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Credit CARD Act II: Expanding Credit Card Reform by Targeting Behavioral Biases

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ABSTRACT

Three years ago, the U.S. Congress passed the Credit CARD Act of 2009. This ambitious piece of consumer protection legislation sought to relieve consumer debt burdens by targeting credit card industry abuses and providing new disclosures. Congress acknowledged that the legislation would not help individuals who borrow irresponsibly on their credit cards, implicitly assuming that it could not encourage more provident decisionmaking. This assumption was a mistake. Human decisionmakers are susceptible to behavioral biases—predictable deviations from perfect rationality. This Comment discusses how these biases encourage consumers to take on excessive credit card debt and calls for Congress to consider how legislation can counteract behavioral biases in the credit card context. It concludes by discussing several possible reforms in three main categories—making costs of credit card use more salient, equipping credit cards with commitment devices, and prohibiting practices that encourage consumer overconfidence.

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INTRODUCTION

In 2009, the average American household had $10,679 in credit card debt.[1] The Federal Reserve estimates that, in the aggregate, American consumers carried credit card debts of $865.5 billion that year,[2] or approximately as much as the gross domestic product of Mexico.[3]

Concerned about the potentially harmful effects of this amount of consumer debt both on individual households and on the American economy,[4] the U.S. Congress crafted legislation in early 2009 to help curb overindebtedness. The debate over the legislation focused primarily on credit card companies' "unfair" treatment of their customers.[5] Supporters of credit card reform proclaimed that in the "crafty and fatally opportunistic" credit card industry,[6] "anything goes in the name of profit."[7] Congressmen exchanged horror stories about their children receiving credit card solicitations,[8] and about church budgets threatened by usurious interest rates.[9] Congress's response was so focused on industry abuses that when the bill first passed in the U.S. House of Representatives, it was known as the Credit Cardholders' Bill of Rights.[10]

Eventually, a large bipartisan majority[11] passed the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009.[12] The Act was an ambitious piece of legislation that took aim at the purportedly worst

1. Charles Duhigg, *What Does Your Credit-Card Company Know About You?*, N.Y. TIMES MAG., May 17, 2009, at 40, 43, *available at* http://www.nytimes.com/2009/05/17/magazine/17credit-t.html (citing industry publication *The Nilson Report*).
2. FED. RESERVE, STATISTICAL RELEASE G.19, CONSUMER CREDIT (2012), *available at* http://www.federalreserve.gov/releases/g19/Current/g19.pdf.
3. *See GDP Data*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited May 14, 2012).
4. *See, e.g.*, H.R. REP. NO. 111-88, at 10 (2009) ("The accumulation of large amounts of credit card debt can have profound implications on individual consumers and the economy more generally."); S. REP. NO. 111-16, at 4 (2009).
5. *See, e.g.*, *id.* at 2 ("The [CARD Act] was developed to implement needed reforms and help protect consumers by prohibiting various unfair, misleading and deceptive practices in the credit card market.").
6. 155 CONG. REC. H4962 (daily ed. Apr. 29, 2009) (statement of Rep. Pascrell).
7. 155 CONG. REC. S5362 (daily ed. May 12, 2009) (statement of Sen. Udall).
8. 155 CONG. REC. H4964 (daily ed. Apr. 29, 2009) (statement of Rep. Ellison).
9. *Id.* (statement of Rep. Maffei).
10. Credit Cardholders' Bill of Rights Act of 2009, H.R. 627, 111th Cong. § 1 (as passed by the U.S. House of Representatives, Apr. 30, 2009).
11. *See* Carl Hulse, *Bill Changing Credit Card Rules Is Sent to Obama With Gun Measure Included*, N.Y. TIMES, May 21, 2009, at A18.
12. Pub. L. No. 111-24, 123 Stat. 1734 (to be codified in scattered sections of 15 U.S.C.).

industry abuses; politicians and commentators lauded it for prohibiting practices like arbitrary rate increases, unpredictable due dates, and the issue of credit cards to minors.[13] Its prohibitions on industry practices like universal default and double-cycle billing[14] also closely tracked the recommendations of many academics and policy advocates, including Elizabeth Warren, whom President Obama chose as the first Special Advisor to the Consumer Financial Protection Bureau.[15] According to many of the Act's proponents, the worst thing about the new law was that it would not take effect soon enough.[16]

Of course, there is more to the problem of overindebtedness than the exploitative practices of unscrupulous lenders. Some consumers overburdened with debt have simply made poor choices—selecting suboptimal cards, spending too much, and paying down too little of their debt.[17] To address the consumer causes of excess debt, Congress attempted to provide individuals with more and better information, enacting an entire title devoted to "enhanced consumer disclosures."[18] After all, as one supporter reasoned, "What could be better than to shine daylight on any product?"[19] To the extent that consumers were merely prodigal, however, the Act would provide no assistance. As supporters like Senator Dodd repeatedly reminded us, the Act was intended to protect "financially responsible credit card users."[20]

Statements like Senator Dodd's, however, raise a question that was conspicuously absent from the congressional debate on credit card reform: Can legislation induce more provident decisionmaking? The 112th Congress apparently

13. *See, e.g.*, 155 CONG. REC. H4964 (daily ed. Apr. 29, 2009) (statement of Rep. Ellison) (praising the CARD Act for "set[ting] a basis for an entire industry so that good credit card companies never have to be tempted to engage in some of these nefarious practices just to stay competitive with companies that do."); Editorial, *Credit Card Chicanery*, N.Y. TIMES, Oct. 23, 2009, at A34 (praising the CARD Act for ending "a great many odious practices").

14. *See infra* Part I.C.1.

15. *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 48–49 (2008).

16. *See, e.g.*, Editorial, *Last-Minute Credit Card Tricks*, N.Y. TIMES, Oct. 17, 2009, at A18. Most of the Act's provisions became effective nine months after enactment. Credit CARD Act § 3, 123 Stat. at 1735.

17. *See, e.g.*, Lawrence M. Ausubel, Adverse Selection in the Credit Card Market 22–23 (June 17, 1999) (unpublished manuscript), *available at* http://weber.ucsd.edu/~aronatas/conference/adverse.pdf (demonstrating that many consumers choose credit cards that result in higher interest payments, given their borrowing behavior); Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 466 (2008) (explaining that the consumers she surveyed "felt enticed to apply for credit cards against their better judgment, and once they had them, they found it . . . easy to spend money they did not have").

18. Credit CARD Act tit. II, 123 Stat. at 1743–47 (to be codified at 15 U.S.C. §§ 1632, 1637, 1640, 1681j).

19. 155 CONG. REC. H4968 (daily ed. Apr. 29, 2009) (statement of Rep. Gutierrez).

20. 155 CONG. REC. S5314 (daily ed. May 11, 2009) (statement of Sen. Dodd).

did not think so, but behavioral economics seems to indicate otherwise. Studies on human decisionmaking have repeatedly shown that human beings are not rational, utility-maximizing machines but instead are prone to behavioral biases, which are systematic and predictable tendencies to deviate from perfect rationality.[21] If we can understand how these behavioral biases contribute to consumer overindebtedness, perhaps we can craft legislation that will influence the decisionmaking context in ways that counteract behavioral biases' deleterious effects. In fact, it would be entirely consistent with the goals of the CARD Act to pursue solutions that would discourage overoptimistic credit limits, encourage consumers to pay down more debt each month, or help individuals think about the long term when determining which card is best for them.[22] This Comment explores how behavioral biases contribute to overindebtedness and suggests several ways in which Congress might consider building upon the CARD Act by attempting to induce more responsible credit card decisions.

Part I reviews the need for legislation to curb overindebtedness and displays Congress's findings on the causes of excess debt. It then discusses the principles behind the legislation and introduces the specific provisions Congress enacted to further those principles. Part II discusses how the CARD Act falls short as a means of reducing consumer debt because it does not acknowledge the effect of behavioral biases on overborrowing. Part III discusses how behavioral biases operate in the credit card context, focusing on bounded rationality, hyperbolic discounting, and optimistic overconfidence. Part IV outlines several policy proposals that address each behavioral bias by making the costs of credit card use more salient, equipping credit cards with commitment devices, and prohibiting practices that encourage consumer overconfidence.

I. THE CREDIT CARD ACT OF 2009

A. The Need for Legislation

Under newly elected President Barack Obama, Congress set out in early 2009 to provide much-needed support to a flagging economy.[23] Crucial to this

21. *See* Jason J. Kilborn, *Behavioral Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions*, 22 EMORY BANKR. DEV. J. 13, 18 (2005); *see also infra* Part III.
22. *See infra* Part IV.
23. Earlier in that year, Congress passed the American Recovery and Reinvestment Act of 2009,

strategy was a bill that would stem the rising tide of credit card debt.[24] Congress was concerned about the effects of consumer overindebtedness both on individual households and on the greater economy.[25] On a micro level, Congress found that consumers were "struggling under the large amounts of credit card debt they ha[d] amassed,"[26] and one senator characterized credit card debt as "a looming problem that ha[s] the potential to wreak havoc on American families."[27] On a macro level, Congress expressed concern over bankruptcy rates,[28] credit card delinquencies,[29] and an anemic national savings rate.[30] As the same senator remarked, "If we don't act soon, [credit card debt] could grow to become a national financial crisis."[31]

Congress expressed alarm at both the record number of households accumulating credit card debt[32] and the record amount of debt the average household had accumulated.[33] Even more troubling, these record debt figures were growing. The Senate Committee on Banking, Housing, and Urban Affairs, for instance, voiced concern that the average credit card debt had increased significantly over the past twenty years and was still rising.[34]

Congress concluded that American consumers needed help managing their credit card debt. Supporters of credit card reform argued that under the current

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providing "supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization." Pub. L. No. 111-5, 123 Stat. 115, 115.

24. *See, e.g.*, Press Release, White House Office of the Press Sec'y, Remarks by the President After Meeting With Representatives of the Credit Card Industry (Apr. 23, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-after-meeting-with-representatives-credit-card-industry ("One of the areas, as we move forward and look at financial regulation, how do we create a framework where this kind of crisis doesn't happen again . . . is the issue of credit cards and how they're used . . . ."); *see also* 155 CONG. REC. S5410 (daily ed. May 13, 2009) (statement of Sen. Menendez) ("We cannot allow the credit card problem to become the next foreclosure crisis.").
25. *See* H.R. REP. NO. 111-88, at 10 (2009) ("The accumulation of large amounts of credit card debt can have profound implications on individual consumers and the economy more generally.").
26. S. REP. NO. 111-16, at 4 (2009).
27. 155 CONG. REC. S5409 (daily ed. May 13, 2009) (statement of Sen. Menendez).
28. *See* H.R. REP. NO. 111-88, at 10.
29. *See* S. REP. NO. 111-16, at 4.
30. *See id.*
31. 155 CONG. REC. S5410 (daily ed. May 13, 2009) (statement of Sen. Menendez).
32. *See* H.R. REP. NO. 111-88, at 10 (expressing concern that 44 percent of American families carry a balance on their credit cards); S. REP. NO. 111-16, at 4 (expressing concern about the record-low proportion of balances paid off monthly).
33. *See* H.R. REP. NO. 111-88, at 10 (noting that credit card debt per household had increased 25 percent in the last ten years, reaching a record high in 2009); S. REP. NO. 111-16, at 4 (expressing concern about the average credit card debt per household).
34. S. REP. NO. 111-16, at 3.

system, cardholders struggled to repay their debts,[35] and they called for new rules that would "allow cardholders to responsibly manage their finances."[36] The CARD Act's supporters hoped that the Act would prohibit practices "that drive so many families deeper and deeper into debt,"[37] and would "make[] it easier for families to pay down their bills and get out of debt."[38]

B. Congressional Findings on the Causes of Cardholder Overindebtedness

Congressional supporters of credit card reform declared that the causes of credit card debt went far beyond irresponsible spending.[39] When considering credit card reform, they found that a main reason for the credit card debt explosion was that creditors employed unfair practices that set financial traps to which even ostensibly responsible cardholders fell prey.[40] Senator Dodd, the chief architect of the CARD Act in the U.S. Senate, declared that "the whole business model of the credit card industry is not designed to extend credit but to induce mistakes and trap consumers into debt,"[41] and he criticized many industry practices as "unfair and arbitrary."[42] Other supporters in Congress spoke of a "crafty and fatally opportunistic" credit card industry,[43] which "abuse[d] customers with an 'anything goes in the name of profit' approach."[44]

The Act identified four principal categories of unfair credit card industry practices. First, creditors subjected their cardholders to unwarranted interest rate

35. 155 CONG. REC. S5571 (daily ed. May 19, 2009) (statement of Sen. Leahy) ("Unfortunately, our current credit card system . . . makes it harder for [cardholders] to pay off their debt."); *see also* Press Release, White House Office of the Press Sec'y, Remarks by the President at Signing of the Credit Card Accountability, Responsibility, and Disclosure Act (May 22, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-signing-of-the-Credit-Card-Accountability-Responsibility-and-Disclosure-Act ("[C]redit card debt is all too easily a one-way street: It's easy to get in, but almost impossible to get out.").
36. 155 CONG. REC. H5023 (daily ed. Apr. 30, 2009) (statement of Rep. Pingree).
37. 155 CONG. REC. S5316 (daily ed. May 11, 2009) (statement of Sen. Dodd).
38. 155 CONG. REC. S5571 (daily ed. May 19, 2009) (statement of Sen. Mikulski).
39. *See* 155 CONG. REC.S5409 (daily ed. May 13, 2009) (statement of Sen. Menendez) ("It is clear this isn't only a question of consumers overspending."); 155 CONG. REC. H4965 (daily ed. Apr. 29, 2009) (statement of Rep. Gutierrez) ("I want[] everybody to understand we are not talking about . . . scofflaws.").
40. *See, e.g.*, 155 CONG. REC. S5409 (daily ed. May 13, 2009) (statement of Sen. Menendez) (expressing need for a law that "mak[es] sure that Americans young and old don't fall so easily into financial traps").
41. 155 CONG. REC. S5314 (daily ed. May 11, 2009) (statement of Sen. Dodd).
42. *Id.*
43. 155 CONG. REC. H4962 (daily ed. Apr. 29, 2009) (statement of Rep. Pascrell).
44. 155 CONG. REC. S5363 (daily ed. May 12, 2009) (statement of Sen. Udall).

increases.[45] Second, creditors gouged cardholders with excessive and surprising fees.[46] Third, creditors engaged in misleading practices with billing statements and due dates, which made it difficult for cardholders to comply with payment deadlines.[47] Fourth, creditors intentionally deceived cardholders to collect more interest and fees—for example, by offering "fixed rate" credit cards with interest rates that were subject to change.[48]

C. Provisions of the CARD Act and Legislative Intent

Congress enacted the CARD Act in order to correct these practices in the credit card industry. The Act sought primarily to combat consumer overindebtedness by banning unfair industry practices.[49] Additionally, it sought to provide consumers with tools to help them manage their finances responsibly, while adhering to guiding principles such as keeping credit available and not bailing out irresponsible cardholders.

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45. *See, e.g.*, 155 CONG. REC. S5320 (daily ed. May 11, 2009) (statement of Sen. Levin) ("The many case histories investigated by my subcommittee show that responsible cardholders across the country are being squeezed by unfair credit card lending practices involving excessive fee and interest charges."); 155 CONG. REC. H4962 (daily ed. Apr. 29, 2009) (statement of Rep. Pascrell) ("Americans are discovering that even if they pay their bills, their interest rates still get jacked through the roof."); 155 CONG. REC. H4964 (daily ed. Apr. 29, 2009) (statement of Rep. Van Hollen) ("[Cardholders] are being tripped up and surprised by unwarranted increases in . . . their interest rates").
46. *See, e.g.*, 155 CONG. REC. S5314 (daily ed. May 11, 2009) (statement of Sen. Dodd) ("[C]redit card companies too often are gouging [consumers] with hidden fees . . . that for many make the task [of paying off their debt] nearly impossible."); *see also* 155 CONG. REC. S5317 (daily ed. May 11, 2009) (statement of Sen. Levin) (discussing "unfair credit card fees").
47. *See, e.g.*, 155 CONG. REC. H4964 (daily ed. Apr. 29, 2009) (statement of Rep. Van Hollen) ("We have heard reports of credit card companies moving around the due dates or holding a payment in order to trigger a late charge. Some credit card companies mailed out bill statements close to the due date to trip up their consumers. Those are the kinds of practices we have got to put an end to.").
48. *See* 155 CONG. REC. S5315 (daily ed. May 11, 2009) (statement of Sen. Dodd) (arguing that the practice of labeling interest rates that are subject to change as "fixed" misleads consumers); *see also* 155 CONG. REC. S5409 (daily ed. May 13, 2009) (statement of Sen. Menendez) ("Credit card companies are trying to boost their profit with deceptive practices . . . ."); 155 CONG. REC. S5314 (daily ed. May 11, 2009) (statement of Sen. Dodd) ("[The credit card industry] has been thriving on misleading . . . its customers."); 155 CONG. REC. H4965 (daily ed. Apr. 29, 2009) (statement of Rep. Gutierrez) ("[T]he industry's revenues come from deceptive practices . . . .").
49. The Act's stated purpose was "to implement needed reforms and help protect consumers by prohibiting various unfair, misleading and deceptive practices in the credit card market." S. REP. NO. 111-16, at 2 (2009); *see also* H.R. REP. NO. 111-88, at 9 (2009) ("[The Act] prohibits certain unfair and deceptive credit card practices . . . ."); 155 CONG. REC. H4961 (daily ed. Apr. 29, 2009) (statement of Rep. Maloney) ("[The Act] targets specific abusive practices . . . .").

1. Prohibiting Unfair Practices

Several provisions of the Act prohibited interest rate increases deemed unwarranted or unfair. A key provision of the Act prohibited creditors from unilaterally changing the terms of cardholder agreements governing outstanding balances,[50] banning a practice known as "any time, any reason repricing."[51] Another provision banned a practice known as "universal default,"[52] in which a creditor increases a cardholder's rate for failing to make timely payments to a *different* creditor.[53] The Act further provided that cardholders subject to a rate increase for delinquent payments must have their interest rate returned to the pre-penalty rate after six consecutive months of on-time payments.[54]

The Act also imposed regulations to prohibit excessive fees and fees that pose a danger of unfair surprise. Most broadly, it required that both late and over-limit fees be "reasonable and proportional to [the] omission or violation."[55] It also prohibited creditors from charging more than one over-limit fee per infraction, per billing cycle.[56] Additionally, it prohibited creditors from approving charges over the cardholder's credit limit (and charging over-limit fees for doing so) unless the cardholder had opted out of a fixed credit limit.[57] Finally, it sought to prevent surprise fees from so-called "fee harvester"[58] cards by requiring creditors to charge all fixed fees for these cards upfront.[59]

Taking aim at unfair billing and due date practices, the Act required a cardholder's due date to fall on the same day each month but prohibited it from

50. Credit CARD Act of 2009, Pub. L. No. 111-24, § 101(b)(2), 123 Stat. 1734, 1737 (to be codified at 15 U.S.C. § 1666i-1(c)(1)).
51. Lawrence M. Ausubel, Oleg V. Baranov & Amanda E. Dawsey, Penalty Interest Rates, Universal Default, and the Common Pool Problem of Credit Card Debt 2 (June 2010) (unpublished manuscript), *available at* http://www.ausubel.com/creditcard-papers/penalty-interest-rates-universal-default.pdf. Prior to the enactment of the CARD Act, this practice was widespread. *See* Bar-Gill & Warren, *supra* note 15, at 13.
52. Credit CARD Act § 101(b)(2), 123 Stat. at 1736 (to be codified at 15 U.S.C. § 1666i-1(a)–(b)).
53. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 25 (2006) [hereinafter GAO-06-929], *available at* http://www.gao.gov/new.items/d06929.pdf.
54. Credit CARD Act § 101(b)(2), 123 Stat. at 1737 (to be codified at 15 U.S.C. § 1666i-1(b)(4)(B)).
55. *Id.* § 102(b)(1), 123 Stat. at 1740 (to be codified at 15 U.S.C. § 1665d(a)).
56. *Id.* § 102(a), 123 Stat. at 1739 (to be codified at 15 U.S.C. § 1637(k)(7)).
57. *Id.* § 102(a), 123 Stat. at 1739 (to be codified at 15 U.S.C. § 1637(k)(1)).
58. A "fee harvester" card is one in which the fixed fees in the first year exceed 25 percent of the card's credit limit. *Id.* § 105, 123 Stat. at 1741–42 (to be codified at 15 U.S.C. § 1637(n)).
59. *Id.*

falling on a weekend or holiday.[60] It also required creditors to set cutoff times on payment due dates no earlier than 5:00 p.m.[61] Additionally, it required that any payment exceeding the minimum payment should first apply toward the debt with the highest interest rate and then apply to each successive balance bearing the next highest interest rate.[62]

Finally, the Act sought to ban deceptive practices in the credit card industry. One provision of the Act banned a practice known as "double-cycle billing," in which the creditor charges interest during the normally interest-free "float" period between the time of purchase and the due date of the payment.[63] The Act also prohibited creditors from advertising a rate as a "fixed rate" if the rate was subject to change[64] and required that "teaser rates" (that is, temporarily low introductory rates) last for an initial period of at least six months.[65]

2. Providing Cardholders Tools to Better Manage Their Finances

In addition to banning unfair practices, Congress intended to use the CARD Act to provide cardholders with tools they could use to better manage their finances and avoid carrying a balance on their credit cards.[66] One sponsor, urging his colleagues to support the Act, stated, "Our consumers need every tool we can give them to pay down their existing credit card debt and avoid getting caught in the cycle of debt."[67] Another spoke of a desire to "help[] people during this time of credit crisis to be able to do a better job in terms of responsibility."[68]

60. *Id.* § 106(a), 123 Stat. at 1742 (to be codified at 15 U.S.C. § 1637(o)). If the regularly scheduled due date falls on a weekend or holiday, the due date becomes the next business day after that weekend or holiday. *Id.*
61. *Id.* § 104(2), 123 Stat. at 1741 (to be codified at 15. U.S.C. § 1666c(a)). Previously, creditors were free to set cutoff times earlier in the day on the due date. *See* Truth in Lending: Proposed Rule and Request for Comment, 72 Fed. Reg. 32,948, 33,013 (June 14, 2007) (to be codified at 12 C.F.R. pt. 226) ("The Board has interpreted [12 C.F.R.] § 226.10 to permit creditors to specify cut-off times indicating the time when a payment is due, provided that the requirements for making payments are reasonable . . . .").
62. Credit CARD Act § 104(4), 123 Stat. at 1741 (to be codified at 15 U.S.C. § 1666c(b)(1)).
63. *Id.* § 102(a), 123 Stat. at 1738 (to be codified at 15 U.S.C. § 1637(j)(1)). For a detailed description of double-cycle billing, see GAO-06-929, *supra* note 53, at 27–28.
64. *Id.* § 103, 123 Stat. at 1741 (to be codified at 15 U.S.C. § 1637(m)).
65. *Id.* § 101(d), 123 Stat. at 1738 (to be codified at 15 U.S.C. § 1666i-2(b)).
66. *See, e.g.*, H.R. REP. NO. 111-88, at 9 (2009) ("[The Act] provides consumers with tools to manage their credit card debt responsibly.").
67. 155 CONG. REC. H5021 (daily ed. Apr. 30, 2009) (statement of Rep. Gutierrez).
68. 155 CONG. REC. S5475 (daily ed. May 14, 2009) (statement of Sen. Lincoln).

Several other supporters praised the Act for providing cardholders with money-managing tools.[69]

Nearly all the purported tools Congress provided in the CARD Act, however, came in the form of mandatory disclosures. Most prominently, the first section of the Act required creditors to give forty-five days' notice of any change in the interest rate or any other "significant change" to the cardholder agreement.[70] The Act required several disclosures (on monthly billing statements) regarding minimum monthly payments, including a warning statement that making only the minimum payment would increase the total interest paid and increase the time necessary to repay the balance.[71] Each monthly billing statement now must also specify the number of months it would take to retire the outstanding debt at the rate of the minimum monthly payment, the total interest paid if the consumer makes only minimum payments, and the lowest monthly payment that would retire the debt in thirty-six months.[72] The Act also requires creditors to include in the monthly billing statement the deadline to avoid a late fee and the interest rate increase that would result if the cardholder made a late payment.[73] Finally, the Act requires creditors to make their cardholder agreements public on their websites[74] and requires the Federal Reserve to maintain a website to serve as a central repository of all cardholder agreements.[75]

The Act includes only two cardholder tools that are not disclosures. First, it creates a new default rule that credit cards have fixed (nonexceedable) credit limits, but the Act allows cardholders to opt out of a fixed limit.[76] Second, if a

69. *See, e.g.*, 155 CONG. REC. S5833 (daily ed. May 20, 2009) (statement of Sen. Hinojosa) ("[The Act will] empower [consumers] to reduce their reliance and dependence on credit cards . . . ."); 155 CONG. REC. S5410 (daily ed. May 13, 2009) (statement of Sen. Menendez) ("It is time we give individual consumers the tools to level the playing field when it comes to dealing with credit card companies."); 155 CONG. REC. H5022 (daily ed. Apr. 30, 2009) (statement of Rep. Pingree) (expressing a need for legislation that "will allow cardholders to responsibly manage their finances"); 155 CONG. REC. H4961 (daily ed. Apr. 29, 2009) (statement of Rep. Maloney) ("[The Act] gives consumers more tools to better manage their own credit . . . .").

70. Credit CARD Act § 101(a)(1), 123 Stat. at 1735 (to be codified at 15 U.S.C. § 1637(i)(1)–(2)).

71. *Id.* § 201(a), 123 Stat. at 1743–44 (to be codified at 15 U.S.C. § 1637(b)(11)(A)).

72. *Id.* § 201(a), 123 Stat. at 1744 (to be codified at 15 U.S.C. § 1637(b)(11)(B)).

73. *Id.* § 202, 123 Stat. at 1745 (to be codified at 15 U.S.C. § 1637(b)(12)).

74. *Id.* § 204(a), 123 Stat. at 1746 (to be codified at 15 U.S.C. § 1632(d)(1)).

75. *Id.* § 204(a), 123 Stat. at 1746 (to be codified at 15 U.S.C. § 1632(d)(3)). This database is currently found at *Credit Card Agreement Database*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/credit-cards/agreements (last visited May 14, 2012).

76. Credit CARD Act § 102(a), 123 Stat. at 1739 (to be codified at 15 U.S.C. § 1637(k)(1)). Prior to the CARD Act, virtually all cardholder agreements allowed the cardholder to exceed the limit—for a hefty price. The creditor would typically approve the transaction and then charge over-limit fees and raise the interest rate as a penalty for exceeding the limit. *See* Littwin, *supra* note 17, at 486.

creditor changes the terms of a cardholder agreement, the Act gives affected cardholders the right to terminate the account and repay the outstanding balance under the previous terms.[77] This second tool, however, relies on disclosures because a cardholder will not make the election to terminate the account unless she reads and understands the new provisions in her credit card materials.

3. Other Guiding Principles

In crafting its solutions to credit card overindebtedness, Congress was influenced by a few guiding principles. It is clear that Congress intended to eschew proposals that would restrict the availability of consumer credit.[78] "In today's economy, Americans need credit that is accessible, affordable, and dependable," one sponsor declared.[79] Supporters also expressed a need to ensure that even consumers with a "checkered credit past" would have access to credit cards,[80] and they demonstrated distaste for usury caps specifically because they would restrict the availability of credit.[81]

Congress further desired that cardholders take on only as much debt as they could repay and had no intention of bailing out cardholders' irresponsible decisions.[82] Supporters stated that "[m]anagement of credit is a matter of personal responsibility,"[83] and that "Americans . . . have a responsibility to live within their means and to pay what they owe."[84] Some supporters even described the Act's protections as benefits earned through responsible behavior.[85]

77. Credit CARD Act § 101(b)(2), 123 Stat. at 1737 (to be codified at 15 U.S.C. § 1666i-1(c)(1)).

78. *See, e.g.*, 155 CONG. REC. H4966 (daily ed. Apr. 29, 2009) (statement of Rep. Gutierrez) ("[W]e don't want to restrict credit.").

79. 155 CONG. REC. S5571 (daily ed. May 19, 2009) (statement of Sen. Leahy).

80. 155 CONG. REC. H4966 (daily ed. Apr. 29, 2009) (statement of Rep. Hensarling).

81. 155 CONG. REC. S5471 (daily ed. May 14, 2009) (statement of Sen. Carper).

82. *See, e.g.*, 155 CONG. REC. H5839 (daily ed. May 20, 2009) (statement of Rep. Frank) (expressing the view that individuals who take on debt they are unable to repay perhaps should not have a credit card); 155 CONG. REC. H4967 (daily ed. Apr. 29, 2009) (statement of Rep. Bachus) (stating that the Act must not provide opportunities for individuals to neglect paying bills without consequences); *see also* Press Release, White House Office of the Press Sec'y, *supra* note 35 ("[W]e're not going to give people a free pass; we expect consumers to live within their means and pay what they owe.").

83. 155 CONG. REC. H5023 (daily ed. Apr. 30, 2009) (statement of Rep. Polis); *see also* 155 CONG. REC. S5475 (daily ed. May 14, 2009) (statement of Sen. Lincoln) ("[I]t is the responsibility, obviously, of consumers and borrowers to manage their own financial affairs . . . .").

84. 155 CONG. REC. S5314 (daily ed. May 11, 2009) (statement of Sen. Dodd); *see also* Press Release, White House Office of the Press Sec'y, *supra* note 35 ("[W]e demand credit card users to act responsibly . . . .").

85. *See, e.g.*, 155 CONG. REC. H5832 (daily ed. May 20, 2009) (statement of Rep. Maloney) ("This bill will make the lives of hardworking, responsible Americans better."); 155 CONG. REC. S5350

Finally, the Act's supporters preferred solutions that would preserve the cornucopia of choices and benefits already available to cardholders. As one of the Act's chief architects in the House stated, it would not be a bill "that takes away consumer choice or that infringes on anyone's rights."[86] Others expressed a desire not to affect cardholders adversely if they prudently managed their debts.[87]

II. CONGRESS'S SOLUTION TO OVERINDEBTEDNESS FALLS SHORT

Congress acknowledged that many consumers struggle with credit card debt not because of industry abuse but because they simply use credit cards irresponsibly. However, instead of asking *why* so many consumers take on too much debt, it simply condemned the behavior.[88] In doing so, Congress failed to recognize how consumers actually make decisions. Far from the economist's ideal of the rational actor, individuals are prone to behavioral biases—predictable and systematic tendencies to deviate from perfect rationality in the decisionmaking process.[89] These biases make many individuals particularly vulnerable to credit card overindebtedness.[90]

Many commentators suggest that a lender's credit card profits depend largely on its ability to design products in ways that capitalize on its cardholders'

(daily ed. May 12, 2009) (statement of Sen. Shelby) ("Consumers who prudently manage their use of credit deserve to be rewarded with lower prices and better terms."); 155 CONG. REC. S5314 (daily ed. May 11, 2009) (statement of Sen. Dodd) ("[The Act] protects the rights of financially responsible credit card users.").

86. 155 CONG. REC. H4961 (daily ed. Apr. 29, 2009) (statement of Rep. Maloney); *see also* 155 CONG. REC. H4966 (daily ed. Apr. 29, 2009) (statement of Rep. Hensarling) ("[I]n a free market, people ought to have consumer choice . . . .").

87. *See, e.g.*, 155 CONG. REC. H5839 (daily ed. May 20, 2009) (statement of Rep. Frank) (expressing a desire to avoid penalizing people who pay on time); 155 CONG. REC. H4967 (daily ed. Apr. 29, 2009) (statement of Rep. Maloney) ("[T]here is absolutely no penalty in this bill for anyone doing the right thing.").

88. *See, e.g.*, 155 CONG. REC. H5839 (daily ed. May 20, 2009) (statement of Rep. Frank); 155 CONG. REC. S5350 (daily ed. May 12, 2009) (statement of Sen. Shelby) ("Consumers who prudently manage their use of credit . . . should not be forced to subsidize the bad habits of others."); 155 CONG. REC. S5316 (daily ed. May 11, 2009) (statement of Sen. Dodd) ("[C]onsumers should act responsibly when it comes to credit cards."); *see also* Press Release, White House Office of the Press Sec'y, *supra* note 35 ("Some end up in trouble because of reckless spending or wishful thinking. Some get in over their heads by not using their heads. And I want to be clear: We do not excuse or condone folks who've acted irresponsibly.").

89. *See* Kilborn, *supra* note 21, at 18.

90. *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1375–76 (2003) (arguing that the "unique design of the credit card contract" makes cardholders especially vulnerable to behavioral biases).

behavioral biases[91]—and less on "tricking" and "trapping" consumers, as the CARD Act's supporters believed.[92] As a former general counsel of Citigroup, Inc.'s Europe and North America card businesses observed, the credit card industry "has turned the analysis of consumers into a science rivaling the studies of DNA."[93] This advanced understanding of consumer behavior allows creditors "to customize their products to exploit consumer error to its fullest."[94] To illustrate, creditors profit from consumers' *bounded rationality*[95] by adopting pricing structures that distract consumers with salient benefits and divert their attention from cost-imposing terms.[96] Creditors capitalize on a bias called *hyperbolic discounting*[97] by reducing minimum monthly payments, which tends to increase the total interest paid by cardholders.[98] They also take advantage of *optimistic overconfidence*[99] by raising cardholders' credit limits, thereby inducing cardholders to take on more debt.[100]

By failing to consider how card design and behavioral biases contribute to prodigal borrowing, Congress missed an opportunity to encourage responsible consumer behavior—a goal the Act's supporters unequivocally desired.[101] "The most significant message of behavioral research" is that individuals' behavior can be altered "by those in a position to influence the decisionmaking context."[102]

91. *See id.* at 1395–1411 (explaining how consumers' behavioral biases distort prices in the credit card market).
92. *See* 155 CONG. REC. S5314 (daily ed. May 11, 2009) (statement of Sen. Dodd); 155 CONG. REC. H4964 (daily ed. Apr. 29, 2009) (statement of Rep. Gutierrez).
93. Duncan A. MacDonald, *Card Industry Questions Congress Needs to Ask*, AM. BANKER, Mar. 23, 2007, at 10.
94. Bar-Gill & Warren, *supra* note 15, at 24.
95. "Bounded rationality" refers to a phenomenon whereby individuals base their decisions on only a handful of a product's attributes rather than deciding among alternatives by weighing all available data points. *See infra* Part III.A.
96. *See* Laurie A. Lucas, *Integrative Social Contracts Theory: Ethical Implications of Marketing Credit Cards to U.S. College Students*, 38 AM. BUS. L.J. 413, 431 (2001).
97. "Hyperbolic discounting" refers to a phenomenon whereby individuals systematically overvalue immediate benefits and costs and undervalue future benefits and costs. *See infra* Part III.B.
98. *See* Bar-Gill, *supra* note 90, at 1394.
99. "Optimistic overconfidence" refers to a phenomenon whereby individuals are systematically and unrealistically optimistic, especially about their abilities to avoid adverse events. *See infra* Part III.C.
100. *See* Dilip Soman & Amar Cheema, *The Effect of Credit on Spending Decisions: The Role of the Credit Limit and Creditibility*, 21 MARKETING SCI. 32, 34 (2002).
101. *See supra* notes 66–69 and accompanying text.
102. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1426 (1999).

In the CARD Act, Congress purported to provide tools to help cardholders better manage their finances,[103] but these provisions probably will not significantly improve most cardholders' decisions. The tools Congress provided are mandatory disclosures,[104] which do little to counteract behavioral biases and will probably aid only very sophisticated decisionmaking processes. For a disclosure to help a consumer make a better decision, the consumer must take the time to read and understand the information and then use that information to estimate accurately the expected utility of available alternatives.[105] As one scholar observed, "Nothing compels consumers to read, understand and respond to disclosures. There is no elixir to cure consumer illiteracy, 'innumeracy,' or just plain disinterest. [Disclosure] cannot force economic rationality into a consumer's consciousness."[106]

Credit card disclosures are probably even less effective than most types of disclosures because many costs of credit cards are hidden in nonsalient terms that carry little or no weight in consumers' decisionmaking calculus.[107] Disclosures can help a consumer learn of terms that are buried in fine print or written in confusing legal jargon, but they will not alter the decisionmaking process of a consumer who is simply unmoved by the terms in the disclosures.[108] Disclosures are even less effective when behavioral biases influence a consumer because biases like hyperbolic discounting and optimistic overconfidence (which strongly influence cardholder decisions) persist even in individuals who know they are prone to those tendencies.[109]

Finally, even if disclosures are effective initially, there is no guarantee that their success will last. Disclosures often "devolve into meaningless boilerplate" as they become more familiar to consumers.[110] "Overexposure or 'wear out' is a major

103. *See, e.g.*, H.R. REP. NO. 111-88, at 9 (2009) ("[The Act] provides consumers with tools to manage their credit card debt responsibly."); *see also supra* Part I.C.2.
104. *See supra* Part I.C.2.
105. *See* Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism*,*"* 151 U. PA. L. REV. 1211, 1230 (2003).
106. Ralph J. Rohner, *Whither Truth in Lending?*, 50 CONSUMER FIN. L. Q. REP. 114, 114 (1996).
107. *See* Arnold S. Rosenberg, *Better Than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 44 COLUM. J. TRANSNAT'L L. 520, 596 (2006) (calling credit card fees "a morass of cross-subsidization"); *see also* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) (arguing that consumers tend to ignore nonsalient contract terms).
108. *See* Korobkin, *supra* note 107, at 1234 ("[A] non-salient term will not automatically become salient just because its content is communicated to the buyer.").
109. *See* Kilborn, *supra* note 21, at 18; *see also id.* at 23 ("[D]ebiasing is difficult if not impossible." (internal quotation marks omitted)).
110. David Adam Friedman, *Free Offers: A New Look*, 38 N.M. L. REV. 49, 84 (2008).

problem for any message that audiences are exposed to repeatedly over time."[111] Considering how much creditors bombard American consumers with credit card solicitations,[112] the new mandatory disclosures might wear out rather quickly.

III. BEHAVIORAL BIASES AND CARDHOLDER DECISIONMAKING

Rational choice theory, the standard economic model of individual choice,[113] posits that individuals make decisions that maximize their expected utility.[114] A rational decisionmaker weighs the attributes of each possible choice, evaluates the uncertainties associated with each choice, and then selects the choice that is superior to other possible alternatives.[115] In short, a consumer presented with Card A (with a 12 percent lifetime interest rate and a $35 annual fee) and Card B (with a 4.9 percent teaser rate, a 16 percent postintroductory rate, 1 percent cash back, and 10 pages of fine print) will choose Card A if and only if Card A will provide the consumer with the greatest utility, on average, over the life of the card.

Although it may have an enormous amount of intuitive appeal to use rational choice theory to describe how individuals actually make decisions,[116] under closer scrutiny it becomes apparent that application of the theory in this way demands an unrealistic amount of insight and sophistication from human decisionmakers. For instance, individuals usually do not compare alternatives by employing mathematical rules like weighted adding strategies,[117] or by calculating expected utilities when facing probabilistically uncertain outcomes.[118] That is not to say that rational choice theory is not useful. On the contrary, it accurately predicts

111. Michelle O'Hegarty, Linda L. Pederson, David E. Nelson, Paul Mowery, Julia M. Gable & Pascale Wortley, *Reactions of Young Adult Smokers to Warning Labels on Cigarette Packages*, 30 AM. J. PREVENTIVE MED. 467, 471 (2006).
112. Credit Suisse estimated that credit card issuers mailed about 5 billion credit card solicitations in 2011. *See* Sam Ro, *Credit Card Companies Expected to Mail 5 Billion Offers This Year*, BUS. INSIDER (Sept. 21, 2011, 9:07 AM), http://www.businessinsider.com/credit-card-companies-expected-to-mail-5-billion-offers-2011-9.
113. *See* AMARTYA SEN, RATIONALITY AND FREEDOM 26 (2002).
114. *See* REZA SALEHNEJAD, RATIONALITY, BOUNDED RATIONALITY AND MICROFOUNDATIONS: FOUNDATIONS OF THEORETICAL ECONOMICS 38 (2007).
115. *See id.*
116. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, *in* RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67 (Robin M. Hogarth & Melvin W. Reder eds., 1987).
117. *See* Korobkin, *supra* note 107, at 1220–22.
118. *See* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1206–07 (2003).

many microeconomic phenomena.[119] For example, rational choice theory correctly predicts that when wages increase, holding everything else constant, the labor supply increases and quantity demanded decreases.[120] However, the theory simply does not accurately describe the decisionmaking process at the individual level.[121]

The behavior of human decisionmakers predictably deviates from that of the fictional rational actor in several ways.[122] These tendencies to deviate are known as behavioral biases.[123] The discussion of consumer behavior in the credit card context includes three biases in particular—bounded rationality, hyperbolic discounting, and optimistic overconfidence. I explore each in turn.

A. Bounded Rationality

"Bounded rationality" refers to a phenomenon whereby individuals base their decisions on only a handful of a product's attributes rather than deciding among alternatives by weighing all available data points.[124] The number of attributes actually considered in the decisionmaking process is surprisingly low—some studies have suggested that decisionmakers rely on as few as three to six attributes.[125] Even expert decisionmakers have been shown to consider small numbers of attributes.[126]

Boundedly rational decisionmakers tend to focus only on the most salient attributes.[127] In the credit card context, this means that consumers are prone to choosing suboptimal credit cards because, for many consumers, the most salient attributes are not major components of the long-term price of the card.[128] One survey identified the lack of an annual fee as the prime selection criterion for one-third of respondents,[129] even though most cardholders will annually pay far more

119. *See* Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705, 1705 (1995).
120. *Id.*
121. *See, e.g.*, Charles R. Plott, *Rational Choice in Experimental Markets*, *in* RATIONAL CHOICE, *supra* note 116, at 117.
122. *See* Kilborn, *supra* note 21, at 17.
123. *Id.*
124. Korobkin, *supra* note 107, at 1206.
125. *See, e.g.*, *id.* at 1227–29.
126. *See id.* at 1229.
127. *See id.* at 1206.
128. *See* Bar-Gill, *supra* note 90, at 1376.
129. DANIEL S. EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 218 (2d ed. 2005).

than the average annual fee in a myriad of other, less salient fees.[130] Another survey found that more than one-third of consumers consider an attractive teaser rate to be the most important attribute,[131] even though consumers mostly borrow at high postintroductory rates.[132] A third study found that 20 percent of consumers considered rewards and rebates to be the prime selection criterion.[133]

For many borrowers, long-term interest rates carry less weight than attributes like annual fees and teaser rates. For instance, two economists found that creditors believe "that the overall demand for credit is relatively insensitive to interest rates."[134] Credit card fees (other than the annual fee) are even less salient for most consumers and are "largely invisible to most consumers trying to choose between different credit card plans."[135]

Although consumers generally give little to no weight to late and over-limit fees, these fees may impose substantial costs—late fees were assessed on 35 percent of accounts in 2005.[136] In the wake of the CARD Act, most late fees for first-time infractions have been capped at $25[137] (down from an average of $33.64 in 2005),[138] but as recently as 1995, late fees averaged only $12.83.[139] Consumers similarly ignore over-limit fees,[140] which have also been set at $25 for first time infractions.[141]

130. By 2009, 40 percent of the credit card industry's income came from penalty rates and fees. *See* Duhigg, *supra* note 1, at 43. Creditors took note of consumers' particular disdain for annual fees, and by 2002, 85 percent of credit cards had no annual fee. *See* EVANS & SCHMALENSEE, *supra* note 129, at 91.
131. Bar-Gill & Warren, *supra* note 15, at 51.
132. *See* Bar-Gill, *supra* note 90, at 1392.
133. *Id.* at 1391 n.95.
134. DANIEL S. EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 167 (1st ed. 1999); *see also* Bar-Gill, *supra* note 90, at 1403. *But see* Bar-Gill & Warren, *supra* note 15, at 46 (concluding that long-term interest rates have become somewhat more salient to consumers in recent years, driving competition with respect to that component of credit card price).
135. EVANS & SCHMALENSEE, *supra* note 134, at 211; *see also* Bar-Gill, *supra* note 90, at 1407–08 (arguing that few consumers give much weight to late and over-limit fees).
136. *See* GAO-06-929, *supra* note 53, at 5.
137. 12 C.F.R. § 226.52(b)(1)(ii) (2012).
138. Bar-Gill & Warren, *supra* note 15, at 47.
139. *Id.* Some creditors, however, began following a strategy of "maximizing fee income" as early as 1982. *See* Beasley v. Wells Fargo Bank, 1 Cal. Rptr. 2d 446, 448 (Ct. App. 1991).
140. Bar-Gill & Warren, *supra* note 15, at 47.
141. 12 C.F.R. § 226.52(b)(1)(ii). This is down from an average of $30.18 in 2005. Bar-Gill & Warren, *supra* note 15, at 47.

Penalty interest rates[142] are potentially even more costly for cardholders, but consumers applying for a credit card are similarly unlikely to consider them.[143] A cardholder subject to a penalty interest rate can expect rates in the upper twenties—for many creditors, 29 percent is the norm.[144] The fastest growing source of revenue in the industry, penalty interest accounted for 12.5 percent of creditors' revenues in 2004.[145]

Other nonsalient components of credit card price include the myriad of risk-related and convenience fees that appear in the fine print.[146] These include cash advance fees, stop-payment-request fees, fees for statement copies and replacement cards, foreign currency conversion fees, wire transfer fees, and balance transfer fees.[147] Consumers might ignore these fees even more often than they ignore late and over-limit fees because many consumers do not even know that they exist.[148]

Because cardholders ignore some cost-imposing terms and give undue weight to more salient terms, creditors have a strong incentive to compete by cross-subsidizing salient terms—that is, pricing salient terms below marginal cost and nonsalient terms above marginal cost.[149] Competition only exacerbates this problem because a creditor who does not cross-subsidize salient terms will tend to lose business to a competitor who does.[150] "Far from operating as an invisible hand

142. A penalty interest rate is an increased rate that a creditor imposes on a cardholder after the cardholder commits some act that is statistically correlated with a higher risk of default. Bar-Gill & Warren, *supra* note 15, at 24. The most common reasons for invoking a penalty rate are making a late payment, exceeding the credit limit, and having a payment returned for insufficient funds. *Id.* at 24–25.

143. Like penalty and over-limit fees, penalty interest rates are "largely invisible to consumers." *Id.* at 47.

144. Ruth Susswein, *Credit Pitfalls Still Exist*, CONSUMER ACTION NEWS, Winter 2010–11, at 4; *see also* Ruth Susswein, *Credit Card Rates Rising*, CONSUMER ACTION NEWS, Summer 2009, at 1 (noting that several of the largest creditors raised their penalty rates in 2009, including Capital One (29.4 percent), U.S. Bank (28.99 percent), and Chase (29.99 percent)).

145. Bar-Gill & Warren, *supra* note 15, at 47.

146. *Id.* at 49.

147. *Id.* The CARD Act eliminated one common type of fee—convenience charges for telephone payments. Credit CARD Act of 2009, Pub. L. No. 111-24, § 102(a), 123 Stat. 1734, 1740 (to be codified at 15 U.S.C. § 1637(l)).

148. *See* Bar-Gill & Warren, *supra* note 15, at 49–50. Balance transfer fees, on the other hand, might be quite salient to consumers shopping for a credit card in order to transfer a preexisting balance. One prominent credit card comparison website dedicates a web page to "Balance Transfer Cards," suggesting that balance transfer fees are salient to some consumers. *See Balance Transfer Credit Cards*, CREDITCARDS.COM, http://www.creditcards.com/balance-transfer.php (last visited May 14, 2012).

149. *See* Bar-Gill & Warren, *supra* note 15, at 9.

150. *Id.*

that promotes efficiency, market forces combined with the presence of non-salient product attributes can perversely enforce a regime of inefficiency."[151] Furthermore, this is true even if creditors are not "crafty and fatally opportunistic,"[152] because market competition provides the impetus on its own.[153]

Evidence suggests that creditors have forgone revenue on salient terms, shifting their focus to "increasingly less visible pricing schemes to achieve similar results."[154] Prior to the mid-1980s, for example, virtually all credit cards had annual fees.[155] The Discover card, introduced in 1986, instigated an arms race of cross-subsidization by offsetting its zero annual fee with a 19.8 percent interest rate.[156] Today, 85 percent of credit cards have no annual fee, and most of those that do have an annual fee are high-end rewards cards.[157]

While creditors have effectively eliminated the annual fee on most nonrewards cards, they have replaced that lost revenue by crafting increasingly complex products with additional fees and charges that consumers pay little attention to ex ante.[158] From 1996 to 2003 alone, the average cardholder agreement grew in length by a factor of twenty.[159] Revenue from late fees grew almost 400 percent during a similar period,[160] and between 1983 and 2001, inflation-adjusted revenue from service fees grew thirteenfold.[161] By 2009, the industry—despite consumers' demands for zero *annual* fees[162]—collected 40 percent of its revenue from less salient cardholder fees.[163]

B. Hyperbolic Discounting

"Hyperbolic discounting" refers to a phenomenon whereby individuals systematically overvalue immediate benefits and costs and undervalue future benefits

151. Korobkin, *supra* note 107, at 1234.
152. 155 CONG. REC. H4962 (daily ed. Apr. 29, 2009) (statement of Rep. Pascrell).
153. Hanson & Kysar, *supra* note 102, at 1551–53.
154. Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 162–63 (2006).
155. LLOYD KLEIN, IT'S IN THE CARDS: CONSUMER CREDIT AND THE AMERICAN EXPERIENCE 30–31 (1999). In the mid-1980s, Visa and MasterCard annual fees ranged from $20 to $40 and American Express fees ranged from $45 to $65. *Id.* at 31.
156. *Id.* at 32.
157. EVANS & SCHMALENSEE, *supra* note 129, at 91.
158. Bar-Gill & Warren, *supra* note 15, at 50.
159. Issacharoff & Delaney, *supra* note 154, at 163 n.33.
160. *Id.* at 163 n.39 (referring to the period from 1993 to 2003).
161. EVANS & SCHMALENSEE, *supra* note 129, at 219.
162. *See supra* note 130 and accompanying text.
163. Duhigg, *supra* note 1, at 43.

and costs.[164] That is not to say that it is irrational to desire having pleasurable things now and paying for them later—a rational actor may also prefer immediate results to delayed gratification.[165] However, a rational actor's desire for some future benefit decreases at a proportional rate as that benefit is further removed in time.[166] Unlike hypothetical rational actors, most individuals find that their preferences often change as gains or losses become more immediate. This overreaction to immediate gains and losses is hyperbolic discounting at work.[167]

To illustrate how this behavioral bias works, suppose an individual (we'll call him Bruce) is given a choice between receiving $10 thirty days from now and receiving $11 thirty-one days from now. Bruce wants the extra dollar and can wait one day, so he chooses the second option. Thirty days later, Bruce is given the option of changing his mind. If Bruce were perfectly rational, he would still wait one more day to earn an extra dollar. However, Bruce might change his mind once he realizes the payoff is instantaneous—he no longer prefers to wait an extra day for an additional dollar.[168]

For a more familiar example, consider what happens when an individual decides what time to wake up the next morning before going to bed for the night. As fictional detective Archie Goodwin once observed, "The trouble with an alarm clock is that what seems sensible when you set it seems absurd when it goes off."[169] Before going to sleep, Archie prefers waking early to rising late, but by the time the alarm rings, Archie's preferences change—he now prefers sleeping in to waking early. A purely rational actor would not share Archie's experience—his preference when setting the alarm would remain his preference when the alarm went off. Only a person experiencing hyperbolic discounting would have less enthusiasm for an early start simply because the unpleasantness of waking up was immediate.[170]

Hyperbolic discounting is such a powerful bias that individuals tend to overreact to immediate costs and benefits even when they know that they are

164. Kilborn, *supra* note 21, at 21.
165. *See* HOWARD RACHLIN, THE SCIENCE OF SELF-CONTROL 31 (2000).
166. *Id.* Readers who are knowledgeable of calculus may recognize this as a differential equation describing exponential decay. A rational actor's "time discount function," therefore, is said to be exponential. *Id.*
167. Kilborn, *supra* note 21, at 21. This type of discount function more closely resembles a hyperbola than an exponential function—hence the term "hyperbolic discounting." RACHLIN, *supra* note 165, at 145.
168. This hypothetical is adapted from Samuel M. McClure et al., *Separate Neural Systems Value Immediate and Delayed Monetary Rewards*, 306 SCIENCE 503, 506 (2004).
169. Rex Stout, *The Rodeo Murder*, ELLERY QUEEN'S MYSTERY MAG., Sept. 1968, at 67, 84.
170. This example is adapted from RACHLIN, *supra* note 165, at 27–29.

prone to doing so.[171] In fact, neuroscience suggests that the overvaluation of immediate benefits and costs is a tendency hardwired into our brains.[172]

In the credit card context, this bias explains why some cardholders borrow on their credit cards despite their original intentions to pay off the balance each month.[173] What begins as a preference to pay off the entire balance often turns into a preference to pay much less once the payment becomes due. In fact, credit cards exacerbate the effects of hyperbolic discounting by allowing cardholders to enjoy the cards' benefits long before paying the corresponding costs.[174] The ability to borrow in small increments further amplifies the effect because individuals tend to deliberate less about small benefits and costs.[175] In sum, "[c]onsumer credit facilitates, indeed, enhances consumers' susceptibility to the bias toward present consumption and against delayed gratification."[176]

C. Optimistic Overconfidence

Behavioral scientists have found that individuals are systematically and unrealistically optimistic, especially about their abilities to avoid adverse events.[177] For example, about 90 percent of motorists believe they drive better than average—a mathematical impossibility.[178] One's overconfidence may be more pronounced for less salient risks. For instance, only 3 percent of consumers consider their homes to present an above-average risk of injury from drain cleaner or bleach.[179]

More tellingly, perhaps, most people harbor unrealistic beliefs about their chances for "personal and professional success."[180] This overconfidence may be partially attributable to the "illusion of control"—that is, the tendency for

171. Littwin, *supra* note 17, at 469.
172. For a full scientific discussion, see McClure et al., *supra* note 168, at 504.
173. Littwin, *supra* note 17, at 468.
174. *See id.* at 472.
175. *See* Shane Frederick, George Loewenstein & Ted O'Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 363 (2002). Indeed, many consumers find themselves overindebted primarily because of small purchases that add up over time. *See* Littwin, *supra* note 17, at 472.
176. Kilborn, *supra* note 21, at 22.
177. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 216 (1995).
178. *See id.*
179. *Id.*
180. *Id.* at 217.

individuals to overestimate their ability to avoid negative events by controlling their own behavior.[181]

This bias has obvious implications in the credit card context—cardholders tend to overestimate their future ability to repay debts and, therefore, take on more debt than they would have taken on had they realized their actual ability to repay.[182] Consumers tend to both overestimate their future income and underestimate the likelihood of liquidity problems.[183]

Most people will find overcoming optimistic overconfidence difficult because, like with hyperbolic discounting, awareness of the tendency alone is usually not enough to counteract it. Individuals tend to remain overconfident about their chances for avoiding adverse events even after learning about the actual statistical probabilities of those events occurring.[184] For this reason, budgeting has little to no effect on overconfidence.[185]

Taken together, these three behavioral biases—bounded rationality, hyperbolic discounting, and optimistic overconfidence—contribute to overindebtedness. And yet the CARD Act responded almost entirely to *creditor* practices.

IV. POLICY PRESCRIPTIONS

When it enacted the CARD Act, Congress took an overly simplistic view of consumer behavior, assuming that it could do very little to instill good stewardship in the American borrower. Although the CARD Act did provide several new mandatory disclosures, it did not aim to discourage informed but improvident decisions. To further reform the credit card market, Congress should explore policies that will discourage these decisions by making credit cards less exploitative of behavioral biases.

This is not a call for an abrupt congressional about-face. With consumer debt reaching record levels,[186] American consumers need help *now*. The search for solutions should therefore begin by focusing on reforms for which we already have the political will to consider seriously. The CARD Act's guiding principles were widely supported by members of both parties, as evidenced by the fact that

181. Kilborn, *supra* note 21, at 18.
182. *See* Issacharoff & Delaney, *supra* note 154, at 162.
183. Kilborn, *supra* note 21, at 19.
184. *See id.* at 18.
185. *Id.* at 19. Budgeting might even exacerbate some consumers' overconfidence by "enhancing their feeling of control over their financial futures." *Id.*
186. *See supra* notes 32–33 and accompanying text.

over 85 percent of Congress voted in favor of the Act.[187] This Comment seeks to build upon this political will by proposing reforms that will encourage wiser cardholder decisions while remaining true to the CARD Act's purpose and guiding principles.[188]

Some proposals are bound to raise material issues on which the congressional record is silent. However, the CARD Act's prescriptions appear to be consistent with the principles of libertarian paternalism, as this Comment articulates below.[189] Therefore, this Part explicates the philosophy and then evaluates potential reforms based on how consistent they are with it, particularly where the legislative record is unhelpful for determining Congress's preferences.

As opposed to strong paternalism, which forecloses individual choice (for example, mandatory seat belt laws),[190] libertarian paternalism aims to steer individuals in welfare-promoting directions while allowing them to do as they please.[191] A school cafeteria, for example, might attempt to encourage students to eat healthier lunches by placing the fruit and salad before the desserts in the cafeteria line.[192] Many initiatives that would qualify as libertarian paternalism are also asymmetrical, meaning they seek to correct individual behaviors without imposing significant costs on individuals who already avoid those behaviors.[193]

187. The bill passed the House of Representatives by a vote of 357–70 and the Senate by a 90–5 margin. *Final Vote Results for Roll Call 228*, HOUSE.GOV (Apr. 30, 2009, 3:34 PM), http://clerk.house.gov/evs/2009/roll228.xml; *U.S. Senate Roll Call Votes 111th Congress—1st Session, on Passage of the Bill (H.R. 627 as Amended)*, SENATE.GOV (May 19, 2009, 12:53 PM), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00194. Additionally, even the opponents of the CARD Act in Congress agreed that it is "appropriate to consider new ways" to reform the credit card industry. H.R. REP. NO. 111-88, at 40 (2009) (section titled "Dissenting Views").

188. Of course, in the time between the passage of the CARD Act and the publication of this Comment, the balance of power in Congress has shifted, as Republicans gained control of the House of Representatives and gained Senate seats in the 2010 midterm elections. *See* Jeff Zeleny, *Republicans Take Control of House, Setting Back Democratic Agenda*, N.Y. TIMES, Nov. 3, 2010, at A1. The Republicans' success in the midterms should not significantly affect congressional intent on this subject, however, because nearly two-thirds of Republicans voted for the bill. *See supra* note 187.

189. The term paternalism often carries a negative connotation. *See, e.g.*, BLACK'S LAW DICTIONARY 1163 (8th ed. 2004) (defining paternalism as "[a] policy or practice of taking responsibility for the individual affairs of [others], esp. by supplying their needs or regulating their conduct in a heavy-handed manner"). For purposes of this Comment, however, paternalism simply means attempting to steer individuals' decisions in welfare-promoting directions. *See* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159 (2003).

190. Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 254 (2006).

191. *Id.* at 256.

192. Sunstein & Thaler, *supra* note 189, at 1166.

193. *See* Sunstein, *supra* note 190, at 256. Although the concepts of asymmetrical and libertarian paternalism overlap, they are not identical. *Id.*

Libertarian paternalism is desirable because it preserves freedom of choice, even when it changes an individual's behavior. In many domains, individuals lack clear, stable, or well-ordered preferences, and in such circumstances, subtly encouraging certain courses of action does not meaningfully encroach on freedom of choice.[194] Furthermore, individuals are more likely to make choices that reflect their true preferences in contexts in which they are experienced and well informed (like choosing ice cream flavors) than those in which they are inexperienced and poorly informed (like selecting the right credit card).[195] In one remarkable experiment, test subjects were shown financial projections based on three different investment portfolios, one of which was the subject's actual portfolio.[196] On average, subjects rated their own portfolios as the *worst* of the three, thereby providing empirical support to the notion that laypersons do not necessarily have stable or utility-maximizing preferences when it comes to decisions regarding their financial futures.[197]

The CARD Act's prescriptions are consistent with libertarian paternalism. Providing tools like disclosures in an effort to help consumers manage their finances, for instance, is both libertarian and paternalistic, in that it helps consumers take welfare-promoting actions—but only if they choose to do so.[198] Money management tools are also asymmetrical because consumers who are already making welfare-promoting decisions will likely find their experiences unchanged. Additionally, Congress's guiding principles, such as preserving the availability of credit and declining to bail out prodigal borrowers, harmonize with libertarian paternalism's aim to encourage welfare-promoting decisions without imposing costs on the individuals who do not need the government's help.[199] Therefore, because Congress appears to have acted consistently with the theories of libertarian paternalism and asymmetry when passing the CARD Act, this Comment assesses potential improvements to the credit card industry along those dimensions when legislative preferences are unclear.

194. *See* Sunstein & Thaler, *supra* note 189, at 1161.
195. *Id.* at 1163.
196. Shlomo Benartzi & Richard H. Thaler, *How Much Is Investor Autonomy Worth?*, 57 J. FIN. 1593, 1596 (2002). The other two projections were made using the mean and median portfolios of the other test subjects. *Id.* at 1597.
197. *See id.* at 1598.
198. *See supra* Part I.C.2.
199. *See supra* Part I.C.3.

A. Making the Costs of Credit Card Use More Salient

1. Standardizing Nonsalient Terms

Congress can counteract consumers' bounded rationality by directing the Federal Reserve to standardize all potentially cost-imposing, nonsalient terms of cardholder agreements.[200] While this would certainly entail a sweeping change to the credit card industry, standards and specifications are common in other industries. With noncredit products, attributes that are difficult for consumers to see and evaluate in advance of purchase quite often must conform to specific regulations.[201] Once these hidden attributes of the product are standardized, consumers are then able to make better-informed decisions by considering the more salient features of the product.[202] Such regulations can even benefit some sellers by allowing them to provide high-quality products without the fear of being undercut by low-quality substitutes.[203]

Standardizing nonsalient credit card terms will also simplify the process of shopping for a credit card by allowing consumers to compare the various alternatives in the market more meaningfully. Cardholder agreements are enormously complex (typically consisting of about eighty separate provisions),[204] and under the current rules, comparing the fine print can be challenging even for a financial professional.[205] Even consumers who have time to hack through the thicket of fine print will not likely benefit from their efforts because consumers are extremely unlikely to make utility-maximizing decisions when faced with such an overwhelming number of product attributes.[206] Finally, there are simply too

200. The Federal Reserve writes regulations to implement consumer protection laws regarding credit transactions, including credit cards. *See* FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 75–76 (9th ed. 2005), *available at* http://www.federalreserve.gov/pf/pdf/pf_complete.pdf.

201. Bar-Gill & Warren, *supra* note 15, at 9–10. Title 16 of the Code of Federal Regulations, for example, contains thousands of provisions for consumer products, including standards for a wide range of products like lawn mowers, *see* 16 C.F.R. pt. 1205; electronically operated toys, *see* pt. 1505; carpets and rugs, *see* pt. 1630; and refrigerators, *see* pt. 1750.

202. Bar-Gill & Warren, *supra* note 15, at 10.

203. *Id.* This concern was voiced by at least one member of Congress during the CARD Act debates. *See* 155 CONG. REC. H4964 (daily ed. Apr. 29, 2009) (statement of Rep. Ellison) ("This bill sets a basis for an entire industry so that good credit card companies never have to be tempted to engage in some of these nefarious practices just to stay competitive with companies that do.").

204. *See* RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 131 (2006).

205. Bar-Gill & Warren, *supra* note 15, at 13.

206. *See* Korobkin, *supra* note 107, at 1229.

many products to compare—the top five credit card issuers alone offer one hundred different cards.[207]

The government can probably standardize nonsalient terms like late, over-limit, and other fees without imposing an undue burden on creditors because these fees bear little relation to the actual cost to the creditors.[208] Such fees are almost always expressed in large, fixed dollar amounts regardless of the infraction.[209] In fact, the lack of relation between back-end fees and the actual costs of late payments and over-limit transactions has led at least two courts to rule that such fees were unenforceable liquidated damages.[210]

Standardizing nonsalient terms also fits well within Congress's original intent in enacting the CARD Act. The Act took a large step in this direction by setting numerous limits on fees.[211] Most tellingly, Congress mandated that penalty fees must be "reasonable and proportional to [the] omission or violation."[212] Instructing the Federal Reserve to set a "reasonable and proportional" fee would simply add clarity to this existing provision while eliminating the need for ex post review.[213]

In addition to the plain language of the statute,[214] the legislative history of the CARD Act indicates that standardizing nonsalient terms would align with congressional intent. One of Congress's original goals was to simplify credit cards

207. American Express offers twenty-two, *see Compare Credit Cards*, AM. EXPRESS, https://www304.americanexpress.com/credit-card/compare (last visited May 14, 2012); Chase offers nineteen, *see Browse Credit Cards*, CHASE, https://creditcards.chase.com/credit-card-search.aspx (last visited May 14, 2012); Bank of America offers nineteen, *see All Credit Cards*, BANK AM., https://www.bankofamerica.com/credit-cards/view-all-credit-cards.go (last visited May 14, 2012); Citibank offers twenty-six, *see View All Credit Cards*, CITI, https://creditcards.citi.com/credit-cards/view-all-credit-cards (last visited May 14, 2012); and Capital One offers fourteen, *see Browse Credit Cards*, CAPITAL ONE, http://www.capitalone.com/creditcards/products/browse-all (last visited May 14, 2012).

208. Of course, creditors would take in less revenue from late and over-limit fees, but creditors could make up this lost revenue by shifting costs to more salient terms. See the discussion of cross-subsidization, *supra* Part III.A.

209. Bar-Gill, *supra* note 90, at 1424–25.

210. *See* Hitz v. First Interstate Bank, 444 Cal. Rptr. 2d 890, 900 (Ct. App. 1995); Beasley v. Wells Fargo Bank, 1 Cal. Rptr. 2d 446, 449 (Ct. App. 1991).

211. *See* Credit CARD Act of 2009, Pub. L. No. 111-24, § 102, 123 Stat. 1734, 1738–41 (to be codified at 15 U.S.C. §§ 1637, 1665d).

212. *Id.* § 102(b)(1), 123 Stat. at 1740 (to be codified at 15 U.S.C. § 1665d(a)).

213. Ex post review of penalty fees may be prohibitively costly and difficult. *See* Bar-Gill & Warren, *supra* note 15, at 98.

214. "The amount of any penalty fee or charge a card issuer may impose . . . including any late payment fee, over-the-limit fee, or any other penalty fee or charge, shall be reasonable and proportional to such omission or violation." Credit CARD Act § 102(b)(1), 123 Stat. at 1740 (to be codified at 15 U.S.C. § 1665d(a)).

so that individuals could make more utility-maximizing choices. As Representative Maloney, the CARD Act's chief architect in the House, stated, "The President called for a plain vanilla card that people could understand."[215] Forcing creditors to shift the consumers' costs to more salient terms would also promote transparency, which was one of the main purposes of the CARD Act.[216]

Finally, if Congress does indeed desire more consumer-friendly terms in the fine print of cardholder agreements, it must impose them itself because such terms otherwise will not be available. Unlike manufacturers of physical products, credit card issuers have little incentive to invest in a consumer-friendly credit card because offering better nonsalient terms would probably not attract enough customers to justify the investment.[217] Since nonsalient terms are unimportant to most consumers, it is unlikely that consumer-friendly fine print will attract customers unless they are educated about the benefits of these nonsalient terms. Such an education campaign would be difficult and expensive because safety features of credit products are not as easy to understand as, say, childproof lids.[218] To highlight one real-world example, Citigroup made a large public announcement in 2007 that it would no longer employ universal default.[219] Citigroup reinstated universal default less than two years later, however, because consumers did not "vote with their feet," as the company had hoped.[220] "When the largest credit card issuer in the country has given the most public launch of a safety feature and it is nonetheless unable to explain to consumers why they should choose this safer card, the limits of creditor education become clear."[221]

Further eroding any incentives to offer consumer-friendly terms, competitors can easily free ride on a creditor's efforts to make and market a more

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215. 155 CONG. REC. H5029 (daily ed. Apr. 30, 2009) (statement of Rep. Maloney); *see also* 155 CONG. REC. S5410–11 (daily ed. May 13, 2009) (statement of Sen. Merkley) ("We need to create a functional market where there is competition . . . based on good interest rates, based on fair fees, and based on good, old-fashioned consumer service.").

216. As the Senate committee report stated in its "Purpose" section, "[t]he legislation enhances the supervision of credit card issuers and the transparency of their practices." S. REP. NO. 111-16, at 2 (2009); *see also* H.R. REP. NO. 111-88, at 11 (2009) (expressing concern about a "lack of transparency in the market"); 155 CONG. REC. H4968 (daily ed. Apr. 29, 2009) (statement of Rep. Gutierrez) ("[W]hat the bill does is it brings transparency. It brings openness to the credit card marketplace. What could be better than to shine daylight on any product?").

217. *See* Bar-Gill & Warren, *supra* note 15, at 17–19.

218. *Id.* at 19.

219. *See* Eric Dash, *Citigroup Considers Repealing a Pledge, and the Slogan With It*, N.Y. TIMES, June 25, 2008, at C4.

220. *Id.* (quoting Citigroup Chief Administrative Officer John P. Carey) (internal quotation marks omitted); *see also* Bar-Gill & Warren, *supra* note 15, at 20.

221. Bar-Gill & Warren, *supra* note 15, at 20.

consumer-friendly credit card, even if the creditor is successful in educating the public about its high-quality terms. Credit products are especially vulnerable to copying because, unlike manufactured goods, they are not protected by patents, and a creditor can roll out a new credit card or redesign an old one quickly and at relatively low cost.[222] Additionally, an "informed minority" does not drive the credit card market as it does with other consumer products because credit card issuers can differentiate between their customers, tailoring the product to each one.[223] A creditor can, for instance, distinguish between its informed and uninformed customers by imposing a new fee and then waiving that fee for any customer who objects—this way, the creditor collects additional revenue from its uninformed customers while keeping the informed customers happy.[224] The informed minority might enjoy a better product, but the benefit will not carry over to the uninformed customers.

2. Regulating the Presentation of Teaser Rates

Teaser rate cards, which offer a low introductory rate for a limited time, followed by a much higher rate for the remainder of the card, present another area ripe for reform. The teaser rate is a common hook that creditors use to attract new customers. In one study, 74 percent of the cards examined offered a teaser rate.[225]

To consider how teaser rates might work to the detriment of some cardholders, consider three hypothetical cardholders: Alicia, Bryan, and Carlos. Each cardholder chooses a teaser rate card, believing that he or she will incur less interest with the teaser rate card than with a card that has a single lifetime interest rate. For different reasons, however, each one of our hypothetical cardholders is wrong.

Alicia chooses the teaser rate card because she is simply *confused*; she believes the package with the teaser rate is mathematically the better option given her level of borrowing.[226] Many consumers report confusion over teaser rate offerings,[227]

222. *See id.* at 19.
223. *Id.* at 22.
224. *See id.* at 22 n.40.
225. GAO-06-929, *supra* note 53, at 17.
226. *See, e.g.*, Littwin, *supra* note 17, at 494.
227. In one study, 61 percent of respondents stated that mailings and other ads that offered teaser rates were "confusing to me." Thomas A. Durkin, *Credit Cards: Use and Consumer Attitudes, 1970–2000*, 86 FED. RES. BULL. 623, 629 (2000).

but even consumers who feel more confident about their assessments may find that teaser rates "can create cognitive illusions that trick [them] into borrowing."[228]

Bryan and Carlos are not confused by the math, but they also choose the teaser rate card under the mistaken belief that it will accrue less interest than a card with a single rate. Bryan makes his choice because of *bounded rationality*—he does not realize that the teaser rate card will accrue more interest because he gives insufficient weight to the postintroductory rate or ignores it entirely. Carlos makes his choice because of *optimistic overconfidence*—he underestimates his future interest because he erroneously predicts that he will borrow during the introductory period but will pay off the balance by the time the interest rate increases.

Empirical research indicates that many cardholders are just like Bryan and Carlos—they are not confused by the teaser rate and they ultimately will not benefit from it, but they take the bait anyway.[229] Teaser rates are so alluring that consumers prefer offers with teaser rates to offers without teaser rates even when "casual inspection" of the two options reveals that the offer with the teaser rate will result in higher interest payments over the life of the card.[230] Examining market data, Lawrence Ausubel found that consumers are at least three times more responsive to changes in the teaser rate than to dollar-equivalent changes in the postintroductory rate,[231] and they are two to three times more responsive to changes in the teaser rate than to dollar-equivalent changes in the duration of the introductory offer.[232] As further proof of consumers' economic irrationality,

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228. Rachlinski, *supra* note 118, at 1184. Rachlinski demonstrates the trick that teaser rates play on some consumers by discussing a landmark behavioral experiment. Each subject was asked to place a bet on one of three games. In the first game, the subject would draw one marble from a bag containing half red marbles and half white marbles and would win if the marble was red. In the second game, the subject would draw seven marbles from a bag containing 90 percent red marbles and would win if each marble were red. In the third game, the subject would draw seven marbles from a bag containing 10 percent red marbles and would win if any of the seven was red. The most popular game was the second, even though it was the game that offered the worst probability of winning. "Subjects seem to anchor on the salient 90% probability offered by the second choice and fail to adjust downward sufficiently from the salient 10% probability of success that the third option offers. Similarly, individuals offered a [teaser rate] might fail to fully understand the effect of the subsequent [interest rate] increase on their budget." *Id.*

229. *See* Ausubel, *supra* note 17, at 21–22.

230. *Id.* at 22.

231. *Id.* at 21.

232. *Id.* at 22. Similar findings have been made in other real-world markets. For example, in 2006, 61 percent of subprime mortgagors could have qualified for conventional loans with "far better terms." Rich Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy: As Housing Boomed, Industry Pushed Loans to a Broader Market*, WALL ST. J., Dec. 3, 2007, at A1.

cardholders show these preferences even though they mostly borrow at high, postintroductory rates.[233]

Before advocating any particular policy prescription, this Comment recognizes the potential benefits that teaser rates may provide consumers. A teaser rate might benefit a cardholder engaging in consumption smoothing, preferring to pay more interest later to finance low-interest purchases in the short term.[234] A teaser rate also benefits a cardholder who pays less interest because she transfers the balance to another card at the end of the introductory period,[235] and it also benefits a cardholder who incurs less interest because she pays off her outstanding balance before the introductory period expires.[236] Finally, at least one commentator has argued that a cardholder might benefit by using the introductory period to "sample" the card and decide whether she likes the cardholder experience enough to keep using it.[237] A desirable policy solution should preserve these benefits.

To limit consumers' vulnerability to seductive teaser rates, Congress should consider the following policy: In a credit card offer, the creditor must display the card's average interest rate at least as prominently as the teaser rate.[238] In other words, creditors must present the offering such that if a potential borrower notices the teaser rate, she will also notice the average rate.[239]

To examine the effects of such a requirement, let us consider how this new presentation would influence the choices of Alicia, Bryan, and Carlos. For Alicia, the benefits should be clear. Since she erroneously believes the average interest

233. *See* Bar-Gill, *supra* note 90, at 1392. Generally, cardholders do not switch to another card at the end of the introductory offer. *See id.* at 1405 n.142 (citing David B. Gross & Nicholas S. Souleles, *Do Liquidity Constraints and Interest Rates Matter for Consumer Behavior? Evidence From Credit Card Data*, 117 Q. J. ECON. 149, 171 (2002)).

234. *See* Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111, 124 (2006).

235. *See id.* at 131.

236. *See* MANN, *supra* note 204, at 172.

237. *See* Epstein, *supra* note 234, at 131. *But see* EVANS & SCHMALENSEE, *supra* note 129, at 218–23 (discussing several potential dimensions of product differentiation but declining to include "cardholder experience").

238. "Average interest rate" refers to the weighted arithmetic mean of all interest rates. For instance, if a card has a teaser rate of 4.9 percent for one year followed by a postintroductory rate of 16 percent for four years, the average rate would be $4.9 \times 1/(1+4) + 16 \times 1/(1+4) = 13.78$ percent.

239. This Comment does not seek to explain in depth what types of print layouts would make the average interest rate as prominent as the teaser rate. Indeed, were Congress to create such a requirement, it could delegate the particulars to the Federal Reserve. One possibility might be to display the average rate on the same page as the teaser rate, against the same background, in the same font, color, and typeface, in the same font size as or larger than the teaser rate, but higher on the page or to the left of the teaser rate if on the same line.

rate on the teaser rate card is lower than it actually is, confrontation with the true average rate will correct her misconception.

It is much less obvious why confrontation with the average interest rate would be helpful to boundedly rational Bryan, especially since this Comment previously argued that disclosures are typically unhelpful to boundedly rational consumers.[240] Requiring prominent display of the average interest rate, however, could counteract bounded rationality because such confrontation with the average interest rate mandates not only *disclosure* but also a particular *presentation* that might render the teaser rate less salient.

There is good reason to believe that consumers are moved by teaser rates not only because of a pure preference for them but also because when a creditor presents a teaser rate without more context, the teaser rate becomes more salient to the potential borrower.[241]

Presenting an offer in separate pieces can powerfully encourage a consumer to overvalue the offer as a whole, and it is precisely this piecemeal presentation that makes teaser rates so irresistible.[242] One scholar has observed that, since gains are more highly valued when segregated, sellers have learned not to "wrap all the Christmas presents in one box."[243] On the other hand, prominent display of the average rate might disrupt the effect of segregating the highly salient teaser rate. Such a display places the teaser rate in a proper context that reminds the borrower of the true price of the card.[244]

Confrontation with the average rate, unfortunately, would probably not benefit optimistically overconfident Carlos. Since Carlos does not believe he will have a balance when the introductory period expires, the only rate of consequence to him is the teaser rate. "If a consumer believes that she will not borrow on her card, she will not mind the high interest rate, no matter how large the font."[245]

240. *See supra* Part II.
241. Korobkin, *supra* note 107, at 1233. For a scientific explanation of how bundling affects purchase decisions, see Manjit S. Yadav, *How Buyers Evaluate Product Bundles: A Model of Anchoring and Adjustment*, 21 J. CONSUMER RES. 342 (1994).
242. *Id.* at 51.
243. Richard Thaler, *Mental Accounting and Consumer Choice*, 4 MARKETING SCI. 199, 202 (1985).
244. For similar reasons, David Friedman has advocated an almost identical proposal that would prohibit the late-night advertising practice of offering "free" throw-ins. Friedman, *supra* note 110, at 90–91. For example, instead of advertising a juicer for $49.99 and throwing in a "free" knife at the end of the advertisement, the seller would be required to name all the components of the offer before revealing its price. *Id.*
245. Bar-Gill, *supra* note 90, at 1378.

Regulating teaser rates by requiring prominent display of the average interest rate harmonizes with Congress's guiding principle of preserving benefits for responsible cardholders because it will allow people who currently benefit from teaser rate cards to continue to enjoy those benefits. This proposed rule would not impose any restriction on the types or bundles of rates that creditors could offer, and the prominent display of the average interest rate would not obscure the information that sophisticated consumers would need to identify the cards that are right for them and to use these cards effectively.[246]

The legislative history of the CARD Act further indicates that such a rule would resonate with congressional intent. Congress demonstrated a willingness to regulate teaser rates in the CARD Act by requiring that introductory periods last at least six months.[247] Previously, the House Committee on Financial Services had also called for reform of teaser rate practices.[248] As Committee Chairman Barney Frank explained, the six-month minimum for teaser rates was an attempt to ensure that the teaser rate "will not mislead some people."[249]

Additionally, Congress enacted a similar proposal in the CARD Act with respect to minimum monthly payments. This rule requires billing statements to include information about the consequences of making only minimum payments; the rule can be interpreted as an initiative to place the minimum payment in a context that makes it harder for the cardholder to ignore the negative consequences of paying less in the short term.[250] Similarly, the rule proposed in this Part places the teaser rate in a context that will help the cardholder weigh the long-term costs of the card more appropriately.

Finally, this new rule is also politically desirable because it fits within the framework of libertarian paternalism. While it places teaser rates in a new context, it does not prevent consumers from choosing a teaser rate card. Furthermore, it is asymmetric because people that benefit from teaser rate cards should find their experiences unchanged.

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246. *But see* 155 CONG. REC. H5033 (daily ed. Apr. 30, 2009) (statement of Rep. Hensarling) (arguing that any attempt to regulate teaser rates will eliminate teaser rates entirely).
247. Credit CARD Act of 2009, Pub. L. No. 111-24, § 101(d), 123 Stat. 1734, 1738 (to be codified at 15 U.S.C. § 1666i-2(b)).
248. H.R. REP. NO. 111-88, at 10 (2009) ("[M]any cards have 'teaser' rates which are unrealistically low and soon increase to a much higher maximum rate . . . .").
249. 155 CONG. REC. H5033 (daily ed. Apr. 30, 2009) (statement of Rep. Frank).
250. Credit CARD Act § 201(a), 123 Stat. at 1743–44 (to be codified at 15 U.S.C. § 1637(b)(11)). The minimum payment disclosures mandated by the CARD Act are less likely to be effective than the average rate presentation recommended in this Part, because minimum payments implicate hyperbolic discounting in addition to bounded rationality. *See infra* Part IV.B.2.

3. Allowing Merchants to Impose Point-of-Sale Credit Surcharges

Legislation that would guarantee merchants the right to impose credit surcharges at the point of sale would make the costs of credit card use more salient. Currently, merchants nationwide are prohibited from imposing credit surcharges by contractual terms known as "merchant restraints," which are conditions of joining credit card network associations, such as Visa, MasterCard, and the like. At least nine states also statutorily prohibit such surcharges.[251]

Many commentators have reasoned that because credit cards are more expensive to process than other types of payment,[252] merchants should be able to charge transactional fees to customers for credit card purchases.[253] While the first two proposals discussed in this Part would help consumers better weigh costs and benefits in the first instance—when deciding which cards they want in their wallets—this point-of-sale proposal would help consumers make decisions when the cardholder is on the verge of putting a purchase on her card.

The "buy now, pay later" nature of credit card transactions provides a strong impetus for a consumer to spend beyond her means.[254] Rewards and benefits

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251. *See* CAL. CIV. CODE § 1748.1(a) (Deering 2005 & Supp. 2012); COLO. REV. STAT. § 5-2-212(1) (2011); CONN. GEN. STAT. ANN. § 42-133ff(a) (West 2007 & Supp. 2012); FLA. STAT. ANN. § 501.0117 (West 2010 & Supp. 2012); KAN. STAT. ANN. § 16a-2-403 (2007 & Supp. 2010); MASS. ANN. LAWS ch. 140D, § 28A(a)(2) (Lexis 2007); N.Y. GEN. BUS. LAW § 518 (McKinney 1996 & Supp. 2012); OKLA. STAT. ANN. tit. 14A, § 2-417 (West 1996 & Supp. 2012); TEX. FIN. CODE ANN. § 339.001(a) (West 2006 & Supp. 2011).

252. Credit card transactions are expensive to process because the creditor relies on these processing fees to pay for rewards programs, the cost of funds during the float period, insurance against fraud, and the cost of issuing new cards. *See* Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1, 7 (2008). Credit card transactions are also surprisingly complex, and the details are important to the discussion about transaction fees. Three entities facilitate each credit card transaction—the acquiring bank, which purchases the merchant's account receivable created by the cardholder's transaction; the network association, which authorizes and clears the transaction; and the issuing bank, which is the entity that has the relationship with the cardholder and collects the cardholder's payments. *See id.* at 5. When a consumer makes a credit card transaction, the acquiring bank credits the merchant's account with the purchase price, minus a fee knows as the merchant discount fee. *See id.* at 6–7. The merchant discount fee is split among the acquiring bank, network association, and issuing bank, but the vast majority is retained by the issuing bank—this portion of the fee is known as the interchange fee. *See id.* at 7, 9. The merchant discount fee typically includes a flat fee of 5–25¢ and a percentage fee of 1–3 percent of the total transaction value, so for most credit card purchases, the merchant pays 1–3.5 percent of the purchase price to process the transaction. *Id.* at 7–8. In 2000, processing a credit transaction cost twice as much (on average) as a check or PIN debit transaction and six times as much as processing a cash transaction. *Id.* at 2.

253. *See, e.g.*, MANN, *supra* note 204, at 122.

254. *See supra* Part III.B–III.C.

programs further encourage consumers to overspend by creating negative transaction costs for credit card purchases.[255] Negative transaction costs induce some individuals to spend more when paying with a credit card than they would spend with cash.[256] Surcharges at the point of sale eliminate negative transaction costs for credit card users and therefore may curb this tendency.

Market data indicate that consumers are highly sensitive to surcharges and would likely respond by switching to noncredit payment methods, such as debit cards.[257] In Norway, for instance, bank customers began switching from checks to debit cards once banks began charging fees for checks.[258] Now, Norway boasts one of the highest rates of debit card use in the world.[259] Similarly, when the Reserve Bank of Australia (RBA) banned no-surcharge rules, the rate of growth in credit card spending dropped to its lowest level since the RBA began collecting data in the early 1990s.[260]

As a side benefit, permissible credit surcharges might also result in lower prices at some establishments. A study of gas stations in Delaware and Washington in the 1980s, for instance, compared stations with uniform pricing to those that set different prices for cash and credit. The study found that prices were, in fact, lower at stations with differential pricing—cash customers paid an average of at least 1.48¢ more per gallon when no surcharge was imposed, and at least 1.3 percent of every cash purchase went to paying the merchant fees for credit transactions.[261]

In the CARD Act, Congress expressed concern about merchant fees and anticipated the possibility of regulating them by directing the Comptroller General

255. *See* Levitin, *supra* note 252, at 3. A buyer usually incurs some expense to make a purchase, whether it is time, effort, money, or some combination of the three. A negative transaction cost occurs when then buyer also receives some benefit—like cash back or airline miles—that more than offsets that expense.
256. *See, e.g.*, Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, 12 MARKETING LETTERS 5, 5 (2001). The tendency for rewards programs to induce purchases a consumer might otherwise avoid has been lampooned in popular culture. *See, e.g.*, *Seinfeld: The Implant* (NBC television broadcast Feb. 25, 1993) (Kramer splits the cost of George's airfare so that Kramer can receive the frequent flyer miles); NOFX, *The Marxist Brothers*, *on* WOLVES IN WOLVES' CLOTHING (Fat Wreck Chords 2006) ("I'll get this one, put it on my card. I get frequent flyer mileage and a booklet of upgrades.").
257. *See* MANN, *supra* note 204, at 122.
258. *Id.* at 122–23.
259. *See id.*
260. *See* Levitin, *supra* note 252, at 51–52.
261. *See id.* at 29–32.

to conduct a study.[262] This provision raised some of the same issues as this Comment raises, specifying that the study will examine "the costs and factors incorporated into interchange fees such as advertising, bonus miles, and rewards,"[263] "the consequences of the undisclosed nature of interchange fees on merchants and consumers with regard to prices charged for goods and services,"[264] and "other jurisdictions where the central bank has regulated interchange fees and the impact on retail prices to consumers in such jurisdictions."[265]

A federal policy that permits credit surcharges also remains true to Congress's goals of preserving the credit supply and promoting transparency in the marketplace. Currently, about one-half of every interchange fee funds credit card rewards.[266] For this reason, if surcharges were allowed, and if they reduced the number of credit purchases, they would likely result in a *restructuring* of credit card user costs rather than in costlier credit. With less revenue from interchange fees, creditors would have to find some other way to fund rewards and might have to increase annual fees on rewards cards—shifting part of the cost of credit card rewards back to the cardholders who actually earn them.[267] The aforementioned Australia example provides empirical confirmation for this theory. When the RBA banned no-surcharge rules, rewards card customers began internalizing more of the costs of their rewards—annual fees on rewards cards increased by 40 percent.[268]

Finally, a public policy favoring credit surcharges already exists. One can find evidence of this policy in the Cash Discount Act, which guarantees merchants nationwide the right to offer customers a discount for paying in cash.[269]

262. Credit CARD Act of 2009, Pub. L. No. 111-24, § 501, 123 Stat. 1734, 1754. The Act specified that this study should include "such recommendations for legislative or administrative actions as may be appropriate." *Id.* § 501(c), 123 Stat. at 1755; *see also* 155 CONG. REC. S5315 (daily ed. May 11, 2009) (statement of Sen. Dodd) ("We will get to the interchange fees at a later date. Certainly, a study would give us a better framework in which to consider legislation.").

263. Credit CARD Act § 501(b)(3), 123 Stat. at 1754.

264. *Id.* § 501(b)(4), 123 Stat. at 1754.

265. *Id.* § 501(b)(7), 123 Stat. at 1754.

266. *See* Levitin, *supra* note 252, at 7. Before the explosion of rewards programs, the interchange fee covered only the costs of fraud, issuing cards, and maintaining funds during the float period. *Id.*

267. *See id.* at 1 ("Who pays for credit card rewards? . . . Credit cards create significant costs for merchants and, most strikingly, for consumers who do not use credit cards. Consumers almost never see a price tag for payments themselves."). This criticism is not new. *See* Irvin Molotsky, *The Hidden Costs of the Cashless Society*, N.Y. TIMES, Mar. 4, 1984, at A3. While this shift in the credit card price structure may promote transparency, it somewhat undermines the goal of preserving existing benefits for cardholders.

268. *See* Levitin, *supra* note 252, at 52.

269. Cash Discount Act, Pub. L. No. 97-25, § 101, 95 Stat. 144, 144 (1981) (codified as amended at 15 U.S.C. § 1666f(b)).

Of course, there is no mathematical difference between a cash discount and a credit surcharge, but few retailers offer cash discounts because doing so requires retailers to advertise a higher baseline price.[270] Additionally, consumers react much less intensely to discounts than they do to surcharges. One study found that 26 percent of consumers had strong negative reactions to surcharges, whereas only 3 percent had strong positive reactions to equivalent discounts.[271]

If credit surcharges indeed benefit many consumers, one might be tempted to conclude that surcharges should be mandated on *every* credit transaction, rather than simply permitted at the merchant's discretion.[272] This temptation should be resisted. It would be imprudent to create mandatory surcharges because many merchants would prefer no surcharge, believing that purchasers will spend more when they pay with a credit card.[273] Indeed, at least one study supports the "credit card premium" theory—that a customer who has already decided to complete a transaction will spend more if she pays with a credit card.[274]

The "credit card premium" theory, however, raises an important counterpoint to the argument that credit surcharges should be permitted to discourage overspending. Credit surcharges might have little effect on cardholder overspending because the types of merchants with which credit card customers are most likely to overspend are the very same merchants who are *least* likely to impose credit surcharges. A merchant who is convinced that its customers will spend more with credit than with cash will want to encourage credit card purchases by imposing no surcharge for credit card purchases. Rather, those most likely to surcharge for credit are merchants that "are not good vehicles for discretionary consumption," such as airlines and couriers.[275]

However, we should expect permissible credit surcharges to curtail spending on inexpensive impulse buys. Merchants are more likely to impose surcharges on

270. For example, if the retailer wants to offer a widget for $104 with a credit payment and $100 with a cash payment, the retailer would have to advertise a baseline price of $104. Levitin, *supra* note 252, at 20–21.
271. ITM RESEARCH FOR COMPETITION DG, THE ABOLITION OF THE NO-DISCRIMINATION RULE 12 (2000), *available at* http://www.creditslips.org/files/netherlands-no-discrimination-rule-study.pdf.
272. This would follow cartoon character Strong Bad's rule of thumb: "Too much of a good thing is an awesome thing." *Cartoon*, HOMESTAR RUNNER, http://www.homestarrunner.com/sbemail21.html (last visited May 14, 2012).
273. *See* MANN, *supra* note 204, at 126–27.
274. *Id.* at 46. For example, on average, individuals leave higher tips when paying by credit card than with cash, even controlling for purchase size. *Id.* at 47.
275. *Id.* at 127.

small purchases where the fixed portion of the merchant fee consumes most or all of the profit margin.[276] Curtailing this type of spending is important, since it contributes substantially to the problem of overspending—small purchases are the least memorable, and therefore they tend not to factor heavily in mental accounting.[277] Furthermore, the Norway and Australia examples provide enough support (for the theory that permissible surcharges stimulate debit card use) to further explore permissible surcharges as a policy option.

B. Equipping Credit Cards With Commitment Devices

A commitment device is a tool that allows an individual to make a choice at time t_A that will take away her ability to choose to give in to temptation at time t_B.[278] In plain English, a commitment device allows an individual to avoid temptation by binding herself to an alternative course of action in advance.[279] Since hyperbolic discounting causes some individuals to give in to temptation as gains and losses become more immediate, commitment devices can be powerful tools to combat that bias.[280]

Individuals show a strong preference for commitment devices in many areas of life.[281] Individual Retirement Arrangements, for instance, are popular in part because they penalize early withdrawals.[282] Self-help resources suggest commitment devices for dieters (requesting, upon ordering, that half of their restaurant meal be served in a doggie bag) and alcoholics (avoiding situations in which alcohol is present).[283] A night owl might also employ a simple commitment device by placing her alarm clock across the bedroom so that she cannot turn it off without getting out of bed.[284]

276. *See* Levitin, *supra* note 252, at 17.
277. *See* Joydeep Srivastava & Priya Raghubir, *Debiasing Using Decomposition: The Case of Memory-Based Credit Card Expense Estimates*, 12 J. CONSUMER PSYCHOL. 253, 254 (2002).
278. RACHLIN, *supra* note 165, at 48.
279. *See* Littwin, *supra* note 17, at 470.
280. *See* RACHLIN, *supra* note 165, at 27.
281. *See* Littwin, *supra* note 17, at 471.
282. *See* GARY BELSKY & THOMAS GILOVICH, WHY SMART PEOPLE MAKE BIG MISTAKES—AND HOW TO CORRECT THEM: LESSONS FROM THE NEW SCIENCE OF BEHAVIORAL ECONOMICS 35 (1999). An additional tax of 10 percent applies to any withdrawals from an IRA that a taxpayer makes before the age of fifty-nine years, six months. 26 U.S.C. § 72(t) (2006).
283. *See* Littwin, *supra* note 17, at 470.
284. *See* RACHLIN, *supra* note 165, at 27.

Credit cards, however, are "the antithesis of a commitment device."[285] In one study, 52 percent of participants attempted to implement some type of commitment device with their credit cards.[286] These do-it-yourself strategies are almost always ineffective at curbing spending, however, and require the cardholder to forgo benefits of the card.[287] Some individuals, for instance, report keeping their credit cards in a lockbox instead of a wallet.[288] Not only does this strategy allow the cardholder to keep spending (especially if shopping at home), but it also makes it less likely that she will have the card in case of an emergency.[289] Because of the impracticality of self-imposed commitment devices, Congress should explore using legislation to create more optimal commitment devices for credit cards.

1. Allowing Consumers to Impose Their Own Credit Limits

Two simple reforms would give consumers control over their credit limits, and these reforms are not mutually exclusive. First, Congress could require creditors to offer an automatic payment option from the cardholder's checking account. Second, Congress could require creditors to grant a cardholder's request to lower her credit limit (a self-imposed credit limit).

The automatic payment option is common in many other countries but is still unavailable for many cardholders in the United States.[290] By opting in to automatic monthly payments, the cardholder commits to not charging more than she can pay each month—in essence, committing to not borrowing on the card. Under this commitment, the credit card effectively acts like a debit card, but the cardholder retains the benefits of credit card use—like the interest-free float period and rewards programs—that he would not normally have with a debit card.[291] By choosing this option, the cardholder also eliminates the possibility of late fees and, as long as the cardholder does not overdraw the account, it eliminates the possibility of over-limit fees.[292]

285. Littwin, *supra* note 17, at 472.
286. *Id.* at 473.
287. *See id.*
288. *See id.* at 476.
289. *See id.*
290. *See* Bar-Gill, *supra* note 90, at 1422 n.207.
291. *See id.* at 1422.
292. *See id.*

Moreover, requiring an automatic payment option squares with libertarian paternalism because it provides more choices for the consumer without imposing any corresponding costs. Since this option would be technologically simple to implement,[293] it would require no significant investment by creditors. It is therefore unlikely to affect the price or availability of credit.[294]

The functionality of a self-imposed credit limit should be apparent—the cardholder simply directs the creditor not to process any transaction past a certain user-defined limit.[295] Under the current regime, however, a typical cardholder will find it difficult or impossible to implore her creditor to lower her credit limit.[296] Indeed, it is likely that the creditor will instead *raise* the credit limit without prompting.[297]

Although Congress said little about the possibility of self-imposed credit limits, one sponsor expressed support for "giv[ing] consumers more tools to better manage their own credit, such as setting their own credit limit."[298] Requiring creditors to offer self-imposed credit limits, however, seems in line with congressional intent because it is both asymmetrical and libertarian. Like the automatic payment option, the self-imposed limit provides choice to the consumer without imposing significant costs on the credit card company. This requirement should not affect the price or availability of credit because it would demand minimal technological investment by creditors, who already have the technology to change a cardholder's credit limit upon request.[299]

293. Automatic payment is already offered by many banks and is the norm in many countries. *See id.* at 1422 n.207.

294. *See* Littwin, *supra* note 17, at 488.

295. Note that under the CARD Act, by default credit limits may not be exceeded. Credit CARD Act of 2009, Pub. L. No. 111-24, § 102(a), 123 Stat. 1734, 1738 (to be codified at 15 U.S.C. § 1637(k)(1)).

296. *See* Littwin, *supra* note 17, at 476–77, 485. In the wake of the recent economic downturn, credit card issuers have unilaterally lowered cardholders' credit limits in increasing numbers. *See, e.g.*, Alexis Leondis, *American Express, Chase Cut Card Limits, Lowering Credit Scores*, BLOOMBERG (Mar. 3, 2009, 12:01 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=adCwmmkzFI3U. However, this author is unaware of any reports that credit card issuers have also become more responsive during this period to cardholder requests to lower their credit limits. Additionally, there is reason to believe the recent trend of credit limit restrictions will reverse as the economy improves. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON REDUCTIONS OF CONSUMER CREDIT LIMITS BASED ON CERTAIN INFORMATION AS TO EXPERIENCE OR TRANSACTIONS OF THE CONSUMER 39 (2010), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/creditcard/2009/consumercreditreductions.pdf ("[S]ignificant changes in broad economic conditions can be important factors leading to changes in account terms . . . .").

297. *See* Littwin, *supra* note 17, at 476–77, 485.

298. 155 CONG. REC. H4961 (daily ed. Apr. 29, 2009) (statement of Rep. Maloney).

299. Creditors will often raise a cardholder's credit limit upon request. *See* Littwin, *supra* note 17, at 485.

2. Higher Minimum Monthly Payments

Aside from the credit limit, perhaps the only credit card feature that functions as a commitment device is the minimum monthly payment, which commits the cardholder to paying down a certain amount of her debt each month. Creditors prefer lower monthly payments because when a cardholder makes only the minimum payment, the interest that accrues over the life of the loan is greater than it would be if the cardholder made larger payments.[300] In the past, creditors have designed bills to highlight the minimum payment rather than the balance due to encourage their cardholders to pay off less of the principal each month.[301]

The CARD Act's supporters expressed concern about minimum payments. As one representative stated, "Minimum payment practices, which often are deceptive at best and abusive at worst, clearly contribute to the problem of unmanageable debt. And they need to be reined in."[302] The text of the Act itself also demonstrates Congress's intent to induce cardholders to make more than the minimum payment. Most notably, the Act required enhanced disclosures and warnings on billing statements about the consequences of making only the minimum payment.[303] Additionally, the Act provided an incentive for making more than the minimum payment, providing that any amount paid in excess of the minimum would count toward the debt with the highest interest rate first.[304]

Mandating higher minimum monthly payments would probably have an enormous impact on credit card debt levels in the United States because 39 percent of all consumers who carry a balance make only the minimum payment.[305] Experience indicates that the credit industry can tolerate higher minimum payments. In the mid-1980s, minimum payments in the United States ranged from 5 to 20

300. *See* Bar-Gill, *supra* note 90, at 1394; Issacharoff & Delany, *supra* note 154, at 164; *see also* Duhigg, *supra* note 1, at 43 (noting that creditors' biggest profits come from "less-responsible" customers who never pay their entire balance).
301. *See* Issacharoff & Delany, *supra* note 154, at 164.
302. 155 CONG. REC. H5030 (daily ed. Apr. 30, 2009) (statement of Rep. Price).
303. Credit CARD Act of 2009, Pub. L. No. 111-24, § 201(a), 123 Stat. 1734, 1743–44 (to be codified at 15 U.S.C. § 1637(b)(11)); *see also* 155 CONG. REC. H5030 (daily ed. Apr. 30, 2009) (statement of Rep. Miller) (explaining that the new minimum payment disclosures were designed to inform cardholders of the negative consequences of making only the minimum monthly payment).
304. Credit CARD Act § 104(4), 123 Stat. at 1741 (to be codified at 15 U.S.C. § 1666c(b)(1)).
305. Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers Into Less Desirable Lending Alternatives?*, 2009 U. ILL. L. REV. 403, 414. This figure represents 18 percent of all credit card users. *Id.*

percent of the outstanding debt,[306] but they fell to around 2.0–2.5 percent of the balance by 2005.[307] Additionally, many consumers can probably afford higher minimum payments. A 2002 study found that more than 90 percent of consumers with credit card debt had liquid assets in deposit accounts and that one-third of all borrowers had more than one month's income in checking and savings accounts.[308]

If Congress decides to mandate higher minimum monthly payments, it should require creditors to calculate minimum payments so as to amortize the outstanding balance in a specified period. Because the borrower would be under no illusions about what it would take to retire the loan, such a requirement would make the point at which the loan is unaffordable much more apparent to the borrower.[309] To date, the U.S. Department of the Treasury has declined to issue such specific guidelines regarding minimum payments,[310] and instead has merely issued vague standards, such as directing creditors to set minimum payments at an amount that amortizes the debt over a "reasonable period of time."[311]

One possible legislative solution would be to require creditors to set thirty-six-month repayment schedules for outstanding debts.[312] Since the CARD Act mandated that billing statements inform cardholders of the minimum monthly payment required to retire their debt in thirty-six months,[313] one could reasonably conclude that thirty-six months was the period within which Congress wanted cardholders to repay their debts.[314] Raising minimum payments to this level would

306. *Id.* at 414 n.66. Great Britain once went even further, requiring cardholders to pay off at least 15 percent of their outstanding debts each month. MANN, *supra* note 204, at 193 n.20.

307. Littwin, *supra* note 305, at 415.

308. Bar-Gill & Warren, *supra* note 15, at 35.

309. *See* Littwin, *supra* note 17, at 472, 490.

310. *See* MANN, *supra* note 204, at 193–95.

311. *See, e.g.*, OFFICE OF THRIFT SUPERVISION, U.S. DEP'T OF THE TREASURY, CREDIT CARD LENDING: ACCOUNT MANAGEMENT AND LOSS ALLOWANCE GUIDANCE 3, *available at* http://www.ots.treas.gov/_files/48917.pdf (last visited May 14, 2012). In recent years, minimum payments were typically calculated as a percentage of outstanding debt. Littwin, *supra* note 305, at 415. MBNA, for example, required each borrower to pay down 1 percent of the outstanding principal each month during 2004. MANN, *supra* note 204, at 194 n.22.

312. This would retire the debt in 36 months if the cardholder did not make any additional purchases.

313. *See* Credit CARD Act of 2009, Pub. L. No. 111-24, § 201(a), 123 Stat. 1734, 1744 (to be codified at 15 U.S.C. § 1637(b)(11)(B)(iii)). Apparently, Congress chose thirty-six months because it is a typical length for a debt management plan. *See* 155 CONG. REC. S5484 (daily ed. May 14, 2009) (statement of Sen. Akaka).

314. One could also argue that five years is the appropriate period because the CARD Act requires creditors to allow cardholders to close their accounts and repay the balance over an amortization period of five years. *See* Credit CARD Act § 101(b)(2), 123 Stat. at 1737 (to be codified at 15 U.S.C. § 1666i-1(c)). For purposes of this Comment, however, the actual length of the amortization period is not important.

simply require borrowers to repay their debts within the period that Congress apparently desired.

Calculating minimum payments in this manner would yield several benefits to cardholders. First, as previously mentioned, it would help cardholders assess the affordability of their debts.[315] Second, higher minimums would also decrease the total interest paid over the life of the loan[316] and make credit card loans bear more relation to the useful life of their purchases.[317] Finally, because each additional purchase would increase the minimum monthly payment, higher monthly minimums might even counteract bounded rationality problems by making the costs of incremental borrowing more salient to the cardholder.[318]

A more aggressive response would tie the minimum payment to the credit limit instead of the outstanding debt. In other words, it would set the minimum payment at a point that would amortize a loan for the *entire amount of the credit line* within thirty-six months, or within whatever period of time Congress deemed reasonable.[319] In addition to decreasing the total interest paid, tying minimum monthly payments to the credit line amount would make salient the potential cost of obtaining credit in the first place. Since the minimum monthly payment would not depend on the outstanding balance, such a policy would discourage consumers from obtaining more credit than they need.[320]

Prominent display of the minimum monthly payment on credit card offerings might even enhance the effect of discouraging consumers from obtaining excessive credit.[321] While this Comment argues that many disclosures are ineffective,[322] this type of disclosure has a greater likelihood of changing behavior than

315. *See supra* note 311 and accompanying text.
316. Issacharoff & Delaney, *supra* note 154, at 164.
317. MANN, *supra* note 204, at 195.
318. *See id.* at 194. Academics have suggested that paying with a credit card puts a mental "distance" between the purchaser and the numerical value of the purchase, making the costs of incremental borrowing less salient. *See, e.g.*, Soman & Cheema, *supra* note 100, at 34 ("Payments by cash and check are both memorable and painful, while those by charge cards are more easily forgotten and painless."). *See generally* Srivastava & Raghubir, *supra* note 277.
319. For example, a credit card with a $5,000 credit limit and a 14 percent interest rate would require a minimum monthly payment of $167.17, or 3.34 percent of the credit limit.
320. Minimum monthly payments calculated according to this method are highly sensitive to changes in the credit limit. Returning to the example from note 319, *supra*, doubling the credit limit would double the minimum monthly payment, whereas doubling the interest rate would increase the minimum monthly payment by only 21.6 percent (to $203.24).
321. *See, e.g.*, Camerer et al., *supra* note 105, at 1230 (explaining that disclosures are more effective when they help the target audience conceptualize the information).
322. *See supra* Part II.

most other types of disclosures—since the cost of the minimum payment lies in the near future, the consumer is more likely to take notice.[323]

Furthermore, tying minimum monthly payments to the credit limit might indirectly discourage overspending through incremental borrowing, even though this policy would not impose any incremental cost on credit card usage. Since consumers tend to borrow roughly in proportion to their credit limit, discouraging individuals from choosing high credit limits would tend to discourage excessive incremental borrowing as well.[324]

While there might be many good reasons to raise minimum monthly payments, it is difficult to make the case that raising minimum payments resonates with congressional intent. Imposing higher minimum payments is a hard paternalism solution. It is not libertarian because higher minimum payments would eliminate a consumer's ability to choose a credit card with low minimum monthly payments. It is also not asymmetrical because it is imposed on all cardholders, including those who do not take on excessive debt.

One might try to characterize mandating higher minimum payments as prohibiting an unfair industry practice, which would fit squarely within the principles of the CARD Act.[325] This argument, however, is difficult to reconcile with the text of the Act itself. Congress spoke at length about minimum payments, devoting an entire section of the Act to the subject, and its silence about raising minimum payments speaks volumes.[326] The statutory text clearly indicates that Congress desired that cardholders make higher payments than their current minimum each month,[327] but it declined to raise minimum payments. It seems highly improbable that Congress simply did not realize it could do so.

Rather, it is far more probable that Congress missed an opportunity to craft a more creative and less intrusive policy—requiring creditors to prominently offer their customers the opportunity to *opt in* to higher minimum payments. Such a

323. *Cf.* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-434, CREDIT CARDS: CUSTOMIZED MINIMUM PAYMENT DISCLOSURES WOULD PROVIDE MORE INFORMATION TO CONSUMERS, BUT IMPACT COULD VARY 30 (2006), *available at* http://www.gao.gov/new.items/d06434.pdf (summarizing survey responses indicating that consumers found minimum payment disclosures more compelling when they disclosed the amount of additional interest the cardholder would accumulate *that month* by making only the minimum payment).

324. *See* Littwin, *supra* note 17, at 487.

325. *See supra* Part I.C.1.

326. *See* Credit CARD Act of 2009, Pub. L. No. 111-24, § 201, 123 Stat. 1734, 1743–45 (to be codified at 15 U.S.C. §§ 1637(b)(11), 1640(a)).

327. *See supra* notes 302–303 and accompanying text.

requirement could easily be folded into the CARD Act's new minimum payment disclosures and might look something like the following:

> The Federal Reserve strongly suggests that you repay your credit card debt within 3 years to avoid unnecessary interest charges. Under a 3-year repayment schedule, your minimum payment this month would be $_____. Would you like to raise your minimum payments to follow a 3-year repayment schedule, starting next month?
>
> □ Yes

An opt-in program for higher minimum payments might attract a large number of cardholders, many of whom would be interested in committing to greater monthly debt reduction. Most households report that they would like to spend less and save more but lack the willpower to do so. In one study, two-thirds of the 401(k) participants surveyed stated that their savings rates were too low; in another, 76 percent of respondents admitted that they should be saving more for retirement.[328] Other data show that a large proportion of consumers who plan to pay down more of their debt in the upcoming month fail to do so.[329]

Offering individuals the option to increase their savings at some set time in the future has proven to be an effective way to increase savings rates.[330] The Save More Tomorrow, or "SMarT," plan is a well-known example.[331] Under the SMarT plan, employees are approached about increasing their contributions to their retirement plans several months before the increase would take effect.[332] If an employee opts in, her contribution then continues to increase with each scheduled raise until it reaches some preset maximum.[333] The employee is free to opt out at any time.[334]

The SMarT program has proven wildly successful. A large majority of employees who are offered the program join it and a large majority of those who

328. Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164, S167 & n.3 (2004).

329. The Cambridge Consumer Credit Index coined the term "Reality Gap" to describe the difference between the percentage of consumers who say they will pay down their debt in the upcoming month and the percentage who actually do. Levitin, *supra* note 252, at 42. In a forty-one month observation, the Reality Gap ranged from 6 to 46 percent, averaging 23 percent. *Id.*

330. *See generally* Thaler & Benartzi, *supra* note 328.

331. *See, e.g.*, JONAH LEHRER, HOW WE DECIDE 91–92 (2009) (praising the SMarT plan); Sunstein, *supra* note 190, at 256–57 (offering SMarT as an exemplar for libertarian paternalism).

332. Thaler & Benartzi, *supra* note 328, at S170.

333. *See id.* at S170–71.

334. *See id.* at S171.

join do not opt out.[335] More importantly, the program actually induces financially responsible behavior. In its first implementation, those who joined tripled their savings rates within twenty-eight months, and their average savings rates closely tracked the suggestions of financial experts.[336]

A similar opt-in program for minimum credit card payments fits squarely within the congressional intent expressed in the CARD Act. As the success of the SMarT program indicates, such an option might far more effectively achieve Congress's clearly expressed goals regarding cardholder repayment behavior than would mere disclosures. Furthermore, it is both asymmetrical and libertarian. Not only would it have no effect on cardholders who already make adequate payments, but it would also allow cardholders to retain discretion about what amount, if any, they choose to pay above the creditor-determined minimum.

C. Prohibiting Practices That Encourage Consumer Overconfidence

Because Congress clearly expressed a desire for American consumers to live within their means, one might have expected the Act to target any industry practice that contributes to cardholder overconfidence. It did not. At least two industry practices contribute to this problem either by directly inducing cardholders to overestimate the amount of debt they will be able to repay in the future, or by encouraging cardholders to delay repayment of their debts. Since individuals are prone to optimistic overconfidence without the encouragement of their creditors,[337] the dangers of practices that further promote overconfidence should be apparent. Both deserve much closer scrutiny from Congress.

1. Prohibiting Creditors From Raising Credit Limits Without a Cardholder's Request

Standard industry practice gives a creditor complete control over its cardholders' credit limits, including the ability to raise or lower credit limits at the creditor's discretion.[338] This discretion allows a creditor to raise a cardholder's credit

335. In the first implementation, 78 percent of employees who were offered the plan joined, and 80 percent of those who joined remained in the program four years later. *Id.* at S173.
336. *Id.* at S179.
337. *See supra* Part III.C.
338. Nearly every cardholder agreement contains a clause granting the creditor this authority. *See, e.g.*, CREDIT CARD AGREEMENT FOR CONSUMER CARDS IN CAPITAL ONE® BANK (USA), N.A. (2011), *available at* http://www.federalreserve.gov/CreditCardAgreementsContent/creditcardagreement_3174.PDF ("We may also increase, decrease, restrict or cancel your credit limit on

limit strategically to encourage the consumer to use the card. As one commentator observed, "[T]o the extent you raise the credit line on the account, you can keep the cardholder in the fold and get greater usage."[339] The danger of giving creditors discretion to issue more credit is that borrowers tend to see the credit limit as a signal of their future ability to repay.[340] When consumers have easy access to large amounts of credit, they tend to infer that their lifetime income is high and consequently borrow more.[341]

Furthermore, an unexpected increase in a cardholder's credit limit tends to induce more borrowing than a scheduled or anticipated increase induces because a sudden, new line of credit is psychologically coded as an unbudgeted windfall gain.[342] Psychological studies have found that subjects tend to use unbudgeted windfall gains to spend more.[343] Because unexpected credit increases contribute to consumer overconfidence and induce borrowing, Congress should strongly consider prohibiting creditors from raising a cardholder's credit limit except when the cardholder makes such a request.

The text of the CARD Act indicates that Congress might have intended to use credit limits to discourage excessive borrowing and to give cardholders more control over their credit limits. Section 102, for instance, requires hard credit limits by default,[344] but it also includes an element of cardholder control, requiring creditors to allow cardholders to opt in to over-the-limit transactions.[345] The Act's legislative history also provides support for greater cardholder control over credit limits. One sponsor stated that the Act should "give[] consumers more tools to better manage their own credit, such as setting their own credit limit."[346] Another

any *Segment* at any time."); FIRSTBANK CREDIT CARD AGREEMENT, *available at* http://www.federalreserve.gov/CreditCardAgreementsContent/creditcardagreement_3177.PDF (last visited May 14, 2012) ("We have the right to change any of the [credit] limits from time to time."). Countless other examples are available at the *Credit Card Agreement Database*, *supra* note 75.

339. Soman & Cheema, *supra* note 100, at 36 (quoting Linda Punch, *The Latest Anti-Attrition Tool: More Credit*, CREDIT CARD MGMT., Aug. 1992, at 48).

340. *See* MANN, *supra* note 204, at 48–49. A typical thought process might be, "If a bank is willing to loan me this much money, there must be good reason to think that my salary will increase in the future sufficiently to permit repayment." *Id.* at 49.

341. *See* Soman & Cheema, *supra* note 100, at 33.

342. *See id.* at 36.

343. *See id.*

344. Credit CARD Act of 2009, Pub. L. No. 111-24, § 102(a), 123 Stat. 1734, 1739 (to be codified at 15 U.S.C. § 1637(k)(1)).

345. *Id.*

346. 155 CONG. REC. H4961 (daily ed. Apr. 29, 2009) (statement of Rep. Maloney).

opined that cardholders "need to have the assurance that . . . the[ir] credit limits do not change on the basis of the issuer deciding [to do] that on [its] own."[347]

Prohibiting creditors from raising credit limits unilaterally also seems to meet the objectives of libertarian paternalism. The policy is clearly libertarian because it would not prevent anyone from obtaining a higher credit limit—it would simply require the cardholder to call the company and ask for a higher limit. It does not appear on its face to be particularly asymmetrical, though, because it imposes a new default on all cardholders, not just the ones that spend too much of their available credit. Furthermore, it may cause some responsible cardholders to have lower credit limits than they would have had in the absence of such a policy. Despite this policy's apparent lack of asymmetry, however, it might still operate like an asymmetrical policy. Even if it causes some responsible cardholders to have lower credit limits, these cardholders might not have clear, stable preferences for higher credit limits.[348] A cardholder who does have a clear preference for a higher credit limit will likely seek one from her creditor.[349]

2. Banning Rewards Programs That Award Benefits for Carrying Balances

Some credit cards offer certain rewards only on the portion of a cardholder's balance that remains unpaid at the end of the month.[350] Since this practice directly rewards the cardholder for not paying off his debt, Congress should strongly consider banning it outright.

While rewards like cash back or frequent flier miles generally tend to result in negative transaction costs when a cardholder pays with credit at the point of sale, rewards that accrue on unpaid balances also create negative transaction costs when it is time to pay the bill.[351] These rewards may not directly tell the cardholder anything about her future earning potential, but they contribute to the problem of overconfidence by incentivizing the cardholder to use overly optimistic projections to justify delaying repayment.[352]

347. 155 CONG. REC. S5411 (daily ed. May 13, 2009) (statement of Sen. Dodd).
348. *See* Sunstein & Thaler, *supra* note 189, at 1161.
349. *See* Littwin, *supra* note 17, at 486 (suggesting that a consumer who wants a higher credit limit will "call[] her issuer and ask for the increase").
350. *See* Duhigg, *supra* note 1, at 45; Linda Punch, *The Cash-Rebate Card, Part II*, CREDIT CARD MGMT., Oct. 2002, at 56.
351. *See* MANN, *supra* note 204, at 168.
352. *See id.* at 169 (suggesting that a ban on such rewards programs would counteract some consumers' tendencies to delay repayment); *cf. supra* notes 253–254 and accompanying text (explaining how negative transaction costs encourage spending).

It is not difficult to make the case that prohibiting this practice falls squarely within congressional intent since Congress clearly meant for borrowers to live within their means and pay what they owe.[353] Of course, the policy proposed here would be neither asymmetrical nor libertarian, since it would ban a practice outright that some consumers may desire. Still, the idea of encouraging unpaid balances is so counter to the overarching intent of the CARD Act that it is somewhat surprising that the Act did not address this practice. But Congress is not perfect—it may have simply overlooked this issue.[354]

CONCLUSION

By enacting the Credit CARD Act, Congress committed to easing the debt burdens of American consumers. In the Act, Congress aggressively targeted the industry practices it identified as contributing to overindebtedness, and consumer watchdogs argue that these reforms have indeed made credit cards more consumer friendly.[355] Congress also resolved that Americans must "go on a credit diet,"[356] but since the purported tools it provided to further this goal consisted only of disclosures, the Act probably will not significantly encourage more provident spending. Congress might better reduce overindebtedness by turning its focus to consumer decisionmaking and exploring reforms that will make credit cards less exploitative of behavioral biases like bounded rationality, hyperbolic discounting, and optimistic overconfidence.

The reforms proposed in this Comment certainly do not comprise an exhaustive list. Other observers, for instance, have suggested additional measures to reduce consumer debt, such as creating personalized point-of-sale disclosures,[357] or prohibiting merchant restraints like the "honor-all-cards" rules.[358] This Comment does not necessarily reject these or other reforms by negative implication; rather, it seeks to highlight several proposals that have the potential to reduce prodigal credit card borrowing while remaining true to the principles that made the CARD Act such a widely supported initiative.

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353. *See supra* Part I.A.
354. It is unlikely that many readers will quibble with the assertion that Congress is fallible. Those who might disagree may wish to see, for example, Editorial, *Congress's $2 Billion Typo*, N.Y. TIMES, Feb. 23, 2006, at A26.
355. *See, e.g.*, Linda Sherry, *CARD Act Changes Are Noticeable, Finds Poll*, CONSUMER ACTION NEWS, Winter 2010–11, at 1.
356. 155 CONG REC. H5007 (daily ed. Apr. 30, 2009) (statement of Rep. Eshoo).
357. *See, e.g.*, MANN, *supra* note 204, at 207.
358. Levitin, *supra* note 252, at 23.

Neither does this Comment argue for the immediate enactment of each of the highlighted proposals—it simply calls for Congress to turn its attention to consumer decisionmaking by considering these or similar policy prescriptions. If Congress devotes the same rigorous debate to the causes of individuals' suboptimal decisions as it did to the "nefarious practices"[359] of issuing banks, it may realize further opportunities to diminish the debt burden of American consumers. "We must become better stewards over the things that we are entrusted,"[360] and perhaps we can, with the right encouragement.

359. 155 CONG. REC. H4964 (daily ed. Apr. 29, 2009) (statement of Rep. Ellison).
360. 155 CONG. REC. H5009 (daily ed. Apr. 30, 2009) (statement of Rep. Jackson-Lee).