VANISHING FINANCIAL FREEDOM

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INTRODUCTION

As a nation, we value freedom. We have fought numerous wars here and abroad all for the sake of protecting freedom. The freedom we value most is political freedom. In our zeal to safeguard our civil liberties, civil rights, and other forms of political freedom, however, we somehow lost sight of the encroaching threats to our financial freedom. Indeed, after decades of neglect, our financial freedom is now the freedom that is most at risk.

For the last several decades, we have narrowly construed financial freedom to be the virtually unlimited right to engage in financial transactions unimpeded by governmental intervention or regulations. This construction of financial freedom encourages people to incur massive amounts of debt since any attempt to *prevent* them from exercising their financial freedom arguably would be a form of unfreedom. The current financial crisis vividly and painfully demonstrates, however, that far too many people in the United States lack real control over their financial lives.

This Article uses the current economic crisis to show how giving people the freedom to bury themselves in debt gives them an illusion of freedom, but ultimately deprives them of any true sense of financial freedom. Part I of this Article discusses freedom generally and financial freedom specifically. This Part also shows how most discussions of "freedom" involve political liberty and argues that this country has never protected financial freedom as vigorously as it has protected political freedom.

Part II examines how our societal views of consumerism and debt have changed over time and how a society that once scorned overspending slowly became consumed by the desire to consume. Part III considers how much freedom is *too* much freedom and then shows how giving people an almost unlimited right to exercise the freedom to make investment and spending decisions may not be in their long-term best interest. This Part notes that the value we place on freedom of contract may be one reason we reluctantly regulate potentially harmful financial activities.

Part IV discusses the "new" unregulated financial freedom consumers have and then lists the consequences that often result when consumers have too much financial freedom. Part V explains why financial freedom is vanishing and why giving people the power to go into debt gives them the illusion of freedom, but does not give them true financial freedom. Moreover, the temporary illusion of financial freedom causes people to make unwise spending decisions that ultimately strip them of control over their finances and render them incapable of managing their financial lives. Part VI presents the most frequently cited causes for our changed norms

about thrift and frugality, and our seeming willingness as a nation to accept a culture of consumer indebtedness. The Article concludes by showing how over-indebtedness and our almost total lack of financial freedom increasingly impose sometimes unexpected personal and external costs on individuals as well as the U.S. as a whole.

I. FREEDOM

A. Generally

> "*To coerce a man is to deprive him of freedom—freedom from what?*"[1]

Freedom has been described as a term that is "so porous that there is little interpretation that it seems able to resist."[2] People often disagree about the precise definition of freedom, and the meaning of the term seems to differ depending on the person's moral and political worldview.[3] Perhaps the most basic and common understanding of freedom is that it allows you to choose, and then to achieve, a goal without anything or anyone intentionally impeding your actions.[4] Though people might disagree about the exact contours of the definition of freedom, most would agree that more freedom is better than less freedom since greater freedom gives you more opportunities to help yourself, control your life, and maybe even influence other people or things.[5]

Freedom most often is expressed in positive and negative terms and usually is thought to have two fundamental, but often conflicting, parts: freedom *from* and freedom *to*.[6] Positive freedom generally examines what or who is the source of control or interference that determines whether a person can engage in certain activities.[7] A person would have positive freedom if she has the physical and mental ability to choose goals and nothing prohibits her from planning for, and exercising control over the achievement of, those goals. Positive freedom anticipates that the person can predict what will happen as she strives to achieve her goals, or whether she likely will be able to achieve her goals, based on an understanding

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1. ISAIAH BERLIN, LIBERTY 168 (Henry Hardy ed., 2002).
2. *Id.*
3. GEORGE LAKOFF, WHOSE FREEDOM? THE BATTLE OVER AMERICA'S MOST IMPORTANT IDEA 22 (Farrar, Straus, and Giroux 2006).
4. *Id.* at 25, 29.
5. AMARTYA SEN, DEVELOPMENT AS FREEDOM 18 (1999); RONALD T. WILCOX, WHATEVER HAPPENED TO THRIFT? WHY AMERICANS DON'T SAVE AND WHAT TO DO ABOUT IT 60 (2008) ("Freedom to choose implies a greater capacity for self-expression and actualization.").
6. LAKOFF, *supra* note 3, at 30.
7. BERLIN, *supra* note 1, at 169.

that her decisions will not be affected by external forces like the negative intervention of others.[8] Negative freedom is generally defined by the limits, barriers, restrictions, or impediments that are placed on a person's ability to act. Thus, freedom is often defined by what it is not: you are free if you are *not* in chains, imprisoned, enslaved, trapped, oppressed, held down, held back, or powerless.[9]

Freedom requires more, however, than just the absence of impediments to act. Freedom includes the process and procedure that is needed to exercise freedom and also the capacity to seize actual opportunities that freedom provides.[10] Thus, to have freedom, a person must have access or adequate opportunities to achieve the goals that he or she would like to achieve because even if there is no actual prohibition against a certain activity or decision, a person lacks freedom if he or she is deprived of the opportunity to engage in an activity or to make a decision.[11]

B. Financial Freedom

Defining personal financial freedom is perhaps even more complicated than defining freedom itself. Defining financial freedom requires some combination of the following: evaluating the morally and politically charged concept of freedom; calculating how to equitably assess financial resources; determining when (or whether) a person has a meaningful opportunity to use his allocated resources; and, deciding how much responsibility people should take for the choices they make when using their allocated resources.[12]

Financial freedom, at a minimum, serves to shield people from things they do *not* want, including hunger, homelessness, illnesses, or dangers.[13] Most people would agree that if you fall below a certain minimum level of resources you cease to have financial freedom.[14] Indeed, financial freedom is often defined by what it is *not*, as economic slavery is the term that often is used to describe people who are too poor to afford things or participate in legally permissible activities.[15] It is, of course, possible for a person to have financial freedom even if his financial resources are small relative to others. However, financial freedom necessarily assumes that the

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8. *Id.*; LAKOFF, *supra* note 3, at 25.
9. LAKOFF, *supra* note 3, at 29.
10. SEN, *supra* note 5, at 17.
11. *Id.*; LAKOFF, *supra* note 3, at 30.
12. SEN, *supra* note 5, at 72–73, 283–85. *See* EDWIN R.A. SELIGMAN, THE ECONOMICS OF INSTALMENT SELLING 275 (1927) ("Because some individuals or even some classes are so improvident as to allow themselves to be caught in the maelstrom of discouragement, shall we say that this represents a true picture of credit, whether in the form of instalment selling or of any other variety?").
13. SEN, *supra* note 5, at 17.
14. BERLIN, *supra* note 1, at 170.
15. Examples would include purchasing a loaf of bread or filing suit in court. *Id.*

person has adequate access to, and the opportunity to use, at least a minimal amount of financial resources since it would be meaningless to conclude that a person has financial freedom if he or she is completely deprived of the opportunity to engage in even basic financial activities.

In general, people have financial freedom if they can plan for future spending decisions, or can make reasonable predictions about their future ability to spend money or make purchases. A person would lack economic or financial freedom if he cannot make spending decisions or choices because of monetary limitations or restrictions, or if an external factor or process prevents him from being able to control his spending decisions. Assuming a person is above the economic slavery threshold, whether a person who fails to engage in particular financial transactions has financial freedom would depend on the causes for the failure to participate in those activities and whether that failure is caused by the individual's lack of responsibility or by factors outside of his control. Even if a person has the actual means to participate in certain economic activities, she would not have financial freedom if she is prevented from making use of that freedom or otherwise controlling (by planning for or making choices about) her economic decisions.[16]

C. Protecting Freedom: Historically

Most current debates over freedom concern political freedom, i.e., civil rights and civil liberties, and this type of freedom is often discussed in the context of the need or desire to protect against slavery, oppression, and tyranny.[17] Of course, this is not surprising given the revolutionary origins of this country. Ever since the political leaders in this country declared our independence from England, we have had an almost single-minded national focus on protecting political rights and liberties and on ensuring that citizens have the right to determine who will govern the country and which principles will be used to govern them.[18]

Other countries have protected socioeconomic or financial rights in their constitutions.[19] In contrast, the U.S. has never been willing to ensh-

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16. *Id.* at 171, 178; SEN, *supra* note 5, at 25, 284.

17. SEN, DEVELOPMENT AS FREEDOM, *supra* note 5, at 17, 38. For example, I recently attended a luncheon sponsored by the Anti-Defamation League in Austin, Texas. In the context of introducing the recipient (the President of the University of Texas-Austin) of the Jurisprudence Award, prominent trial lawyer Joe Jamail discussed the importance of protecting "freedom." In doing so, he linked that term with the Rule of Law and the need to protect citizens against slavery and anarchy.

18. Political freedom has been described as "the opportunities that people have to determine who should govern and on what principles, and also include the possibility to scrutinize and criticize authorities, to have freedom of political expression and an uncensored press, [and] to enjoy the freedom to choose between different political parties." SEN, *supra* note 5, at 38.

19. The constitutions of at least 54 countries, on all continents except Antarctica, guarantee economic or financial rights. For example, Afghanistan provides that "[d]ebt shall not curtail or deprive the freedom of the individual," while Costa Rica ensures that "[n]o person may be imprisoned for

rine financial freedom with the same protections we have given the freedom not to be oppressed, tyrannized, enslaved, or otherwise deprived of our political rights.[20] Moreover, early U.S. political leaders appear to have knowingly rejected the notion of characterizing financial rights as basic unalienable rights. For example, the Virginia Declaration of Rights provided:

> [A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, *with the means of acquiring and possessing property*, and pursuing and obtaining happiness and safety.[21]

Thomas Jefferson is thought to have relied extensively on this document and to have adapted much of its text when writing the Declaration of Independence.[22] But, the Declaration of Independence omits economic or financial rights from the list of inalienable rights that are protected, an oddity that has long puzzled historians.[23]

D. Modern Protections

The Fifth and Fourteenth Amendments to the U.S. Constitution and various federal statutes do, of course, protect individual property rights.[24]

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debt." CONST. OF ISLAMIC REP. OF AFG. ch. 2., art. 32, *available at* http:// www.president.gov.af / Contents/ 68/ Documents/ 213/ ChapterTwo Fundamental RightsAnd Duties OfCitizens.html; Pol. CONST. OF THE REP. OF COSTA RICA tit. IV, art. 38, *available at* http:// usembassy.or.cr/ engcons4.htm.

20. Countries also protect economic or financial through multilateral treaties. For example, China, Japan, and all other industrialized Western states (except the United States) have ratified the International Covenant on Economic, Social and Cultural Rights, a multilateral treaty that requires the state to assure its people an adequate standard of living. Barbara Stark, *Theories of Poverty/The Poverty of Theory*, 2009 BYU L. REV. 381, 394 (2009). *See also* UNESCO, HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 54–110 (Yvonne Donders & Vladimir Volodin eds., Ashgate 2007); Taynya Lovell Banks, *A Few Random Thoughts About Socio-Economic "Rights" in the United States in Light of the 2008 Financial Meltdown*, 24 MD. J. INT'L L. & TRADE 169 (2009); Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557 (2003).

21. JOSEPHINE F. PACHECO ET AL., THE LEGACY OF GEORGE MASON 139 (Josephine F. Pacheco ed., George Mason U. Press 1983) (emphasis added).

22. ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE 56, 132 (1998); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 104, 165 (1997).

23. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (listing "Life, Liberty and the pursuit of Happiness" as the unalienable rights that needed protection). *See* GARRY WILLS, INVENTING AMERICA—JEFFERSON'S DECLARATION OF INDEPENDENCE 229 (1978) ("Those who think Jefferson's Declaration is Lockean have been justifiably puzzled by the omission of property from the brief list of 'inalienable rights' in that document.").

24. U.S. CONST. amend. V, XIV, § 1; 11 U.S.C. § 522 (2006) (protecting right to exempt prop-

However, from the Revolutionary War to the Civil War, to the U.S. involvement in World War II after the attack on Pearl Harbor, to the terrorist attacks on the U.S. on 9/11, the freedom this nation has tenaciously fought to protect has largely focused on political rights and liberties.[25] For example, just in the last two years Congress has passed at least five new laws,[26] and the Supreme Court has issued at least five opinions that are designed to protect political freedom or protect against the erosion of civil liberties or other noneconomic freedoms.[27]

To be sure, during this period individual members of Congress have introduced legislation that would have protected consumers from the harms associated with certain financial transactions and, after years of failed attempts, finally passed legislation that is designed to improve accountability and transparency in the financial system and to exercise better regulatory powers over mortgages and credit cards.[28] Congress—as a whole—seemed more intent on protecting the political freedom of U.S. citizens and those under the control of the U.S. government than preventing those same people from the financial ruin often associated with high-cost consumer credit transactions. Thus, during the same period that Congress and the Supreme Court have assiduously protected political freedom, Congress considered at least eight bills that give struggling homeowners relief from foreclosures or other housing-related financial problems.[29]

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erty in bankruptcy); 17 U.S.C.S. § 106 (LexisNexis 2009) (protecting right in copyrighted works); 18 U.S.C. §§ 1341, 1343 (2006) (protecting against the deprivation of property from mail and wire fraud, respectively); 35 U.S.C.S. § 271 (LexisNexis 2009) (protecting right in patents); 42 U.S.C.S. § 1982 (LexisNexis 2009) (protecting right to transfer property, regardless of race).

25. Similarly, most discussions of "justice" place a higher value on political and civil rights than other rights (including the need to remedy poverty). *See* SEN, *supra* note 5, at 63–64 (discussing liberal theories of political liberty).

26. *See, e.g.*, Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-344, 122 Stat. 3934 (2008); Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (preventing employment discrimination); Kendell Frederick Citizenship Assistance Act, Pub. L. No. 110-251, 122 Stat. 2319 (2008) (creating easier naturalization for members of the armed forces, therefore promoting privacy and civil liberties); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007); Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007).

27. *See, e.g.*, CBOCS West, Inc. v. Humphries, 533 U.S. 442 (2008) (protecting employment anti-discrimination rights); Gomez-Perez v. Potter, 533 U.S. 474 (2008) (protecting the right against retaliation in age-based employment); FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (protecting First Amendment rights); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2006) (protecting rights in school race classification). The Supreme Court opinions protect the right of freedom of expression (Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009)), the right to vote (Crawford v. Marion County Election Bd., 553 U.S. 181 (2008)), free speech (United States v. Williams, 553 U.S. 285 (2008)), and the Second Amendment right to bear arms (District of Columbia v. Heller, 128 S. Ct. 2783 (2008)).

28. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, H.R. 4713, 111th Cong. (2010).

29. *See, e.g.*, Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009); Homeowner Protection and Wall Street Accountability Act of 2009, S. 3, 111th Cong. (2009) (protects homeowners and consumers by reducing foreclosures; ensuring the availability of credit for homeowners, businesses, and consumers; and reforming the financial regulatory system);

Congress considered multiple pieces of legislation during this same time frame that would protect credit card customers from the consequences of some credit card practices,[30] that would create a process to rate credit cards based on their consumer-friendly terms,[31] and that would ban or limit potentially unfair or predatory credit card terms or practices[32] and the recently enacted Dodd-Frank Wall Street Reform and Consumer Protec-

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Mortgage Credit Repair Act of 2009, H.R. 1486, 111th Cong. (2009); Foreclosure Prevention Act of 2008, S. 2636, 110th Cong. (2008) (incorporated into the Hous. and Econ. Recovery Act of 2008); S. 2136, 110th Cong. (2008) (Comm. on the Judicial hearings held); Homeowner Assistance and Taxpayer Protection Act, S. 3690, 110th Cong. (2008), H.R. 7307, 110th Cong. (2008) (helps struggling families stay in their homes); Housing and Economic Recovery Act of 2008 (Title IV establishes the HOPE for Homeowners program), Pub. L. No. 110-289, 122 Stat. 2654 (2008) (an omnibus act providing housing reform); H.R. 7267, 110th Cong. (2008) (amends the Fair Credit Reporting Act with respect to requirements relating to information contained in consumer reports); Systemic Foreclosure Prevention and Mortgage Modification Act, H.R. 7326, 110th Cong. (2008) (establishes a systematic mortgage modification program at the FDIC); Mortgage Reform and Anti-Predatory Lending Act of 2007, H.R. 3915, 110th Cong. (2007) (amends the Truth in Lending Act to reform consumer mortgage practices and provide accountability for such practices, among other purposes); National Affordable Housing Trust Fund Act of 2007, S. 2523, 110th Cong. (2007); H.R. 2895, 110th Cong. (2007) (establishes the Nat'l Affordable Housing Trust Fund in the Treas. of the U.S. to provide for the construction, rehabilitation, and preservation of decent, safe, and affordable housing for low-income families); Home Owners Mortgage and Equity Savings Act, S. 2133, 110th Cong. (2007); H.R. 3778, 110th Cong. (2007) (authorizes bankruptcy courts to take certain actions with respect to mortgage loans in bankruptcy).

30. Credit Card Minimum Payment Notification Act of 2008, S. 2542, 110th Cong. (2008) (as referred to the Comm. on Banking, Hous., and Urban Affairs); Credit Card Interchange Fees Act of 2008, H.R. 6248, 110th Cong. (2008) (as referred to the H. Comm. on Fin. Servs.); Credit Card Reform Act of 2008, S. 2753, 110th Cong. (2008) (as referred to the Comm. on Banking, Hous., and Urban Affairs); Fair and Justifiable Credit Card Interest Rate Act, H.R. 5988, 110th Cong. (2008) (as referred to the H. Comm. on Fin. Servs.); H.R. 2973, 110th Cong. (2007) (as referred to the H. Comm. on Fin. Servs.); Loan Shark Prevention Act, H.R. 6977, 110th Cong. (2008) (as referred to the H. Comm. on Fin. Servs.); Credit Card Minimum Payment Warning Act of 2007, S. 1176, 110th Cong. (2007) (as referred to the Comm. on Banking, Hous., and Urban Affairs); Credit Card Payment Fee Act of 2007, H.R. 873, 110th Cong. (2007) (as referred to the Subcomm. on Fin. Instns. and Consumer Credit); Credit Card Repayment Act of 2007, H.R. 1510, 110th Cong. (2007) (as referred to the H. Comm. on Fin. Servs.); Credit Protection Act of 2007, H.R. 3421, 110th Cong. (2007) (as referred to the Subcomm. on Fin. Instns. and Consumer Credit); Student Credit Card Protection Act of 2007, S. 1925, 110th Cong. (2007) (as referred to the Comm. on Banking, Hous., and Urban Affairs), H.R. 3347, 110th Cong. (2007) (as referred to the Subcomm. on Fin. Instns. and Consumer Credit); Universal Default Prohibition Act of 2007, S. 1309, 110th Cong. (2007) (as referred to the Comm. on Banking, Hous., and Urban Affairs), H.R. 2146, 110th Cong. (2007) (as referred to the H. Comm. on Fin. Servs.).

31. Credit Card Safety Star Act of 2009, S. 900, 111th Cong. (2009) (as introduced by Sen. Ron Wyden); Credit Card Safety Star Act of 2008, H.R. 6978, 110th Cong. (2008) (as introduced by Rep. John F. Tierney); Credit Card Safety Star Act of 2007, S. 2411, 110th Cong. (2007) (as introduced by Sen. Ron Wyden); H.R. 2146, 110th Cong. (2007) (as referred to the H. Comm. on Fin. Servs.).

32. Credit CARD Act of 2008, S. 3252, 110th Cong. (2008) (as referred to the Comm. on Banking, Hous., and Urban Affairs); Credit CARD Act of 2007, H.R. 1461, 110th Cong. (2007) (as referred to the H. Comm. on Fin. Servs.); *but see infra* note 36, as the 111th Congress enacted a similar bill. Credit Cardholders' Bill of Rights Act of 2008, H.R. 5244, 110th Cong. (2008) (as referred to the Comm. on Banking, Hous., and Urban Affairs), *but see infra* note 36, as the 111th Congress enacted a similar bill. Stop Unfair Practices in Credit Cards Act, H.R. 5280, 110th Cong. (2008) (as referred to the H. Comm. on Fin. Servs.); Stop Unfair Practices in Credit Cards Act of 2007, S. 1395, 110th Cong. (2007) (as referred to the Comm. on Banking, Hous., and Urban Affairs), H.R. 5280, 110th Cong. (2008) (as referred to the H. Comm. on Fin. Servs.).

tion Act created a Consumer Financial Protection Agency, an independent "watchdog" agency that is authorized to protect American consumers from hidden fees, abusive terms, and deceptive practices by ensuring that they receive clear and accurate information about mortgages, credit cards, and other financial products.

Congress passed (and expanded) the Homeowners' Assistance Program to respond to the credit crisis. However, neither that bill nor any other bill passed in the last two years (including the Dodd-Frank Wall Street Reform and Consumer Protection Act) lets homeowners force lenders to reduce the amount of their mortgages or the total debt they owe on their homes.[33] While Congress enacted the Helping Families Save Their Homes Act of 2009 in May 2009, the Senate refused to permit bankruptcy judges to modify the mortgages of people who filed for bankruptcy.[34] Thus, the last major piece of bankruptcy legislation was, ironically, designed to make it *harder* (not easier) for people to relieve themselves of too much debt.[35] Likewise, Congress failed until recently to pass any of the bills that restrict the rights of credit card issuers or that generally expand consumers' rights in credit card transactions. Only after the failed attempts of three Congressional sessions did Congress pass the Credit Card Accountability, Responsibility, and Disclosure (CARD) Act, which, among other provisions, curbs some controversial credit card practices like the card companies' ability to apply penalty interest rates or to unilaterally charge a fee to increase credit limits.[36]

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33. *See* John D. Geanakoplos & Susan P. Koniak, *Matters of Principal*, N.Y. TIMES, Mar. 5, 2009, at A31 (arguing that foreclosure relief must include reducing principal, not just modifying interest rates).

34. Helping Families Save Their Homes Act of 2009, *supra* note 29 (providing for mortgage relief, but not giving bankruptcy judges the authority to modify mortgage terms for bankrupt homeowners).

35. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005). *See, e.g.*, *Bankruptcy Reform Act of 1998: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 11 (1998) (statement of Rep. Moran) (characterizing pre-BAPCPA bankruptcy as "a convenient financial management tool" and highlighting its convenience and ease).

36. Credit CARD Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009) (includes provisions, such as a Credit Cardholders' Bill of Rights, that ban abusive credit practices, enhance consumer disclosures, and protect underage consumers). *See also* Credit Cardholders' Bill of Rights Act of 2008, *supra* note 32; Credit CARD Act of 2008, *supra* note 32; Credit CARD Act of 2007, *supra* note 32; Credit CARD Act of 2006, H.R. 5383, 109th Cong. (2006) (as referred to the H. Comm. on Fin. Servs.); Credit CARD Act of 2005, S. 499, 109th Cong. (2005) (as referred to the Comm. on Banking, Hous., and Urban Affairs); Credit CARD Act of 2004, S. 2755, 108th Cong. (2004) (as referred to the Comm. on Banking, Hous., and Urban Affairs).

II. Changing Views of Financial Freedom

A. Financial Freedom and the American Dream

Financial freedom is intricately connected to the concept of the "American Dream." Defining the American Dream, like defining freedom or financial freedom, is no easy task though most would agree that it entails financial security and the general ability to live comfortably.[37] The American Dream is a dual-edged concept, however, that encompasses both the ideal of a better life and also the bundle of consumer goods and leisure that are needed to achieve the goal.[38] Thus, like financial freedom, to live the American Dream means that you can buy or do the things you want,[39] that you can live where you want to, drive the car you want to, work if you want to, or stop working when you get tired of working.[40] The ability to purchase consumer durable goods has always been part of the American Dream, and there was a significant increase in purchases of durable goods (especially cars) at the turn of the twentieth century.[41] Still—while we seem to have forgotten this in recent years—the American Dream's current focus on rampant overspending, over-indebtedness, and *not* working is a relatively recent phenomenon for most Americans, and it only recently became acceptable for people to be hopelessly over-indebted.[42]

B. Thrift and Frugality (aka Debt is Bad)

> "*The rich ruleth over the poor, and the borrower is servant to the lender.*"[43]

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37. Robert Powell, *Holes in the Dream catcher: Many not living American Dream; older folks pessimistic*, CBS MARKET WATCH, Oct. 13, 2004, http://www.marketwatch.com/story/dream-eluding-many-americans-seniors-pessimistic. *See generally* LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 4 (1999) (discussing the "paradoxical nature of the American dream").

38. CALDER, *supra* note 37, at 4.

39. Things like traveling, buying health services, having political influence, or sending your children to college.

40. LAKOFF, *supra* note 3, at 43; CALDER, *supra* note 37, at 3 (providing definition of the dream as including "a house in the suburbs with a backyard for the kids to play in, a patio for barbecues, a shady street, bright and obedient children, camping trips, fishing, two family cars, seeing the kids taking part in school and church plays, and online access to the world") (quoting Marilyn vos Savant).

41. MARTHA L. OLNEY, BUY NOW PAY LATER 9, 33–40 (1991).

42. HILLEL BLACK, BUY NOW PAY LATER 84 (1961) ("An equally important reason why debt is so eagerly grasped is that without it [consumers] could not realize the Twentieth Century American Dream."); ALFRED L. MALABRE, JR., BEYOND OUR MEANS: HOW AMERICA'S LONG YEARS OF DEBT, DEFICITS, AND RECKLESS BORROWING NOW THREATEN TO OVERWHELM US 16–17 (1987) (discussing changed views of working, and the negative connotations now associated with the term "workaholic").

43. *Proverbs* 22:7.

There have always been borrowing, lending, and thus, debt.[44] But, the earliest views and treatment of over-indebtedness and consumerism were negative and harsh. Biblical laws[45] and laws that existed under the British feudal system allowed creditors to take the wages of debtors, allowed creditors to take their debtors' real or personal property, and permitted people to be sent to debtors' prisons if they failed to repay their debts.[46] Early British laws also gave creditors the right to force a debtor who fraudulently incurred debts to be "set upon the pillory in some public place" and, two hours later, "have one of his or her ears nailed to the pillory and cut off."[47] Of course, being imprisoned or maimed was harsh. But, these penalties were actually more lenient than earlier penalties for the nonpayment of debts. Specifically, sixteenth-century British debtors who were deemed to have fraudulently incurred debts could be executed for not paying their bills. While an effective way to signal the importance of repaying your creditors, executing the debtor obviously did little to enhance the likelihood that the creditor's debt would ever be repaid.[48]

The early British inhabitants of the U.S. also appeared to reject the concept of luxury or self-indulgence and, instead, preached the gospel of thrift and frugality.[49] Credit, while to be avoided generally, was only acceptable if the purpose of the borrowing was to purchase socially productive things or services.[50] Perhaps the best reflection of the early colonial views of debt and credit was expressed in Benjamin Franklin's admonishment that "the borrower is a slave to the lender, and the debtor to the creditor . . . preserve your freedom; and maintain your independency: be industrious and free; be frugal and free."[51] During this period, credit was most often portrayed as being seductive and something noble men should

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44. BLACK, *supra* note 42, at 7 (noting that the "Babylonians, the Egyptians, the Celts and the Romans among other civilizations, extended credit. Even the Puritans on the Mayflower bought passage on an installment plan."); WILCOX, *supra* note 5, at 18 ("The Babylonians had detailed laws for dealing with debt contracts. The Greeks and Romans both used credit extensively to finance far-flung commercial ventures."); SELIGMAN, *supra* note 12, at 33 (noting that debt contracts existed in the Middle Ages).

45. A site maintained by Christian Oriented Education, Inc., a non-profit organization whose mission is to provide personal finance education using the practical applications of biblical principles, provides an interesting perspective on the modern biblical view of debt. *See* About C.O.E., Inc., http://www.coeinc.org/AllPages/9Sections/Sidebar/AboutUs.htm (last visited Aug. 15, 2010).

46. BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 36–37, 46 (2002); HUGH BARTY-KING, THE WORST POVERTY: A HISTORY OF DEBT AND DEBTORS 3 (1991).

47. BARTY-KING, *supra* note 46, at 17–18.

48. MANN, *supra* note 46, at 46.

49. For a discussion of the moral history of frugality and thrift, and how world views toward those concepts have changed over time, see DAVID M. TUCKER, THE DECLINE OF THRIFT IN AMERICA: OUR CULTURAL SHIFT FROM SAVING TO SPENDING 1–14 (1991).

50. CALDER, *supra* note 37, at 101.

51. The Benjamin Franklin Institute of Global Education, *The Way to Wealth*, http://www.bfranklin.edu/johnhibbs/WayToWealth.pdf (last visited Sept. 23, 2010); *See also* SEN, *supra* note 5, at 29–30 (discussing the linkage between labor bondage and indebtedness).

avoid.[52] Many colonial leaders viewed debt repayment as a morally righteous obligation that could be satisfied only if the debts were repaid in full.[53] Debtors, who were almost always small business owners, were viewed as having a moral obligation to repay their debts by all means necessary even if that entailed selling everything they owned.[54] While early views of debt pitied the poor, it characterized people who did not repay their debts as sinners.[55] Indeed, debt was viewed as part of the trinity of evil: "debt, dirt, and the devil."[56]

As was true in England, to help debtors in America understand the importance of thrift, frugality, and of repaying their debts, they also could be imprisoned if they failed to pay their bills.[57] Unlike British debtors, people who failed to repay their bills in the U.S. were not always sent to freestanding debtors' prisons. Instead, in most instances, they were sent to prisons that housed debtors with other criminals, and these prisons were sometimes dangerously violent.[58] The conditions in these jails were brutal: cells were severely overcrowded, often unheated, and unsanitary.[59] Moreover, prisoners (or their families) were forced to provide their own food and clothing. Those who lacked the means to provide these basic necessities would have to beg others, or pay often exorbitant sums to jailors, or would simply be forced to go without.[60]

Imprisoning debtors in the U.S. also did little to increase the likelihood that debts would be repaid. However, these harsh conditions stigmatized debtors, reinforced the negative cultural views associated with incurring too much debt, and painfully showed debtors the importance of working hard and making sacrifices to honor your duty to repay your debts.[61] Thus, while creditors rarely were repaid by imposing harsh conditions

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52. MANN, *supra* note 46, at 120–121. One historian observes, however, that there were distinctive regional and cultural views toward credit and frugality. *Id.* at 134 ("Frugality was not a southern virtue."); CALDER, *supra* note 37, at 94–95 (discussing characterizations of debt as temptation).

53. MANN, *supra* note 46, at 36–37, 39. *See also* PATRICK SELIM ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 78–83 (1979) (discussing 18th Century views of the moral obligation to observe promises).

54. MANN, *supra* note 46, at 38, 42.

55. *Id.* at 38. *See also* TUCKER, *supra* note 49, at 12 ("Christians in British America never ceased to worry about weak and profligate human nature. . . . Rhetoric from the Protestant ethic so pervaded the culture that even the American War of Independence became a struggle of frugal, industrious, and virtuous Americans against assaults of a corrupt mother country debased by luxury, extravagance, and vice.")

56. CALDER, *supra* note 37, at 92.

57. Bruce H. Mann, *Tales from the Crypt: Prison, Legal Authority, and the Debtors' Constitution in the Early Republic*, 51 WM. & MARY Q. 183, 198 (1994); MANN, *supra* note 46, at 79.

58. MANN, *supra* note 46, at 85, 88.

59. Mann, *supra* note 57, at 185; MANN, *supra* note 46, at 86–90.

60. Mann, *supra* note 57, at 185; MANN, *supra* note 46, at 86–87. English laws also forced debtors to pay for their prison rooms and, as a result, prison guards routinely exacted exorbitant sums from prisoners who wanted better quarters. BARTY-KING, *supra* note 46, at 44.

61. CALDER, *supra* note 37, at 15 (discussing the 19th Century stigma attached to personal debts).

(especially imprisonment) on debtors,[62] creditors nonetheless used the threat of imprisonment to induce debtors to disclose concealed assets, to voluntarily relinquish assets that were otherwise exempt from attachment, or to convince the debtor's family members to repay the debt to avoid subjecting the debtor to the rigors of imprisonment.[63]

C. Expanding Financial Freedom (aka Credit is Good)

The cultural significance of thrift vacillated throughout the first few decades of the twentieth century. Once the consumer finance industry became fully developed, fewer people aspired to be thrifty misers or recoiled at the thought of going into debt to purchase consumer goods.[64] While high-cost credit has always been available (though often in the form of loans from illegal loan sharks),[65] early twentieth-century middle-class households were given more opportunities to finance the purchase of relatively small dollar consumer goods (like refrigerators, pianos, washing machines, and sewing machines) through retail installment lenders or finance companies.[66]

Starting around 1915, the consumer finance industry revolutionized borrowing by letting more and more consumers purchase furniture, pianos, and ultimately cars on an installment plan.[67] Because the price of a car in the 1920s was 20%–40% of average annual disposable household income, few Americans could afford to purchase cars then. Indeed, most middle class buyers were initially excluded from this market because they could not save enough quickly to pay for the cars in full in cash.[68] Especially after the Depression, the ability to buy cars over time on credit caused the demand, mass production, and sales for cars to skyrocket.[69] Though auto dealers financed some car purchases, most consumers bor-

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62. While economic equilibrium models may "recognize that all debt *could* be repaid if the punishment were sufficiently large," executing or imprisoning a debtor obviously makes it harder for the debtor to repay his bills. Giuseppe Bertola et al., *The Economics of Consumer Credit Demand and Supply*, *in* THE ECONOMICS OF CONSUMER CREDIT 14 (2006).

63. Mann, *supra* note 57, at 185, 199.

64. CALDER, *supra* note 37, at 37 ("It is true that thrift, frugality, and the delay of gratification were important cultural ideals in eighteenth- and nineteenth-century America."); TUCKER, *supra* note 49, at 131–40.

65. *See* BLACK, *supra* note 42, at 7 ("Never have so many owed so much. Never has so much profit been made out of debt itself."); *id.* 151–55 (discussing some of the "reprehensible abuses" involved with loan sharking).

66. WILLIAM A. GRIMES, FINANCING AUTOMOBILE SALES BY THE TIME-PAYMENT PLAN 9–10 (1926); SELIGMAN, *supra* note 12, at 51–54; STUART VYSE, GOING BROKE 98 (2008); WILCOX, *supra* note 5, at 18.

67. CALDER, *supra* note 37, at 156–84; SELIGMAN, *supra* note 12, at 39–43.

68. OLNEY, *supra* note 41, at 102–105 (arguing that a typical American household would need to save for two to five years to purchase a car with cash); SELIGMAN, *supra* note 12, at 31.

69. BLACK, *supra* note 42, at 188–93; CALDER, *supra* note 37, at 184; GRIMES, *supra* note 66, at 8–9; SELIGMAN, *supra* note 12, at 46–51.

rowed money from finance companies on an installment basis.[70] These early finance companies recognized the profitability of making car purchases more convenient for consumers of moderate means and also developed the business model that priced the credit based on the risk of nonpayment.[71]

Despite the convenience of early consumer lending and its greater availability after its 1920s success in the automobile financing industry,[72] it was cumbersome and often quite expensive to purchase consumer goods on credit, and the consumer credit industry was still viewed with disfavor by many.[73] Moreover, the stigma and shame associated with overindebtedness appeared to remain part of the cultural norms associated with consumer behavior.[74] However, with the backdrop of the mass production of consumer goods, debt-based mass consumerism was born, and consumer debt levels increased. With more debt, the draconian views toward indebtedness generally and overspending specifically relaxed, and both business owners and individual consumers ultimately were allowed to incur then discharge their debts in bankruptcy.[75] Indeed, the 1938 and 1978 changes to formal U.S. bankruptcy laws were designed to give people greater financial freedom by shielding them from the harsh consequences of their improvident borrowing choices, by letting them become full participants in the market economy, and by clearly signaling that our nation no longer embraced the view that people should ever be imprisoned, executed, or maimed simply because they are deeply in debt.[76]

D. Financial Freedom to Retire and Invest

In addition to their enhanced abilities to engage in consumer credit transactions, people now have greater freedom to make investment decisions. Unlike the days when individual investors were forced to rely on the advice and skills of a stock broker, people can now invest directly in the stock market without the intervention of a professional stock broker or

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70. BLACK, *supra* note 42, at 188–93; CALDER, *supra* note 37, at 192–94; OLNEY, *supra* note 41, at 110–12, 118–30.

71. GRIMES, *supra* note 66, at 11, 32–35.

72. *Id.* at 79–80; BLACK, *supra* note 42, at 200–07 ; OLNEY, *supra* note 41, at 86–91; SELIGMAN, *supra* note 12, at 51.

73. CALDER, *supra* note 37, at 191 (discussing Henry Ford's refusal to sell cars on credit and his disdain for finance companies and installment buying). *Id.* at 200 (noting Macy's disdain for installment selling); OLNEY, *supra* note 41, at 132.

74. CALDER, *supra* note 37, at 212–30 (discussing the turn of the century disapproval of consumer credit and its mythologized departure from previous moral views of debt).

75. 11 U.S.C. §§ 101–1532 (2006); CALDER, *supra* note 37, at 107.

76. DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 98–100, 154–57 (2001) (arguing that the 1930s bankruptcy regulation "illustrates the convergence of the general bankruptcy bar and prodebtor ideology" and that the 1978 reforms had a "mildly prodebtor effect").

advisor.[77] In fact, the freedom to make personal investment decisions now extends to retirement funds. Historically, employers invested their employees' retirement funds in employer-controlled defined-benefit plans and paid a fixed monthly pension once the employee retired.[78] Employers found that they had little ability to control the costs associated with these plans and specifically found that defined-benefit plans are expensive to maintain principally because employers are required to pay a fixed, guaranteed amount to retired employees (who increasingly have longer life spans). Largely to save costs, most employers who provide retirement plans for their employees have now switched to 401(k) or other defined-contribution plans.[79] These plans give employees the freedom to control many of their investment decisions, and this freedom often includes whether to invest at all or in which plan to invest their funds.[80]

Although this freedom arguably protects an employee from an employer's overly conservative investment decision, unsophisticated employees who choose an unwise or risky investment vehicle, who do not understand the basic principles of diversifying or rebalancing as they age, or who are just overwhelmed by the amount of investment information they receive, are harmed by this unfettered investment freedom.[81] Moreover, employees who invest unwisely, or choose not to invest funds at all, in a voluntary retirement plan run the risk of entering retirement with no income at all.[82] While most Americans now graduate from high school, few are financially sophisticated enough to prudently invest their retirement funds.[83] Indeed, though the Securities and Exchange Commission and other governmental agencies provide investment information on the Inter-

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77. *See* Ramon P. DeGennaro, *Direct Investments in Securities: A Primer*, 88 ECON. REV. 1 (2003) ("Recently, dividend reinvestment plans and their more general cousins, direct investment plans, [collectively, DRIPs] have virtually eliminated the problems of direct stock ownership by permitting investors to bypass traditional investment channels, such as securities brokers."). Since December 1, 1994, when the Securities and Exchange Commission issued a letter granting an exemption from Rule 10b-6, DRIPs have proliferated. CHARLES B. CARLSON, BUYING STOCKS WITHOUT A BROKER 40 (1996); Exemption from Rule 10b-6 for Certain Dividend Reinvestment and Stock Purchase Plans, Exchange Act Releases Nos. 33-7114; 34-35041 (Dec. 1, 1994). *See generally* Barbara Hetzer, *Direct Stock Buying: A Load of New No-Loads*, BUS. WK., June 16, 1997, *available at* http:// www.businessweek.com/ 1997 /24/ b3531 156.htm; Amey Stone, *Joe and Jane Investor Are Here to Stay*, BUS. WK., Aug. 27, 2001, *available at* http:// www.businessweek.com/ magazine/ content/01_35/ b3746620.htm.

78. *See* A. Mechele Dickerson, *The Story of* Patterson: *Plainly Protecting Pensions*, *in* BANKRUPTCY LAW STORIES 121 (2007).

79. WILCOX, *supra* note 5, at 41–42.

80. *See* Dickerson, *supra* note 78, at 121–22; WILCOX, *supra* note 5, at 42–43.

81. WILCOX, *supra* note 5, at 60–62 (discussing information overload and the benefits of limiting choices).

82. Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECONS. 164 (2004) (forwarding a retirement plan that allocates a portion of an employee's future wage increases to savings as a mechanism to compensate for a household's tendency to under-save). *See* Dickerson, *supra* note 78, at 122.

83. WILCOX, *supra* note 5, at 47–48.

net,[84] former President Bush created a Financial Education and Literacy Commission to respond to the financial illiteracy of people in this country.[85] In fact, the concern that workers would not properly plan for their retirement is one of the primary reasons that recent attempts to privatize Social Security failed.[86]

III. HOW MUCH (OR LITTLE) IS TOO MUCH (OR LITTLE) FREEDOM

> *"[F]reedom is a concept of degrees, and some choices are easier than others."*[87]

A. Freedom of Contract

As a nation, we value freedom of contract and our laws have long enforced contracts that contain terms that arguably are unfair to one of the contracting parties.[88] This country has long believed that parties should have the freedom to voluntarily enter into contracts and that those contracts should be viewed by courts as legally enforceable promises.[89] We

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84. *See* SEC, Financial Navigating in the Current Economy: Ten Things to Consider Before You Make Investing Decisions, *available at* http://www.sec.gov/investor/pubs/tenthingstoconsider.htm.

85. U.S. Fin. Literacy and Educ. Comm'n, http:// www.mymoney.gov/ about-us.html; U.S. Trade, Office of Domestic Fin., Council on Fin. Literacy, *President's Advisory Council on Financial Literacy*, http:/ /www.treas.gov/ offices/ domestic-finance/ financial-institution/ fin-education/ council/ index.shtml. Currently, Congress is considering two related bills. National Financial Literacy Act of 2009, H.R. 767, 111th Cong. (2009) (provides incentives to encourage financial institutions and small businesses to provide continuing financial education to customers, borrowers, and employees); H.R. 1325, 111th Cong. (2009) (requires financial literacy counseling for borrowers).

86. *See* Paul Krugman, *Buying Into Failure*, N.Y. TIMES, Dec. 17, 2004, *available at* http:// www.nytimes.com/ 2004/ 12/ 17/ opinion/ 17krugman.html (citing Chile and Britain as examples of privatized countries where workers fail to accumulate sufficient savings); Barry Schwartz, *Choose and Lose*, N.Y. TIMES, Jan. 5, 2005, *available at* http:// www.nytimes.com/ 2005/ 01/ 05/ opinion/ 05schwartz.html (arguing that the additional options provided by privatization would discourage savings). For a description of Bush's privatization plans, *see* Pres.'s Comm'n to Strengthen Soc. Sec. (CSSS), *Strengthening Social Security and Creating Personal Wealth for all Americans: Report of the President's Commission* (2001), *available at* http:// govinfo.library.unt.edu/ csss/ reports/ Final_ report.pdf (proposing three alternative plans for partial privatization); Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126 (Feb. 2, 2005) (embracing Plan II of the CSSS's report).

87. VYSE, *supra* note 66, at 43.

88. *See* Roger Brownsword, CONTRACT LAW: THEMES FOR THE TWENTY-FIRST CENTURY 50–51 (2d. ed., Oxford Univ. Press 2006) ("[F]reedom of contract enjoins that the parties shall have 'the utmost liberty of contracting', in the sense that they are left free to set their own terms" (quoting Printing & Numerical Registering Co. v. Sampson, (1875) 19 L.R. Eq. 462, 465)); ATIYAH, *supra* note 53, at 398–405 (arguing that the classical law of contract emphasized the bargaining process, rather than the substantive fairness of contract terms, so that the "unfairness of the bargain—gross inadequacy or excess of price—[was] irrelevant").

89. *See* CHARLES FRIED, CONTRACT AS PROMISE 16 (1981) ("The obligation to keep a promise is grounded . . . in respect for individual autonomy and in trust."); JOHN STUART MILL, ON LIBERTY 153 (1969) ("The reason for not interfering, unless for the sake of others, with a person's voluntary

value the right of parties to construct their own bargains, to properly allocate the risks associated with the proposed bargain, and to protect themselves against any harmful effects of the bargain.[90] Because courts are expected to facilitate individual action by enforcing contracts and by not interfering with parties' bargains, courts generally will enforce contractual terms. Freedom of contract has been characterized as "purely negative freedom" because contracting is most often viewed as an activity that is protected from direct governmental intervention.[91]

Even contracts that may be significantly more favorable to one party will be enforced, assuming there was no fraud or duress in their making,[92] unless there is a gross disparity in bargaining power that would render the contract unfair or unconscionable, or the contract contains terms that encourage gross negligence or reckless conduct.[93] Most other contracts between competent parties are, however, routinely enforced by our courts even if some terms in the contract may ultimately be unfair to one of the contracting parties. Notwithstanding this fervent belief in the freedom *of* contract, however, certain contracts cannot be made or, even if made, will not be enforced. Specifically, contracts deemed to be illegal or inconsistent with public policy generally will not be enforced. Instead, one contracting party will in effect be given freedom *from* contract.[94] For example, contracts for slavery, prostitution, or gambling,[95] or contracts that

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acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided by allowing him to take his own means of pursuing it.").

90. *See generally* JOHN N. ADAMS & ROGER BROWNSWORD, UNDERSTANDING CONTRACT LAW 174 (J.A.G. Griffith ed., Sweet & Maxwell 2000) (1987) (explaining that the freedom of contract doctrine holds that "parties should enter the market, choose their fellow-contractors, set their own terms, strike their bargains and stick to them"); ATIYAH, *supra* note 53, at 398–405 (indicating that the classical law of contract "assumed that the parties [knew] their own minds, . . . that they [would] calculate the risks and future contingencies that [were] relevant, and that all these enter[ed] into the bargain."); Blake D. Morant, *Contracts Limiting Liability: A Paradox with Tacit Solutions*, 69 TUL. L. REV. 715, 717 (1995) (discussing historical views of freedom and liberty in contracting).

91. Todd D. Rakoff, *Is "Freedom from Contract" Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 481 (2004).

92. FRIED, *supra* note 89, at 92 ("A promise given under duress, though knowingly made, is not freely made. Paradigmatically, it is a promise induced by the threat of force . . . and by extension it is a promise made in response to any improper pressure.").

93. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

94. Rakoff, *supra* note 91, at 484.

95. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 290 (1986) ("[S]lavery contracts are also thought to be unenforceable per se."); Nelson Rose, *Gambling and the Law—Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 95 (1992) ("Even while legal gambling spreads throughout the country, the public policy of virtually every state makes legal gambling debts unenforceable, treating a casino marker the same as a contract for prostitution."); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 68 (1994) ("Because prostitution is illegal, a contract for prostitution is unenforceable."). *See also* MILL, *supra* note 89, at 153 (" . . . by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it, beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. . . . The principle of freedom cannot require that he should be free not to be free.").

limit a party's negligence, that involve the sale of body organs, or that pay a woman to be a surrogate parent are unenforceable as against public policy.[96]

B. Debt and the Free Market

The prevailing view of markets in this country for the last several decades is that free markets are competitive and that competition maximizes efficiency, minimizes waste and costs, and maximizes benefits for all.[97] At least until recently, freedom (including financial freedom) was viewed as an unqualified good, and the economic and political philosophy of our country deemed more financial choices to be better than fewer choices.[98] This country's belief in the market economy for the last several decades has caused consumers to be given increasingly greater access to, and the right to participate in, a wide range of complicated financial transactions like, as mentioned above, managing their retirement accounts.

If greater increased private wealth helps individual consumers, then restrictions, regulations, or, even worse, taxes that prevent consumers from making legally permissible consumption, savings, or investment decisions would impede that person's ability to create greater wealth and exercise financial freedom.[99] Giving consumers greater access to consumer credit, and the higher household debt levels associated with consumer credit, are not by themselves bad things since consumer spending is a key to both the individual's and this country's economic prosperity. Indeed, making relatively easy and low-cost credit available to unserved or underserved borrowers gives them a form of financial freedom that can make them more active participants in the market economy and that will give them greater future opportunities. Household borrowing allows people to finance productive long-term activities, such as buying a home, paying for

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96. Morant, *supra* note 90, at 718 (listing limitations of freedom of contract); RICHARD A. LORD, WILLISTON ON CONTRACTS, §§ 12–19 (4th ed. 2009) (discussing illegal agreements and agreements against public policy); ADAMS & BROWNSWORD, *supra* note 89, at 129–137 (explaining that § 2 of the Unfair Contract Terms Act 1977 voids any clause which excludes or restricts liability for negligence that leads to death or personal injury). At one point, prenuptial agreements were unenforceable because of the concern that the weaker marriage partners (typically wives) would be unfairly harmed by those contracts. However, beginning in 1970, courts reversed course, viewing the failure to enforce such agreements as contrary to prospective spouses' freedom to enter into a contract to determine how their property would be distributed post-divorce. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 252–53, 263, 282–83 (1994). *See also* Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990) (upholding a prenuptial agreement, the terms of which the wife did not understand, because, in part, "[t]o impose a *per se* requirement that parties entering a prenuptial agreement must obtain independent legal counsel would be contrary to traditional principles of contract law, and would constitute a paternalistic and unwarranted interference with the parties' freedom to enter contracts.").

97. SEN, *supra* note 5, at 27–28.

98. VYSE, *supra* note 66, at 83.

99. LAKOFF, *supra* note 3, at 149.

college or other educational expenses, or starting a business over a longer period of time. [100] Thus, from a purely economic point of view, indebtedness is both expected and desirable based on the life-cycle theory because it allows people to smooth out their consumption behavior by borrowing while they are young (and have current income) then saving money as they get older (and no longer have current income).[101]

C. Freedom to Consume

Until the 1970s, low-cost credit generally was made available only for wealthy Americans who already had assets that could be pledged as collateral.[102] Thus, if financial freedom includes the opportunity to engage in convenient, low-cost financial transactions that could improve your standard of living, then most middle- to lower-income people remained decidedly unfree in the consumer credit market until the 1960s because existing law and policies interfered with their freedom of contract. As the next sections show, until the 1970s, most middle- and lower-income households effectively were denied low-cost credit to purchase even basic consumer durables, goods, or services unless they had savings and also were willing to satisfy the cumbersome requirements imposed by those contracts.

1. Buying a Home

Until the relatively recent "democratization" of the residential mortgage market, a person who wanted to finance a home purchase would be offered a long-term, conventional mortgage by commercial banks or the U.S. government.[103] To qualify for this mortgage, potential homeowners were required to meet with a representative of the lender and to complete forms that painstakingly documented their income, assets, and debts.[104] Unless they had financial wealth, they also needed to either make a down payment of at least 20% or to purchase private mortgage insurance (PMI)

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100. *But see* Melissa B. Jacoby, *The Debtor-Patient Revisited* , 51 ST. LOUIS U. L.J. 307, 320 (2007) (noting that using credit to smooth consumption of health maximizing goods or services is desirable but potentially leads to financial instability).

101. *See* Bertola et al., *supra* note 62, at 2–3 (discussing the economics of consumer credit); VYSE, *supra* note 66, at 216–18 (discussing life-cycle theory); WILCOX, *supra* note 5, at 59–60; Barbara Dafoe Whitehead, *A Nation In Debt: How We Killed Thrift, Enthroned Loan Sharks and Undermined American Prosperity*, THE AMERICAN INTEREST, July/Aug. 2008, at 9 (discussing benefits of borrowing).

102. HOWARD D. CROSSE & GEORGE H. HEMPEL, MANAGEMENT POLICIES FOR COMMERCIAL BANKS 175, 181 (2d ed. 1973); Alan Greenspan, Chairman, Fed. Reserve Bd., *Consumer Finance*, (Apr. 8, 2005) (speech at the Fed. Res. Sys.'s Fourth Annual Community Affairs Research Conf.).

103. *See* Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 194 (2005) (describing the evolution of low-cost, long-term credit in the home mortgage market).

104. CROSSE & HEMPEL, *supra* note 102, at 175, 181.

to protect the lender against the risk of default.[105] After making this significant down payment, borrowers then needed sufficiently steady income to make monthly loan payments of principal and a fixed rate of interest for an extended period of time—typically fifteen or thirty years.[106] While these requirements were somewhat relaxed in the 1980s, most potential homeowners could not purchase a home without satisfying these burdensome financial requirements until the 1990s. These requirements became problematic starting in the late 1990s and lasted through the first quarter of 2008, when the U.S. household savings rate hovered around 1% (and, in some years, was negative).[107] At the same time consumer savings plummeted, the United States experienced unprecedented home price appreciation, and the resulting real estate bubble caused homes in some markets to appreciate at unprecedented, often astronomical, rates.[108]

Skyrocketing housing prices gave some (though not all) homeowners the perception that they had vast sums of wealth.[109] This increased wealth

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105. *See* Allen J. Fishbein & Patrick Woodall, *Exotic or Toxic? An Examination of the Non-Traditional Mortgage Market for Consumers and Lenders* 12, Consumer Federation of America (2006), *available at* http:// www.consumerfed.org/ elements/ www.consumerfed.org/ file/housing/ Exotic_Toxic _Mortgage _Report0506.pdf; Whitehead, *supra* note 101, at 8. Typically, the down payment requirement would be waived for wealthy borrowers who wanted to use their cash to make other investments. *Id.* at 12; Pamela Gaynor, *New Types of Mortgages Are Hot But Could Burn*, PITTSBURGH POST-GAZETTE, July 31, 2005, at A1.

106. In 1971, 99.3% of all mortgages were for a term of 20 years or more. FHA, Statistical Analysis and Research Branch, FHA Trends of Home Mortgage Characteristics: 3d Qtr. 1972 (Apr. 18, 1973).

107. Until the recent financial meltdown, for several years the U.S. had a negative savings rate (i.e., Americans saved less than they spent on goods or services) or a savings rate of less than 1%. Press Release, Bureau of Econ. Analysis, Personal Income and Outlays: Sept. 2007 (Nov. 1, 2007), http://www.bea.gov/newsreleases/national/pi/2007/pi0907.htm; Brian K. Bucks et al., *Recent Changes in U.S. Family Finances from 2004-2007: Evidence from the Survey of Consumer Finances,* 95 FED. RES. BULL. A9 (2009), *available at* http:// www.federalreserve.gov/ pubs/ bulletin/ 2009/ pdf/ scf09.pdf. Ironically, while the current economic crisis has now caused U.S. consumers to save more, increased household savings are exacerbating the current economic crisis. Press Release, Bureau of Econ. Analysis, Personal Income and Outlays: Nov. 2006 (Dec. 22, 2006), http:// www.bea.gov/ newsreleases/ national/ pi/ 2006/ pi1106.htm; Kelly Evans, *Hard-Hit Families Finally Start Saving, Aggravating Nation's Economic Woes*, WALL ST. J., Jan. 6, 2009, at A1.

108. Gov. Frederic S. Mishkin, Enter. Risk Mgmt. and Mortgage Lending, speech before the Board of Governors of the Federal Reserve System (Jan. 17, 2007), *available at* http:// www.federalreserve.gov/ newsevents/ speech/ Mishkin20070117a.htm. Real home prices in the aggregate increased by more than 80% between 1997 and 2006 and, in some regions, had annual increases of over 10%. ROBERT J. SHILLER, THE SUBPRIME SOLUTION 32 (2008); Fishbein & Woodall, *supra* note 105, at 28.

109. *See* Hang Nguyen, *Will Their Kids Ever Be Able to Buy a House?*, CHI. TRIB., Jan. 8, 2005, at 12 (describing how homeowners in Orange County, California benefit from the rise in home prices, but are concerned because their children can't afford homes in the same area); Jon Birger, *Should You Cash Out While You Can?*, MONEY, Aug. 1, 2005, at 51. While many homeowners did amass vast wealth from housing price appreciation, the "wealth effect" caused some to increase their spending because of their perception of their yet unrealized housing wealth. Marilyn Kennedy Melia, *Heady Effect of Housing Wealth*, CHI. TRIB., Jan. 23, 2005, at 22; Congressional Budget Office, *Housing Wealth and Consumer Spending* 8 (2007); Satyendra Verma & Jules Lichtenstein, *The Declining Personal Saving Rate: Is There Cause for Alarm?*, AARP Public Policy Institute 8–9 (2000), *available at* http://assets.aarp.org/rgcenter/econ/ib42_alarm.pdf (discussing wealth effect caused by accrued

allowed them freedom to engage in other financial activities, such as removing equity from their homes to purchase other items, pay for college expenses, or pay down higher interest credit card debt.[110] Unfortunately, this price appreciation and the existing lending standards during this time fueled an "unaffordability" problem for potential homeowners who lacked savings and had unsteady or stagnant incomes.[111] Potential homeowners who lacked savings were priced out of certain housing markets.[112] and could not qualify for a low-cost conventional fixed rate mortgage because they could not satisfy the traditional 20% down payment requirement—especially when home prices started to escalate.[113] Likewise, stagnant or declining income made it increasingly difficult for borrowers to make the monthly principal plus interest payments on traditional fifteen- or thirty-year fixed interest rate mortgages.

These factors (no savings, declining income, and escalating home prices) combined to deprive many potential homeowners of the freedom to participate in the American Dream of homeownership.[114] To help maintain and increase homeownership rates, the U.S. government encouraged mortgage originators to diversify their loan products.[115] The lending industry eagerly complied with this request and radically altered the criteria they used to approve mortgage loans principally by creating—then extensively marketing—a wide array of nontraditional (also called "exotic" or "alternative") products.[116] These exotic loans had several common fea-

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capital gains).

110. Fannie Mae, *The Growing Demand for Housing: 2002 Fannie Mae National Housing Survey* 2 (2002), *available at* http://www.fanniemae.com/global/pdf/media/survey/survey2002.pdf, at 2; Alan Greenspan & James Kennedy, *Sources and Uses of Equity Extracted from Homes* 8–11 (Fed. Reserve Bd., Working Paper No. 2007-20, 2007); MALABRE, *supra* note 42, at 44–46.

111. Greg Ip, *Not Your Father's Pay: Why Wages Today Are Weaker*, WALL ST. J., May 25, 2007, at A2.

112. *See, e.g.*, Karl E. Case & Robert J. Shiller, *The Behavior of Home Buyers in Boom and Post-Boom Markets* 2 (Nat'l Bureau of Econ. Research, Working Paper No. W2748, 1989) (discussing capriciousness of housing price appreciation wealth distribution).

113. Julie Kosterlitz, *Home Sweet Home?*, 36 NAT'L J. 712 (Mar. 6, 2004).

114. *Affordable Housing Needs in the City of Houston: Unique Challenges and Opportunities: Hearing Before the Subcomm. on Hous. and Econ. Opportunity of the H. Comm. on Fin. Servs.,* 110th Cong. 8 (2007) (testimony of Daniel Bustamante, Executive Director, Greater Houston Fair Hous. Ctr., stating that the "dream of home ownership continues to be just a dream for most working people"), *available at* http://financialservices.house.gov/hearing110/htbustamante102907.pdf.

115. *See* Luci Ellis*, The Housing Meltdown: Why Did It Happen in the United States?*, Bank for Int'l Settlements Working Paper No. 259 (Sept. 2008), at 5, *available at* http:// www.bis.org/ publ/ work259.pdf (arguing that legislative and policy changes aimed at increasing homeownership encouraged the development of a non-conforming (Alt-A and subprime) lending sector); Russell Roberts, *How Government Stoked the Mania*, WALL ST. J., Oct. 3, 2008, *available at* http:// online.wsj.com/ article/ SB122298 982558 700341.html ("Fannie and Freddie played a significant role in the explosion of subprime mortgages and subprime mortgage-backed securities.").

116. The Mortgage Bankers Association defines "nontraditional mortgage products" as "financing options which have been developed to increase flexibility and affordability and otherwise meet the needs of homebuyers who have been purchasing homes in an environment where real estate prices have increased faster than borrowers' incomes." *Preserving the American Dream: Predatory Lending Practices and Home Foreclosures: Hearing before the Subcomm. on Banking, Hous., and Urban*

tures, though the most significant difference between these mortgages and the low-cost conventional mortgages of the 1960s was the prevalence of flexible, "adjustable" interest rates. Adjustable rate mortgages ("ARMs") had initial monthly payments that started low then adjusted on specific future dates, which made homeownership more affordable—especially for borrowers with no savings, low or unsteady income, or bad credit.[117] These products also eschewed the fifteen- and thirty-year conventional mortgage periods and instead offered extended maturity mortgage loans for terms up to forty or fifty years.[118]

These nontraditional mortgages almost eliminated overnight the requirement of face-to-face contact between the lender and the borrower, and the newer, easier lending standards abandoned the requirement that borrowers document their income and assets. Instead, low-income (or, no-income) borrowers were given the freedom to purchase homes using no documentation or low documentation (commonly referred to as "no doc," "low doc," or "liar") loans.[119] These loans, which could be approved over the Internet, used minimal standards to verify the borrower's income and assets.[120] Finally, to keep the American Dream of homeownership within the reach of people who lacked savings or steady income, lenders relaxed (and at times altogether abandoned) the down payment requirement[121] and,

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Affairs, 110th Cong. 123 (2007) [hereinafter *Preserving the American Dream*] (statement of Douglas G. Duncan, Senior Vice Pres. of Research and Bus. Dev., and Chief Economist, Mortg. Bankers Assn.).

117. After the initial period, monthly payments "reset" and the low initial monthly payments would increase based on the adjusted, always higher, "fully-indexed" rate. Bd. of Govs. of the Fed. Reserve Sys., *Interest-Only Mortgage Payments and Payment-Option ARMS—Are They for You?* 3–4 (2006) [hereinafter *Interest-Only Mortgage*], *available at* http://www.federalreserve.gov/PUBS/mortgage_interestonly/mortgage_interestonly.pdf.

118. Gretchen Morgenson, *FAIR GAME:Home Loans: A Nightmare Grows Darker*, N.Y. TIMES, Apr. 8, 2007, at C1; FitchRatings, *2006 Global Structured Finance Outlook: Economic and Sector-by-Sector Analysis* (Jan. 17, 2006); Holden Lewis, *50-Year Mortgage Debuts in California*, BANKRATE, Apr. 27, 2006, http://www.bankrate.com/brm/news/mortgages/20060427a2.asp. Extended maturity mortgage loans have terms for longer than 30 years and produce a product that looks substantially similar to a monthly rental payment. *See id.* (describing the 40-year loan, which results in lower monthly payments).

119. Peter Henderson, Tim McLaughlin, Andy Sullivan & Al Yoon, *Frenzy of Risky Mortgages Leaves Path of Destruction*, REUTERS, May 8, 2007, http:// www.reuters.com/ article/ idUSN 032989 22200 70508. *See also Preserving the American Dream*, *supra* note 116, at 4–6 (statement of Jean Constantine-Davis, Senior Attorney, AARP Foundation) (describing perils to consumer of "stated income" loans), *available at* http:// banking.senate.gov/ public/_files/ davis.pdf.

120. These loans often relied on the credit scoring devices credit card companies used when deciding whether to give a consumer a credit card even though those scoring devices have never been used to verify income (and, indeed, do not consider income at all). Lenders protected themselves from the increased risk of default by charging borrowers higher interest rates for these loans. *See* Kenneth R. Harney, *The Lowdown on Low-Doc Loans*, WASH. POST, Nov. 25, 2006, at F1 (describing how lo-doc and no-doc loans work).

121. William E. Nelson & Norman R. Williams, *Suburbanization and Market Failure: An Analysis of Government Policies Promoting Suburban Growth and Ethnic Assimilation,* 27 FORDHAM URB. L.J. 197, 226 33 (1999) (tracing the history of government intervention in the housing markets to expand home ownership by loosening financial requirements).

instead, offered mortgages with high loan-to-value ("LTV") ratios. High LTV loans ostensibly gave borrowers the freedom to "buy" a house yet invest little (if any) of their own financial capital since they could take out a loan (or loans) equal to the sales price of their home.[122]

2. Living On Credit

Though "easy" consumer credit has been the norm for almost two decades, before the 1960s, low-cost credit was largely unavailable for people who wanted to purchase goods on credit. Most households had to either borrow from loan sharks[123] or rely on installment loans that local commercial institutions or credit unions approved only after scrutinizing the borrower's income and assets and evaluating their creditworthiness.[124] Like potential homebuyers until the 1980s, people who sought this type of credit would almost always be forced to have a face-to-face meeting with the lender and, unless they were wealthy, would be required to document their income and assets.[125] Borrowers who did not have assets they could pledge as collateral and people who could not (or would not) document that they had stable income would almost always be denied credit. The only type of credit that might have been available to middle- to low-income consumers was relatively high-cost installment loans offered by local retailers (department stores or automobile dealers) that often required a significant down payment and typically could be used only to purchase goods from the lender that issued the credit.[126] Commercial small-loan lending had been widely available since the turn of the twentieth century

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122. Fishbein & Woodall, *supra* note 105, at 12; *Calculated Risk: Assessing Non-Traditional Mortgage Products, Hearing Before the Subcomm. on Hous. and Transp. and the Subcomm. on Econ. Pol. of the Subcomm. on Banking, Hous., and Urban Affairs*, 109th Cong. 4, 6 (2006) [hereinafter *Calculated Risk*] (statement of William A. Simpson, Vice Pres., Mortg. Ins. Cos. of Am.), *available at* http://banking.senate.gov/public/_files/ACF84D5.pdf. For example, rather than requiring borrowers to make a $20,000 down payment when purchasing a $100,000 home, lenders would let borrowers purchase a home with no money down by taking out a first mortgage (typically for 80% of the value of the home) and then a simultaneous second mortgage (or line of credit) for the balance of the sales price, a loan system commonly referred to as a "piggyback" loan. Piggyback lending arrangements let borrowers avoid purchasing PMI. Borrowers sometimes put no money down, though many borrowed 80% with a traditional mortgage, 10% as a second loan, and put 10% down. Fishbein & Woodall, *supra* note 105, at 3; Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, 92 Fed. Reserve Bulletin A123, A135, A137–38 (2006).

123. *See, e.g.*, BLACK, *supra* note 41, at 151–55 (discussing loan sharking in the 1960s).

124. *See* Robert M. Hunt, *Development and Regulation of Consumer Credit Reporting in the United States, in* THE ECONOMICS OF CONSUMER CREDIT, *supra* note 61, at 308; Michelle J. White, *Bankruptcy Reform and Credit Cards*, J. ECON. PERSP., Fall 2007, at 175, 180; Whitehead, *supra* note 100, at 8.

125. *See* CALDER, *supra* note 36, at 192–93; CROSSE & HEMPEL, *supra* note 102, at 181; GRIMES, *supra* note 65, at 44–45; Whitehead, *supra* note 100, at 8.

126. *See* DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 28–29 (1974); GRIMES, *supra* note 65, at 45–46; Robert M. Hunt, *Development and Regulation of Consumer Credit Reporting in the United States, in* THE ECONOMICS OF CONSUMER CREDIT, *supra* note 61, at 309; Alan Greenspan, *supra* note 102.

and—though costly—was still preferable to other forms of consumer lending at the time, i.e., pawnbrokers and illegal loan sharks.[127] Even though credit bureaus had already started to collect a dossier of financial information about potential purchasers,[128] the costs associated with processing consumer loans before the 1960s, then supervising them to ensure repayment, made this type of lending relatively expensive by current standards.[129]

While anything with a pulse could get a credit card starting in the 1990s until the recent credit meltdown forced issuers to tighten their lending standards,[130] only higher-income individuals could get credit cards when Diners' Club introduced the first payment card in 1950.[131] Moreover, these early cards did not serve the same function as modern credit cards since users were required to pay the balances on these early credit cards in full each month.[132] Likewise, these early cards were not created to satisfy any pent-up desire for credit and, instead, served to satisfy the desires of higher income users to have a fast and convenient way to purchase items without using cash.[133]

A series of laws and Supreme Court rulings starting in the 1970s essentially deregulated the consumer credit market and made it easier, quicker, and much more profitable, for companies to extend credit to individuals.[134] As a result, since the 1960s, creditors have aggressively democratized consumer credit, and with fewer controls or usury laws, regulators now do little to curtail lending.[135] In an almost deregulated environment, creditors had an incentive to extend larger amounts of credit to all

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127. *See* BLACK, *supra* note 41, at 151–55; CALDER, *supra* note 36, at 20, 42–55, 112–20.

128. BLACK, *supra* note 41, at 35–52 (discussing the efficiency of credit bureaus in the 1960s).

129. *See* GRIMES, *supra* note 65, at 15, 52–56.

130. *Credit Cards at 50: The Problems of Ubiquity,* N.Y. TIMES, Mar. 12, 2000, at C11 (reporting that former Federal Reserve Chair Alan Greenspan told the Senate Banking Committee that "[c]hildren, dogs, cats and moose are getting credit cards").

131. *See* BLACK, *supra* note 41, at 21; VYSE, *supra* note 65, at 98.

132. VYSE, *supra* note 65, at 98.

133. *Id.*

134. *See, e.g.*, Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299 (1978) (allowing national banks to charge credit card customers the prevailing interest rate in the bank's —not the borrower's—home state); Smiley v. Citibank, 517 U.S. 735 (1996) (permitting banks to treat fees as interest and providing that the banks' home state laws regulated those fees); Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate,* BANK TRENDS: ANALYSIS EMERGING RISKS BANKING (Washington, D.C.), Mar. 1998, at 5–6, 9, http://www.fdic.gov/bank/analytical /bank/bt_9805.pdf.

135. *See* Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1302 (2006); Ellis, *supra* note 134, at 9; Susan Jensen-Conklin, American Bankruptcy Institute, Minutes of Meeting Held (July 18-19, 1996); *see generally* DEMOS: A NETWORK FOR IDEAS & ACTION, COMMENTS REGARDING ADVANCE NOTICE OF PROPOSED RULEMAKING: REVIEW OF THE OPEN-END (REVOLVING) CREDIT RULES OF REGULATION Z 4, http://www.federalreserve.gov/SECRS/2005/March/20050329/R-1217/R-1217_110_1.pdf (asserting that the credit card industry more than tripled credit offers between 1993 and 2000).

consumers.[136] Since creditors could charge higher rates of interest to compensate for any higher risks of default, these new consumers included those who had until then been deemed unworthy of credit.[137]

Technological advances also made it easier for lenders to dramatically expand the amount of consumer debt (both mortgage and credit card) they were willing to give high-risk borrowers. Until the recent credit freeze, millions of prescreened mail solicitations for credit cards were mailed.[138] Credit card and mortgage applications were readily available and could be approved almost immediately on the Internet because technology largely eliminated the need for bank officers to scrutinize a potential borrower's financial information. As a result, face-to-face meetings with lenders became largely a historical relic. Instead, when deciding whether to grant credit applications, lenders now rely heavily on credit scores and other sophisticated modeling devices to evaluate the borrower's credit and determine the probability that a borrower will default. These scoring devices combine individual and statistical risks and have made it more efficient for creditors to assess aggregate default risks.[139] Since credit can be quickly and efficiently approved, creditors have a greater incentive to extend more credit than they did twenty years ago.[140] In addition, intense competition in the credit card market induced issuers to offer consumers incentives, cash-back bonuses, merchandise discounts, and airline or hotel miles to encourage consumers to increase their credit card use.[141]

Consumers are not just gullible pawns though. They have been willing participants in the deregulated consumer credit market and have voraciously accepted credit offers, even high cost ones. In addition to the desire to charge more to ostensibly earn more credit card miles (or points or cash back), people do more leisure traveling and can now easily shop on the

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136. Shortly after U.S. consumer credit markets were deregulated, interest rate ceilings and other consumer credit regulations were lifted in European consumer credit markets. Nicola Jentzsch & Amparo San José Riestra, *Consumer Credit Markets in the United States and Europe, in* THE ECONOMICS OF CONSUMER CREDIT, *supra* note 61, at 28–29.

137. *See, e.g.*, VYSE, *supra* note 65, at 50–51.

138. *See* Thomas A. Durkin, *Credit Card Disclosures, Solicitations, and Privacy Notices: Survey Results of Consumer Knowledge and Behavior*, 92 FED. RES. BULL., A109, A115–A118 (2006).

139. Nicola Jentzsch & Amparo San José Riestra, *Consumer Credit Markets in the United States and Europe, in* THE ECONOMICS OF CONSUMER CREDIT, *supra* note 61, at 39; s*ee also* RONALD MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 113–14 (2006) (noting that credit bureaus allowed lenders to determine the potential performance of future borrowers, resulting in this technique being widely used along with computer technology advancement in the 1990s); WILCOX, *supra* note 5, at 19.

140. *See* MANN, *supra* note 139, at 113 (noting that increased accuracy of risk assessment allowed lenders to increase amounts lent to consumers, indicating a positive relationship between credit bureau data and increased consumer lending); Emilio Fernandez-Corugedo & John Muellbauer, *Consumer Credit Conditions in the United Kingdom* 5 (Bank of Eng., Working Paper No. 314, 2006), *available at* http://www.bankofengland.co.uk/publications/workingpapers/wp314.pdf.

141. *See* ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 8 (2000).

Internet or by mail. Given this, they ostensibly *need* to use their credit cards more to book hotel rooms and rental cars and to pay for online or mail order purchases.[142] But whether because of the convenience of Internet and mail order shopping[143] or because of a perceived need for certain goods or services,[144] having the financial freedom to finance your lifestyle on credit has now become as entrenched in the American Dream as the desire to own a home, retire comfortably, or send your children to college.[145] However, just as NoDoz and caffeine supplements initially make people more alert and able to stay up later to finish work (or study or complete a term paper), overindulging in caffeine, alcohol, or anything (including credit) ultimately and inevitably will cause the consumer to crash and suffer toxic consequences.[146]

IV. Vanishing Financial Freedom

> "*[F]inancial ruin, like death, is not a moment but a process, a slow, merciless grinding down.*"[147]

The increase in opportunities for people to exercise their freedom to become overindebted has created an illusion of financial freedom that masks the fact that overindebtedness itself erodes financial freedom. When most consumers lacked access to convenient, low-cost credit, they were to a certain extent deprived of financial freedom. But once they were given so much credit and so many choices that their debts (and their creditors and debt collectors) controlled their lives, they also were deprived of fi-

142. Of course, it is hard to argue that people *need* to shop on the Internet. However, once the decision is made to shop online it is virtually impossible to do so without a credit card.

143. *See* VYSE, *supra* note 65, at 102–04 (discussing the effect that modern telecommunications has had on spending behavior).

144. *See id.* at 120 (discussing hierarchy of needs); *id.* at 152–53 (discussing when wants become needs); *see also* SELIGMAN, *supra* note 12, at 214–25 (discussing historical views of luxuries and necessaries). Happily, the current economic crisis appears to be causing people to shift their views of needs versus wants. *See* RICH MORIN & PAUL TAYLOR, PEW RESEARCH CENTER; LUXURY OR NECESSITY? THE PUBLIC MAKES A U-TURN, (Apr. 23, 2009), http:// pewsocialtrends.org/ pubs/ 733/ luxury-necessity-recession-era-reevaluations.

145. *See* BLACK, *supra* note 41, at 32 ("It appears that credit cards and the all-purpose cards in particular are rooted in our way of life as surely as apple pie, Marilyn Monroe and slaughter on the highways."). For a 1960s discussion of the consumers' responses to the addictive nature of credit, see *id.* at 85 (discussing a group patterned on Alcoholics Anonymous, named "Charge Accounts Anonymous").

146. I thank my colleague, John Deigh, for suggesting this analogy. *See* Julie Deardorff, *Caffeine Abuse: An Emerging Problem*, CHI. TRIB., Nov. 21, 2006, http://featuresblogs.chicagotribune.com/features_julieshealthclub/2006/11/caffeine_abuse_.html; Mayo Clinic Staff, *Alcoholism*, May 8, 2008, http://www.mayoclinic.com/print/alcoholism/DS00340/METHOD=print&DSECTION=all; Robert A. Stickgold, John W. Winkelman & Peter Wehrwein, *You Will Start to Feel Very Sleepy . . . And You Should Go to Bed, Because Shortchanging Your Rent Can Hurt Your Health*, NEWSWEEK, Jan. 26, 2004, *available at* http://www.newsweek.com/id/52848.

147. JOHN GARDNER, MICKELSSON'S GHOSTS 209–10 (1982) (emphasis added).

nancial freedom. The subprime housing/consumer credit/global financial crisis, viewed appropriately, is part of a larger yet-untreated epidemic, i.e., the loss of financial freedom. Early colonial imagery of debt likened debtors to slaves and linked insolvency with dependence.[148] Of course, modern debtors are no longer imprisoned when they fail to pay their bills.[149] Still, the ability to become hopelessly overindebted facilitates and indeed hastens financial bondage. Thus, like their colonial predecessors, modern consumers also are enslaved by their debts.[150]

A. The Illusion of Freedom

To live comfortably and with financial security, you need to have some type of income or assets and not too much debt. Many households do not save, and overall savings rates—though currently rising because of reduced consumer spending levels—remain lower than they were before the turn of the twentieth century.[151] That the savings rate has dropped in recent years is especially problematic because for almost two decades U.S. workers have faced job instability and we now have the highest unemployment rates in a quarter of a century.[152] Consumer debt levels—especially mortgage loans—have skyrocketed over the last decade and now have resulted in the near-total collapse of the entire U.S. financial system.[153] As was true in colonial America, credit remains seductive and, for some consumers, almost seems to be addictive.[154]

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148. *See, e.g.*, Bruce H. Mann, *Failure in the Land of the Free*, 77 AM. BANKR. L.J. 1 (2003).

149. Though the United States Supreme Court held in *Williams v. Illinois*, 399 U.S. 235 (1970), that people cannot be forced to remain in prison because they cannot pay fines or court costs, this has not prevented states from sending debtors (or their parents) to prison if they fail to pay fines or to reimburse the state for the cost of being detained in a detention facility. Editorial, *The New Debtors' Prisons,* N.Y. TIMES, Apr. 6, 2009, at A24.

150. *See* BLACK, *supra* note 41, at 84 (suggesting that families do not "concern themselves with the fact that in effect they have become the bill collector's indentured servant"); SELIGMAN, *supra* note 12, at 274 ("A man with a millstone of indebtedness about his neck is not apt to make much progress in the fierce competitive current of modern life: a family water-logged by debt is likely to sink.").

151. WILCOX, *supra* note 5, at 8. *But see* Catherine Rampell, *Shift From Spending to Saving May be Slump's Lasting Impact*, N.Y. TIMES, May 10, 2009, at A1 (discussing the increase in savings rate from less than 1% to 4% in just one year).

152. *See* LOUIS UCHITELLE, THE DISPOABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES 124–77 (2006); Peter S. Goodman, *Joblessness Hits 9.5%, Deflating Recovery Hopes,* N.Y. TIMES, Jul. 2, 2009, at A1; Peter S. Goodman & Jack Healy, *663,000 Jobs Lost in March; Total Tops 5 million*, N.Y. TIMES, Apr., 3, 2009, at A1; Press Release, Bureau of Lab. Statistics, Employment Situation Summary (Sep. 3, 2010), http://www.bls.gov/news.release/empsit.nr0.htm; Algernon Austin, *Uneven Pain: Unemployment by metropolitan area and race*, ECON. POL. INST., ISSUE BRIEF # 278, (June 8, 2010), http://epi.3cdn.net /91deae2086 a6f00e2a _afm6bnshh .pdf.

153. *See* Brian K. Bucks et al., *Recent Changes in U.S. Family Finances: Evidence from the 2001 and 2004 Survey of Consumer Finances,* 92 FED. RES. BULL. A1, A26–28 (2006), *available at* http://www.federalreserve.gov/pubs/oss/oss2/2004/bull0206.pdf.

154. *See* Jennifer Levitz, *Hi, My Name Is Fred, and I'm Addicted to Credit Cards: In the Debt Soaked Economic Slump, Americans Find Solace in Support Groups*, WALL ST. J., June 10, 2008, at 1; Steven Mufson, *End of Cheap Credit Hits Homes, Businesses*, WASH. POST, Mar. 18, 2008, at D1

Given the life-cycle benefits of indebtedness and this nation's affinity for freedom of contract, anyone who contends that consumer financial contracts are unfair and should be banned or not enforced, or who seeks laws to protect a consumer's freedom *from* the harms caused by certain financial contracts, will meet with stiff resistance from the consumer credit industry[155] and often from politicians.[156] Restrictions, regulations, and taxes are said to impede the smooth functioning of the market and unnecessarily restrict the consumer's freedom to participate in acts or make decisions that are available to wealthier Americans.[157] Thus, attempts to protect consumers from the almost inevitable consequences of making unwise financial decisions (like incurring too much debt) are almost always challenged for being paternalistic restrictions on the consumer's freedom.[158] The only relatively noncontroversial efforts to protect consumers from the consequences of too much financial freedom *to* engage in transactions (or, conversely, efforts that protect the consumer's freedom *from* those transactions) typically involve laws that regulate physically harmful conduct, such as loan sharking, or undeniably oppressive conduct, such as debt collection telephone calls in the middle of the night.[159]

(discussing Bankaholic.com, a website that lets consumers "shop" for credit cards and mortgages). *But see* VYSE, *supra* note 65, at 28–30 (disputing the view that over-indebted consumers have a mental illness).

155. For example, the consumer credit industry mounted a full-fledged attack when Professor Elizabeth Warren originally suggested that the U.S. create a Consumer Financial Protection Agency to help consumers better compare complex financial products and better understand the risks associated with those products.

156. For example, in October 2002, Georgia enacted the Georgia Fair Lending Act, touted as the toughest legislation in the nation against predatory mortgage lending practices to date. However, less than six months later, legislators repealed many of the restrictions—restrictions that some think would have helped homeowners who are now in foreclosure—in response to subprime industry pressure. Ann Hardie & Carrie Teegardin, *Lenders Win, Lose in Gold Dome Battles*, ATLANTA J.-CONST., Feb. 1, 2005, at A5, *available at* http:// www.ajc.com/ news/ content/ business/ borrowerbeware/ 0201 creditside.html; Glenn R. Simpson, *Lender Lobbying Blitz Abetted Mortgage Mess: Ameriquest Pressed for Changes in Laws; A Battle in New Jersey*, WALL ST. J., Dec. 31, 2007, at A1, *available at* http:// online.wsj.com/ article/ SB119906 606162358773.html; GA. DEP'T OF BANKING & FIN., GEORGIA FAIR LENDING ACT RESOURCES, http:// dbf.georgia.gov/ 00/ article/ 0,2086, 43414745_ 46387757_ 69095 972, 00.html.

157. *See* SEN, *supra* note 5, at 25.

158. *See* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1160 (2003) (arguing that because libertarians favor freedom of choice, they "cannot possibly embrace paternalism," including in the context of savings behavior).

159. *See* Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2006) (prohibiting certain types of abusive and deceptive conduct when attempting to collect debts); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006) (disallowing the use of post-dated checks and electronic debit authorizations to repay small consumer loans and prohibiting charging interest of more than 36% annually to military members). Also, many states regulate payday loans, including Alabama and New York. Ala. Code § 5-18-15 (LexisNexis 2010) (setting maximum interest rates and account maintenance fees); N.Y. PENAL LAW §§ 190.40, 190.42 (Consol. 2010) (criminal usury statutes prohibiting charging interest of more than 25% annually); N.Y. BANKING LAW § 14-a (Consol. 2010) (civil banking law restricting unlicensed lenders to 16%); *see generally* NAT'L CONSUMER LAW CTR., PREDATORY SMALL LOANS A FORM OF LOANSHARKING: THE PROBLEM, LEGISLATIVE STRATEGIES, A MODEL ACT, http://web.archive.org/web/20080429230915/

Having more financial freedom may have had good results for some consumers. However, other consumers were under the impression that they had more freedom, but in fact, they never had any real control over their personal financial situation. Indeed, while unlimited financial freedom temporarily gave consumers more power in the consumer credit market, as the next sections show, this purported freedom has had unfortunate (yet quite predictable) consequences.

B. Skyrocketing Credit Card Debt

People seem particularly likely to engage in impulsive behavior and to have self-control problems when given greater freedom to use credit cards.[160] This is not terribly surprising since they are fast, convenient, user-friendly, and "allow consumers to smooth [their] spending over [periods of] temporary liquidity shortfalls."[161] The main argument used to justify the 2005 amendments to the Bankruptcy Code was that too many people incurred too much debt (especially credit card debt) then opportunistically sought to discharge that debt in bankruptcy rather than even attempt to repay it.[162] Unfortunately, just as Congress was making it harder for people to discharge debts, credit card debt levels escalated.[163]

Consumers have dramatically increased their consumer debt, and credit card debt in particular has increased fairly consistently for the last two

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www.consumerlaw.org/issues/payday_loans/pay_menu.shtml. For an earlier description of the rise and importance of debt collectors and the role they played in facilitating the spread of credit card debt, see BLACK, *supra* note 41, at 51–72 and *id.* at 151–61 (discussing loan sharking industry).

160. *See* Carol C. Bertaut & Michael Haliassos, *Credit Cards: Facts and Theories*, *in* THE ECONOMICS OF CONSUMER CREDIT, *supra* note 61, at 226–29; VYSE, *supra* note 65, at 107–08.

161. Carol C. Bertaut & Michael Haliassos, *Credit Cards: Facts and Theories*, *in* THE ECONOMICS OF CONSUMER CREDIT, *supra* note 61, at 181; *see also* VYSE, *supra* note 65, at 216 (discussing life-cycle theory and why people spend based on their perceived lifetime earning potential).

162. *See* 151 CONG. REC. E737 (daily ed. Apr. 22, 2005) (statement of Rep. Tiahrt) ("[T]he United States cannot afford to continue down the path where high consumer debt is routinely directed toward bankruptcy as a first stop rather than a last resort."); 151 CONG. REC. S1820 (daily ed. Mar. 1, 2005) (statement of Sen. Sessions) ("When a person in America undertakes an obligation to pay someone, they ought to pay them . . . . We are drifting a bit to suggest there is no real obligation to pay the debts we incur. If we get to that point, then we have eroded some very important fundamental moral principles about commerce in America."); 149 CONG. REC. H1998 (daily ed. Mar. 19, 2003) (statement of Rep. Davis) ("Rather than an action of last resort, [bankruptcy] had evolved into a convenient vehicle to discharge debts through irresponsible financial practices."); 147 CONG. REC. 2551 (Mar. 1, 2001) (statement of Rep. Boucher) ("Bankruptcy was never meant to be a financial planning tool, but it is increasingly becoming a first stop rather than a last resort . . . ."); 146 CONG. REC. 22367 (2000) (statement of Rep. Bryant) ("In recent years, bankruptcy has truly become a first stop rather than a last resort."); 144 CONG. REC. 20650, 20662 (1998) (statement of Sen. Hatch) ("Bankruptcy has become a routine financial planning device used to unload inconvenient debts, rather than a last resort for people who truly need it.").

163. While bankruptcy filings plummeted after Congress revised the Bankruptcy Code in 2005, filings have steadily increased since 2006. *See* Press Release, U.S. Courts, Bankruptcy Filings up in Calendar Year 2008 (Mar. 5, 2009), http:// www.uscourts.gov/news/NewsView/ 09-03-05/ Bankruptcy_ Filings_ Up_ In_Calendar_Year_2008.aspx.

decades. For example, in 1983, 43% of all households had a revolving bank-type credit card.[164] Less than ten years later, this number had increased to 62%,[165] and by 2004, 74.9% of all households had credit cards (though this number did slightly decrease in 2007 to 73%).[166] In addition to the overall growth in the number of people who have credit cards, total credit card debt has increased significantly as well. Credit card debt at the end of 1990 was $238.6 billion, it was $309.9 billion by the of 1993, and it was $540 billion by the end of 1997.[167] By 2000, this amount had increased to $675 billion, then increased by almost a third, to $960.4 billion by 2008.[168]

While overall revolving debt declined by 0.7% between 2004 and 2005, that appears to be the result of borrowers substituting credit card borrowing for lower-interest home equity loans since total home mortgage debt over that period increased by over $1 billion.[169] Moreover, between 2005 and 2006, just as the subprime mortgage crisis caused lenders to start restricting mortgage credit, overall revolving debt increased at an annual rate of 3%,[170] likely because consumers who were unable to get mortgage loans, refinancing loans, or home equity loans relied again on credit card debt.[171] People continued to have the freedom to be approved for and then to incur debts on their credit cards until fairly recently, when credit card issuers finally started to reduce and even deny credit for cardholders and generally tighten their credit standards.[172] Once the credit crunch spread to the credit card market, credit card issuers tightened credit limits, increased

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164. Thomas A. Durkin, *Credit Cards: Use and Consumer Attitudes, 1970-2000*, FED. RES. BULL., Sept. 2000, at 623, 625, *available at* http:// www.federalreserve.gov/ pubs/ bulletin/ 2000/ 0900lead.pdf.

165. Arthur B. Kennickell et al., *Family Finances in the U.S.: Recent Evidence from the Survey of Consumer Finances*, FED. RES. BULL., Jan. 1997, at 1, 17, *available at* http:// www.federalreserve.gov/ pubs/ bulletin/ 1997/ 0197lead.pdf.

166. Bucks et al., *supra* note 107, at A46.

167. FED. RES. G.19 RPT. ON CONSUMER CREDIT, CONSUMER CREDIT HISTORICAL DATA, SEASONALLY ADJUSTED, http:// www.federalreserve.gov/ releases/ G19/ hist/ cc_hist_sa.txt.

168. Fed. Res., Statistical Release: Consumer Credit (Mar. 6, 2009), http:// www.federalreserve.gov/ releases/ g19/ 2009 0306/ [hereinafter Fed. Res. (Mar. 6, 2009)]; Fed. Res., Statistical Release: Consumer Credit (Jan. 9, 2006), http:// www.federalreserve.gov/ releases/ g19/ 2006 0109/.

169. Fed. Res. (Mar. 6, 2009), *supra* note 168.

170. *Id.*

171. *See generally* TIM WESTRICH & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, HOUSE OF CARDS: CONSUMERS TURN TO CREDIT CARDS AMID THE MORTGAGE CRISIS, DELAYING INEVITABLE DEFAULTS (2008), http://www.americanprogress.org/issues/2008/02/house_of_cards.html.

172. OFFICE OF THE COMPTROLLER OF THE CURRENCY, SURVEY OF CREDIT UNDERWRITING PRACTICES: 2008 2 (2008), http://www.occ.treas.gov/2008Underwriting/2008UnderwritingSurvey.pdf ("After four consecutive years of eased underwriting standards, the majority of the banks surveyed tightened underwriting standards for both commercial and retail loans."); Nick Zieminski, *Mortgage Delinquencies May Have Peaked: Equifax*, REUTERS, June 11, 2009, http:// www.reuters.com/ article/ idUSN 11395857 20090612 ("Companies are also imposing lower limits on balances, and are choosier about who gets credit in the first place.").

their lending standards, slashed rewards programs, and closed accounts.[173] Overall revolving debt has declined at an annual rate of 5.2%, and in part because of rising unemployment rates, credit card defaults are at their highest levels in two decades.[174]

Until the credit crisis deprived borrowers of the ability to have an almost unlimited number of credit cards with almost unlimited credit limits, people could use their credit cards to charge goods and services and also to get cash advances. They then had the freedom to repay the credit card debt (plus interest and potential late fees) and cash advances in small monthly payments that could extend well into the future.[175] Of course, a borrower who makes only minimum payments soon becomes unfree as she will remain indebted to the creditor for a longer period of time, and if interest rates are high and payments are low, her debt may actually *increase* over time.[176] Likewise, high fees, higher interest rates, and bewildering and often incomprehensibly complex terms (that the credit card issuer often could change retroactively and without notice) accompany the freedom of increased access to credit.[177] Thus, while increased access to credit cards ostensibly may have made consumers *feel* more powerful, this

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173. Credit card issuers also slashed rewards programs, raise interest rates, and increase credit card fees to compensate for higher charge offs. Ron Lieber, *Dealing Consumers a New Hand in Credit Cards*, N.Y. TIMES, May 20, 2009, at A1.

174. Fed. Res. (Mar. 6, 2009), *supra* note 168; *see also* Catherine Holahan, *A Family's Tale: From Middle Class to Unemployed*, MSN MONEY, Apr. 2, 2009, http:// articles.moneycentral.msn.com/ Investing/ StockInvestingTrading/ true-tale-from-middle-class-to-unemployed.aspx; Juan Lagorio, *U.S. Credit Card Defaults Rise to 20 Year High*, REUTERS, Mar. 16, 2009, http:// www.reuters.com/ article/ idUSN 16391 42420 090316; Kathy Shwiff, *Moody's: Credit Card Charge-Off Rate Near 10%, Highest Ever*, DOW JONES NEWSWIRES, May 27, 2009, *available at* http:// www.nasdaq.com/ aspx/ stock-market-news-story.aspx? storyid= 20090 5271752 dowjones djonline 000873; Louis Uchitelle, *Pain Spreads as Credit Vise Grows Tighter*, N.Y. TIMES, Sept. 19, 2008, at A1.

175. *See* VYSE, *supra* note 65, at 100–01 (discussing the psychology of allowing borrowers to make small minimum payments). Consumers who do not pay the balances in full each month tend to pay relatively higher rates of interest than convenience users who never carry a balance from month to month. *See* Carol C. Bertaut & Michael Haliassos, *Credit Cards: Facts and Theories*, *in* THE ECONOMICS OF CONSUMER CREDIT, *supra* note 61, at 206–07. While the minimum credit card repayment amount was increased slightly in 2005 during the overhaul of the U.S. Bankruptcy Code, consumers still have the freedom to remain financially enslaved to their credit card holders for years.

176. *See* VYSE, *supra* note 65, at 100–01; DEMOS: A NETWORK FOR IDEAS & ACTION, *supra* note 135.

177. *See* S. REP. NO. 111-16 (2009) (discussing a 2006 GAO study finding that credit card disclosures are written using language that more than 50% of people in the U.S. cannot understand); U.S. GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS, GAO-06-929 (2006), http:// www.gao.gov/ new.items/ d06929.pdf.

Consumer credit advocates have long urged for greater regulation of certain practices (like universal default provisions or double-cycle billing) and have argued that the tangled web of often expensive fees (like over-the-limit fees, balance transfer fees, set up fees, fees to pay by telephone, fees for foreign transactions) are abusive, misleading, or opaque and that those practices should either be reduced or more clearly disclosed. *See, e.g.*, WESTRICH & WELLER, *supra* note 171, at 7.

freedom has resulted in these same consumers losing financial freedom in any meaningful sense of the term freedom.

C. Easy—But Risky—Nontraditional Credit

In addition to having greater freedom to pay for goods or services or to get a cash advance using their credit cards, the largely deregulated consumer credit market gives people the freedom to get cash they need (or want) but don't have in between paychecks. Payday lenders give cash-strapped borrowers cash now in exchange for the borrower's promise to repay that cash (plus a fee, typically $15–$20 for every $100 borrowed, or an implied annual percentage rate of almost 400%) later once they receive their next paycheck. Or, if they are still short of cash at the next paycheck, they can rollover the loan and repay both loans from a future paycheck.[178] Like the financial freedom credit cards provide, the price tag attached to the freedom to quickly and conveniently get cash reflects exorbitantly high fees and interest rates.[179]

The deregulated consumer credit market also gives cash-strapped borrowers the freedom to purchase appliances or furniture from rent-to-own (RTO) companies[180] and to borrow against (but essentially pawn) their cars from auto title lenders.[181] Again, the cost of that financial freedom is also high, and it could include losing your car or having all the items you were buying on credit repossessed if you miss a payment to the RTO company.[182]

D. Toxic Mortgage Debt

Despite lacking savings or stable income, the illusory freedom that people exercised to pursue the American Dream of Homeownership caused them to purchase homes they could not afford—which has had the effect of destroying household balance sheets. Borrowers who purchased these overpriced homes decimated their household net worth and are now saddled with "assets" that are worth less than the debt that is attached to those assets.[183] With little income, little in savings, and just too much debt,

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178. *See* Robert Deyoung, *Congress Takes Aim at Payday Loans*, WALL ST. J., Apr. 14, 2009, at A13.

179. *See* Whitehead, *supra* note 100, at 11–12 (discussing the perils of borrowing from payday lenders).

180. *See* Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041 (2008) (describing the RTO industry and evaluating proposals to ban or severely regulate the industry).

181. *See generally* 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 (2000) (discussing fringe banking industry, including auto title pawning).

182. *See* Drysdale & Keest, *supra* note 181, at 598; Hawkins, *supra* note 180, at 2099.

183. For example, in "2008 as a whole, household net worth [($51.5 trillion)] fell [by] $11.2

many in our society now have negative net worth and little financial freedom.[184] Flat incomes, low household savings, ARM mortgage interest rate resets, and declining home prices created the perfect storm for the current financial crisis.

When interest rates on the ARM loans rose dramatically, borrowers suffered a "payment shock" and could not afford the new higher monthly mortgage payments.[185] Once housing prices dropped precipitously in 2006 and total mortgage lending started to plummet, borrowers could no longer refinance their mortgages or remove equity from their homes to pay their debts. Inevitably, mortgage loan defaults and foreclosure rates started rising.[186] Foreclosure rates in 2008 increased by 81% over 2007 rates, and the 2007 rates increased by 225% from 2006 rates. For much of 2008, almost one in ten mortgages was either past due or in foreclosure.[187] Foreclosure rates for March 2009 increased 17% from February 2009 rates and were almost 50% higher than the rates one year earlier.[188]

The acceleration of credit card debt combined with the deceleration of mortgage debt starting in 2005 appears to have exacerbated the mortgage crisis and deepened the current recession.[189] Notwithstanding various stimulus plans Congress has already approved and other stimulus activities (or bailouts) proposed by the Obama administration, financial experts accurately predicted that the higher mortgage default and foreclosure rates

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trillion," or approximately 20%. FED. RESERVE, FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES: FLOWS AND OUTSANDINGS FOURTH QUARTER 2008 (Mar. 12, 2009), http:// www.federalreserve.gov/ releases/ z1/ 20090312/ z1.pdf.

184. While the U.S. savings rate also plummeted during the Depression, the rate remained above 5% for most years post-Depression until the 1990s. OLNEY, *supra* note 40, at 48–49; *see also* MALABRE, *supra* note 41, at 22.

185. *See* FISHBEIN & WOODALL, *supra* note 105, at 9–12; *see also Subprime and Predatory Lending: New Regulatory Guidance, Current Market Conditions, and Effects on Regulated Financial Institutions: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs.*, 110th Cong. 396-97, at 6–7 (2007) [hereinafter *Subprime and Predatory Lending*] (statement of Shelia C. Bair, Chairman, FDIC); Les Christie, *Subprime Bailouts: How They Work*, CNNMONEY, Apr. 24, 2007, http:// money.cnn.com/ 2007/ 04/ 24/ real_estate/ bailout_ plans_ how_ they_ work/ index.htm. The lending industry also refers to a payment shock as "reset payment sensitivity." CHRISTOPHER L. CAGAN, MORTGAGE PAYMENT RESET: THE RUMOR AND THE REALITY 19 (Feb. 8, 2006), http:// www.loanperformance.com/ infocenter/ whitepaper/ FARES_ resets_ whitepaper_ 021406.pdf (emphasis omitted).

186. *See* SHILLER, *supra* note 108, at 32 (discussing dramatic rise and fall of house prices).

187. *See* Vikas Bajaj & Michael M. Grynbaum, *A Rising Tide of Mortgage Defaults, Not All on Risky Loans*, N.Y. TIMES, June 6, 2008, at C1; *Foreclosure Activity Hits Record High in Third Quarter*, REALTYTRAC, Oct. 15, 2009, http:// www.realtytrac.com/ foreclosure/ foreclosure-rates.html.

188. Alan Zibel, U.S. *Foreclosures up 24 Percent in 1st Quarter*, HUFFINGTON POST, Apr. 16, 2009, http:// www.huffingtonpost.com/ 2009/ 04/16/ us-foreclosures-up-24-per_n_187612.html.

189. *See* Nick Adama, *Experts Blame Recession On Overspending and Housing Inflation*, HULIQ NEWS, Jan. 27, 2008, http:// www.huliq.com/ 48504/ experts-blame-recession-overspending-and-housing-inflation ("[S]pending too much money is exactly what caused some of these problems in the economy."); Kathy Chu, *More Americans Using Credit Cards to Stay Afloat*, USA TODAY, Feb. 29, 2008, at A1, *available at* http:// www.usatoday.com/ money/ perfi/ credit/ 2008-02-28-credit-cards _N.htm; WESTRICH & WELLER, *supra* note 171.

would continue into 2010.[190] Moreover, even the U.S. Treasury Department has conceded that some of the government mortgage relief programs provided little relief for most people.[191] Moreover, these programs provide virtually no relief for people who owe more than their homes are worth or for the growing number of unemployed homeowners who lack the income to make their mortgage payments.[192] In short, even if all proposed plans were enacted, far too many people will continue to drown in their debts because of the harsh economic consequences of the new financial freedom they were given to buy homes they could not afford.

V. WHY FINANCIAL FREEDOM IS VANISHING

In our quest to give consumers more and more financial freedom, we have discounted or completely ignored the harm that the freedom to plunge into debt has on borrowers, and we seem to have lost sight of the fact that true freedom includes both the freedom *to* engage in financial transactions and also the freedom *from* being controlled by those transactions. Given current debt loads, the freedom some consumers have largely consists of fretting over how they will pay their bills, stressing out over their inability to pay their bills, and getting stressed out by debt collectors who "encourage" them to repay those bills.[193] The next sections discuss why the illusion of more financial freedom seemed to cause so many people to lose control over their ability to manage their financial lives and the harmful consequences of vanishing financial freedom.

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190. *See, e.g.*, Jim Carlton, *U.S. News: Builders Predict More Housing Pain*, WALL ST. J., Jan. 21, 2009, at A6; Ruth Simon, *The Financial Crisis: Loan Delinquencies Rear Their Ugly Head Again—Rates for Many Categories Jumped at Their Fastest Pace Since Last Year as 6.6% of Mortgages Were at Least 30 Days Past Due*, WALL. ST. J., Sept. 20, 2008, at A3; CENTER FOR RESPONSIBLE LENDING, UPDATED PROJECTIONS OF SUBPRIME FORECLOSURES IN THE UNITED STATES AND THEIR IMPACT ON HOME VALUES AND COMMUNITIES (2008), http://www.responsiblelending.org/mortgage-lending/research-analysis/updated-foreclosure-and-spillover-brief-8-18.pdf. *But cf.* Bd. of Governors of the Fed. Reserve Sys., Semiannual Monetary Policy Report to the Congress, (Feb. 24, 2009) http://www.federalreserve.gov/newsevents/testimony/bernanke20090224a.htm (statement by Federal Reserve Chair Ben Bernanke suggesting that foreclosures should decline in 2009 and that 2010 will be the recovery year).

191. Andrea Fuller, *U.S. Effort Aids Only 9% of Eligible Homeowners*, N.Y. TIMES, Aug. 5, 2009, at B8.

192. *See* FINANCIALSTABILITY.GOV, BORROWER FREQUENTLY ASKED QUESTIONS, July 16, 2009, http://www.financialstability.gov/docs/borrower_qa.pdf (relating that people who have recently lost their job will not qualify for the Home Affordable Refinance option but may be qualified for the Home Affordable Modifications portion of the plan); Macon Phillips, *Help for Homeowners*, THE WHITE HOUSE BLOG, Feb. 18, 2009, http://www.whitehouse.gov/blog/09/02/18/help-for-homeowners/ (explaining that under the Homeowner Affordability and Stability Plan, eligible loans include those where the new first mortgage will not exceed 105% of the current market value of the property).

193. Given recent debt collection tactics, the harms caused by loss of financial freedom now extend to the relatives of *dead* consumers. *See* David Streitfeld, *You're Dead? That Won't Stop the Debt Collector*, N.Y. TIMES, Mar. 4, 2009, at A1 (discussing debt collectors who contact the debtor's next of kin to collect consumer debts).

A. The U.S. Needs Financially Unfree Consumers

One cynical argument is that the U.S. laws and policies that purportedly give people more financial freedom are designed to encourage overindebtedness because our economy is so dependent on consumer spending and in recent years has been especially dependent on residential housing expenditures. Consumer spending has long been viewed as necessary for a strong economy, and consumers have been urged to infuse money into the economy (i.e., spend, spend, spend) in order to jumpstart the economy or respond to a national crisis.[194] For years, in fact, consumer spending has accounted for almost 70% of all U.S. economic activity.[195] Thanks to the democratization of credit, U.S. families in 2007 on average spent more than 18% of their income on debt payments, and almost 15% of all families had debt payments that exceeded 40% of their income.[196]

While consumer spending has slowed and household debt fell—for the first time ever—in 2008, the 0.8% decline did little to help consumers whose debt levels have more than doubled in the last decade.[197] It is not surprising that the subprime mortgage crisis was the immediate trigger for the current recession since in 2005 residential investment as a percentage of the gross domestic product reached the highest level in over fifty years.[198] Moreover, since the decrease in consumer spending has been cited as one reason the U.S. has been unable to quickly recover from the current credit crisis,[199] the need to have overindebted citizens provides an incentive for politicians to resist changing laws in ways that discourage consumer spending.

B. Bad Debtors, Bad Creditors, Irrational Debtors

Both borrowers and lenders have helped contribute to the erosion of financial freedom. Some consumers engaged in fraudulent conduct and abused their financial freedom by simply incurring too much mortgage

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194. For example, President George Bush encouraged U.S. citizens to continue their same spending patterns after 9-11, which some critics now contend helped to create the current financial crisis. *See* Andrew J. Bacevich, *He Told Us to Go Shopping. Now the Bill Is Due,* WASH. POST, Oct. 5, 2008, at B3; Janice Revell et al., *How to Profit in the New Economy*, MONEY, July 2009, at 57. The South Korean government also encouraged its citizens to increase their credit card use after the 1999 Asian financial crisis, which lead to a credit card crisis in that country as well. Suki Kim, *Notes from Another Credit Card Crisis*, N.Y. TIMES, May 18, 2009, at A23.

195. Uchitelle, *supra* note 174, at A1.

196. *See also* Bucks et al., *supra* note 107, at A37–A48; Whitehead, *supra* note 100, at 9–10.

197. *See* FED. RESERVE, *supra* note 183.

198. SHILLER, *supra* note 108, at 7 (observing that the share of residential investment in GDP has not been this high since the pre-Korean War housing boom in 1950).

199. *See* Evans, *supra* note 107, at A11; Revell, Bigda & Rosata, *supra* note 194, at 57; Press Release, Bureau of Econ. Analysis, Personal Income and Outlays: Nov. 2006 (Dec. 22, 2006), *supra* note 107.

debt[200] or by greedily or irresponsibly living well beyond their means,[201] while other consumers' spending patterns make it appear as if they are addicted to spending.[202] Other consumers may make irrational credit choices, including accepting high-cost credit offers, because they failed to shop around for the best credit terms or because—even if they searched for the best terms—the information they found was too complex or was incomprehensible.[203] Still other consumers may simply be unable to reliably calculate the risks associated with the freedom to go deeply into debt.[204]

One reason it may have been harder to link the current crisis to the general erosion of financial freedom is the way the crisis initially was characterized. That is, the financial crisis was first cast as one that was largely limited to the subprime market and only affected borrowers with poor credit or entities that invested in subprime mortgage loans.[205] Because sub-

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200. For example, reports suggest that some borrowers intentionally inflated their incomes on no-documentation loans (also known as liar loans), some rented or borrowed the credit scores of more creditworthy borrowers, some paid to be added to the credit cards of people with good credit histories, and others bought fake payroll stubs. Julie Creswell, *Fake Pay Stubs Online, and Other Mortgage Fraud*, N.Y. TIMES, June 16, 2007, at A1; *see also The Role of the Secondary Market in Subprime Mortgage Lending: Hearing before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs.,* 110th Cong. 16 (2007) [hereinafter *The Role of the Secondary Market*] (statement of Larry B. Litton Jr., President and CEO, Litton Loan Servicing LP, stating that defaults were "the result of lax underwriting standards, improper documentation, or fraud"); MERLE SHARICK ET AL., MORTGAGE ASSET RESEARCH INST., LLC, NINTH PERIODIC MORTGAGE FRAUD CASE REPORT TO MORTGAGE BANKERS ASSOCIATION 11 (2007), http:// www.mortgagefraudblog.com/ images/ uploads/ MBA9th CaseRpt.pdf.

201. *See* SHILLER, *supra* note 108, at 104–05 (discussing borrower desire for "easy money and quick riches" but noting the difficulty of being able to "quickly and reliably sort out who is at fault and who is not"); COMM'N ON THRIFT, FOR A NEW THRIFT: CONFRONTING THE DEBT CULTURE 12 (2008). Ironically, the reasons people fail to pay their bills in the twenty-first century are largely the same reasons people failed to pay their bills almost 100 years ago. *See* GRIMES, *supra* note 65, at 52 ("Some people fall in arrears because of unforeseen emergencies; some because they do not appreciate the nature of their promise; a few because they are dishonest.").

202. *See* Levitz, *supra* note 154, at 1, Mufson, *supra* note 154, at D1 (discussing Bankaholic.com, a website that lets consumers "shop" for credit cards and mortgages).

203. The inability to understand the true cost of credit is not, unfortunately, a new phenomenon. *See* Black, *supra* note 41, at 75 ("Perhaps the most important single phenomenon concerning on-the-cuff living is this: When it comes to knowing the cost of credit, the American consumer is undoubtedly one of the most ignorant, illiterate and easily deceived."); *id.* at 76 ("The consumer's abysmal ignorance of the cost of credit has been pointed up in survey after survey.").

204. Thus, information asymmetry appears to have caused some of these borrowers to accept expensive, nontraditional mortgage products even though they did not understand the loan features and even though they may have qualified for a lower cost loan product. *See Subprime and Predatory Lending, supra* note 185, at 72–73 (statement of Sheila C. Bair, Chairman, FDIC); *id.* at 351 (statement of Allen Fishbein, Director of Housing and Credit Policy, Consumer Federation of America); BRIAN BUCKS & KAREN PENCE, FED. RESERVE BD. OF GOVERNORS, DO HOMEOWNERS KNOW THEIR HOUSE VALUES AND MORTGAGE TERMS? 26 (2006), http://www.federalreserve.gov/Pubs/feds/2006/200603/200603pap.pdf; FANNIE MAE, *supra* note 110; MARK WIRANOWSKI, NEIGHBORHOOD REINVESTMENT CORP., SUSTAINING HOME OWNERSHIP THROUGH EDUCATION AND COUNSELING 6 (2003), http://www.jchs.harvard.edu/publications/homeownership/w03-7_wiranowski.pdf (discussing informational rents extracted from naive homeowners when lenders offer complex products that are not conducive to consumer comprehension).

205. Steven Pearlstein, *Will the Leak Ruin the Engine?*, WASH. POST, July 27, 2007, at D7; *see also* Michael A. Fletcher, *Bush Responds With Restraint To Questions About Economy*, WASH. POST,

prime homeowners were the ones who were blamed for behaving recklessly by purchasing homes they could never afford,[206] it was convenient and convincing to view their problems as discrete ones that were not related to responsible people generally or vanishing financial freedom specifically. Indeed, once the subprime mortgage crisis spread to the housing market generally, the government still maintained that it was an isolated problem that would not spread to other markets. Only after the subprime/housing crisis spread to other U.S. markets, slowed consumer spending, destabilized the U.S. economy at large, then spread to financial markets globally, did the U.S. government *finally* acknowledge that the current crisis could not just be blamed on irresponsible people with bad credit.[207]

Creditors are not without fault, though, and some lenders appear to have defrauded, manipulated, or aggressively targeted certain borrowers.[208] Critics have long argued that creditors need people who overspend and who are ignorant about the true costs of debt because of the profitability of credit itself.[209] Indeed, some lenders appear to have made a conscious effort to capitalize on their borrowers' cognitive defects[210] and to

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Aug. 19, 2007, at A7; Paul Krugman, *A Catastrophe Foretold*, N.Y. TIMES, Oct. 26, 2007, at A25; Steven Pearlstein, *Credit Market's Weight Puts Economy on Shaky Ground*, WASH. POST, Aug. 1, 2007, at D1.

206. *Cf.* Editorial, *The American Dream in Reverse*, N.Y. TIMES, Oct. 8, 2007, at A18; Patrice Hill, *Blame Abounds for Housing Bust*, WASH. TIMES, Dec. 26, 2007, at A1; Jessica Holzer, *Major Bailout is Unlikely on Sub-Prime Mortgages*, THE HILL (Wash. D.C.), Sept. 4, 2007, at 13 (quoting President Bush: "It's not the government's job to bail out speculators, or those who made the decision to buy a home they knew they could never afford"); Kathleen Pender, *Why We Shouldn't Be Bailing Out Subprime Lenders or Borrowers*, S.F. CHRON., Apr. 22, 2007, at D1 (arguing against government bailouts of borrowers and lenders).

207. *See* DAVID M. ABROMOWITZ, CTR. FOR AM. PROGRESS, ADDRESSING FORECLOSURES: A GREAT AMERICAN DREAM NEIGHBORHOOD STABILIZATION PLAN 3 (2008) (commenting on the evolution of the crisis).

208. *See* Christopher Maag, *Cleveland Sues 21 Lenders Over Subprime Mortgages*, N.Y. TIMES, Jan. 12, 2008, at A9. The States of California, New York, Massachusetts, and Illinois and the Cities of Baltimore and Cleveland have sued or are contemplating suing various financial institutions that packaged subprime loans. *See* Mara Der Hovanesian & Brian Grow, *Did Big Lenders Cross the Line?*, BUS. WK., Aug. 20, 2007, at 33; Amir Efrati & Kara Scannell, *Countrywide Draws Ire of Judges*, WALL ST. J., Jan. 14, 2008, at A3; Jonathan Karp & Miriam Jordan, *House of Cards: How the Subprime Mess Hit Poor Immigrant Groups*, WALL ST. J., Dec. 6, 2007, at A1; Kate Kelly, Amir Efrati & Ruth Simon, *State Subprime Probe Takes a New Tack*, WALL ST. J., Jan. 31, 2008, at A3; Greg Morcroft, *Massachusetts Charges Merrill with Fraud, Misrepresentation*, MARKETWATCH, Feb. 1, 2008, http://www.marketwatch.com/story/massachusetts-charges-merrill-with-fraud; Gretchen Morgenson, *Illinois Suit Set Against Countrywide*, N.Y. TIMES, June 25, 2008, at C1.

Other possible sources of blame for the current housing mess include mortgage originators (who ignored borrowers' repayment risks because they intended to shift the risk of nonpayment once they sold the mortgages to securitizers) and compliant appraisers (who placed unrealistically high values on the home that secured the mortgage). SHILLER, *supra* note 108, at 6.

209. *E.g.*, BLACK, *supra* note 41, at 86 ("The reason why the debt merchants want us to remain credit imbeciles is simple. Credit has become an end in itself. In many instances more profit is derived from credit than from the goods and services being sold.").

210. SHILLER, *supra* note 108, at 47 (discussing "information cascades" that cause people to disregard their own collected information and adopt an excessively optimistic view of the risks associated with a particular transaction because of their mistaken belief that the large group of people who have

hope that these defects would prevent borrowers from rationally exercising their financial freedom.[211]

C. Shifting Cultural Norms

Whether the fault of greedy (or gullible) borrowers or greedy (or unscrupulous) lenders, delayed gratification is no longer the norm in the U.S. (assuming it ever was the norm), and even rational people often overspend because of a lack of self-control.[212] It is true, of course, that some borrowers (especially lower income ones) use credit cards to maintain their living standards after they have lost their jobs.[213] But in the midst of the spending frenzy of the last few decades, we seem to have abandoned the view that people have a moral or ethical duty to exercise the restraint to actually wait until you can afford to pay for nonessential goods and services with cash before purchasing those items.[214]

A report recently issued by the Commission on Thrift argues that consumers are willing to go deeply into debt because being thrifty or frugal is simply no longer the norm. Norms have changed, this Commission argues, because the institutions that historically encouraged thrift and savings (most notably credit unions) no longer establish societal spending norms.[215] Instead, cultural spending norms are now shaped by *anti*-thrift institutions (most notably credit card issuers, payday lenders, and state lotteries), and these institutions encourage indebtedness and wasteful spending.[216] This Commission argues that the country needs to reinstitute a public education campaign that stresses the importance of being thrifty,

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engaged in a similar transaction cannot all be wrong).

211. *Cf.* Karp & Jordan, *supra* note 208, at A1.

212. *See* VYSE, *supra* note 65, at 62–72; WILCOX, *supra* note 5, at 49 ("Even the economics literature that focuses the choice behavior of perfectly rational economic agents has concluded that temptation and the inability to delay gratification should be incorporated in models that are trying to predict actual economic behavior."). Indeed, some would argue that U.S. consumers have been concerned with immediate happiness for almost fifty years. *See* BLACK, *supra* note 41, at 19 (suggesting that people in the 1960s had shifted "more and more from a puritanical culture to a hedonistic one" and that they were "more concerned with immediate happiness rather than counting on delayed satisfactions in life, or the life hereafter").

213. *See* PAUL TAYLOR ET AL., PEW RESEARCH CTR., 'INFORMATION AGE' BILLS KEEP PILING UP: WHAT AMERICANS PAY FOR—AND HOW 2, 6 (2007), http:// pewresearch.org/ assets/ social/ pdf/ Expenses.pdf; Jacoby, *supra* note 99, at 319 (characterizing consumer credit as the "umbrella insurance policy for [people] hovering on the edge of financial stability").

214. *Cf.* VYSE, *supra* note 65, at 61–89.

215. Members of The Commission on Thrift include politicians; law, divinity, medical school and sociology professors; credit union lobbyists; members of conservative and liberal think tanks; and members associated with groups that range from the Georgia Family Council to Earth Charter U.S. Commission on Thrift, Members of the Commission on Thrift, http:// www.newthrift.org/ commission.htm (last visited Aug. 10, 2010). For a historical account of the role that savings banks played in encouraging thrift in nineteenth-century America, see TUCKER, *supra* note 48, at 39–53.

216. COMM'N ON THRIFT, *supra* note 201.

that the government should help build new "thrift" institutions, and that "anti-thrift" institutions should be more heavily regulated.[217]

It is unclear exactly when thrift became un-American or when thrift ceased to be a core value in this country.[218] For at least the first two decades of the twentieth century, living within one's means and *not borrowing* appeared to be a firmly entrenched norm in this country.[219] Until very recently, however, U.S. consumers both craved and demanded the immediate gratification associated with the freedom to buy nonessential goods and services *now*.[220] The rejection of frugality as a shared societal norm transformed the concept of financial freedom from the colonial view that debt was morally reprehensible and enslaving, to an early twentieth century view that debt was not immoral and that people should be given greater opportunities to incur debt if the debt provides benefits to the consumer,[221] to the current view that financing your version of the American Dream is not only acceptable but in fact expected.[222] Granted, there still seems to be a stigma associated with being insolvent.[223] However, for years in this country, there does not seem to have been *any* stigma asso-

217. *See* Whitehead, *supra* note 100, at 16–17. Even economists who are not involved with this thrift initiative have argued that the loose monetary policies of the U.S. Federal Reserve contributed to the current credit crisis and that federal officials failed to take a leadership role and adequately respond to the recent housing bubble. *E.g.*, SHILLER, *supra* note 108, at 48–49 (arguing that the Federal Reserve's emphasis on preventing a recession and deflation caused it to implement monetary policies that would themselves feed the housing bubble); *id.* at 51–55 (suggesting that regulators did not appear to fully understand the risks associated with the excessive mortgage lending because they failed to recognize that the housing boom was a bubble that, at some point, would burst).

218. CALDER, *supra* note 36, at 24–25; GRIMES, *supra* note 65, at 93 ("[O]ne has heard complaints concerning the extravagance and lack of thrift which were certain to result from any system of long-deferred credits."); *Cf.* BLACK, *supra* note 41, at 18 ("The virtue of thrift once expounded by Benjamin Franklin has been turned into the virtue of the spendthrift."). *But cf.* TUCKER, *supra* note 48, at 71–82 (arguing that neither blacks nor poor whites during the antebellum period embraced thrift).

219. *See* OLNEY, *supra* note 40, at 130–31; TUCKER, *supra* note 48, at 83–98.

220. *See* TUCKER, *supra* note 48, at 75.

221. For example, in justifying the benefits of early automobile financing and extolling the benefits of owning a car, one writer notes that:

> In addition to the use which so many cars find in assistance to the owner, they have also the value they confer in the immaterial benefits derived from them as pleasure vehicles. Over the week-end the tired man may enjoy the conveniences and comforts obtainable from having at his disposal a means for satisfying his wishes to see the country, to take his family for the much desired ride away from the commonplace affairs of daily existence, and even to keep them in better health. . . . And it is wise to remember that your proud owner, even though the possession cost very little, is probably a better citizen for having become a property holder or for having increased what he previously had.

GRIMES, *supra* note 65, at 95–96.

222. *See* CALDER, *supra* note 36, at 20.

223. 151 CONG. REC. S2421 (daily ed. Mar. 10, 2005) (statement of Sen. Durbin) ("People I have known who have gone through bankruptcy are not proudly announcing to their friends: Well, I had a great day in bankruptcy court. These are people who are a little embarrassed, a little ashamed of what they had to go through."). *But see* Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481, 485–88 (2006); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 218 (2006).

ciated with going deeply into debt, and the shift in our financial mores undoubtedly has contributed to the erosion of financial freedom.[224]

Of course, while thrift is good, being *too* thrifty is not so good. That is, just as there is a problem with too *much* debt, there also is a problem with too *little* debt. Economists have long acknowledged the "paradox of thrift" and have stressed that saving and spending are good for the individual and are needed for the economy. Reasonable amounts of household savings are needed to foster economic stability and keep the economy strong. But saving too much and having too little household debt harms the economy by reducing the demand for goods and services and—as we are seeing now—by making bad recessions even worse.[225] Consumers are (and reasonably should be) encouraged to incur some debt since it benefits them and also the economy. However, consumers should be discouraged from becoming *too* much in debt. Not surprisingly, where to draw the line between enough debt and too much debt has thus far escaped being understood by individual borrowers and the government itself.

The current recession appears to have caused many to re-embrace thrift and to redefine their perception of luxury versus necessity.[226] Indeed, many now flaunt their newfound frugality.[227] While there is no clear line between too much debt and not enough debt, debt is now a topic that is routinely discussed in popular culture, and the predominant current view is that excessive consumer debt should be avoided. Financial guru Dave Ramsey routinely preaches the value of living debt-free,[228] and television personality Dr. Phil has urged families to scale back their debt and take responsibility for their bad financial choices.[229] Similarly, personal financial pundit Suze Orman routinely preaches the gospel of financial literacy.[230] Likewise, there are a plethora of blogs and web sites that promote frugality, thrift, and the importance of paying off your debts.[231]

Of course, not all web pages that appear to embrace the value of being debt-free actually do so. For example, the entity that controls the right to

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224. *See* David Brooks, *The Culture of Debt*, N.Y. TIMES, July 22, 2008, at A19.

225. *See* Evans, *supra* note 107, at A1; Rampell, *supra* note 151 (discussing the dependence of the U.S. and global economics on U.S. consumer spending); Press Release, Bureau of Econ. Analysis, Personal Income and Outlays: Nov. 2006 (Dec. 22, 2006), *supra* note 107.

226. *See* MORIN & TAYLOR, *supra* note 144.

227. Ylan Q. Mui, *A Race to Keep Up With the Tightwads: Up and Down the Block, People are Sharing Tips on Making Do*, WASH. POST, June 5, 2009, at A1, *available at* http:// www.washingtonpost.com/ wp-dyn/ content/ article/ 2009/06/ 04/ AR20090 60404577.html.

228. DaveRamsey.com, http:// www.daveramsey.com (last visited Aug. 10, 2010).

229. Dorothy Pomerantz, *Tough Love For Tough Times*, FORBES, Feb. 23, 2009, http:// www.forbes.com/ 2009/02 /23/ phil-mcgraw-advice-business-media_dr_phil.html.

230. SuzeOrman.com, http:// www.suzeorman.com (last visited Aug. 10, 2010).

231. For example, a blog called http://www.workingforfinancialfreedom.com/ excoriates debt, and chronicles one family's quest to pay off almost $60,000 in debt. Another web page, http://www.couponmom.com, appears to have turned its operator into "one of the new rock stars of the recession." Mui, *supra* note 227.

the web page http://financialfreedom.com/ espouses a decidedly anti-thrift message. Had this web page existed thirty years ago, it likely would have provided information that would help people increase their financial freedom and *reduce* their debts. While purportedly promoting financial freedom, flexibility, and independence, the main goal of this website is to encourage senior citizens to incur debt by taking out a reverse mortgage on their home. Other web pages that extol financial freedom also contain information that is more likely to deprive people of financial freedom than to expand their freedom.[232]

D. The Devastating Effects of Vanishing Financial Freedom

If greater financial freedom means giving people unlimited choices and the unfettered opportunity to go deeper into debt, then *less* financial freedom and fewer choices would be better for many people because it would make them happier and ultimately increase their well-being.[233] Financially stressed consumers are more likely to suffer from a host of medical problems, including migraines/headaches, stomachaches, back pains, higher rates of cardiovascular disease, and hypertension. These medical conditions, in turn, often lead to anxiety and other psychological issues, most notably depression.[234] People who are financially stressed also may have higher mortality (including suicide) rates.[235] Excessive debt also undermines healthy habits, as financially stressed people tend to avoid or delay medical or dental treatment in order to avoid incurring medical expenses,[236] or they eat cheaper, but less nutritious, food.[237]

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232. For example, one of the first entries that appears after you google the term *financial freedom* is a book entitled *Safe Strategies for Financial Freedom*. While the 325 page book devotes fourteen pages to explaining the importance of getting out of debt, the vast majority of the book extols the virtues of margin trading, and other speculative methods of attaining financial freedom.

233. *See* VYSE, *supra* note 65, at 83 (discussing current research on self-control and observing that "individuals struggling to negotiate . . . economic environments . . . are often better off with less choice").

234. CHRISTOPHER G. DAVIS & JANET MANTLER, CARLETON UNIV., THE CONSEQUENCES OF FINANCIAL STRESS FOR INDIVIDUALS, FAMILIES, AND SOCIETY 9–13 (2004), http:// www.doylegroup.ca/ personal/ reports/f inancial_distress _DSI.pdf; *cf.* Sarah Ross et al., *Stress, Debt and Undergraduate Medical Student Performance*, MED. EDUC., June 2006, at 584, 588. If these medical conditions cause the individual to incur medical debt, it is likely that those debts will add additional stress to the consumer. *See* Jacoby, *supra* note 99, at 307 (discussing poll findings about worries "about falling deep into debt because of medical expenses").

235. DAVIS & MANTLER, *supra* note 234, at 9–10; Mark D. West, *Dying to Get Out of Debt: Consumer Insolvency Law and Suicide in Japan* (Mich. Law & Econ. Research Paper, Paper No. 03-015, 2003), *available at* http:// papers.ssrn.com/ sol3/ papers.cfm? abstract_td=479844 (examining the relationship between suicide and debt in Japan). For an anecdotal account of the relationship between over-indebtedness and suicide in the U.S. in the 1960s, *see* BLACK, *supra* note 41, at 124–27.

236. *See* Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J.L. MED. & ETHICS 560, 561–62 (2002) [hereinafter Jacoby, *Does Indebtedness Influence Health?*] (discussing studies); Kevin Sack, *Slump Pushing Cost of Drugs Out of Reach*, N.Y. TIMES, June 4, 2009, at A1, *available at* http://www.nytimes.com/2009/06/04/us/04pharmacy.html ("National surveys consistently find that as many as a third of respondents say they are not complying with prescriptions

People who are suffering from financial stress often suffer privately and silently, and they tend to have lower self-esteem and feel disconnected from society because they no longer participate in a central life activity (i.e., working in the marketplace).[238] They also feel alienated from the people around them and tend to argue more with family members and, not surprisingly, have higher divorce rates.[239] This alienation may in turn cause the person's spouse and children to feel a loss of control or become anxious or depressed.[240]

VI. CONCLUSION

The gradual erosion of financial freedom is an untreated epidemic that largely has been overlooked even as we have worked assiduously to protect U.S. citizens from threats to their personal liberty in the U.S. and from domestic and international threats. Whether caused by creditor misconduct, debtor naiveté, or the almost total deregulation of the consumer credit market, people who have no control over their financial affairs live in a state of unfreedom that harms them, the people in their lives, their communities, and the nation. Consumers have been harmed, and will always be harmed, when they have the unfettered freedom to accumulate massive amounts of debt. Ignoring the harm created by the unregulated freedom to become indebted significantly contributed to the current financial crisis. While indebtedness is not by itself a bad thing, when protecting financial freedom, we must continue to remember the importance of protecting both the financial freedom *to* participate in activities and the financial freedom *from* being harmed by certain activities.

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because of cost, up from about a fourth three years ago.").

237. *See* Jacoby, *Does Indebtedness Influence Health?*, *supra* note 236, at 561–62 (discussing studies).

238. DAVIS & MANTLER, *supra* note 234, at 5–6.

239. *Id.* at 8, 14; Jacoby, *Does Indebtedness Influence Health?*, *supra* note 236, at 562 (discussing studies); Rand D. Conger et al., *Economic Stress and Marital Relations*, *in* FAMILIES IN TROUBLED TIMES: ADAPTING TO CHANGE IN RURAL AMERICA 187, 201–03 (Rand D. Conger & Glen H. Elder Jr. eds., 1994).

240. DAVIS & MANTLER, *supra* note 234, at 8, 17. Jacoby, *Does Indebtedness Influence Health?*, *supra* note 236, at 561 (discussing studies); Conger, *supra* note 239, at 202.

One study also has found that parents who help their children financially also experience stress, suggesting that debt has an impact that is wider than just on the indebted person. Ross et al., *supra* note 234, at 588.