incentives that have shaped the very structure

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14. For example, while credit cards have always charged high rates of interest, the past decades have seen the emergence of escalating fees and penalty charges, including late payment, over-limit, cash advance, returned check, and membership fees. *The Effect of Current Credit Card Industry Practices on Consumers: Hearing Before the Comm. on Banking, Housing and Urban Affairs of the United States S.*, 110th Cong. 11-23 (2007) (testimony of Travis B. Plunkett, Legislative Director, on Behalf of the Consumer Fed'n of Am., Consumer Action and Consumers Union), *available at* http://www.consumerfed.org/pdfs/Credit_Card_Senate_Testimony_01-07.pdf; Nancy Trejos, *Fed's Rate Cuts Bring No Relief for Consumers' Credit Card Bills*, WASH. POST, Feb. 11, 2008, at A01; Dean Starkman, *Red Ink Rising: How the Press Missed a Sea of Change in the Credit-Card Industry*, COLUM. JOURNALISM REV., Mar./Apr. 2008, http://www.cjr.org/feature/red_ink_rising.php?page=1. *See also* MANNING, *supra* note 1, at 299 (providing that pursuant to the holding in Smiley v. Citibank, 517 U.S. 735, 740–47 (1996), there are few limits on the amount of fees and other penalties that can be charged); Kathleen Day & Caroline E. Mayer, *Credit Card Penalties, Fees Bury Debtors*, WASH. POST, Mar. 6, 2005, at A01 ("Punitive charges—penalty fees and sharply higher interest rates after a payment is late—compound the problems of many financially strapped consumers, sometimes making it impossible for them to dig their way out of debt and pushing them into bankruptcy.").

15. As reported by the Office of the Comptroller of the Currency:

> The easing of retail credit standards is primarily concentrated in home equity products and residential real estate lending. Indirect consumer loans and affordable housing loans also experienced some easing . . . . Higher credit limits and loan-to-value ratios, lower credit scores, lower minimum payments, more revolving debt, less documentation and verification, and lengthening amortizations - have introduced more risk to retail portfolios.

National Credit Committee, Comptroller of the Currency: Administrator of National Banks, 2005 Survey of Credit Underwriting Practices (June 2005), http://www.occ.treas.gov/2005Underwriting/CreditUnderwriting2005.htm.

16. *What Went Wrong?*, ECONOMIST, Mar. 22, 2008, at 22.

17. See *infra* notes 191–220 and accompanying text (discussing the subprime mortgage crisis, the effect of credit and lending practices on borrowers who are driven by need, and the newly-developed secondary market for consumer credit).

of the consumer marketplace. The drivers of consumption and the policy-makers supporting them created a condition, opportunistically or deliberately, in which high levels of consumer debt became necessary to sustain and support the growth and transformation of the financial markets. The markets affirmatively, aggressively, and insistently encouraged an ever-more rapid and high-risk consumer lending and borrowing cycle, which in turn both fueled and was fueled by ever-increasing levels of consumption and debt. Consumers acquiesced to the efforts made to persuade them to buy and borrow more. Over the past few decades, these dynamics became the established order, thus resulting in widespread consumer over-indebtedness.[18]

And yet the virtually unregulated financial market has, until recently, operated with unquestioned legitimacy and invincibility.[19] Against the backdrop of a reordered and globalized economy, the past decades have seen financial wizardry transform simple consumer credit transactions into complex securitized and collateralized debt instruments and their derivatives—all conducted with little regulation, public scrutiny, or criticism.[20] Driven by fee income and high yields and unburdened by

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18. As noted:

> There is a confluence of interests: People want, or at least are led to think they want, all of those goods and services. The new means of consumption require consumers to want those things and in increasing quantities. The same is true of manufacturers. Bankers and the executives of credit card companies also have vested interests in increased consumption because that means rising debt and growing income from servicing that debt. Politicians want to see an increasingly robust economy—their positions often depend on it—so they adopt policies that help to pump it up.

RITZER, *supra* note 8, at 27.

19. Noting the value of self-regulation:

> Although the safety net necessitates greater government oversight, in recent years rapidly changing technology has begun to render obsolete much of the examination regime established in earlier decades. Regulators are perforce being pressed to depend increasingly on greater and more sophisticated private market discipline, the still most effective form of regulation. Indeed, these developments reinforce the truth of a key lesson from our banking history—that private counterparty supervision remains the first line of regulatory defense.

Alan Greenspan, Chairman, U.S. Fed. Reserve Bd., Remarks at the Sixth Annual Reception for Regulators, Sponsored by Women in Housing and Finance, Washington, D.C.: Technology and Banking (Nov. 20, 2000), *available at* http://www.federalreserve.gov/boarddocs/speeches/2000/20001120.htm.

20. As described in a report issued by the FDIC, the role consumers and consumer debt has played in the financial markets has had a major impact upon economic growth over the past decades:

> The structural changes in the lending markets have influenced consumer behavior through this economic cycle and have increased the sector's economic importance in recent quarters. Consumers behaved differently during the most recent recession than in previous downturns in part because the economic influences themselves have been atypical. Although faced with an unfavorable labor market and declines in financial

regulatory oversight, originators, investors and participants at every level of the consumer-borrowing-and-lending chain yielded to the incentives to alter the way the consumer lending and financial markets operate. By creating a self-reinforcing supply and demand cycle, investment banks and other participants in the securitized debt market have, opportunistically or deliberately, encouraged retail lenders to make a high number of risky loans to a broader array of consumers, which has created a seemingly insatiable demand for the sale of this consumer debt in the public markets.[21]

Such high levels of debt have adversely impacted countless consumers' lives, compounding existing social, economic, and political inequalities, and threatening opportunities for mobility and advancement.[22] Debt has frustrated the chances for countless Americans to exercise social, economic, and political power.[23] It is this power—to make choices, to realize opportunities, to be heard and to have realistic hope for a future that is better than the past—that is at the core of our ostensibly mobile and open society. Simply put, over-indebtedness reinforces existing class divisions and thwarts class mobility.

Few concepts have been as fundamental to the study of cultural, sociological, political, and economic forces as "class."[24] The role of class analysis in the development of social and economic theory and

> asset values, fiscal and monetary policies have helped households maintain spending instead of retrenching. Indeed, throughout this cycle, consumers have been able to provide important support to the economy while business conditions remained weak. Consumer spending has contributed over 85 percent of economic growth since the end of the 2001 recession. Personal consumption expenditures increased year-over-year by 2.5 percent in 2001 and 3.1 percent in 2002, in sharp contrast to the 0.2 percent and 0.3 percent declines experienced during previous recessions in 1991 and 1980, respectively.

Burhouse, *supra* note 2.

21. *Link By Link*, ECONOMIST, Oct. 18, 2008, at 10.

22. It was observed:

> Recent studies suggest that there is less economic mobility in the U.S. than researchers originally believed. And, in sharp contrast to the view of America as the land of opportunity, we may be a less mobile society than many other nations. This suggests that the time is right for a rigorous and nonpartisan initiative designed to spark an informed national discussion of the state of economic mobility in America.

ECON. MOBILITY PROJECT, ECONOMIC MOBILITY PROJECT: AN INITIATIVE OF THE PEW CHARITABLE TRUST 1, http://www.economicmobility.org/reports_and_research/Ecnomic%20Mobility%20Project%20Fact%20Sheet.pdf (last visited Feb. 27, 2009).

23. BENJAMIN DEMOTT, THE IMPERIAL MIDDLE: WHY AMERICANS CAN'T THINK STRAIGHT ABOUT CLASS 178 (1990) (referring to knowledge of the "location, name, and nature of the levers of power" as one of the key determinates of higher class and its membership privileges).

24. Richard Breen & David Rottman, *Class Analysis and Class Theory*, 29 SOC. 453, 453 (1995), *available at* http://soc.sagepub.com.flagship.luc.edu/cgi/reprint/29/3/453.

even its continued relevance, however, remain contested.[25] Some believe that viewing social and economic policies and resulting structures through the lens of class is irrelevant, or at the very least, passé.[26] Yet others believe a study of class dynamics is essential to understanding public and private policies that "make for inequality of a normatively troubling kind."[27] This Article argues that in light of the magnitude of the crisis and the fragmented approach with which solutions have been offered to date, a broader examination of the relationship between factors, policies, and practices that have caused the crisis—essentially an examination of the factors that impact class creation, reinforcement, and mobility—becomes ever more essential.

The study of public and private policies and their impact on class mobility is closely aligned with the issue of the appropriate relationship between government and the marketplace.[28] Over the past twenty years, the economy has, in a very real sense, been reordered.[29] The deregulatory efforts of recent years have opened up new opportunities for many participants in the financial markets.[30] This shifting landscape has also resulted, however, in new disquiet and uncertainty, with initial unease evolving into fundamental questions about the risk and even the legitimacy of essentially unregulated markets.[31] Particularly in light of

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25. *Id.* at 453 ("Despite the centrality of class within sociology (or perhaps because of it) claims have frequently been made about its demise as a useful sociological concept.").

26. *Id.*

27. Adam Swift, *Class Analysis from a Normative Perspective*, 51 BRIT. J. SOC. 663, 664 (2000); Erik Olin Wright, *Introduction*, *in* APPROACHES TO CLASS ANALYSIS 1, 2 (Erik Olin Wright ed., 2005) (describing the various contemporary approaches to class analysis).

28. DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS 379–99 (1998) (describing the "battle" between the government and the marketplace).

29. *Id.*

30. As noted by Chairman of the Federal Reserve, Alan Greenspan:

> The impact of information technology has been keenly felt in the financial sector of the economy. Perhaps the most significant innovation has been the development of financial instruments that enable risk to be reallocated to the parties most willing and able to bear that risk. Many of the new financial products that have been created, with financial derivatives being the most notable, contribute economic value by unbundling risks and shifting them in a highly calibrated manner. Although these instruments cannot reduce the risk inherent in real assets, they can redistribute it in a way that induces more investment in real assets and, hence, engenders higher productivity and standards of living. Information technology has made possible the creation, valuation, and exchange of these complex financial products on a global basis.

Alan Greenspan, Chairman, U.S. Fed. Reserve Bd., Remarks Before the Boston College Conference on the New Economy, Boston, Massachusetts: The Revolution in Information Technology (Mar. 6, 2000), *available at* http://www.federalreserve.gov/BoardDocs/Speeches/2000/20000306.htm.

31. *See* JACOB S. HACKER, THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT AND HOW YOU CAN FIGHT BACK 11–34 (2006)

the remote relationship between consumer borrowers and their ultimate lenders,[32] coupled with the credit market's information asymmetries,[33] the public's confidence in the unregulated markets in which consumer credit transactions take place has been called into question.[34]

This Article critically examines the public and private policies and practices that have contributed to consumer over-indebtedness and discusses the relationship of these policies to class creation, reinforcement, and mobility. It also explores the extent to which these public and private policy decisions have acquiesced to and facilitated the debt crisis and how this attendant impact on class mobility can be justified. Part II explains the various conceptions of class recognized in the United States and outlines a working definition of the factors that mark one's class position.[35] Part III analyzes the multi-pronged origins of the current consumer debt crisis and also describes the relationship between the insidious hegemonic forces that have aligned and thus contributed to current day strengthening of class divisions and thwarted mobility.[36] Part III further discusses the role debt plays in the lives of low-means consumers.[37] Part IV describes the class-related effects of over-indebtedness.[38] Because the public trust in the credit markets has been eroded, and in light of the market's negative externalities, Part IV argues that broad-spectrum intervention and oversight is needed.[39] Finally, this Article concludes in Part V by arguing that understanding

(arguing that Americans are bearing greater economic risks).

32. *See infra* notes 193–200 and accompanying text (describing the transformed consumer finance markets).

33. *See infra* notes 149–52 and accompanying text (reviewing informational imbalances inherent in the financial market's structure).

34. Federal Reserve Chairman Bernake observed:

> [S]ince August, mortgage lenders, commercial and investment banks, and structured investment vehicles have experienced great difficulty in rolling over commercial paper backed by subprime and other mortgages. More broadly, a loss of confidence in credit ratings led to a sharp contraction in the asset-backed commercial paper market as short-term investors withdrew their funds.

Ben S. Bernanke, Chairman, U.S. Fed. Reserve Bd., Remarks at the Federal Reserve Bank of Atlanta Financial Markets Conference, Sea Island, Georgia: Liquidity Provision By the Federal Reserve (May 13, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20080513.htm.

35. *See infra* Part II (describing the difficulty in defining "class").

36. *See infra* Part III (explaining the parallel rise in consumerism and the liberalization of the credit markets and the structure of the markets for goods, services, and credit).

37. *See infra* Part III (discussing the unique role debt plays in the lives of low income consumers).

38. *See infra* Part IV (examining over-indebtedness from a class perspective).

39. *See infra* Part IV (recounting the causes of the credit crisis and discussing a framework for oversight).

the causes of consumer over-indebtedness and its impact on class mobility and opportunity is essential to the question of whether existing policies and practices supporting this system are defensible.[40]

II. AN APPROACH TO CLASS ANALYSIS

Mapping the contours of class divisions in the United States is a "culturally complex process," and one that is often met with resistance.[41] Confounding attempts to explain the class impact of a given public policy is the ahistoric effort to deny that an identifiable class structure even exists.[42] The media,[43] politicians,[44] and

40. *See infra* Part V (concluding that recognizing the credit crisis, in its full dimension, is essential to the development of effective solutions).

41. The issue of class hierarchy creation and reinforcement and its impact on people's lives has not generally been part of discussions of social and economic inequality, let alone a part of the credit crisis discourse. Moreover, the failure to recognize class-based hierarchies and class-related consequences extends to legal rule-making. For example, poverty and discrimination law fails to place the issue of wealth disparity and opportunity in the greater context of class as a general social and economic phenomenon. Deborah C. Malamud, "*Who They Are—Or Were": Middle-Class Welfare in the Early New Deal*, 151 U. PA. L. REV. 2019, 2019 (2003). Nor has class provided a social, economic, and political context for the recent revisions of commercial laws—the laws governing secured lending, securitization transactions, and bankruptcy. Heather Lauren Hughes, *Creditors' Imagined Communities and the Unfettered Expansion of Secured Lending*, 83 DENV. U. L. REV. 425, 467–70 (2005). Moreover, despite the efforts of many academics, the revision of the Bankruptcy Code—the purported "solution" to consumer over-indebtedness—does not reflect meaningful consideration of the social and economic conditions that have precipitated elevated rates of consumer bankruptcy filings, nor the consequences of limiting access to a discharge of crushing debt loads. *See, e.g.*, *Bankruptcy Reform: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2005) (testimony of Professor Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Law School), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1381&wit_id=3996 (testifying about the impact on the lives of consumers of the conditions leading to bankruptcy filings).

42. Furthermore, "[f]or many, America stands as the model of the classless society, one in which most people think of themselves as *middle* class (or at least potentially so, with hard work and a little luck) and in which middle-classness is the socioeconomic face of 'American-ness.'" Malamud, *supra* note 41, at 2019. *See also* DEMOTT, *supra* note 23, at 167 ("[I]nsistence on classlessness falsifies history—in particular the history of group solidarity among workers.").

43. Popular media still enjoys reporting on Horatio Alger success stories resulting from hard work. *See* Andrea Chang, *A Rags-to-Riches Story*, PALO ALTO WKLY., Sept. 24, 2004, at 31, *available at* http://www.paloaltoonline.com/weekly/morgue/2004/2004_09_24.nunan24ja.shtml (documenting the story of a poor farm girl from France who worked hard to establish a successful French restaurant in California).

44. As observed by Paul Starr:

> Throughout our history, the major parties have been economically heterogeneous, and the basic tenets of the American creed have denied any legitimacy to class as a basis of political action-except, that is, for measures in aid of the great, sprawling middle class that is ideally supposed to embrace nearly everyone. Democrats lean to labor but regularly nominate multimillionaires for office, and Republicans lean to business but appeal to the moral traditionalism of many working families.

Paul Starr, *The Executive-Class President*, AM. PROSPECT, Apr. 8, 2001, at 6, *available at*

Americans' general optimism about prospect and advancement rebuff the public recognition of class divisions in favor of the boundless opportunity myth.[45] Pursuant to this myth, reliance on a class-based conceptual framework to explain differences between groups suggests acceptance of a permanence of one's relative position along the hierarchy.[46]

Interestingly, while Americans balk at viewing social and economic hierarchies as class-based, we have an inherent cultural tolerance for high levels of inequality.[47] The corollary that balances this tolerance, however, is a deeply held belief in unlimited prospect and opportunity.[48] As such, to overtly acknowledge class distinctions and to identify and analyze the forces that affect class creation, reinforcement, and mobility is deemed by some to be an untenable concession that opportunity and advancement may not be available to everyone.[49]

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http://www.prospect.org/cs/articles?articleId=5707.

45. Forty percent of people responding to a *New York Times* poll on class said that "the chance of moving up from one class to another had risen over the last 30 years, a period in which the new research shows that it has not." Janny Scott & David Leonhardt, *Class in America: Shadowy Lines that Still Divide*, N.Y. TIMES, May 15, 2005, at 11. In *In These Times Magazine*, it was reported that:

> While the real income of the bottom ninety percent of Americans fell from 1980 to 2002, the income of the top 0.1 percent—making $1.6 million or more—went up two and a half times in real terms before taxes. With the help of the Bush tax cuts, the gap between the super-rich and everyone else grew even larger. The American people accept this, it is argued, because they think not only that there's more social mobility than there is, but also that they'll personally get rich. Indeed, a poll in 2000 indicated that thirty-nine percent of Americans thought they were either in the wealthiest one percent or would be "soon." The *Times* poll was slightly less exuberant: eleven percent thought it was very likely they would become wealthy, another thirty-four percent somewhat likely.

David Moberg, *Class Consciousness Matters*, IN THESE TIMES MAG., July 11, 2005, *available at* http://www.inthesetimes.com/article/2175/class_consciousness_matters/.

46. Even using the term "class" is a "normatively charged" act due to its historical infusion of "ideas of oppression, exploitation and domination." ERIK OLIN WRIGHT, CLASS COUNTS: COMPARATIVE STUDIES IN CLASS ANALYSIS 519 (1997). "Class is important in its own right, but in the United States people usually do not talk much about it. The term is unfamiliar, packed with many different meanings, and uncomfortably radical." Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 802 (2003) (footnotes omitted) (discussing the complex relationship between class and race in affirmative action and voting rights cases). *See also* EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT 7–13, 27–31 (1996) (explaining present level and historical trends of household wealth and income inequality).

47. ECON. MOBILITY PROJECT, *supra* note 22, at 1.

48. *Id*. Moreover, any class-based discussion commonly results in all but the highest and lowest stratum lumped under the umbrella of "middle class."

49. As noted in *The Fragile Middle Class*, "The most important point to make about the American middle class is that most Americans believe that they are in it. . . . Although some

It is this ideological commitment to opportunity and advancement that makes the analysis of public and private policies' impact on class so critical. Engaging in class analysis in a specific contextual realm not only affords an opportunity to examine policy decisions and how they are operationalized,[50] but also allows for the normative evaluation of such policies.[51] Answering the question of how and to what extent given public and private policies adversely affect material standards of living and inequalities in life chances not only aids in our understanding of these policies, but also enables us to think expansively about the types of transformation that can ameliorate or eliminate them.[52]

The starting point in any class analysis is identification of the common elements that contribute to the constitution of a class.[53] For

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people call themselves upper class and others call themselves working class or lower class, these identifications are numerically somewhat rare." SULLIVAN, WARREN & WESTBROOK, *supra* note 6, at 28. *See also* Margaret Thatcher, *Sayings of the Week*, OBSERVER, Oct. 27, 1974 ("The charm of Britain has always been the ease with which one can move into the middle class.").

50. *See* Kristin Brandser Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181, 1181–91 (2006) (analyzing the bankruptcy amendments from a variety of perspectives, including through the lens of class). Professor Donald Korobkin argues that the bankruptcy system functions as a strategy protective of middle class political power: "Insulating mostly middle-class debtors from the experience of long-term poverty, the bankruptcy process protects the political power of the middle class, and offers a redemptive possibility that works to vindicate middle-class ideology in the face of its challenges." Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2131 (2003). In the context of a consideration of the revision of Article 9 of the Uniform Commercial Code it was observed that consumers' concerns and welfare were subordinated to the interests of large money center creditors. Hughes, *supra* note 41, at 439.

51. In recent years, there has been "increased attention to the investigation and specification of the mechanisms—or 'causal narratives'—that generate" and indeed, reinforce, class structures. Swift, *supra* note 27, at 664. There has been "analogous developments on the normative side . . . explor[ing] how the findings of research into social mobility relate to the questions of meritocracy and social justice." *See* Breen & Rottman, *supra* note 24, at 453–73 (delineating the boundaries of class divisions); Geoffrey Evans, *Class, Prospects and the Life-Cycle: Explaining the Association Between Class Position and Political Preferences*, 36 ACTA SOCIOLOGICA 263, 263–76 (1993) (explaining the relationship between class differences and political preferences at different points in the life-cycle). *See also* GORDON MARSHALL, REPOSITIONING CLASS 126–77 (1997) (examining social inequality in contemporary industrial societies); Gordon Marshall & Adam Swift, *Social Class and Social Justice*, 44 BRIT. J. SOC. 187, 187–211 (1993) (comparing findings on educational attainment and social mobility); Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1371 (1995) (discussing "what is class").

52. Swift, *supra* note 27, at 665. *See also* WRIGHT, *supra* note 46, at 3 ("The task of class analysis is not simply to understand class structure and its effects, but to understand the interconnections among all these elements and their consequences for other aspects of social life.").

53. How the term "class" is defined in a particular discussion depends in large part on the context, the objective of the discussion, and the theoretical perspective adopted. The classic Marxian definition focuses on the relationship of individuals who do not own the means of production with those who do. RITZER, *supra* note 8, at 47–51. Class boundaries are defined

purposes of this Article, having access to similar levels of rent-seeking assets, or wealth, is identified as the essential core element members of a class hold in common.[54] Wealth is defined, however, in a broad conceptual way to include not only the typical capital-related markers, but also common social, cultural, and political conditions that arise as a consequence of the accumulation of assets, including human capital.[55] These conditions, taken as a whole, are tied directly to the capacity of a class to exercise social, economic, and political power, and to commensurate restraints on such power.[56] This power and these constraints enable each class to flourish, as well as navigate and endure societal exigencies, with a collective degree of capacity, autonomy, and legitimacy.

Correspondingly, social, economic, and political opportunity allow persons within a class to move to a higher rung and enjoy a more expansive choice of resource allocation and greater degree of control over their lives.[57] To illustrate, to be a member of a "lower class" may

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primarily in terms of the relationship between property interests and exploitation. Weber's conception of class similarly examines the relationship between members of a society and available resources, but the focus is instead on the economic opportunities and disadvantages resulting from such relationships. WRIGHT, *supra* note 46, at 29–35. In another formulation, class is described as "the inherited accumulation of property, competencies, beliefs, tastes, and manners that determines, for most of us, our socioeconomic lot and our share of civic power." DEMOTT, *supra* note 23, at 10. In class analysis:

> [C]lasses are "sets of structural positions. Social relationships within markets, especially within labor markets, and within firms define these positions. Class positions exist independently of individual occupants of these positions. They are 'empty places.'" The question for all forms of class analysis is how—on what basis—we should distinguish these positions.

Richard Breen, *Foundations of a Neo-Weberian Class Analysis*, *in* APPROACHES TO CLASS ANALYSIS, *supra* note 27, at 31, 35.

54. Aage B. Sorensen, *Foundations of a Rent-Based Class Analysis*, *in* APPROACHES TO CLASS ANALYSIS 119, 119 (Erik Olin Wright ed., 2005) (describing what constitutes a rent-seeking asset: one that is capable of a return on its value). *See also* MICHAEL SHERRADEN, ASSETS AND THE POOR 95–120 (1991) (arguing that assets, not income, are the key determinate of present and future poverty).

55. While recognizing the absence of a uniform definition, a *New York Times* feature on class focused on income, accumulated wealth, education, and culture to identify class formation. Scott & Leonhardt, *supra* note 45, at 1 (describing class as "indistinct, ambiguous, the half-seen hand that upon closer examination holds some Americans down while giving others a boost").

56. DEMOTT, *supra* note 23, at 45. *See also* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 13 (1999) ("Researchers generally use indicators of [socioeconomic status] to gauge the influence of social background on a variety of outcomes. The three measures that usually constitute socioeconomic status are education, occupation, and income.").

57. CONLEY, *supra* note 56, at 14 ("[W]ealth both represents class and determines class. Through this dual nature, assets can serve to create or reinforce class identity."); *see also* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 11–33 (2006) (discussing access to wealth and its constitution of class

mean one has diminished economic stability, fewer resources with which to resist coercive influences, a greater susceptibility to market temptation, and less confidence that hard work will lead to opportunity and transformation for current and future generations. Accordingly, conditions creating opportunity and mobility would enable a person to move from this "lower class" to a higher one within which he or she would have more financial, social, and cultural capital and a commensurately greater degree of autonomy and power.

III. THE "CAUSES" OF THE CONSUMER DEBT CRISIS

A. *The Creation of Wants*

1. The Rise of Consumerism: The Traveling English Fair, the Parisian Arcades, and Current Day Cathedrals of Consumption

During the middle and late nineteenth century, industrialization and advances in transportation gave rise to a number of new consumer markets.[58] One such market was the English traveling fair.[59] The fair became a place for the aristocratic, merchant, and plebian classes to gather, sample wares, and be entertained.[60] At the fair— "domains of transgression where place, body, group identity and subjectivity interconnect[ed]"[61]—the "high and low" met and "ideology and fantasy conjoin[ed]."[62] These fairs provided a forum for merchants to shape consumers' desires and an opportunity for consumers of various strata to develop associations with the merchant class.[63] These marketplaces

divisions).

58. Donald N. McCloskey, *Does the Past Have Useful Economics?*, *in* HISTORICAL PERSPECTIVES ON THE AMERICAN ECONOMY 3, 28–29 (Robert Whaples & Dianne C. Betts eds., 1995); John K. Walton & Robert Poole, *The Lancashire Wakes in the Nineteenth Century*, *in* POPULAR CULTURE AND CUSTOM IN NINETEENTH-CENTURY ENGLAND 100, 105 (Robert D. Storch ed., 1982).

59. PETER STALLYBRASS & ALLON WHITE, THE POLITICS AND POETICS OF TRANSGRESSION 27 (Cornell Univ. Press 1995) (1986).

60. Walton & Poole, *supra* note 58, at 113–14.

61. STALLYBRASS & WHITE, *supra* note 59, at 25; ROSALIND H. WILLIAMS, DREAM WORLDS: MASS CONSUMPTION IN LATE NINETEENTH-CENTURY FRANCE 58–59 (1982).

62. STALLYBRASS & WHITE, *supra* note 59, at 25. Stallybrass and White explain:

> Indeed fairs were as much an agent of transformation as of 'popular tradition,' since they brought together the exotic and the familiar, the villager and the townsman, the professional performer and the bourgeois observer. Fairs actually promoted a conjuncture of discourses and objects favourable to innovation. The market square was a crossroads, and if it was the focus of 'community' it was also the point of intersection of different cultures.

Id. at 36.

63. *Id.* at 38 ("If, indeed, the fair could be the site of opposition to official ideologies, it was

provided one of the first opportunities for classes to intersect and proved to be socially and culturally transformative.[64] As described, "[p]art of the transgressive excitement of the fair for the subordinate classes was *not* its 'otherness' to official discourse, but rather the disruption of provincial habits and local tradition by the introduction of certain cosmopolitanism, arousing desires and excitements for exotic and strange commodities."[65]

The nineteenth century Parisian arcade similarly became a central province for the gathering of the populace.[66] Like the English fairs, these arcades were described as "the original temple of commodity capitalism"—giving rise to desires, while at the same time creating frustration and a sense of failure in some at their inability to attain the objects of these desires.[67] Furthermore:

> [T]he dreams created by the new means of consumption can be seen as creating a "false consciousness" among consumers in much the same way that such a consciousness was created among the proletariat in the heyday of producer capitalism. Adrift in a dreamworld of consumption, people are unable to see what is happening to them as well as the realities of the economic system in which they are immersed.[68]

The wares on display in these fairs and arcades were viewed with fascination and reverence and had the effect of transforming desire structures across the social and economic spectrum.[69] Shopping (and browsing) became universally accessible entertainment.[70]

At the same time, a parallel rise in consumerism took place in the United States.[71] The development of the telegraph and railroad

also the means by which emergent mercantile interests could stimulate new desires. Languages, images, symbols and objects met and clashed at the fair and it was their *interconnection* which made for their significance.").

64. *Id.*

65. *Id.* at 37.

66. WILLIAMS, *supra* note 61, at 219; RITZER, *supra* note 8, at x ("[C]athedrals of consumption . . . have helped to entice us to consume far more than we ever did in the past; we have been led in the direction of hyperconsumption. We are also being led to consume differently than we did in the past. For instance, we are now more likely to consume alone, to purchase many different kinds of goods and services in one locale, and to buy many of the same things and consume in many of the same kinds of places as most other people.").

67. RITZER, *supra* note 8, at 63 (citing SUSAN BUCK-MORSS, THE DIALECTICS OF SEEING: WALTER BENJAMIN AND THE ARCADES PROJECT 83 (1989)).

68. *Id*. at 65.

69. STALLYBRASS & WHITE, *supra* note 59, at 25.

70. RITZER, *supra* note 8, at 65.

71. WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE 15–38 (1993).

networks enabled communication and rapid transportation, thus fostering the emergence of integrated markets for consumer goods.[72] Industrialization led to further economic growth, rising income, and new patterns of production and consumption.[73] By the early 1900s, mass production of consumer goods, advertising, and new merchandising environments, such as department stores and mail order houses, became well established.[74]

The post-World War II economy saw industrialized development on an even larger scale, coupled with rising household prosperity.[75] As suburban communities flourished, with them came the proliferation of the ubiquitous American shopping mall.[76] In lieu of a town fair or marketplace, malls in post-modern culture have provided a place for the citizenry to gather, consume, and be entertained in a sanitized, homogenized environment.[77] Amusement and consumption of goods and services became the core of the enterprise, and retailers prospered by deliberately blurring the line between these activities.[78] At malls, the focus of marketing efforts became the creation and fulfillment of consumptive fantasies.[79] Furthermore:

> In an earlier era, it was the means of production that were predominant, but today it is the means of consumption that have gained ascendancy. The shopping mall has replaced the factory as the defining structure of the age in developed societies. Like it or not, the future of such societies lies mainly in consumption and the means that allow, encourage, and even coerce us to consume.[80]

Not only have malls and other "bricks and mortar" shopping destinations become defining features of America's cultural landscape, new media and information technologies have offered ever-more varied means of consumption and have further contributed to recent seismic shifts in consumptive norms.[81] The Internet has brought retail activity

72. *Id*.

73. *Id.*

74. *Id.*

75. RITZER, *supra* note 8, at 26.

76. *Id.*

77. Robert V. Kozinets, *Brands in Space: New Thinking About Experiential Retail*, *in* BRICK & MORTAR SHOPPING IN THE 21ST CENTURY 3–16 (Tina M. Lowrey ed., 2007); RITZER, *supra* note 8, at 182–84.

78. RITZER, supra note 8, at 174.

79. This phenomenon has been identified as "coercive consumption." *See generally id.* at 38–40 (conceptualizing the idea of coercive consumption).

80. *Id.* at 174.

81. For example, Japan and South Korea have had "mobile commerce payment schemes" widely available in major metropolitan areas for several years. Dan Collins, *Cell Phones & Electronic Cash: New Cell Phone With Computer Chip Could Replace the Wallet*, CBS NEWS,

into the home[82] and expanded the hours purchases can be made, thus making shopping increasingly efficient. Goods' quality, prices, and availability can be instantly compared, and purchases can be made impulsively and instantaneously.[83] The "think about it" time has evaporated.[84] In the absence of time to consider and reconsider purchasing decisions,[85] greater emotional rather than measured decision-making has become the norm.

In addition, consumers have been subject to ever-greater manipulation through advertising.[86] Consumers' natural purchasing susceptibility has been exacerbated by the ubiquitous media barrage of words and images presenting narratives of a living standard that many aspire to but few can genuinely achieve, all relaying the not-so-subliminal message to consume.[87] Lured by the account of a life enhanced by the acquisition of "more" and fueled by readily available credit, consumers have come to believe the picture of the mythic "middle class America" as genuinely attainable.[88] This conviction

July 22, 2004, http://www.cbsnews.com/stories/2004/07/22/tech/main631231.shtml. These allow people to purchase items from vending machines by either punching keys on their cell phones or simply holding them up to a scanner on the machine itself. *Id.* This phenomenon has now begun spreading to the United States. *Id.*

82. The U.S. Department of Commerce reported retail e-commerce was up nineteen percent to $136.4 billion in 2007. U.S. CENSUS BUREAU, *Wholesale and Retail Trade*, *in* STATISTICAL ABSTRACT OF THE UNITED STATES: 2008 (2008), *available at* http://www.census.gov/prod/2007pubs/08abstract/domtrade.pdf.

83. Monica Corcoran, *Internet Shopping Under the Influence*, CHI. TRIB., Apr. 22, 2008, at C1 (discussing the phenomenon of consumers' impulse shopping on-line while inebriated).

84. *See* DAVID BROOKS, BOBOS IN PARADISE: THE NEW UPPER CLASS AND HOW THEY GOT THERE 145–46 (2001) (discussing the rise of commercialism and what it reveals about American culture). *See also* THE PROJECT ON DISNEY, INSIDE THE MOUSE: WORK AND PLAY AT DISNEY WORLD 39–44 (1995).

85. Purchases can be made even quicker using "one click":

> In the fall of 1997, Amazon.com submitted a patent application entitled "A Method and System for Placing a Purchase Order Via a Communications Network." On September 28, 1999, two years and one week after the application was filed, Amazon was granted United States Patent Number 5,960,411. It is now known as Amazon's "1-Click" patent. The patent describes an online system allowing customers to enter their credit card number and address information just once so that on follow up visits to the website all it takes is a single mouse-click to make a purchase from their website.

Amazon One-Click Shopping, http://cse.stanford.edu/class/cs201/projects-99-00/software-patents/amazon.html (last visited Feb. 22, 2009).

86. BROOKS, *supra* note 84, at 98–102.

87. *Id.*

88. As described on the U.S. Census Bureau's website:

> The Census Bureau does not have an official definition of the "middle class," but it does derive several measures related to the distribution of income and income inequality. Traditionally, the Census Bureau uses two of the more common measures of income inequality: the shares of aggregate income received by households (or other

masks the truth that the kitchens featured in Williams Sonoma,[89] the clothes at Abercrombie & Fitch,[90] the bedroom set in Pottery Barn,[91] and the electronics gaudily displayed at Best Buy[92] are far beyond the reach of the vast majority of consumers.[93] Entreaties to buy, and to buy more, appear so crass—so perceptibly manipulative—yet the brilliance of the advertising is revealed by the classic consumer response: the calculating nature of the message advertised is recognized, understood, and "seen through," at the same time it is responded to.[94]

For many consumers, the ability to fulfill consumptive desires as quickly as they are created has resulted in an apparent cultural homogenization—consumers can dress alike, drive the latest model car,

> income recipient units such as families) and the Gini index (or index of income concentration). In the shares approach, we rank households from lowest to highest on the basis of income and then divide them into equal population groups, typically quintiles. We then divide the aggregate income of each group by the overall aggregate income to derive shares. The Gini index incorporates more detailed shares data into a single statistic which summarizes the dispersion of the income shares across the whole income distribution. The Gini index ranges from zero, indicating perfect equality (where everyone receives an equal share), to one, perfect inequality (where all the income is received by only one recipient).

U.S. Census Bureau, Housing and Household Economics Statistics Division, U.S. Census Bureau, Income Inequality (Middle Class)—Narrative (Apr. 30, 2008), http://www.census.gov/hhes/www/income/midclass/midclsan.html.

89. *See* Williams-Sonoma Inc., http://www.williams-sonoma.com/shop/cookware/index.cfm?cm_ type=gnav (last visited Jan. 7, 2009) (featuring a Beehive Pizza Oven priced at $2000, a twenty-eight piece All-Clad Copper Core cookware set on sale for $3,999.95, and a fully automatic Impressa Espresso Coffeemaker for $3,699).

90. Abercrombie & Fitch, Womens Jeans, http://www.abercrombie.com/webapp/wcs/stores/servlet/category1_10051_10901_12261_-1_12203 (last visited Feb. 22, 2009) (featuring jeans ranging in price from $79.50 to $198.00).

91. Pottery Barn, Bedroom Collections, http://www.potterybarn.com/coll/col/colbed/f024/index.cfm?cm_src=sch&words=hudson%20bedroom%20set (last visited Feb. 22, 2009) (featuring a Hudson bedroom set for approximately $7000.00).

92. Best Buy, Magnolia Home Theater, Televisions, http://www.bestbuy.com/site/olspage.jsp?skuId=8949613&type=product&id=1215819843633 (last visited Feb. 22, 2009) (featuring a Samsung 55 inch 1080p 120 Hz Flat-Panel LCD HDTV for $4,999.98).; Best Buy, Audio, Speakers, Home Theater Speaker Systems, http://www.bestbuy.com/site/olspage.jsp?skuId=7366735&st=bose+cinemate&lp=1&type=product&cp=1&id=1122653506577 (last visited Feb. 22, 2009) (featuring a Bose® - CineMate® Digital Home Theater Speaker System for $499.99).

93. As described on the Center on Budget and Policy Priorities website:

> [M]edian earnings of both male and female full-time workers declined in 2005. Median earnings for men working full time throughout the year fell for the second straight year, dropping by $774, or 1.8 percent, after adjusting for inflation. The median earnings of full-time year-round female workers fell for the third straight year, declining by $427, or 1.3%.

Center on Budget and Policy Priorities, Poverty Remains Higher, and Median Income for Non-Elderly Is Lower, Than When Recession Hit Bottom: Poor Performance Unprecedented for Four-Year Recovery Period (Sept. 1, 2006), http://www.cbpp.org/8-29-06pov.htm.

94. RITZER, *supra* note 8, at 52.

use the same cell phones, and listen to identical MP3 players—notwithstanding vast disparities in income and wealth levels.[95] In many communities, difference is made invisible—hidden behind the chimera of material satisfaction.[96] The diabolical genius of the private and public policies that encourage consumption and credit use is that they appear to be the exact opposite of what they are—policies that foster the illusion of classlessness, even as they directly create and reinforce sharp and severe class divisions. Thus, the homogenization efforts become the very force that produces greater societal stratification—meaning greater disparities in wealth, which means compromised social, economic, and political power for those on the lower end of the strata.

The public and private policies that support the illusion of classlessness mask the hegemonic forces that affect consumers in the retail and credit marketplace. The simultaneous consent and resistance to these forces commonly exhibited by consumers is the product of "the systematic (but not necessarily or even usually deliberate) engineering of mass consent to the established order. No hard and fast line can be drawn between the mechanisms of hegemony and the mechanisms of coercion. . . . In any given society, hegemony and coercion are interwoven."[97]

It is inadequate, however, to suggest simply that mere coercion is the only force driving consumers' enthusiastic embrace of consumerism and corresponding incurrence of debt. While retailers and consumer credit providers have certainly benefited from the creation and satisfaction of consumptive yearnings to the detriment of consumers, consumers are not acting under blind duress: the dynamic is far more insidious and nuanced. In the liminal space between desire and resistance, consumers have voluntarily adopted and realized the illusion of a middle class identity in their willingness to acquire "stuff" at any cost.[98] Consumers *know* that carrying a balance on a credit card makes

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95. *Id.* at 182.

96. Notwithstanding appearances fueled by the rise in consumer spending and consumption, the gap between the rich and middle classes has been expanding over the past thirty years and the long-term trend in the United States has been toward ever-increasing income and wealth inequality. MANNING, *supra* note 1, at 20–26. *See* U.S. Census Bureau, *supra* note 88 (stating that "the long-term trend has been toward increasing income inequality").

97. TODD GITLIN, THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING & UNMAKING OF THE NEW LEFT 253 (1980).

98. As noted by Bell Hooks:

> The poor are expected to live with less and are socialized to accept less (badly made clothing, products, food, etc.), whereas the well-off are socialized to believe it is both a right and a necessity for us to have more, to have exactly what we want when we want it.

all purchases more expensive[99] and that using home equity funds to go on a Disneyland vacation can mean financing it over thirty years.[100] Nevertheless, the acquisition yields significant benefits for consumers: an identity in addition to the "stuff."

2. The Rise of the Consumer Credit Industry: Deregulation and Credit's Democratization

The past decades' expansion of a culture increasingly marked by consumerism has been tracked by the parallel transformation of the consumer credit markets; consumer credit has played a substantial role in enabling much of the increased cultural emphasis on consumption.[101] As retailers of goods, services, and entertainment began to actively engage in the aggressive and insistent encouragement of consumers to "consume more than they intend and perhaps more than they can afford,"[102] credit providers facilitated these purchases, by "democratizing" the availability of credit.[103]

The transformation of the consumer credit industry, however was an incremental process and the market, as it exists in the United States today, did not develop in a social and moral vacuum: the market has shaped and has been shaped by the values of the industry and its constituent communities.[104] Its evolutionary development has been

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BELL HOOKS, WHERE WE STAND 48 (2000).

99. It would take a consumer 94 months to pay off a $1000.00 balance at 18% by making the minimum payment (2% of the balance). In November 2005, federal regulators at the Office of the Comptroller of the Currency started requiring credit cards issuers to increase the amounts of minimum payments. Minimum payments must cover all fees and interest incurred during the month, as well as covering at least 1% of the principal on the loan. Some banks have raised minimum payments by as much as 2% or 3%, effectively doubling the common minimum payment of 2%.

100. A consumer who borrowed $6000.00 over 30 years would accrue over $6900.00 in interest charges.

101. RITZER, *supra* note 8, at 52 ("Credit cards aid the ability of the new means of consumption to exploit consumers by leading them to buy more.").

102. *Id.*

103. *See* Havard, *supra* note 6, at 263–64 ("Extending credit on unfavorable terms is always suspect. While the presumption is that the borrower is well informed and has the ability to negotiate, this ability is dramatically curtailed in the present day environment of mortgage brokers."); Sandra E. Black & Donald P. Morgan, Risk and the Democratization of Credit Cards (June 25, 1998) (unpublished manuscript), *available at* http://www.newyorkfed.org/research/staff_reports/research_papers/9815.pdf (arguing that bank card borrowers are becoming inherently riskier).

104. "Retail lending has undergone a dramatic transformation in recent years as banks have aggressively moved into the retail arena to solidify market positions and gain market share." National Credit Committee, *supra* note 15.

punctuated by deliberate strategic decision-making by both industry leaders and policy-makers.[105]

Major policy shifts first began following the Great Depression of the 1930s.[106] At that time, the government's fiscal plan was focused upon stimulating economic growth and one central target of this focus was consumer credit.[107] Government loan guarantees and other regulatory structures were put into place to create a market for consumer lending.[108] When the revolving charge card was introduced in the early years following WWII,[109] its debut marked a pivotal and strategic turning point in the consumer credit market.[110]

105. As observed by Alan Greenspan, Chairman of the Federal Reserve, in 2005:

> [R]ecent regulatory reform, coupled with innovative technologies, has stimulated the development of financial products, such as asset-backed securities, collateral loan obligations, and credit default swaps, that facilitate the dispersion of risk. Conceptual advances in pricing options and other complex financial products, along with improvements in computer and telecommunications technologies, have significantly lowered the costs of, and expanded the opportunities for, hedging risks that were not readily deflected in earlier decades. The new instruments of risk dispersal have enabled the largest and most sophisticated banks, in their credit-granting role, to divest themselves of much credit risk by passing it to institutions with far less leverage.

Alan Greenspan, Chairman, U.S. Fed. Reserve Bd., Remarks to the National Association for Business Economics Annual Meeting, Chicago, Illinois: Economic Flexibility (Sept. 27, 2005), *available at* http://www.federalreserve.gov/BoardDocs/Speeches/2005/20050927/default.htm.

106. LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 265–87 (2001).

107. *Id.*

108. *Id.*

109. Diners Club International, Company History, https://www.dinersclubus.com/dce_content/aboutdinersclub/companyhistory (last visited Feb. 22, 2009). The first credit card introduced to and used by consumers was the Diners Club card in 1950. *Id.* Timed to take advantage of the expanding economy, the credit industry's initial business model focused upon the pursuit of economies of scale: increasing the number of credit card holders while at the same time maximizing the number of merchants who accepted credit cards as a form of payment. American Express, Bank Americard, and Master Charge followed in Diners Club International's footsteps. *See generally* CreditCards.com, Credit Card Industry Facts, Debt Statistics 2006–2009, http://www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics-1276.php (last visited Feb. 22, 2009) (providing credit card-related statistics); Visa, History, http://corporate.visa.com/av/about_visa/corp_history.jsp (last visited Feb. 22, 2009) (providing the story of Visa's history). The credit industry soon recognized that widespread credit card use would reduce issuers' transaction costs. *See generally* Manning, supra note 1, at 35–38. See also Schor, supra note 8, at 20; Vyse, supra note 8, at 96.

110. As observed by Chairman Alan Greenspan:

> While the process of innovation, of course, is never-ending, the development of the transistor after World War II appears in retrospect to have initiated a special wave of innovative synergies. It brought us the microprocessor, the computer, satellites, and the joining of laser and fiber-optic technologies. By the 1990s, these and a number of lesser but critical innovations had, in turn, fostered an enormous new capacity to capture, analyze, and disseminate information. It is the growing use of information technology throughout the economy that makes the current period unique.

Timed to take advantage of the expanding economy, the credit card industry's initial business model focused upon the pursuit of economies of scale: increasing the number of credit card holders, while at the same time maximizing the number of merchants who accepted credit cards as a form of payment.[111] Credit card lenders at this time, however, took a comparatively conservative approach to lending: fixed interest rate loans marketed to borrowers deemed creditworthy, judged according to strict underwriting standards.[112]

Aided by technological advances, national banking networks emerged in the ensuing boom years, presenting the need to expand customer markets to maintain profitability.[113] Banks' marketing methods became more targeted and aggressive: the first mass-mailing credit card solicitation resulted in millions of new customers, although largely confined to consumers with consistent records of reliable credit repayment.[114] Regulatory restrictions in the form of interest rate caps, however, kept strict limits on credit card issuers' potential for profitability.[115]

It was not until the 1970s that regulatory, technological, and competitive forces aligned, forever altering the fundamental structure of the consumer credit industry.[116] The most significant rule change arose out of the Supreme Court's 1978 decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*[117] This decision had the effect of removing barriers to the consumer credit industry's growth by allowing banks to move their credit card headquarters to states with high usury caps.[118] Banks were thus able to raise interest rates on

Alan Greenspan, Chairman, U.S. Fed. Reserve Bd., Remarks Before the National Technology Forum, St. Louis, Missouri: Technology Innovation and Its Economic Impact (Apr. 7, 2000), *available at* http://www.federalreserve.gov/BoardDocs/Speeches/2000/20000407.htm.

111. MANNING, *supra* note 1, at 35–38.

112. *Id.*

113. The credit industry soon recognized that widespread credit card use would reduce issuers' transaction costs. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 301 (1978) (holding that the National Bank Act authorized a national bank based in one state to charge its out-of-state credit card holders an interest rate allowed by its home state, even if that rate is higher than that permitted by the state of the bank's nonresident customers, resulting in banks being able to avoid many federal banking barriers and increase profit margins by relocating their physical locations to states with interest rates favorable to financial institutions and subsequently charging these rates to nonresident customers).

118. *Id.* at 318–19.

consumer credit by expanding their operations beyond state borders.[119] The *Marquette* decision was followed over the next decade by the enactment of numerous laws further deregulating the consumer credit industry.[120]

Despite a largely unregulated environment, banks issued comparatively conservative credit products until as recently as the late 1980s.[121] For example, most credit cards continued to offer fixed interest rates, charged annual fees, and were marketed to borrowers with strong credit histories.[122] It was not until the early 1990s that the consumer banking industry found the good-credit-risk market close to saturated.[123] New entrants into the consumer credit supply market, including pay day lenders,[124] rent-to-own centers,[125] and other non-

119. The McFadden Act prohibiting the creation of branches outside the state in which the bank was located was later repealed by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (although state law continues to control intrastate branching for both state and national banks). Pennsylvania Association of Community Bankers, Bank Geographic Structure, http://www.pacb.org/banks_and_banking/geography.html (last visited Feb. 22, 2009). S*ee Marquette*, 439 U.S. at 308 (providing the issue before the Court); H.R. Res. 3841, 103d Cong. (1994) (providing the Interstate Banking Efficiency Act of 1994). "[12 U.S.C.] Section 85 thus plainly provides that a national bank may charge interest 'on any loan' at the rate allowed by the laws of the State in which the bank is 'located.'" *Marquette*, 439 U.S. at 308. The Court later determined that a bank's location is "'[t]he place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village.'" *Id.* at 302 n.2 (citing 12 U.S.C. § 22 (2006)). In *Marquette*, First National Bank of Omaha was clearly "located," for purposes of Section 85, in the state of Nebraska and was therefore allowed to charge Nebraska interest rates. *Id.* at 313; 12 U.S.C. § 22 (2006).

120. Burhouse, *supra* note 2 ("The trend toward deregulation continued in 1980, when the Depository Institutions Deregulation and Monetary Control Act eliminated state interest rate maximums for home mortgages and introduced the gradual phase-out of ceilings on deposit rate offerings. Eliminating deposit rate caps increased competition in banking and gave banks the ability to raise deposits in all credit environments."). *See generally* DIV. OF RESEARCH AND STATISTICS, FED. DEPOSIT INS. CORP., HISTORY OF THE 80S—LESSONS FOR THE FUTURE (2000), *available at* http://www.fdic.gov/bank/historical/history/index.html (detailing the complex combination of causes that led to the extraordinary number of bank failures in the 1980s, as well as an evaluation of the legislative, regulatory, and supervisory responses to those failures). Additionally, the Garn-St. Germain Depository Institutions Act of 1982 further expanded the powers of federal S&Ls to diversify their activities to increase profits by eliminating statutory limits on loan-to-value ratios, among other provisions. *Id.*

121. *See Hearing Before the S. Banking Comm.*, 109th Cong. (2005) (testimony of Marge Connelly, Executive Vice President, Capital One Financial Corporation), *available at* http://banking.senate.gov/public/_files/connelly.pdf [hereinafter Connelly testimony] (examining legal and regulatory requirements and industry practices for credit card issuers).

122. *Id.*

123. *Id.*; *see also* MANNING, *supra* note 1, at 11–12 (identifying the saturation of the middle-class credit card user market and the rise of "convenience users").

124. Pay-day lenders' business model is based on lending consumers relatively small sums of money, typically on a short-term basis, which are designed to be repaid from the borrower's next paycheck. Commonly charging up to 15% for each two-week period (which is in excess of 400% on an annualized basis), loans are advanced in exchange for the consumer's post-dated personal

bank lenders, put increasing pressure on traditional banks to increase their market share in order to maintain profitability.[126] The proliferation of the high-cost non-bank lenders began at the same time the traditional banking industry was becoming increasingly consolidated.[127]

In response to these competitive pressures, banks' card issuers took measures to expand their target markets to include less affluent households.[128] Citicorp credit card division's decision to alter its business model is reflective of industry practice at that time:

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check, or for the authorization to debit the borrower's deposit account in the amount of the loan, plus a fee on a date certain. Such loans, if not repaid on the first "due date," can be rolled over, with the borrower accruing additional interest charges and fees. *See* About.com, Beware Payday Loans, http://financialplan.about.com/od/creditanddebt/aPaydayLoan.htm (last visited Feb. 27, 2009).

125. Rent-to-own businesses offer furniture, appliances, electronics, and other household goods on a short-term rental basis, long-term lease or for sale. To illustrate:

> Rainbow Rentals, the nation's fourth largest RTO, leases/rents a Frigidaire washer and dryer for $19 a week, or $69 a month for 21 months. The total cost is between $1450 and $1600 for a washer and dryer that could be purchased for $700–800 at a local discount store. A Compaq Presario notebook rents for $38 a week or $144 a month for $24 months, raising the cost to $3500. The same computer can be bought for one-third the price—about $1,200 to $1,300—at major discount retailers. A 32-inch Toshiba flat screen television costs $1,800 to rent for 24 months while Best Buy sells the same set for $650. The list goes on and on. RTO customers generally pay at least two to three times more than the retail price for furniture or appliances.

HOWARD JACOB KARGER & DAVID D. STOESZ, AMERICAN SOCIAL WELFARE POLICY: A PLURALIST APPROACH 105 (5th ed. 2005).

126. *See generally* Michael Hudson, *"Signing Their Lives Away," in* MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY 42 (Michael Hudson ed., 1996) (examining how Ford Motor Company profited from vulnerable consumers).

127. *Id.*

128. The change in the credit card industry's business practice was described by the Executive Vice President of credit card issuer Capital One:

> Our founders realized that the "one size fits all" approach made little sense when each consumer possessed vastly different needs and characteristics. While some consumers were risky, many more were less so—in varying degrees. Without the ability to differentiate one from another, however, lenders were compelled to raise prices to cover the cost of higher credit losses, or to cut back on the granting of credit to reduce the losses. Either way, consumers suffered. The less risky customers were paying too much, and for the rest, credit was hard to come by—if available at all. Capital One was able to use information within the legal framework provided by the FCRA [Fair Credit Reporting Act] to make significant advances in underwriting - better distinguishing the risk characteristics of our customer base. The benefits of greater access to better information went beyond risk analysis, however. Capital One and other companies were also able to use information to create profound innovations in the marketing and design of credit cards. Our company led the charge with new product ideas like balance transfers, where customers could shift balances away from high-priced cards to our lower-priced offerings, and low introductory rates. The resulting reductions in price and expansion of credit into traditionally underserved markets sparked a consumer revolution that can fairly be called the "democratization of

> After increasing the finance charges on its credit cards, Citicorp sought to expand the social frontiers of its credit card portfolio by soliciting lower-income households. This was an important marketing shift because the early focus on more affluent, middle-class households produced large numbers of unprofitable, albeit low-risk, convenience users. Bankers had hoped that a larger proportion of these cardholders would revolve a portion of these purchases or occasionally forget to pay their credit card bills. Instead, they soon realized that they were stuck with costly deadbeat clients, who zealously paid off their charges within the specified grace period. As inflation rates climbed to double digits, the architects of [this business model] encountered a crucial institutional crossroads: continue losing even more money on large numbers of low-risk, middle-class clients or increase their lending to higher-risk, lower-income households that previously had been avoided.[129]

Credit card issuers further sought to increase profits by raising interest rates and charging higher fees and penalties following the Supreme Court's decision in *Smiley v. Citibank*.[130] The Court held that late payment, over-limit, cash advance, returned check, membership, and other fees fell within the definition of "interest"[131]—making their proliferation, as well as industry profits, virtually unhindered by regulation.[132]

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credit."

Connelly testimony, *supra* note 121, at 3–4 (footnotes omitted). *But see* Complaint at 2-10, State v. Capital One Bank, No. C1-04-12506 (Minn. Dist. Ct. Dec. 30, 2004) (alleging that Capital One Bank and Capital One F.S.B. violated Minnesota consumer protection law, including false and deceptive branding, false advertising, consumer fraud, and deceptive trade practices).

129. MANNING, *supra* note 1, at 89.

130. Smiley v. Citibank, 517 U.S. 735, 740–47 (1996) (holding that a bank governed by the National Bank Act may charge loan customers' "interest" at a rate allowed by the laws of the particular state in which a bank is located).

131. "Interest" is defined by the Office of the Comptroller of the Currency. *See* 12 C.F.R. § 7.4001(a) (2004) (providing that "interest" includes "any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports").

132. "[W]hen the proportion of convenience users jumped from 34 percent in 1995 to 43 percent in 2000, credit card issuers responded with sharp increases in penalty fees—from $8.3 billion in 1996 to $18.9 billion in 1998." MANNING, *supra* note 1, at 298–99. *See* Trejos, *supra* note 14 (demonstrating that credit card interest rates remained high after the Federal Reserve's rate cuts). "Punitive charges—penalty fees and sharply higher interest rates after a payment is late—compound the problems of many financially strapped consumers, sometimes making it

The consumer credit industry has continued to modify its business model and marketing practices with the persistent goal of expanding demand and increasing profits.[133] In addition, the credit products currently offered more widely are far more expensive than they were twenty years ago[134] and "[the credit card industry] has shifted from a lending and underwriting paradigm to a sales paradigm; penalties, fees, and default interest at rates that were illegal a generation ago are no longer regrettable outcomes to be avoided but central to the business model."[135]

impossible for them to dig their way out of debt and pushing them into bankruptcy." Day & Mayer, *supra* note 14.

133. As noted by Robert Manning:

> [C]redit card issuers earned between three and five times the ordinary rate of return from banking from 1983 to 1988; the largest money center banks earned the highest profits. This earlier "gold" strike yielded even more impressive "platinum" returns in the aftermath of the 1989–1991 recession. For example, between 1982 and 1985, the spread on bank credit cards averaged 8.8 percent, whereas between 1991 and 1994 it averaged 13.2 percent. Although the spread declined to about 11 percent in the late 1990s, credit card companies compensated by sharply raising fee income from late and over-limit penalties; between 1993 and 1998, fee income tripled—from $6.3 billion to $18.9 billion. This explains why banks were so eager to increase their credit card loan portfolios—regardless of the creditworthiness of prospective customers.

MANNING, *supra* note 1, at 94 (footnotes omitted). In 1989, Citicorp's after-tax profits from its credit card division was about $600 million, exceeding its corporate profits and accounting for about 50 percent of its total earnings. *Id.* This steady and dramatic increase in earnings from credit cards continued through the 1990s into the 2000s. *Id.* at 80–81, 94.

134. CardTrak.com® reported:

> Credit card profits in the last three months of 2003, topped $7.0 billion and may have exceeded $30 billion for the year. Among the nation's largest issuers, profits grew 17% on average in the fourth quarter. MBNA led the pack with a 30% surge in profits, followed by Chase with a 25% increase in card operating income. Citigroup posted its first billion dollar profit quarter in 4Q/03 thanks to its acquisition of the Sears card portfolio in November. The nation's top three issuers, ranked by card loans, raked in $2.2 billion in fourth quarter profits, while seven top issuers collectively produced $3.6 billion in 4Q/03 profits. On the other end of the scale, Bank of America's card profits were up 3%, and Bank One produced an 8% gain in net income. In the middle, but below the group average, is Capital One with an 11% increase, and American Express with a 10% gain over 4Q/02. According to R.K. Hammer Investment Bakers [sic], credit card profits hit their highest level in fifteen years during 2003, driven primarily by lower cost-of-funds. The average pre-tax, return-on-assets for credit card portfolios last year is projected to reach 4.4%, compared [sic] 4.2% for 2002, and 4.5% for 1988.

Cardtrack.com, Banner Year, Feb. 2004, http://www.cardweb.com/cardtrak/pastissues/feb04.html. *See also* Bernanke testimony, *supra* note 4 ("[B]anks and other institutions have taken on their balance sheets various assets that can no longer be financed on a standalone basis. Thus, the capacity and willingness of some large institutions to extend new credit remains limited.").

135. Starkman, *supra* note 14.

Credit cards have become as ubiquitous as cash [136] and are used ever-more commonly.[137] According to the Federal Reserve, Americans are now carrying $943.5 billion in revolving credit card debt, up 6.8% from a year ago:[138]

> [B]etween 1989 and 2001: Credit card debt among very low-income families grew by an astonishing 184 percent. But middle-class families were also hit hard—their credit card debt rose by 75 percent. Very low-income families are most likely to be in credit card debt: 67 percent of cardholding families with incomes below $10,000 are affected. Moderate-income families are not far behind: 62 percent of families earning between $25,000 and $50,000 suffer from credit card debt.[139]

Moreover, in the first quarter of 2008, consumers financing the purchase of a new car through an auto finance company had an average outstanding balance of $28,174, with a loan-to-value ratio of 94% and maturity of 62.6 months.[140] In 2003, mortgage originations and refinancings hit a decade high, with $3.802 trillion of housing-backed loans made.[141] These high debt levels have been incurred at a time where household savings levels are at an all-time low, leaving many without a safety net in the event of an unexpected expense or interruption in income.[142] Enormous pressure has been brought to bear on consumers to buy instead of save, and to borrow, rather than wait.[143]

136. Kathleen W. Johnson, *Recent Developments in the Credit Card Market and the Financial Obligations Ratio*, 91 FED. RES. BULL. 473, 474 (2005) ("Three developments in the credit card market likely accounted for much of the rise in household financial obligations over the past fifteen years: an expansion in the prevalence of credit cards among lower-income households, the widespread adoption of variable-rate cards, and a greater willingness of households to use their credit cards for day-to-day purchases of goods and services.").

137. *Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs.*,. 110th Cong. 5 (2007) (written testimony of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School) [hereinafter Wilmarth testimony] ("Credit card debt in the United States has exploded from $69 billion in 1980 to $675 billion in 2001 and $1.8 trillion in 2006. This rapid growth in credit card debt is consistent with the huge increase in all types of household debt during the past three decades.").

138. The average household with credit card debt runs a balance of about $8,000. Statistical Release, Federal Reserve, Consumer Credit (June 6, 2008), *available at* http://federalreserve.gov/releases/g19/20080606/.

139. Tamara Draut & Javier Silva, Demos, *Borrowing to Make Ends Meet: The Growth of Credit Card Debt in the 90s*, at 10 (2003), *available at* http://caseyfoundation.org/upload/publicationfiles/fe3679k534.pdf.

140. Statistical Release, Federal Reserve, Consumer Credit (Feb. 6, 2009), *available at* http://federalreserve.gov/releases/g19/Current/.

141. Mortgage Bankers Ass'n, *Mortgage Origination Estimates* (Aug. 13, 2008), *available at* http://www.mbaa.org/files/HistoricalMortgageOriginationEstimates.pdf.

142. *See supra* note 9 and accompanying text (discussing the low savings rate during the recent financial crisis).

A similar culture of free borrowing has been encouraged by the mortgage banking industry.[144] Aided by rising real estate values, consumers have taken advantage of the mortgage market's liquidity, borrowing against their homes to a greater degree than before seen in history.[145] Seemingly under the impression that the market's rising valuations would continue forever, liberal mortgage underwriting, low introductory variable rate products, and low- and no-documentation loans with high loan-to-value ratios led many consumers to buy more house than they could afford and carry larger mortgages than could be repaid.[146] The present day escalation in the number of housing foreclosures[147]—the very issue that brought public attention to the crisis of consumer over-indebtedness—is a consequence of the normalization of lax underwriting, overly optimistic value projections, the conversion of unsecured debt into home-secured debt, and the lure of low introductory rates for adjustable rate mortgages,[148] as well as the escalation of subprime and predatory lending.[149]

143. David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 333–37 (1999) (describing the increased use of credit cards for low- and moderate-income borrowers over the past decades).

144. As reported by the Center for Responsible Lending, "Today's foreclosure epidemic resulted from the legal mass marketing of dangerous loan products and systematic overcharging of vulnerable consumers." Center for Responsible Lending, Mortgage Lending, http://www.responsiblelending.org/issues/mortgage (last visited Feb. 22, 2009).

145. A newspaper account described consumers using their houses as ATM machines. Peter S. Goodman, *Homeowners Feel the Pinch of Lost Equity*, N.Y. TIMES, Nov. 8, 2007, at A1. *See also* Cohen testimony, *supra* note 2, at 2 ("This debt crisis causes consumers to file bankruptcy more often, to reduce their savings to a historic low point, to spend the equity in their homes to pay off credit card debt by refinancing and putting homes at risk of foreclosure—all precipitated by unaffordable credit card debt."); Wilmarth testimony, *supra* note 137, at 5–6 (stating that total household debt, in large part due to home equity loans, "has risen from $1.4 trillion in 1980 to $7.2 trillion in 2001 and $11.8 trillion in 2006").

146. News Release, Office of Fed. Hous. Enter. Oversight (OFHEO), Widespread House Price Declines in Fourth Quarter: Pockets of Strength Remain; Coasts, Midwest Show Biggest Declines (Feb. 26, 2008), *available at* http://www.ofheo.gov/media/pdf/4q07hpi.pdf.

147. RealtyTrac, a foreclosed property online tracker, reported:

> [F]oreclosure filings—default notices, auction sale notices and bank repossessions—were reported on 649,917 properties during the first quarter [of 2008], a 23 percent increase from the previous quarter and a 112 percent increase from the first quarter of 2007. The report also shows that one in every 194 U.S. households received a foreclosure filing during the quarter.

RealtyTrac, U.S. Foreclosure Activity Increases 23 Percent in First Quarter (Apr. 29, 2008), http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4566&accnt=64847.

148. Press Release, Mortgage Bankers Ass'n, Delinquencies & Foreclosures Increase in Latest MBA Nat'l Delinquency Survey (June 5, 2008), *available at* http://www.mbaa.org/NewsandMedia/PressCenter/62936.htm.

> The Mortgage Bankers Association's first quarter report showed that a record 2.5% of all loans being serviced by its members are now in foreclosure, which works out to

The credit industry has created the pressure to borrow and knows where consumers' social, economic, and psychological vulnerabilities lie.[150] It knows that consumers tend to discount the long- and short-term consequences of credit use, due to the temporal disconnect between the charge and receipt of a bill.[151] This discounting and underestimation extends to a number of features of credit use, including present and future balances, the importance of interest rates, the likelihood of a late payment, the speed at which interest accrues,[152] the implications of merely making the minimum payment due; as well as the likelihood of exceeding credit limits,[153] and credit products have been designed to opportunistically exploit these susceptibilities.[154] As observed:

> about 1.1 million homes. That's up from the 2% of loans, or about 938,000 homes, that were in foreclosure at the end of 2007. The report also showed that 448,000 homes, or about 1% of loans being serviced, began the foreclosure process during the first quarter [of 2008]. That's up from about 382,000 homes, or 0.83%, that entered foreclosure in the last three months of 2007. The seasonally-adjusted rate of homeowners behind on their mortgage payments also hit a record high. Nearly 3 million home loans, or 6.4%, have missed at least one payment, while about 737,000 are at least three months past due, but not yet in foreclosure.

Chris Isidore, *Homes in Foreclosure Top 1 Million*, CNNMONEY.COM, June 5, 2008, http://money.cnn.com/2008/06/05/news/economy/foreclosure/index.htm.

149. The residential finance market can roughly be divided into three tiers: the prime lenders (mortgage lenders who lend to borrowers with strong credit histories and good credit ratings), sub-prime lenders (mortgage lenders who lend to borrowers with marginal credit histories), and predatory lenders. *See* Charles Hallman, Acorn.org, Urban League, ACORN Launch Anti-Foreclosure Program in Minneapolis, Jan. 7, 2008, http://www.acorn.org/index/index.php?id=8313&L=0%2Findex.php%3Fid%3D10964&tx_ttnews[tt_news]=21999&tx_ttnews[backPid]=2680&cHash=7b8968a4a9 ("'Most [victims of foreclosure] are not first-time homebuyers. Many are people who are sucked into refinancing. Many of them are people of color who were eligible for prime loans but were shifted into sub-prime loans.'" (quoting United States Representative Keith Ellison)).

150. Bar-Gill, *supra* note 6, at 33; Edelberg, *supra* note 6, at 16–28 (reporting the results of an empirical study of whether collateral is used to offset asymmetric information in consumer credit markets).

151. Ausubel, *supra* note 6, at 50–81.

152. *Id.*; Gabaix & Laibson, *supra* note 6, at 5; *see also* BELSKY & GILOVICH, *supra* note 6, at 42 ("[T]he money we charge on plastic is devalued because it seems as if we're not actually spending anything when we use the cards. Sort of like Monopoly money. The irony, of course, is that the dollar we charge on plastic is actually more valuable, inasmuch as it costs an additional sixteen cents to spend it—16 percent or so being the typical interest rate for such borrowing.").

153. Ausubel, *supra* note 6, at 50–81.

154. A study of the incidence of credit card use derived from bank records when compared to a study of reported use by consumers exposed a vast discrepancy: Many consumers who use credit "are unaware of how frequently they do it or, more likely, deny (to themselves and others) that they do it." *Id.* at 72 (footnote omitted). Interestingly, studies have further shown that consumers are more sensitive to annual credit card fee increases than to corresponding interest rate increases. *Id.* And because of high "search and switch" costs, many consumers fail to optimize their market behavior by changing credit providers when a lower priced or higher

> The averse [sic] consequences for using credit cards is abstract (i.e., a printed bank statement) and delayed, and thus is likely to have less of an impact on behavior. High interest rates and penalties are present when payments are delinquent, often making it difficult to reduce the total amount of debt for individuals who do make payments. Thus, although not inevitable, credit cards allow for disadvantageous allocation of funds by allowing immediate impulsive purchasing at high long-term cost.[155]

Simply put, the credit industry knows that the classic economic model of the rational market actor does not prove to be an accurate description of consumer behavior in practice.[156]

Moreover, the "consumer protection" regulatory model currently in place is premised on the concepts of disclosure[157] and private enforcement.[158] With few meaningful limits placed on the cost of credit, disclosure has proven to offer little consumer protection;[159] the

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quality credit product is available. *Id.* Furthermore, "optimizing behavior would lead many consumers to (a) shop around for lower-priced credit cards, (b) shift into different modes of borrowing (e.g., home equity loans), or (c) rearrange their intertemporal stream of consumption (i.e., not borrow)." *Id.* at 72 n.44.

155. Marcello Spinella, Bijou Yang & David Lester, *Prefrontal System Dysfunction and Credit Card Debt*, 114 INT'L J. NEUROSCIENCE 1323, 1324 (2004).

156. Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1498–525 (2006).

157. As noted:

> Most consumers do not read contracts or disclosure forms. They routinely enter into contracts in an atmosphere that discourages them from reading the contract to be signed and, in any event, precludes negotiation of the terms of the writing. Among, or in addition to, the long agreements they sign, consumers are provided with legally mandated disclosure forms that are supposed to make clear the essential terms of the deal (such as cash price, cost of credit, and quantity), but the utility of these disclosures is also widely questioned.

Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 233–34 (2002) (footnotes omitted).

158. The current consumer credit market has been virtually unburdened by regulation since the 1970s and early 80s. This period was marked by the enactment of numerous deregulatory measures. The 1970s and early 80s saw a wave of deregulatory measures. *See, e.g.*, Fair Credit Billing Act, 15 U.S.C. § 1666 (2006) (setting out the process for obligors to claim inaccuracies in their credit bills); Consumer Leasing Act of 1976, 15 U.S.C. § 1667 (2006) (establishing the rights and responsibilities of lessors and lessees); Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691(a) (2006) (providing rules for seeking and granting credit renewals); Fair Debt Collection Practices Act of 1977, 15 U.S.C. § 1692f (2006) (prohibiting creditors from using unconscionable means to collect a debt); Electronic Fund Transfer Act of 1978, 15 U.S.C. § 1693c (2006) (regulating electronic fund transfers).

159. Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1501 (1998) (describing the origin of the "behavioral decision theory"); Richard L. Weiner, Michael Holtje, Ryan J. Winter, Jason A. Cantone, Karen Gross & Susan Block-Lieb, *Consumer Credit Card Use: The Roles of Creditor Disclosure and Anticipated Emotion*, 13 J. EXPERIMENTAL PSYCHOL.: APPLIED 32, 44–46

display of onerous credit terms in the context of aggressive marketing has not corrected the information asymmetries in access to information that characterize the consumer lending market. Moreover, with recourse for abuses available only on the basis of individual consumer transactions rather than on systemic flaws in the operation of the market itself, consumers with relatively small claims and truncated access to information are excluded from regulatory protections.[160] Myriad reported cases have illuminated the barriers consumers face in seeking a remedy for harms caused by creditor behavior or industry practices.[161] Defending consumers' affirmative responses to offers of credit as part of the supply and demand cycle places the risk of loss solely and squarely on consumers. Thus, it is not surprising that consumer financiers, in accounting for consumers' systematic biases, have reported record profits in recent years—profits which have been directly correlated to record levels of consumer over-indebtedness.[162]

B. Needs Financed by Debt

The tension between the desire and resistance to consume is felt by consumers at all levels of the class spectrum.[163] Among consumers in poverty, however, this tension creates an even greater pull: studies have demonstrated that consumers often buy things to "compensate for worries and doubts about their self-worth, their ability to cope effectively with challenges, and their safety in a relatively unpredictable

(2007).

160. In connection with a class action lawsuit against Tay-Tay, Inc., Arkansas Payday Check Cashers, Inc., Payday Advance, and Jim Mead, a candidate for Class Representative, Jimmie Sue Spencer, made the following observation:

> My goal is, I think that personally if they are going to offer this service, they should do it at a more reasonable, they should not be allowed to charge that much interest because most people aren't aware of it. . . . I would like for people not, common people, just working every day, working class people, who live from pay check to pay check, not to be taken advantage of because they can do it.

Tay-Tay, Inc. v. Young, 80 S.W.3d 365, 370 (Ark. 2002).

161. The financial impact of a two hundred dollar consumer loan was analyzed by Professors White and Mansfield in their article *Literacy and Contract*. White & Mansfield, *supra* note 157, at 240. They concluded that to fully understand the terms of her loan, the borrower "would have needed document and quantitative literacy skills at the top of the [National Adult Literacy Survey] literacy scales." *Id.*

162. In 1989, Citicorp's after-tax profits from its credit card division was about six hundred million dollars, exceeding its corporate profits and accounting for about fifty percent of its total earnings. MANNING, *supra* note 1, at 94. This steady and dramatic increase in earnings from credit cards continued through the 1990s into the 2000s. *Id.*

163. Stephen E.G. Lea, *Credit, Debt and Problem Debt*, *in* THE ELGAR COMPANION TO CONSUMER RESEARCH AND ECONOMIC PSYCHOLOGY 139, 139–44 (Peter E. Earl & Simon Kemp eds., 1999); Howard Tokunaga, *The Use and Abuse of Consumer Credit: Application of Psychological Theory and Research*, 14 J. ECON. PSYCHOL. 285, 285–316 (1993).

world."[164] The world is a far less predictable place for people lacking resources.[165] Economic and social stability is compromised, as is the ability to hope and plan for the future.[166] Consumption can act as a salve, a way of feeling as if one has a degree of control over a world that too often feels out of control.[167]

When debt is used in an attempt to escape *extreme* financial exigency, however, consumers are seeking more than a mere salve. In such circumstances, consumers are not primarily concerned with emotional comfort, the satisfaction of material desires, or the creation of

164. Tim Kasser, Richard M. Ryan, Charles E. Couchman & Kennon M. Sheldon, *Materialistic Values: Their Causes and Consequences*, *in* PSYCHOLOGY AND CONSUMER CULTURE 11, 14 (Tim Kasser & Allen D. Kanner eds., 2004) ("According to our model, a strong MVO [Materialistic Value Orientation] is one way in which people attempt to compensate for worries and doubts about their self-worth, their ability to cope effectively with challenges, and their safety in a relatively unpredictable world. For example, large salaries and the possession of material goods may be especially valued if they represent an attempt to gain approval and acceptance that is otherwise felt to be lacking. A strong MVO may also develop in situations where people feel that wealth, possessions, image, and status enhance their likelihood of meeting basic needs for safety and sustenance.").

165. The lack of resources impacts every aspect of a person's day-to-day life. For example, making a dozen calls to evaluate various credit offers may be viable for someone who has an office and autonomy during the work day, but it is not possible to do so while being closely supervised as a waitress, retail clerk, assembly line worker, or hotel maintenance person. Reliable transportation and child care enable and facilitate the accomplishment of chores, such as regular visits to a neighborhood bank. For those who live in neighborhoods without bank branches, paying bills may involve long trips on public transportation, while toting packages and children. David Shipler provides a telling narrative describing the interrelationship between the downward cycle of poverty and the cost of credit. DAVID SHIPLER, THE WORKING POOR 26 (2004). He expresses the plight of a twenty-four year old mother who was living "in the kind of housing . . . [that] cause[s] and exacerbate[s] asthma in children" and who recently purchased a used car from a dealer "that didn't do credit checks but charged her 15.747 percent interest." *Id.* at 16-27. Shipler discussed:

> On the surface, it seems odd that an interest rate can be determined by the condition of an apartment, which in turn can generate illness and medical bills, which may then translate into a poor credit rating, which limits the quality of an automobile that can be purchased, which jeopardizes a worker's reliability in getting to work, which limits promotions and restricts the wage, which confines a family to the dilapidated apartment. Such are the interlocking deficits of poverty, one reinforcing the other until an entire structure of want has been built.

Id. at 26.

166. SHERRADEN, *supra* note 54, at 148 (describing a range of non-capital benefits that flow from having assets).

167. As reported:

> [This] study investigated the impact of locus of control on home mortgage loan behaviours. The results showed that participants with stronger external control were more likely to purchase a lower priced home, have a lower ratio of mortgage loan amount to the total home value, and have a shorter term of mortgage loan.

Mingji Wang, Hong Chen & Lei Wang, *Locus of Control and Home Mortgage Loan Behaviour*, 43 INT'L J. PSYCHOL. 125, 125 (2008).

an identity; they are concerned with the basics of survival. The prescription has to get filled, groceries have to be bought, the baby needs a crib, and the car needs gas—today. If credit is the only resource available, failing sufficient income, assets or public assistance, it is accessed—whatever its cost.[168] Lower-wealth consumers are caught in a vise: wedged between desiring the material goods that have become part of the American identity, and needing to use credit for fundamental subsistence. The decline in real wages, particularly in the service sector,[169] coupled with increases in part-time employment[170] and layoffs have meant that workers' relationships with their employers have become progressively more tenuous.[171] Jobs are less likely to offer health insurance[172] or long-term wage and retirement security than they were in decades past.[173]

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168. Ronald Paul Hill, *Stalking the Poverty Consumer: A Retrospective Examination of Modern Ethical Dilemmas*, 37 J. BUS. ETHICS 209, 210–11 (2002).

169. MANNING, *supra* note 1, at 14; Erik Eckholm, *America's 'Near Poor' Are Increasingly at Economic Risk, Experts Say*, N.Y. TIMES, May 8, 2006, at A14 (citing a study which concluded that "the risk of a plummet of at least a year below the official poverty line rose sharply in the 1990's, compared with the two previous decades. By all signs . . . such insecurity has continued to worsen").

170. Part-time employment statistics are reported by race. For example, over twenty million Caucasian workers engage in part-time employment. Bureau of Labor Statistics, *Household Data Annual Averages, 8. Employed and Unemployed Full- and Part-Time Workers By Age, Sex, Race, and Hispanic or Latino Ethnicity*, EMP. & EARNINGS, Jan. 2005, at 205, *available at* http://www.bls.gov/cps/cpsa2004.pdf.

171. The poverty rate was 11.3 percent in 2000 (31.6 million people), and rose for 4 consecutive years to reach 12.7 percent in 2004 (37.0 million people). CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, U.S. BUREAU OF THE CENSUS, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 9 (2005), *available at* http://www.census.gov/prod/2005pubs/p60-229.pdf. In 2006, the official poverty rate was 12.3 percent, down slightly from 12.6 percent in 2005. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA SMITH, U.S. BUREAU OF THE CENSUS, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006, at 11 (2007), *available at* http://www.census.gov/hhes/www/poverty/poverty06.html. Professors Steven Pressman and Robert H. Scott argue in an unpublished paper that due to consumer debt, the poverty rate in 2006 should have been 13.7 percent, and not 12.3 as reported in the Census ("The number of these "debt poor" has been on the rise since the early 1980's, growing from 0.5 percent of the population to 1.4 percent in 2006. During the same period, the government's poverty rate fell from 15 percent to 12.3 percent.").

172. *See generally* U.S. Department of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2006* (2006), *available at* http://www.bls.gov/ncs/ebs/publications.htm (providing that, for example, in 2006 only 62% of all workers participated in medical care benefits in private industry; 57% had access to paid sick leave; only 15% had access to employer assistance for child care; and 21% participated in a defined benefit pension).

173. LAWRENCE MISHEL, JARED BERNSTEIN & JOHN SCHMITT, THE STATE OF WORKING AMERICA: 2000/2001, at 37–48 (2001).

Moreover, an estimated twelve million renter and homeowner households now pay more than fifty percent of their annual incomes for housing, and a family with one full-time worker earning the minimum wage cannot afford the local fair-market rent for a two-bedroom apartment anywhere in the United States.[174] The dearth of affordable housing presents a significant hardship for low-income households, preventing them from meeting their other basic needs, such as nutrition and healthcare, or saving for their future.[175] The spike in the price of gasoline has had an enormous impact on poor families, many of whom own older, less efficient vehicles.[176]

When unexpected expenses arise, many families are forced to "dissave" (withdraw savings, sell assets, or borrow) to meet their obligations.[177] With few assets,[178] the vast segment left out of the so-called "ownership society"[179] has strained to bridge the divide between

174. "An estimated 12 million renter and homeowner households now pay more than 50 percent of their annual incomes for housing, and a family with one full-time worker earning the minimum wage cannot afford the local fair-market rent for a two-bedroom apartment anywhere in the United States." U.S. Department of Housing and Urban Development, Homes & Communities, Affordable Housing, http://www.hud.gov/offices/cpd/affordablehousing/index.cfm (last visited Feb. 22, 2009).

175. As stated by Sullivan, Warren, and Westbrook:

> Debts that were just manageable on a full salary fall into arrears as interest and penalties mount while the family tries to survive on a suddenly lower disability paycheck. If the family uses credit during the period of disability to make ends meet and to live at their pre-injury levels, the family goes further into debt. In a short time, the debt may be beyond control.

SULLIVAN, WARREN & WESTBROOK, *supra* note 6, at 159–60.

176. Posting of Adam Stein to The TerraPass Footprint, http://www.terrapass.com/blog/posts/squeezed-at-the-pump (June 10, 2008) ("[D]ue to a combination of poverty, low density, and aging car fleets, gas prices are hammering the rural poor. In Holmes County, Mississippi, residents spend 15.6% of their income on gas.").

177. ALAN R. ANDREASEN, THE DISADVANTAGED CONSUMER 34 (1975) (defining "dissave").

178. A 1994 Rent-A-Center survey indicated that approximately thirty-one percent of rent-to-own customers are on some form of public assistance, such as food stamps, housing, or other subsidies and twenty-five percent are unemployed. Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 WIS. L. REV. 1221, 1254 (2000) (citing Carl C. Hoffmann & Robert L. Lovler, Rent-A-Center Final Report 15 (Feb. 9, 1994)).

179. Critics have responded to President Bush's vision of an ownership society, where "people would have more choices and assume more risk in nearly every part of their lives," by observing that "Bush's version of an 'ownership society' would mean 'you're on your own'—unless you are well-heeled, well-informed and already an owner. 'It's a wonderful phrase,' says former Clinton Labor secretary Robert Reich. . . . 'But in fact, its going to further concentrate ownership in fewer and fewer hands.'" Jill Lawrence, *Some Ask Who Belongs in 'Ownership Society,'* USA TODAY, Mar. 22, 2005, at 04a.

income and expenses. In the absence of savings, a living wage or public assistance,[180] credit becomes what enables many families to survive.[181]

At the time the traditional credit industry relaxed its underwriting standards and made credit more widely available, it also created new credit products tailored for the low-income consumer.[182] The credit aggressively offered to low-income and low-means consumers is categorically different than that used by middle-class consumers.[183] These products have higher interest and fee rates, more onerous terms,[184] and are designed for long-term borrowing, rather than convenience use.[185] Easy access to this credit has significantly contributed to high consumer debt levels.[186]

180. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1611 (2006). This revolutionary legislation shifted focus away from entitlement welfare toward demanding more responsibility of recipients, including the necessity of employment or a search for employment.

181. The credit card industry is well aware of people's needs for credit and has responded accordingly:

> Robert Manning in his book, *Credit Card Nation*, also describes direct marketing campaigns for high-interest "secured" credit cards that are marketed to customers who likely would not qualify for a standard-rate bank-issued credit card. In one example, he cites an offer for a $400 line of credit for which, in return for applying for the credit card, an unsuspecting consumer agrees to pay a variety of fees totaling $369. Such "offers" may be widely distributed, but the people most likely to accept the offer are the most financially vulnerable populations with the least financial sophistication and the fewest credit options.

James H. Carr & Jenny Schuetz, *Financial Services in Distressed Communities: Framing the Issue, Finding Solutions*, *in* FINANCIAL SERVICES IN DISTRESSED COMMUNITIES: ISSUES AND ANSWERS 5, 8 (2001), *available at* http://www.cra-nc.org/financial.pdf.

182. RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 46–47 (2006) [hereinafter MANN, CHARGING AHEAD]; Ronald J. Mann, "*Contracting" for Credit*, 104 MICH. L. REV. 899, 914 (2006).

183. *See* Angela Littwin, Testing the Substitution Hypothesis: Would Credit Card Regulation Force Low-Income Borrowers Into Less Desirable Lending Alternatives? (Oct. 14, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1014460&rec= 1&srcabs=968330 (discussing whether low-income individuals are forced to use less desirable forms of credit from high-cost lenders, such as pawn shops and rent-to-own stores, when traditional forms of credit are unavailable).

184. CALDER, *supra* note 106, at 60–64.

185. MANN, CHARGING AHEAD, *supra* note 182, at 136 (referring to credit card users as either "convenience users" or "borrowers"); *see also* Connelly testimony, *supra* note 121, at 4 (describing Capital One's introduction of new credit products such as balance transfers).

186. As observed by Professor Littwin:

> It is easy for policymakers to view credit cards through the lens of their familiar, positive transacting experiences and fail to grasp fully the difference between their experiences and those of financially insecure revolvers. Recognizing that the convenience credit card usage is largely out of reach to the poor and the financially struggling segments of the middle class will enable policymakers to evaluate the revolving product more precisely and place it in context with other fringe borrowing services.

In addition to credit issued by the traditional banking sector, an entire sector of the credit industry has emerged in recent decades specifically designed to serve the "need borrower."[187] Known colloquially as "fringe bankers,"[188] these lenders offer credit to augment other lending sources.[189] Marked by convenience of location, lax underwriting, and high interest rates, these lenders have identified their target market as those consumers who need credit for the basics of subsistence.

Lower-income homeowners are also vulnerable to predatory mortgage lenders, who offer easy but expensive money to purchase homes, pay property taxes, make home repairs, and pay other household expenses.[190] These predatory loans are distinguished by high interest rates, unnecessary fees, risky terms,[191] and low- to no-credit underwriting standards.[192] Like other post-credit democratization credit offers, these loans are distinguished by information asymmetries and consumer manipulation in the loan origination process.[193]

Littwin, *supra* note 183, at 31–32.

187. Mary Kane, *'Fringe Banks' Profit from Customers Without Banks*, *in* MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY 52, 52-57 (Michael Hudson ed., 1996) (describing the fringe banking industry and its business model).

188. See *supra* note 124 for a description of "pay-day" lenders' business model; *see also* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 9-11 (2002) (same); *see* KATHLEEN E. KEEST & ELIZABETH RENUART, THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES 279 (2d ed. 2000) (discussing how rent-to-own contracts are credit sales disguised as leases); *Beware Payday Loans*, supra note 124 (arguing that payday loans are "dangerous consumer rip-off[s]"). *See also* JOHN P. CASKEY, FRINGE BANKING 37–45 (1994) (demonstrating that the increased public patronage of pawnshops and fringe banks signals an increasing number of cash-only American households); Neal Peirce, Stateline.org, The High Cost of Being Poor: Fighting the Land Sharks (Apr. 11, 2004), http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15611 ("[T]here's a depressingly long list of predatory fiscal devices that have ballooned in number since 1990. Collectively, they're ripping off low-income America, trapping millions of poor Americans in permanent, high-cost indebtedness.").

189. *See generally* Littwin, *supra* note 183 (presenting data from a small study of low-income women suggesting that lenders, such as rent-to-own establishments and pawn shops, may augment, rather than substitute for credit cards, as sources of credit for low-income consumers).

190. Center for Responsible Lending, A Snapshot of the Subprime Market, Nov. 27, 2007, http://www.responsiblelending.org/issues/mortgage/quick-references/a-snapshot-of-the-subprime.html; Mortgage Bankers Association, http://www.mbaa.org (last visited Feb. 23, 2009).

191. Center for Responsible Lending, *supra* note 190 ("Proportion of subprime mortgages made from 2004 to 2006 that come with 'exploding' adjustable interest rates: 89–93%.").

192. In 2006, 28% of all mortgages originated were subprime (up from 8% of all mortgages in 2003) and currently 7.2 million families hold a suprime loan, with $1.3 trillion loans outstanding. *Id.* The Center for Responsible Lending reports that 14% of all home loans currently outstanding are subprime loans. *Id.*

193. In discussing a recent survey using the Survey of Consumer Finance data:

> Survey of Consumer Finance (SCF) data also support the existence of this class segmentation. Although higher-income families are more likely to have credit cards, lower-income families are more likely to struggle with debt. Low-income households

Not surprisingly,[194] the incidence of home foreclosures in the subprime market over the past eighteen months has reached record highs.[195] It is projected that one in five subprime mortgage loans made in 2005–2006 will end in foreclosure, which means that over two million families will lose their homes in the next few years.[196] The equity that will be lost through these foreclosures is projected to be in excess of $160 billion.[197]

The classical economic argument that consumers as self-determined agents reap benefits from markets that are free of regulatory constraints does not hold for consumers driven to borrow by coercion and need. As observed:

> Agency does not [allow for] choice for individuals who are powerless. What it does represent is a perpetual marginality. Contrary to notions of agency, individuals have little power to make sustaining transformations when the underlying structure is flawed. . . . Hierarchical decision-making results in policies and laws that exclude the group of persons who are powerless to oppose those laws and policies that are not in their best interests.[198]

Borrowers who are driven by need, however, *know* that payday lenders are exploiting them, that credit cards are a trap, and that rent-to-own stores are a rip-off, but in the face of such dire need, the price of

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> have much higher debt-to-income ratios than their high-income counterparts across all income quintiles. This is despite that fact that low-income consumers are less likely to be homeowners with mortgage or home-equity debt. SCF data also shows that revolvers are more likely to be black or Hispanic and to have less education than transactors.

Litwinn, *supra* note 183, at 31 (footnotes omitted).

194. It has been found that thirty to fifty percent of the users of fringe banking services qualified for traditional banking services. Carr & Schuetz, *supra* note 181, at 4. Furthermore:

> HUD reports that subprime loans are heavily concentrated in lower-income and minority communities—the same communities that are the target for fringe financial outlets. HUD's analysis indicates that subprime loans are three times more prevalent in lower-income neighborhoods than in high-income areas, and five times more likely in black communities than in white neighborhoods. In fact, in black neighborhoods, high-cost subprime loans accounted for 51 percent of home loans in 1998, compared with 9 percent in white areas. Moreover, homeowners in high-income black communities are six times as likely to have a subprime loan as homeowners in high-income white neighborhoods. Estimates by Fannie Mae, Freddie Mac, and others conclude that many households in the subprime market could reasonably qualify for a prime market loan.

Id. at 11–12.

195. The Center for Responsible Lending further reports that one in eleven American mortgages is past due or in foreclosure. Center for Responsible Lending, *supra* note 190.

196. *Id.*

197. *Id*.

198. Havard, *supra* note 6, at 242 (footnotes omitted).

credit and the effects of indebtedness become irrelevant.[199] In the absence of alternatives,[200] these borrowers do not have the luxury to meaningfully consider the long-term consequences of incurring high priced debt.[201]

C. The Secondary Market for Consumer Credit

Driven by commercial and investment bankers, speculators, traders, lawyers, accountants, investors, and other participants, the financial markets have experienced a massive transformation in virtually every respect over the past decade and a half.[202] Advanced information systems have led to the invention of innovative investment products, including complex securitized assets and their derivatives, backed by mortgage-related loans[203] and other consumer credit receivables.[204]

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199. JAMES M. LACKO, SIGNE-MARY MCKERNAN & MANOJ HASTAK, SURVEY OF RENT-TO-OWN CUSTOMERS ES-1 (Federal Trade Commission Bureau of Economics Staff Report 2000), *available at* http://www.ftc.gov/reports/renttoown/renttoownr.pdf ("Thirty-one percent of rent-to-own customers were African American, 79 percent were 18 to 44 years old, 73 percent had a high school education or less, 59 percent had household incomes less than $25,000, 67 percent had children living in the household, 62 percent rented their residence, 53 percent lived in the South, and 68 percent lived in non-suburban areas.").

200. Interestingly, a survey of low-income borrowers revealed that many low-income consumers borrow from family and friends. Littwin, *supra* note 183, at 21. It is not clear, however, that the terms pursuant to which this money is lent are contributing to the current day debt crisis:

> First, despite the democratization of credit that has taken place in recent years, by far the most common form of credit was still informal borrowing from friends and family. The prevalence of informal borrowing suggests that, were regulation of credit card lending to take place, much of any substitution that occurred would be with the informal sector.

Id. at 37 (footnote omitted).

201. Pawn shops provide credit to consumers who are willing to pledge their personal property. Interest charged for such secured loans is typically capped by statute at 25% per month, which when annualized, comes to about 300% per year. *See generally* Bill Minutaglio, *Prince of Pawns*, *in* MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY 58 (Michael Hudson ed., 1996). Moreover, pawned property is typically property with sentimental meaning: wedding rings, family heirlooms, and the like, and thus the consequences of a consumer defaulting on a 300% interest rate loan can extend beyond the financial. *Id.* Check cashing establishments, due to the absence of traditional bank branches in many communities, have also provided a needed financial service to the "estranged poor" in recent decades. In the past ten years, the number of check cashers increased from approximately two thousand to approximately five thousand, and the number of pawnshops have grown from approximately five thousand to approximately ten thousand. Mike Hudson, *The Costly "Banks" that Welcome the Poor*, 15 APF REP. 4 (1993), *available at* http://www.aliciapatterson.org/APF1504/Hudson/Hudson.html.

202. DANIEL J. BOORSTIN, THE AMERICANS: THE DEMOCRATIC EXPERIENCE 579–99 (1973); YERGIN & STANISLAW, *supra* note 28, at 94.

203. As described by the Securities and Exchange Commission:

> Mortgage-backed securities (MBS) are debt obligations that represent claims to the cash flows from pools of mortgage loans, most commonly on residential property. Mortgage loans are purchased from banks, mortgage companies, and other originators

Unprecedented economic growth has enabled the utilization of new technologies[205] and opened myriad new markets and opportunities.[206] The invention of these securitized and derivative products has allowed both financiers and investors to hedge market and currency risk, further enabling the meeting of financial institutions' goals of borrowing cheaply, transferring and diversifying risk, accessing new sources of capital, and taking advantages of economies of scale.[207]

Such market innovations have also fundamentally altered long-held retail consumer lending policies and practices.[208] For example, lenders'

> and then assembled into pools by a governmental, quasi-governmental, or private entity. The entity then issues securities that represent claims on the principal and interest payments made by borrowers on the loans in the pool, a process known as securitization.

U.S. Securities and Exchange Commission, Mortgage-Backed Securities (June 25, 2007), http://www.sec.gov/answers/mortgagesecurities.htm.

204. SYLVAIN RAYNES & ANN RUTLEDGE, THE ANALYSIS OF STRUCTURED SECURITIES vii (2003) (describing asset-backed securities as "debt securities backed by the pooled receivables of existing loans, leases, trade financings, bonds, or other financial assets whose credit risk generally has been delinked from the credit of the originator or seller by sale, swap, or assignment"). *See also* Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595, 599–605 (1998) [hereinafter Lupica, *Asset Securitization*] (identifying the possible challenges to the claim of structured finance's efficiency and examining the potential equitable bases for a court's avoidance of these transactions); Lois R. Lupica, *Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization*, 33 CONN. L. REV. 199, 209–10 (2000) (identifying risks associated with securitization transactions). In January 1989, the outstanding pool of securitized assets from revolving and non-revolving consumer loans was $29,132,000,000.00. Statistical Release, Board of Governors of the Federal Reserve System, Consumer Credit (Feb. 6, 2009), *available at* http://www.federalreserve.gov/releases/g19/hist/cc_hist_p.html. In April 2006, the securitized asset pool was valued at $610,132,050,000.00. *Id.*

205. Julie L. Williams & James F.E. Gillespie, Jr., *The Impact of Technology on Banking: The Effect and Implications of "Deconstruction" of Banking Functions*, 5 N.C. BANKING INST. 135, 136–40 (2001) (describing the bank deconstruction phase of the 1990s and the role of technology).

206. Simply put, local markets have become globalized. "Globalization refers to the growing economic interdependence of countries worldwide through the increasing volume and variety of cross-border transactions in goods and services and of international capital flows, and also through the more rapid and widespread diffusion of technology." INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK MAY 1997, at 45 (1997); Gerd Häusler, *The Globalization of Finance*, FIN. & DEV., Mar. 1, 2002, at 10, *available at* http://www.imf.org/external/pubs/ft/fandd/2002/03/hausler.htm.

207. Lupica, *Asset Securitization*, *supra* note 204, at 605–15. *See also* RAYNES & RUTLEDGE, *supra* note 204, at vii (noting that "[t]he classic motivations for a corporation to raise funds in the structured [credit] market rather than the corporate credit market are lower funding costs, better placement ability, balance sheet restructuring, and arbitrage of interest rates, credit spreads, taxes, or regulatory conditions").

208. Moreover, the expansion of the breadth and reach of financial markets has led to a fundamental change in the way financial institutions operate: rather than profiting by lending to firms with which they developed long-term relationships based on trust, banks' focus has shifted to shorter-term, riskier, and more speculative investments. YERGIN & STANISLAW, *supra* note 28, at 67.

compensation models shifted in response to changes in risk exposure; once the risk is removed from the loan originator's balance sheet via the securitization transfer, lenders are incentivized to focus on the volume of loan originations, not necessarily the quality or default risk of each loan.[209] This led to the implementation of numerous measures designed to expand the consumer borrowing base and to increase both consumption and consumer borrowing.[210] Accordingly, consumer credit, including credit cards, became more widely and aggressively marketed, and home purchase loans, refinancings, and equity lines of credit became increasingly and insistently promoted to ever-riskier borrowers.[211] Many of the mortgage loans currently in default were written in compliance with industry and "market sanctioned underwriting guidelines"— notwithstanding the fact that they were no-document, 100% loan-to-value ratio loans.[212] With the risk of consumer default shifting to investors in the secondary market, the potential for lost accountability on the part of front-line lenders arose, resulting in an agency problem.[213] The strategy to both expand consumption and borrowing and transform these loans into low-risk, high yield securities has also resulted, until recently, in the banking industry's booking unprecedented profits in recent years.[214]

209. To illustrate, CellarStone, Inc., an incentive management consulting firm, noted that ninety percent of sales commissions and incentives are related to loan originations. Gopi Mattel, *Mortgage Broker Commissions and Incentives—A Primer* 1–4, *available at* http://www.qcommission.com/doc/Mortgage-Broker-SalesCommissions-A-Primer-Article.pdf (last visited Feb. 27, 2009). The loan closing triggers the payment of the commission, and is tied to the principal amount of the loan, as well as to origination fees and points, premium spreads, and any other additional fees and costs, including appraisal fees, processing fees, and credit report fees. *Id.* at 1.

210. As noted during the peak of the securitization market, there was "an almost insatiable appetite for new offerings." Aaron Elstein, *Merrill Sees Danger in Surging Growth of Asset-Backed Market*, AM. BANKER, Oct. 2, 1996, at 24.

211. See *infra* notes 104–21 and accompanying text (discussing the transformation of the consumer credit industry that permitted banks to market to more consumers more aggressively).

212. For example, in a recent report filed with the Securities and Exchange Commission, Indymac Abs, Inc. disclosed, with respect to its securitization of 6,970 fix rate mortgage loans, the weighted average combined original loan-to-value ratio was 96.26% and the percentage of full documentation loans was a mere 12.15%. Home Equity Mortgage Loan Asset-Backed Trust/Series INDS 2007-1, Current Report (Form 8-K) (Feb. 5, 2007), *available at* http://www.secinfo.com/dqTm6.ucn.htm#1stPage.

213. Some federally-regulated banks are required to have reserve funds, in the event they retain the risk of repurchase upon an event of loan non-performance. Other less-regulated originators are not subject to such reserve requirements.

214. Banking profitability began reaching record highs at the turn of the millennium. In the three months ending on September 30, 1999, banks reported $19.4 billion in net income, a record level. Office of the Comptroller of the Currency, *Condition and Performance of Commercial Banks*, 18 Q. J. 1, 1 (1999), *available at* http://www.occ.treas.gov/qj/qj18-4.pdf. Both return on assets and return on equity in the banking industry as a whole had also reached record levels. *Id.*

While minimizing risk and making money is what the banking industry does—with rewards meted out based on who does this best—with escalating profits comes the risk of complacency.[215] As a result of this complacency, originators, investors, rating agencies, insurers, lawyers, accountants, and regulators failed to recognize some of securitization's fault lines and failings in its market's operation.[216] A central failing of the market is directly tied to the "too-clever-by-half"[217] structure of many of these transactions: few investors and other participants in the market truly understood these transactions, the nature of the investments being sold, or how to evaluate the quality and value of the underlying assets.[218]

Appreciating and accurately valuing the assets supporting asset-backed securities (ABS) is fundamental to structured finance.[219] In the absence of a precise understanding and valuation of a securitized asset, the exercise in arbitrage fails, and the credit rating ends up being based upon a misunderstanding that in turn determines the faulty ABS's pricing.[220] This has the potential to further lead to failings in the

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215. With the creation of a robust secondary market for loans, in turn resulting in enormous balance-sheet flexibility, securitization has accounted for twenty to thirty percent of investment banks' profits. *Fear and Loathing, and a Hint of Hope*, ECONOMIST, Feb. 16, 2008, at 14.

216. *What Went Wrong?*, *supra* note 16.

217. As observed:

> There is a growing consensus that loose credit and too-clever-by-half financial wizardry sowed the seeds of America's still-deepening economic malaise. One practice in particular has been singled out for censure--the bundling of loans into assets that could be sold on to investors. The charge is that by breaking the link between those who vet borrowers and those who bear the cost when they default, securitisation led to the lax lending that both fuelled and felled America's housing market.

Chain of Fools, ECONOMIST, Feb. 9, 2008, at 40.

218. The SEC noted in a press release "[t]he Securities and Exchange Commission today released findings from extensive 10-month examinations of three major credit rating agencies that uncovered significant weaknesses in ratings practices and the need for remedial action by the firms to provide meaningful ratings and the necessary levels of disclosure to investors." Press Release, SEC, SEC Examinations Find Shortcomings in Credit Rating Agencies' Practices & Disclosure to Investors (July 8, 2008), *available at* http://www.sec.gov/news/press/2008/2008-135.htm.

219. *See generally* RAYNES & RUTLEDGE, *supra* note 204, at 92; Lupica, *Asset Securitization*, *supra* note 204, at 595; Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133, 135–36 (1994); Thomas J. Gordon, Comment, *Securitization of Executory Future Flows As Bankruptcy-Remote True Sales*, 67 U. CHI. L. REV. 1317, 1318 (2000).

220. The press release describing the SEC report on rating agency performance noted:

> The SEC staff's examinations found that rating agencies struggled significantly with the increase in the number and complexity of subprime residential mortgage-backed securities (RMBS) and collateralized debt obligations (CDO) deals since 2002. The examinations uncovered that none of the rating agencies examined had specific written comprehensive procedures for rating RMBS and CDOs.

Press Release, SEC, *supra* note 218.

fundamental structuring of transactions, with, for example, senior tranches' fallibility far greater than their rating (and pricing) suggests.[221]

Originators, bond insurers, investors, and rating agencies all got caught up in the exuberance of this re-imagined market.[222] The rapidity with which the market moved, the long runs of high yields, and the complexity of the investments led to over-dependence on rating agencies to evaluate risk.[223] Rating agencies, in relying upon originators to pay their fees, were faced with conflicting loyalties.[224] Moreover, it has been exposed, with the benefit of hindsight, that rating agencies relied upon financial models that were alternately based on incomplete and dated assumptions about asset value and performance.[225] Investors blindly accepted the rating agencies' assessments and substituted the agencies' evaluations as a proxy for their own diligence.[226]

The confluence of these market failings has resulted in what has alternately been described as a "credit crisis,"[227] a "melt-down" and even a "conflagration,"[228] leading to the quest for answers to the

221. OFFICE OF COMPLIANCE INSPECTIONS & EXAMINATIONS, DIV. OF TRADING & MKTS. & OFFICE OF ECON. ANALYSIS, SEC, SUMMARY REPORT OF ISSUES IDENTIFIED IN THE COMMISSION STAFF'S EXAMINATIONS OF SELECT CREDIT RATING AGENCIES (2008), *available at* http://www.sec.gov/news/studies/2008/craexamination070808.pdf.

222. *See Fear and Loathing*, *supra* note 215 (discussing the meltdown of the structured finance market). Furthermore:

> Alongside the banks, the "gatekeepers" who were supposed to lend stability and credibility to the new originate-and-distribute model of finance have also been found wanting. Rating agencies' models underplayed the risk that loans from different lenders and regions could turn sour at the same time. Bond insurers, too, misjudged the risks lurking in CDOs [collateralized debt obligations]. That failing has undermined the worth of their guarantees and strained their own credit ratings--and hence financial markets.

Id.

223. *Id.*

224. Conflicts of interest were found: "Furthermore, significant aspects of the rating process were not always disclosed or even documented by the firms, and conflicts of interest were not always managed appropriately." Press Release, SEC, *supra* note 218.

225. *Id.*

226. For example, the President's Working Group on Financial Markets' Policy Statement on Financial Market Developments identified the principal underlying causes of the recent turmoil in the financial markets. THE PRESIDENT'S WORKING GROUP ON FIN. MKTS., POLICY STATEMENT ON FINANCIAL MARKET DEVELOPMENTS 1 (2008) [hereinafter PRESIDENT'S WORKING GROUP], *available at* http://www.ustreas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.

227. *Recovery? What Recovery?*, ECONOMIST, June 7, 2008, at 31.

228. *Dousing the Fire*, ECONOMIST.COM, Mar. 14, 2008, http://www.economist.com/finance/displaystory.cfm?story_id=10855889.

questions of what, how, and why things went so wrong. When viewed in hindsight, however, it is just these factors—"the collective misjudgment of risk; a zealous search for yield; and the failure of oversight"[229]—that constitute the foundation of this market's current failure. Paradoxically, however, it is the very same factors—a willingness to bear extraordinary market risk in exchange for high return, without the burden of regulatory constraints—that were the central reasons for the market's success.[230]

IV. THE CLASS-IMPACT OF CURRENT DAY CREDIT POLICY: THE "EFFECTS" OF OVER-INDEBTEDNESS AND A FRAMEWORK FOR OVERSIGHT

The connection between consumer over-indebtedness, the disruptions in the financial markets, and the adverse impact the debt crisis has had on consumers' lives has finally been recognized, sparking much heated public and private discussion about how to "solve the problem." As part of the effort to find effective solutions, a host of proposals have recently been put forth by scholars, journalists, legislators, and the credit industry, primarily focusing on remedies at the consumer borrowing and lending level.[231] These proposals include (i) greater scrutiny of sub-prime mortgage loans and the curtailment of predatory mortgage lending,[232] (ii) the imposition of substantive restrictions on the price and terms of credit,[233] (iii) voluntary changes in the credit card industry's

229. *Barbarians at the Vault*, ECONOMIST, May 17, 2008, at 56.

230. As observed by Kevin Phillips:

> The financialization of the United States economy over the last three decades . . . has been closely tied to record levels of debt and to the powerful emergence of a debt-and-credit industrial complex. Excessive debt in the twenty-first-century United States is on its way to becoming the global Fifth Horseman, riding close behind war, pestilence, famine, and fire.

KEVIN PHILLIPS, AMERICAN THEOCRACY vii-viii (2006).

231. In May 2008, the American Bankruptcy Institute and the University of Illinois College of Law sponsored a conference entitled "A Debtor World: Interdisciplinary Academic Symposium on Debt." American Bankruptcy Institute, Meetings, http://www.abiworld.org/Debt08/ (last visited Feb. 23, 2009). Presenters at this conference "explored debt as neither a problem nor solution but as a phenomenon." *Id.*

232. PRESIDENT'S WORKING GROUP, *supra* note 226, at 1 (identifying a "dramatic weakening of underwriting standards for U.S. subprime mortgages, beginning in late 2004 and extending into early 2007" as one of the central causes of the global financial market turmoil). *See also* Havard, *supra* note 6, at 233 (advocating for regulating lenders by requiring adequate screening and monitoring activities).

233. *See, e.g.*, JAVIER SILVA & REBECCA EPSTEIN, DEMOS, COSTLY CREDIT: AFRICAN AMERICANS AND LATINOS IN DEBT 11 (2005), *available at* http://www.aecf.org/upload/publicationfiles/fe3679k636.pdf; Vincent D. Rougeau, *Rediscovering Usury: An Argument for Legal Controls on Credit Card Interest Rates*, 67 U. COLO. L. REV. 1, 2–3 (1996); Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 38 (2004).

business practices,[234] (iv) adjustments to the Bankruptcy Code,[235] (v) governmental refinancing of mortgage loans,[236] (vi) the prohibition of mandatory arbitration provisions in consumer loan contracts,[237] and (vii) early financial literacy education for consumers.[238] The events of late 2008, including the demise and near-demise of iconic investment

234. Bruce Hammonds, president of Bank of America Card Services, Richard Srednicki, chief executive officer of Chase Bank USA, and Vikram Atal, chairman and CEO of Citi Cards, appeared before a Senate Subcommittee Hearing on credit cards. *Hearing Before the S. Permanent Subcomm. on Investigations*, 110th Cong. (2007) (testimony of Vikram A. Atal, Chairman and Chief Executive Officer of Citi Cards) [hereinafter Atal testimony], *available at* hsgac.senate.gov/public/_files/STMTAtalCITIGROUP.pdf ; *Hearing Before the U.S. S. Comm. on Homeland Security and Governmental Affairs Permanent Subcomm. on Investigations*, 110th Cong. (2007) (statement of Bruce Hammonds, President of Card Services, Bank of America), *available at* http://hsgac.senate.gov/public/_files/ STMTBankofAmerica0.pdf. Mr. Atal announced changes in his bank's credit card policy. Atal testimony, *supra* note 234. Mr. Atal said his bank would no longer include a "universal default" term in credit card agreements with consumers. *Id.* at 3.

235. A Bankruptcy Code amendment whereby a loan secured by a debtor's primary residence could be "stripped down" to the market value of the house has been proposed. *See* ADAM LEVITIN & JOSHUA GOODMAN, THE EFFECT OF BANKRUPTCY STRIP-DOWN ON MORTGAGE MARKETS (Georgetown Law and Economics, Research Paper No. 1087816, 2008), *available at* http://ssrn.com/abstract=1087816 (reporting on a study which found that mortgage markets are indifferent to bankruptcy modification risk).

236. Chairman of the Senate Banking Committee Chris Dodd proposed the creation of a modern version of the Home Owner's Loan Corporation to refinance home mortgages. Chris Dodd, United States Senator for Connecticut, Opening Statement: "Examining Proposals to Mitigate Foreclosures and Restore Liquidity to the Mortgage Markets" (Apr. 10, 2008), http://dodd.senate.gov/?q=node/4366.

237. *See* MARK J. FURLETTI, MANDATORY ARBITRATION CLAUSES IN THE CREDIT CARD INDUSTRY (Federal Reserve Bank of Phil. Payment Cards Center, Discussion Paper No. 03-01, 2003), *available at* http://ssrn.com/abstract=927078 (describing the arbitration process as a "conflict resolution mechanism in the payment cards industry"). The problem as described by Senator Russ Feingold:

> [T]here is a growing and menacing trend of credit card companies and consumer credit lenders slamming the courthouse doors shut on consumers. [Issuers] insert mandatory binding arbitration clauses in their agreements with consumers often without the consumer's knowledge or consent. . . . [I]f the consumer continues to use the card, it . . . must use arbitration, and the arbitration decision is final. . . . Mr. Chairman, the problem extends beyond creditors. It is also a growing practice in the consumer loan industry. . . . Some consumer borrowers may not fully understand exactly what mandatory binding arbitration is, and they certainly are not represented by counsel.

Overview of Contractual Mandatory Binding Arbitration: Hearing Before the S. Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary, 106th Cong. 12 (2000) (statement of Hon. Russell D. Feingold, U.S. Sen. from the State of Wisconsin), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid =f:72661.pdf.

238. Sandra Braunstein & Carolyn Welch, *Financial Literacy: An Overview of Practice, Research, and Policy*, 88 FED. RES. BULL. 445, 445–46 (2002), *available at* http://www.federalreserve.gov/pubs/bulletin/2002/1102lead.pdf (evaluating the research on and best practices for financial literacy education programs).

banks,[239] the breakdown of Fannie Mae, Freddie Mac[240] and the American Insurance Group (AIG), the unprecedented volatility in the stock market,[241] and corresponding freeze in the credit markets[242] have all resulted in additional enactments and proposals designed to "fix" the damaged credit markets. The government takeover of Fannie Mae and Freddie Mac,[243] the infusion of over $250 billion from the United States Treasury into American banks, the "bailout" of AIG, the commercial paper back-stop program, and the proposal to expand the reach of the Federal Deposit Insurance Corporation are now being trumpeted as the way out of this crisis.[244]

While, to varying degrees, each one of these ideas has merit, in the absence of a broad-based comprehensive plan to address past harms to consumers, coupled with a wide-ranging strategy for ensuring that a crisis of the present magnitude does not happen again, these proposals being sold as "solutions" ring hollow. They will have nothing more than a palliative effect because they fail to reflect a full recognition of the essential problem at the foundation of the crisis: that the fundamental underlying cause of the consumer debt crisis is found in the incentives that have shaped the very structure of the consumer and credit marketplaces.[245] Consumer debt provided the fuel for the explosion of the markets for consumer goods, services, and credit. Debt became necessary to sustain the markets' very existence, and thus

239. *See supra* note 3 and accompanying text (chronicling recent turmoil in the financial markets and the extraordinary reaction by the Treasury Department).

240. As noted in the *Economist*:

> It may be called a "conservatorship", but the seizure of Fannie Mae and Freddie Mac is, in effect, a government takeover. Whether this boldness improves the outlook for America's economy depends on the answer to two big questions. First, will government control of Fannie and Freddie help solve America's housing mess? Second, would stability in the housing market be enough to turn around the economy? The answer to the first question is a qualified yes. It is hard to overstate Fannie's and Freddie's importance in the housing market, both as holders or guarantors of half of America's mortgages, and as lenders who have stepped in as private finance has collapsed. Over the past year they increased their lending by about $600 billion, or 12%, and this year they have financed four out of five mortgages. Without this cushion America's housing bust would be far worse.

Paulson's Pluck, ECONOMIST, Sept. 13, 2008, at 40.

241. *Bad Vibrations*, ECONOMIST, Nov. 1, 2008, at 39.

242. *See supra* note 4 and accompanying text (providing comments made by Federal Reserve Chairman Bernanke).

243. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

244. *America Catches Up*, *supra* note 3.

245. *The Faith that Moves Mammon*, ECONOMIST, Oct. 18, 2008, at 35 (observing that the "glue that binds the whole [financial] system together is trust. . . . When it works well, the banking system underpins trust and allows strangers to deal with each other safely.").

widespread incentives to increase consumer debt levels emerged. Accordingly, without an alteration of market incentives and a major re-tooling of expectations at every level, the problem will not be solved and the current crisis will repeat itself.

At a minimum, greater public oversight of credit transactions at every level is necessary to address many of the debt crisis's causes and effects. The thorny issue, however, is the nature and degree of such oversight.[246] The concern, of course, is that greater regulation of the consumer credit markets will adversely impact the lives of consumers, particularly financially marginal consumers, by limiting or cutting off a source of needed funds.[247]

For all of the harms that flow from easy credit access, credit serves a very important function: it acts as a private safety net, often necessary for short and long-term well being.[248] As noted, in many circumstances, credit is needed to navigate financial hardships and cash-flow interruptions.[249] Particularly for consumers with lesser means, credit can be and is used when food stamp or other public assistance payments are interrupted, upon threats of, or actual eviction, when the car breaks down, and at times of disruption of health care coverage.[250]

Moreover, one of the oft-cited benefits of access to credit, particularly in the form of credit cards, is the private nature of the loan.[251] Unlike emergency public assistance, no "criteria of need" must be met, nor must the nature of the emergency be disclosed.[252] Credit card transactions are private and anonymous, void of any stigma at the

246. Glenn B. Canner & James T. Fergus, *The Economic Effects of Proposed Ceilings on Credit Card Interest Rates*, 73 FED. RES. BULL. 1, 1–2 (1987) (finding that usury caps led to the contraction of credit availability); Christopher C. DeMuth, *The Case Against Credit Card Interest Rate Regulation*, 3 YALE J. ON REG. 201, 238–42 (1986) (finding that usury caps led to the contraction of credit availability).

247. 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.").

248. Littwin, *supra* note 183, at 19.

249. MANNING, *supra* note 1, at 22 ("Credit helped to buffer the fall from the middle class, cope with unexpected emergencies, shield embarrassing economic circumstances from family and friends, and even provide the initial financing to start a small business."). What may be considered a nuisance—a broken appliance, a car in need of repair, a minor illness, or disrupted child care—threatens many consumers' ability to even stay employed. SHIPLER, *supra* note 165, at 4.

250. Littwin, *supra* note 183, at 20.

251. *Id.*

252. *Id.*

point of borrowing or purchase.[253] Needed funds can be obtained immediately, without any bureaucratic delay or obstacle.

Furthermore, credit cards have become essential for many transactions common to consumers of all classes. Necessary to rent a car, check into a motel, rent a video, and make on-line purchases, in their absence, many opportunities that fall both in the "needs" and "wants" categories are foreclosed.[254] Particularly for low-means consumers without access to a full range of traditional banking services,[255] curtailing access to credit may cause those already marginalized to "fall further out of the mainstream."[256]

With respect to mortgage-related credit, without its reasonable availability, it would not be possible for many to purchase a home. Many studies document the individual and community benefits of home ownership, including its encouragement of family stability and responsibility. Additionally, as the largest asset held by most families, homeownership has a direct impact upon inter-generational wealth transfers.[257]

Without a doubt, credit has become an essential part of the consumer economy and is relied upon by many as both a convenience and a necessity. But with increasingly creative and complex credit transactions taking place in a virtually unregulated environment, the fallacy that the transformed and liberalized market offers more good than harm to consumers has been exposed. As noted:

> Of course, [market] liberalizing measures were pursued in the belief that they would generate positive effects. Classical economic philosophy holds that the liberalization of market activity will increase

253. *Id.*

254. Low income consumers cited the necessity of having a credit card to rent a car to attend weddings and funerals. *Id.* at 22.

255. Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 123 (2004).

256. Littwin, *supra* note 183, at 23.

257. SHERRADEN, *supra* note 54, at 192. Even home equity loans provide benefits to consumers. For example, such secured credit is generally offered at lower interest rates than the unsecured credit associated with credit cards, personal loans, and loans made by the "fringe banking" industry. Additionally, tapping home equity may allow consumer-homeowners to pay college tuition, make needed home repairs, or simply, "maintain smooth consumption during fluctuations in income." CHARLES W. CALOMIRIS & JOSEPH R. MASON, HIGH LOAN-TO-VALUE MORTGAGE LENDING: PROBLEM OR CURE? 49 (1999), *available at* http://www.aei.org/doclib/20021130_71252.pdf. It has been further argued, however, that high loan-to-value secured lending reduces the probability of default because of the greater consequences associated with default—the loss of a home. The mortgage lender has a senior claim on a consumer's income, which positions it at the front of the repayment line at the time of a consumer's financial distress. Also characterized as a financial product that provides a strong deterrent to default, these arguments are premised on the idea that (i) real estate values will increase, rather than decrease, and (ii) default is a choice that can be deterred. *Id.*

> both national and international efficiency. Because efficiency maximizes wealth creation, such policies could also be said to maximize social welfare. To equate social welfare with aggregate social wealth, however, is to adopt only one of a number of potential measures of social welfare. Even if one ignores measures of welfare not related to wealth, the equation of social welfare with national wealth overlooks distributive concerns. Indeed, efficiency-increasing measures such as economic liberalization may exacerbate preexisting distributive inequalities. Classical economic measures of efficiency and welfare are simply "indifferent to the distribution of income and wealth.[258]

The past months have exposed not simply credit market inefficiencies, but credit market dysfunction of the highest order.

Notwithstanding the magnitude of the crisis, however, any regulatory proposals will be greeted with resistance: a classic response to any new regulatory proposal is the cry of "the sky is falling," and in this context, the cry will be, "credit will dry up."[259] Studies have demonstrated, however, that regulation does not always and necessarily have such anticipated and predicted effects.[260] For example, when the United States Court of Appeals for the Fifth Circuit announced a new rule limiting the terms pursuant to which non-bankruptcy mortgage foreclosures would be allowable,[261] immediate predictions that this rule would shut down the consumer home mortgage market were made.[262] Pundits called for an emergency statutory amendment that would, in essence, repeal the rule.[263] In the interim, however, when there was no

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258. Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451, 1482 (2000) (footnote omitted).

259. *Id.*

260. *Id.*

261. Durrett v. Wash. Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980).

262. *Durret v. Washington National Insurance Co.* stated that the foreclosure bid-in price had to at least equal seventy percent of a home's value or the foreclosure could be avoided as a fraudulent transfer. *Id.* at 203 ("We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of the Act, which has approved the transfer for less than 70 percent of the market value of the property.").

263. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 378–79 (1984). *See* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 775 (3d ed. 1993) (noting that redemption rights "do not threaten the validity of pre-bankruptcy foreclosure sales"); William A. Walsh, *In Re Bundles: Finding a New Basis for Determining "Reasonable Equivalent Value" Under Section 548 of the Bankruptcy Code*, 40 DEPAUL L. REV. 175, 177–78 (1990) (proposing an amendment to the Bankruptcy Code to eliminate conflicting applications of the term "reasonable equivalent value"); Robert A. Glaves, Comment, *The Controversy over Section 548 of the Bankruptcy Code in the Mortgage Arena: Making the Case for a Federal Statute Reforming the Foreclosure Process*, 23 J. MARSHALL L. REV. 683, 686 (1990) (arguing for "a federal foreclosure reform statute preempting state

such repealing legislation, the market adjusted and the home lending market, both pre- and post-rule, was unaffected.[264]

The popular wisdom associated with the enactment of Sarbanes-Oxley Act provides a more recent example of an overstated prediction of the impact of a regulatory scheme.[265] As noted in a recent article:

> It has become received wisdom on Wall Street that the Sarbanes-Oxley Act has damaged American competitiveness. It made listing in the American market less attractive to foreign companies and drove initial public offerings overseas. It raised costs for American companies without providing any significant benefit.[266]

A new study, however, found that among the sample of foreign companies studied, the wisdom that greater regulation adversely impacted a firm's performance turned out to be false: those firms with good growth prospects suffered a decline in stock price upon leaving the American markets in an effort to avoid the reach of Sarbanes-Oxley.[267]

Sarbanes-Oxley was enacted largely in response to a crisis of confidence in the public markets.[268] We are currently seeing a similar erosion of confidence in the credit markets at every level. The financial markets' imperfections have created rents that have been captured by creditors and related parties at the expense of consumers.[269] The shift of these rents has adversely affected consumers' market choices, as well as "economic opportunities and the investments that maximize these

foreclosure laws"); Steven M. Alden Steven R. Gross & Peter L. Borowitz, *Real Property Foreclosure As a Fraudulent Conveyance: Proposals for Solving the* Durrett *Problem*, 38 BUS. LAW. 1605, 1607 (1983) (discussing the distinction between types of foreclosure sales, foreclosure sales as transfers, and the standard for reasonably equivalent value). *See also* 11 U.S.C. § 101(54) (2006) (defining "transfer").

264. Philip Shuchman, *Data on the* Durrett *Controversy*, 9 CARDOZO L. REV. 605, 607 (1987) ("[T]he Fifth Circuit's decision in *Durrett v. Washington National Insurance Co.*, in conjunction with *In re Hulm*, four years later, was expected to wreak havoc on the mortgage credit markets in states bound by that doctrine. But reference to the relevant financial data measured from the year before *Durrett* through 1985, strongly suggests that the anticipated harms did not materialize; or, if to some extent, they did, the effects were short-lived.").

265. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

266. Floyd Norris, *Reasons Some Firms Left the U.S.*, N.Y. TIMES, Aug. 8, 2008, at C1.

267. CRAIG DOIDGE, GEORGE ANDREW KAROLYI & RENE M. STULZ, WHY DO FOREIGN FIRMS LEAVE U.S. EQUITY MARKETS? AN ANALYSIS OF DEREGISTRATIONS UNDER SEC EXCHANGE ACT RULE 12H-6 (Fisher College of Business, Working Paper No. 2008-03-013, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1204442.

268. Stephen Wagner & Lee Dittmar, *The Unexpected Benefits of Sarbanes-Oxley*, 84 HARV. BUS. REV. 133, 134 (2006). *But see* GREGORY C. LEON, STIGMATA: THE STAIN OF SARBANES-OXLEY ON U.S. CAPITAL MARKETS (GWU Law School Public Law Research Paper No. 224 2006), *available at* http://ssrn.com/abstract=921394 (arguing that American equity markets have suffered from the implementation of Sarbanes-Oxley).

269. *Wealth Gap Is Increasing, U-M Study Shows*, U. MICH. NEWS SERVICE, Aug. 7, 2007, http://www.ns.umich.edu/htdocs/releases/story.php?id=5981.

opportunities."[270] Thwarted opportunities and extreme imbalances in information and power destabilize the legitimacy that a market-oriented system demands. Markets gain legitimacy from the public's trust, and when such trust is undermined, intervention becomes necessary. Economic growth and profits drove the design of the financial system, and in light of the markets' externalities, limits on the design must be crafted.[271]

As a threshold matter, a number of fundamental measures must be put in place to alter the incentives driving the participants in the financial markets. Higher capital requirements must be imposed upon banks, in light of the revealed inadequacy of the levels currently required. Greater retained capital will go a long way toward ensuring greater stability among lenders. Second, securitizing originators must be required to retain a significant portion of the securities they originate. In this way, credit underwriting risk is shared, and not simply transferred. Moreover, pricing models for mortgage-backed securities must reflect the market reality that real estate values cyclically fall—as well as rise. Disclosure and oversight of derivative transactions, including credit default swaps, must be regulated under federal securities laws, not simply by state law insurance statutes, if at all. Additionally, credit rating agencies' role in the markets must be dramatically re-imagined. With their "reputational capital" dissipated, they must labor to regain their credibility by, at a minimum, erasing any potential for the appearance of or actual conflicts of interest. Ultimately, because the collapse of the financial markets has demonstrated that faulty and inadequate pricing and risk assessment holds the potential for catastrophic and wide-ranging third-party effects, regulation must require that the transaction parties bear the financial consequences for their misjudgment.

This pervasive misjudgment among the players in the borrowing-lending-selling-investing cycle has impacted consumers' lives with the force of a hurricane.[272] In the absence of adequate income, assets, or public financial safety net to meet basic needs, consumers have

270. Sorensen, *supra* note 54, at 130. The presence or absence of net wealth serves to shape both "welfare and well-being, as well as economic opportunities and the investments that maximize these opportunities." *Id.*

271. Relative mobility is defined as the ability of people to move from one class to another, which is tied to the issue of opportunity. JULIA B. ISAACS, ISABEL V. SAWHILL & RON HASKINS, GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA (2008), *available at* http://www.economicmobility.org/assets/pdfs/Economic_Mobility_in_America_Full.pdf.

272. *See supra* notes 1–7 and accompanying text (describing the events and results of the lending crisis).

accessed the credit markets. While ensnared in the cycle of indebtedness, many families have been forced into a position of further reliance upon ever-more debt.[273] At the point where a consumer's liabilities eclipse his or her assets, the indicators of upward class mobility—economic equilibrium and stability, the ability to enhance human capital in order to specialize, the wherewithal to take risks and have a positive vision of the future, as well as the capacity to offer future generations greater opportunities—correspondingly disappear.[274] By sanctioning levels of indebtedness beyond consumers' ability to repay, these policies have shifted the risk of loss from the financial industry to the consumer.[275] This risk shift and corresponding losses have resulted in skewed allocations of social, economic, and political power at the macro level and autonomy at the micro level.[276]

273. *Id.*

274. For example, the impact of a family's mortgage loan default and ensuing eviction not only adversely affects the stability of the family forced to move. Payment defaults and the resulting blight on credit scores also impact the family's future opportunities on a variety of fronts, including the "labor and insurance and rental housing market." Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 58 (2006), *available at* http://www.nw.org/network/neighborworksProgs/foreclosuresolutions/pdf_docs/hpd_4closehsgprice.pdf. Moreover, the loss of a home is the loss of an asset that could have been handed down to the next generation. *Id.* Furthermore, the consequences of over-indebtedness spill over beyond the private and into the public realm, upsetting not only individuals and families, but entire communities. *External Effects of Concentrated Mortgage Foreclosures: Evidence from New York City: Hearing Before the Comm. on Oversight and Government Reform, Subcomm. on Domestic Policy*, 110th Cong. (2008) (testimony of Vicki Been, Elihu Root Professor of Law, Director, Furman Center for Real Estate and Urban Policy, New York University), *available at* http://domesticpolicy.oversight.house.gov/documents/20080522105505.pdf. A neighborhood littered with abandoned homes is one more likely to be marked by social and physical disorder and unchecked decay. *Id.* at 3 ("[P]roperty owners who are in default on their mortgages may be less likely to maintain or upgrade their properties, either because they have less incentive to maintain property they may lose, or because the mortgage default results from financial problems that also constrain the property owners from taking appropriate care of their homes. Properties may start to appear rundown as a result, which may make the surrounding homes less desirable.").

275. The risk shift has resulted in debt-laden consumers not only suffering financially, but also becoming vulnerable to a range of other physical, social, and family problems. In a study conducted by researchers at the Brookings Institute it was observed:

> Largely over the next 2 years, an estimated 2 million children will be directly impacted by the mortgage crisis as their families lose their homes due to foreclosures. . . . When foreclosures force children from their homes, their education is disrupted, their peer relationships crumble, and the social networks that support them are fractured. Indeed, their physical health, as well as their emotional health and well-being, is placed at risk.

Phillip Lovell & Julia Isaacs, *The Impact of the Mortgage Crisis on Children and Their Education*, FIRST FOCUS, Apr. 2008, at 1, *available at* http://www.brookings.edu/~/media/Files/rc/papers/2008/04_mortgage_crisis_isaacs/04_mortgage_crisis_isaacs.pdf.

276. A recent AP/AOL survey found that high levels of debt have been linked to a variety of physical and mental ailments, such as "headaches, back pain, depression, severe anxiety, ulcers

Moreover, these losses have directly foreclosed many consumers' opportunities for future asset accumulation and wealth, thus making transformations difficult to effectuate and sustain.[277] It is the accumulation of assets—both intra and inter-generationally—that results in fluid opportunity and class mobility.[278] Furthermore:

> [A]ssets have a variety of important social, psychological, and economic effects. Simply put, people think and behave differently when they are accumulating assets, and the world responds to them differently as well. More specifically, assets improve economic stability; connect people with a viable, hopeful future; stimulate development of human and other capital; enable people to focus and specialize; provide a foundation for risk taking; yield personal, social, and political dividends; and enhance the welfare of offspring.[279]

At the most fundamental level, class positioning is reflective of wealth: "the inherited accumulation of property, competencies, beliefs, tastes, and manners that determines, for most of us, our socioeconomic lot and our share of civic power."[280] While wealth is keyed to class position, "the distribution of opportunity follows that of wealth."[281] In

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and heart problems," impacting over-indebted consumers' quality of life and the hope for a better future in the most fundamental way. Mary Kearl & Caroline Howard, AOL Health, AP/AOL Survey: Americans Maxed Out, Stressed Out, http://www.aolhealth.com/healthy-living/debt-stress (last visited Feb. 27, 2009). An article discussing the survey noted:

> When compared with those with lower stress, high stress people were more than 13 times [sic] to toss and turn at night, more than seven times as likely to experience severe anxiety and nearly seven times as likely to lash out at others. Severe depression showed up nearly six times as often. Debt stressors are also nearly four times as likely to have ulcers or other digestive tract problems and twice as likely to have had heart problems and migraines and headaches.

Id. *See also* Erik Olin Wright, *Foundations of a Neo-Marxist Class Analysis*, *in* APPROACHES TO CLASS ANALYSIS 4, 21-22 (Erik Olin Wright ed., 2005) (explaining that "class" has "significant, systematic consequences" at macro- and micro-levels).

277. As noted:

> When human beings are secure in the present, they tend to look toward the future. For most people, it is not so much today that matters, but tomorrow, the dream, the chance, the hope of improvement. . . . Middle-class people, on average, have stronger future orientations than do lower-class people. The poor tend to be oriented toward the present, and tend not to work toward long-term goals. . . . life chances (structural limitations and opportunities) [are related to] . . . assets, which in turn shape opportunity structures, which in turn are quickly internalized. This process might be called the construction of future possibilities.

SHERRADEN, *supra* note 54, at 151–52 ("This . . . relates to the concept of life chances developed by Max Weber and Ralf Dahrendorf.").

278. *Id.* at 148.

279. *Id.*

280. DEMOTT, *supra* note 23, at 10.

281. JARED BERNSTEIN, CRUNCH 50 (2008) (using inequality as the starting point to understanding American economics).

addition, "[w]hen too many economic resources are held by too few, when the benefits of growth elude broad swaths of working families, opportunity itself becomes a rare commodity, out of the reach of the majority. Too much inequality precludes a meritocracy."[282]

The idea that America is a meritocracy lies at the foundation of our society. Inequality is tolerated so long as hard work will result in the improvement of one's location along the class continuum.[283] Paradoxically, as citizens and consumers, we claim to believe in the importance of opportunity and mobility, but at the same time we have acquiesced to the public and private policies that have foreclosed them.[284]

V. CONCLUSION

Over the past decades, consumer spending and corresponding indebtedness have provided the central source of fuel for the country's economic growth: as a collective resource, consumers have been the chief target of exploitation by the providers of goods, services, and credit. The enormous investments made in the creation and maintenance of the transformed consumer markets have driven this exploitation. As the supporters of the policies behind the markets' transformation began to affirmatively recognize that high levels of consumer debt were necessary to sustain the markets' unprecedented profitability, a relentless campaign was waged to convince, cajole, and coerce consumers to build their lives around consumption through the routine use of credit. The hegemony of the markets has proven to be a powerful force, inexorably altering cultural norms, consumer behaviors, and attitudes toward debt.

The forces that have created this condition must be acknowledged before steps can be taken to address them. If these policies and their impact on class mobility are not acknowledged, they cannot be discussed. If these issues are not discussed, the larger forces that have created the current debt crisis will not be identified or acknowledged

282. *Id.*

283. Moberg, *supra* note 45 ("The myth of the self-made man is American culture's own special heart of darkness, helping to explain both its infectious optimism and ruthless greed. The idea holds enough truth and seductiveness to make it easy to forget its delusional dangers.").

284. Currently, wealth is highly concentrated among Americans: the wealthiest one percent of families own a third of all accumulated assets. JOHN L. CZAJKA, JONATHAN E. JACOBSON & SCOTT CODY, U.S. SOC. SEC. ADMIN., SURVEY ESTIMATES OF WEALTH: A COMPARATIVE ANALYSIS AND REVIEW OF THE SURVEY OF INCOME AND PROGRAM PARTICIPATION, http://www.ssa.gov/policy/docs/ssb/ v65n1/v65n1p63.html (last visited Feb. 27, 2009).

and naïve, confined, palliative, and ineffectual solutions will be the only ones offered. Only when we see the connection between the myth of classlessness and the privilege enjoyed by those with social, economic, and political power can we begin to systematically address the major spheres of class injustice.