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THE DEVELOPMENT OF CONSUMER PROTECTION LAW, THE INSTITUTIONALIZATION OF CONSUMERISM, AND FUTURE PROSPECTS AND PERILS

Mark E. Budnitz*

INTRODUCTION

This article examines major developments in the laws that regulate consumer financial services beginning with the Federal Truth in Lending Act (TILA) that took effect in 1969.¹ Dramatic changes have occurred both in the law and in industry products and practices over the forty years covered in this survey. Some have benefited consumers, while others have not. The current economic crisis has brought renewed attention to the adequacy of these laws and their enforcement. Understanding the context within which consumer law has evolved will better prepare policymakers to make sound decisions when considering improvements to it.

Part I describes the lack of consumer protection law and lawyers before 1969. The few consumer organizations that existed were not focused on consumer financial services. Part II traces the birth and infancy of consumer protection law. That Part includes an

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1. Arguably, the first federal consumer protection statute was the Wheeler-Lea Amendment of 1938 that clearly established the Federal Trade Commission's authority to protect consumers from unfair and deceptive acts and practices. Pub. L. No. 447, 52 Stat. 111 (1938); MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 53 (2009); DONALD P. ROTHSCHILD & DAVID W. CARROLL, CONSUMER PROTECTIONS: TEXT AND MATERIALS 59 (2d ed. 1977). In addition, the states had a variety of usury laws regulating interest rates and retail installment sales acts requiring disclosures. GREENFIELD, *supra*, at 2. One commentator described the chaotic state law situation this way: "These laws combined in a complex tangle of independent, noncomprehensive, and noncoordinated regulation within any one state, with the pattern varying from one state to the next." Paul A. Mondor, *Lock-in Laws: Adding More Patches to the Mortgage Lending Quilt*, 37 CATH. U. L. REV. 543, 545-46 (1988). The focus of this paper, however, is on federal statutes and regulations that provide consumers with a private right of action, which the FTC Act does not do. GREENFIELD, *supra*, at 99. For a brief description of the events leading up to enactment of TILA, see ROBERT J. HOBBS & STEPHEN GARDNER, THE PRACTICE OF CONSUMER LAW: SEEKING ECONOMIC JUSTICE 10-11 (2d ed. 2006).

explanation of how the federal anti-poverty program resulted in the first consumer protection lawyers as well as an analysis of the Truth in Lending Act, state legislation, Supreme Court cases, and the role of federal administrative agencies. Part III describes how consumer protection law was undermined starting with the Reagan administration. Part IV describes the lack of significant developments during the presidencies of the George H.W. Bush and Bill Clinton, as well as the major setbacks that occurred while George W. Bush was president. Part V examines the challenges of the 21st Century, including developments in technology and the obstacles posed by mandatory arbitration.

During the forty years covered in this survey, consumers have continued to face severe problems, and the consumer financial services industry has never slowed its promotion of new practices consumers regard as unfair and deceptive while opposing stronger consumer protection law and enforcement. Given the vast disparity of resources between individual consumers and the industry, the continued viability of efforts to promote consumer protection law is a major concern to those who believe stronger laws and enforcement are essential. Part VI examines the keys to the survival of those efforts. It describes consumerism and its role as a movement for social change and law reform as a means to realize social change. It also describes the development of a permanent organizational structure for engaging in litigation as well as legislative and regulatory advocacy. Part VI contends that consumerism has become institutionalized and its values have become embedded in society's values, better ensuring its survival.

Part VII turns to the present, exploring the prospects for continued development of strong consumer protection law and the perils such progress faces. It does this by analyzing the Credit Card Act of 2009 and President Obama's proposed Consumer Financial Protection Agency Act.

I. THE WAY WE WERE: LIFE BEFORE CONSUMER PROTECTION LAW

Before passage of the Truth in Lending Act in 1968, there were no federal laws regulating the consumer financial services industry that provided consumers with a private right of action.² State laws were inadequate.³ There were few, if any, lawyers whose practice was primarily protecting consumers.⁴ Law schools offered few, if any, courses devoted to consumer law.⁵ No consumer organization produced continually updated manuals for lawyers taking consumer cases or regularly scheduled conferences at which those lawyers could learn from experienced consumer attorneys and network with others.⁶ No organization regularly represented consumers in Congress or before administrative agencies.⁷ The Federal Trade Commission (FTC) was ineffectual.⁸

This lack of activity was not the result of consumers living in an environment devoid of major consumer problems. Major issues included the following: state-assisted seizure of consumer property through pre-judgment repossession and garnishment;⁹ assignees of

2. Adam Goldstein, *Why "It Pays" to "Leave Home Without It": Examining the Legal Culpability of Credit Card Issuers Under Tort Principles of Products Liability*, 2006 U. ILL. L. REV. 827, 834–35 (2006) (noting TILA's inclusion of a private right of action).

3. BARBARA A. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 3 (1965) ("Enactment of legislation relating to credit arrangements has not followed the pattern of expansion of the market. Regulation has been devised on an *ad hoc* basis to take care of problems and abuses or to clarify relationships as the need for such regulation became apparent . . .").

4. DEE PRIDGEN, CONSUMER PROTECTION LAW 5–6 (2004); TANG THANH TRAI LE, PROTECTING CONSUMER RIGHTS § 1.06 (1987).

5. An indication of the presence of consumer law courses is the publication of casebooks for use in those courses. Among the earliest the author has identified are HOMER KRIPKE, CONSUMER CREDIT: TEXT—CASES—MATERIALS (1970) and DAVID A. RICE, CONSUMER TRANSACTIONS (1975).

6. In 1982 NCLC began producing what has grown to a seventeen-volume series that is continually updated. *See, e.g.*, JONATHAN SHELDON & CONSTANCE G. BRIGHAM, REPOSSESSIONS (1982) (exemplifying one of the first volumes in the series); *see* HOBBS & GARDNER, *supra* note 1, at 20.

7. The Consumer Federation of America was established in 1967 for the purpose of representing consumer interests before Congress and federal agencies. *See* HOBBS & GARDNER, *supra* note 1, at 10–11.

8. EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULZ, THE "NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); *Report of the ABA Commission to Study the Federal Trade Commission* [July–Sept.], ANTI-TRUST & TRADE REG. REP. (BNA SPEC. SUPP.) No. 427 (1969).

9. The facts in *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment seizure of property) and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment wage garnishment), illustrate how these creditor remedies subjected consumers to deprivation of property absent an opportunity for a hearing at a meaningful time.

consumer paper immunized from consumer claims and defenses through the holder-in-due course doctrine;¹⁰ abusive debt collection practices;¹¹ credit discrimination;¹² excessive interest rates;¹³ lack of warranty protection;¹⁴ fraud;¹⁵ breach of the peace when creditors resorted to self-help repossession;¹⁶ and cross-collateralization provisions.¹⁷ Low income consumers were targeted.¹⁸

There were few consumer organizations and they did not devote resources to protecting consumers using financial services. The National Consumers League was established in 1898.¹⁹ It investigated working conditions.²⁰ Consumers Union was formed in 1936.²¹ For many years its efforts were primarily devoted to consumer testing.²² Probably the first successful grassroots consumer organization was the Consumers Education and Protective

10. Kurt Eggert, *Held Up in Due Course: Codification and the Victory of Form over Intent in Negotiable Instrument Law*, 35 CREIGHTON L. REV. 363, 367 (2002) (describing how assignees working with creditors were protected from consumer claims by the holder in due course doctrine).

11. Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA Is Failing America's Elderly Debtors*, 16 ELDER L.J. 135, 140 (2008) (noting congressional finding that third party debt collector abuse was a widespread and national problem).

12. MICHAEL GREENFIELD, CONSUMER LAW: A GUIDE FOR THOSE WHO REPRESENT SELLERS, LENDERS, AND CONSUMERS 338 (1995) (noting that by the early 1970s systematic credit discrimination against women was well documented); Andrea M. Farley, *The Spousal Defense—A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act?*, 49 VAND. L. REV. 1287, 1291–92 (1996) (describing Congressional inquiries and hearings into discriminatory credit practices).

13. States had usury laws, but they were inadequate. Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 858–72 (2003).

14. Andrew P. Lamis, *The New Age of Artificial Legal Reasoning As Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173, 184–88 (2003) (describing merchant practices in the 1960s that shielded them from warranty claims).

15. *Jones v. West Side Buick Auto Co.*, 93 S.W.2d 1083 (Mo. Ct. App. 1936) (fraudulent odometer rollback).

16. *See, e.g., Kensinger Acceptance Corp. v. Davis*, 269 S.W.2d 792 (Ark. 1954) (finding that person attempting to repossess consumer's vehicle grabbed his hand and threatened him). *See* Eugene Mikolajczk, *Breach of Peace and Section 9-503 of the Uniform Commercial Code—A Modern Definition for an Ancient Restriction*, 82 DICK. L. REV. 351 (1977).

17. GREENFIELD, *supra* note 12, § 12.2 (describing cross-collateral provisions).

18. *See, e.g., In re Leon A. Tashof*, 74 F.T.C. 1361 (1968), *aff'd*, 437 F.2d 707 (D.C. Cir. 1970); *Williams v. Walker—Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

19. HOBBS & GARDNER, *supra* note 1, at 6.

20. *Id.*

21. ConsumersUnion.org, Nonprofit Publisher of Consumer Reports, <http://www.consumersunion.org> (last visited June 20, 2009).

22. HOBBS & GARDNER, *supra* note 1, at 8.

Association.²³ It established a grievance process for handling individual consumer complaints, engaged in direct action such as picketing car dealers who sold lemons, conducted petition drives, and voiced consumers' concerns in public hearings.²⁴ It had a significant influence on the consumer movement throughout the country.²⁵

II. THE BIRTH AND INFANCY OF CONSUMER PROTECTION LAW

A. *The First Consumer Lawyers*

In order to understand the beginnings of consumer protection law regulating financial services, it is necessary to appreciate the social and political context in which it took place and the type of law practice in which many of the first consumer lawyers represented their clients. In brief summary, the battle for civil rights developed into a widespread movement in the 1960s. A single Supreme Court case, *Brown v. Board of Education*,²⁶ was a major catalyst. The civil rights movement broadened into a more general endeavor to alleviate poverty among people of all races. That effort received the support of the federal government when, as part of President Johnson's War on Poverty, Congress enacted legislation establishing the Office of Economic Opportunity (OEO).²⁷

OEO realized one of the best ways to cure some of the poor's problems was to provide them with lawyers. Consequently, on its own initiative, it created the Legal Services Program.²⁸ Law reform was an explicit goal of that program.²⁹ The Legal Services Program

23. Besse S. Weiner & Judy Canahuati Weiner, *Consumers Education and Protective Association*, in *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT 173-75* (Stephen Brobeck ed. 1997). "When Max Weiner and fifteen other people founded the Consumers Education and Protective Association . . . in 1966, consumer protection was almost nonexistent." *Id.* at 173-74.

24. *Id.* at 174.

25. *Id.*

26. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

27. EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* 41 (1974); MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973*, at 142 (1993) (stating that poverty lawyers were informed by the civil rights movement); see *Economic Opportunity Act of 1964*, Pub. L. No. 88-452, 78 Stat. 508, *repealed by Omnibus Budget Reconciliation Act of 1981*, Pub. L. No. 97-35, tit. VI, § 683(a), 95 Stat. 519.

28. JOHNSON, *supra* note 27, at 127.

29. *Id.* at 130-33.

was a significant departure from the approach of most of the traditional legal aid offices that represented the poor in the past. The goal of legal aid was to provide the poor with access to legal representation.³⁰ The substantive law was regarded as fair to all.³¹ Objectives that might have secured a more lasting benefit such as using the law to improve the social and economic status of the poor were not a priority.³² Few cases were appealed,³³ and no case was ever brought before the Supreme Court.³⁴

The Legal Services Program was based on a different model. The Legal Services Program began disbursing funds to local offices in 1965.³⁵ They did so without first deciding whether the program's top priority should be access to the legal system for low income persons or reform of that system.³⁶ By 1967, however, faced with a burgeoning caseload and inadequate resources to provide access to more than a small number of the poor, the Legal Services Program proclaimed law reform to be its national priority.³⁷

Consistent with the approach of the Legal Services Program, lawyers representing clients with consumer problems in local legal services offices receiving funding from the Legal Services Program began bringing cases that sought, not only to gain redress for their clients' immediate problems, but also to change laws that worked to their clients' detriment. Although lawyers undoubtedly brought consumer cases and advocated for consumer laws before the advent of the Legal Services Program, that program created the opportunity for substantial numbers of lawyers across the country to launch a large number of consumer law reform efforts. This article describes the important role these lawyers played in the development of this country's consumer law.

30. *Id.* at 11–12.

31. *Id.* at 13.

32. *Id.*; see also DAVIS, *supra* note 27, at 10.

33. JOHNSON, *supra* note 27, at 14.

34. *Id.* at 13.

35. *Id.* at 127.

36. *Id.* at 70.

37. *Id.* at 130–33.

Also significant to the development of consumer law was the Legal Services Program's decision to fund national backup centers to participate in law reform. The Legal Services Program believed that national support centers would be better equipped to bring law reform cases than local offices because they would specialize in narrow fields of law, something most local offices would not have the ability to do.³⁸ In addition, the backup centers were expected to engage in training and produce research materials that would assist local offices in their cases.³⁹ Boston College Law School submitted a grant proposal to OEO to establish a consumer backup center, OEO approved, and the National Consumer Law Center (NCLC) began operating in 1969, the same year the Truth in Lending Act went into effect.⁴⁰ In 1995, however, OEO's successor, the Legal Services Corporation (LSC), bowing to political pressure and the certainty of a substantial funding cutback, terminated funding of all backup centers, including NCLC's. As discussed in Part VI.A.2, even after losing LSC funding,⁴¹ NCLC has played a significant role in the development of consumer law in the United States.⁴² After losing LSC funding, NCLC was instrumental in organizing private consumer attorneys into a national association, and also continued their consumer law activities.

38. JOHNSON, *supra* note 27, at 182.

39. *Id.*

40. William F. Willier, *National Consumer Law Center: Current and Projected Activities*, 3 CLEARINGHOUSE REV. 64 (1969). Professor William F. Willier was NCLC's first Executive Director. *Id.* NCLC's connection to the federal Truth in Lending Act was more than the coincidence of sharing the same commencement date. Senator William Proxmire credited Willier with playing a direct role in the enactment of the federal law. John H. Fenton, *Boston College to Aid Consumer*, N.Y. TIMES, July 31, 1969. TILA's effective date was 1969. Pub. L. No. 90-321, § 504, 82 Stat. 146, 167 (1968). For a description of the welfare rights movement and its relationship to OEO, see Jack Greenberg, *Litigation for Social Change: Method, Limits and Role in Democracy*, 29 REC. ASS'N B. CITY OF N.Y. 320 (1974), reprinted in JACK GREENBERG, JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION 581, 590, 592-93 (1977).

41. See *infra* text accompanying notes 218-23.

42. The author was Executive Director of NCLC from 1975-1979. He is currently on NCLC's Board of Directors.

B. *The Truth in Lending Act*

The Truth in Lending Act (TILA) was the first federal law designed to protect consumers shopping for credit.⁴³ TILA's main proponent was Senator Paul H. Douglas of Illinois.⁴⁴ He has been called the "father" of TILA.⁴⁵ TILA was intended to ameliorate the inadequacies of state law.⁴⁶ Although consumer advocates are among its chief critics today,⁴⁷ in the years following its enactment, it has provided consumer lawyers with a litigation handle for ameliorating the problems of their clients.⁴⁸

For example, a consumer might come to her lawyer's office complaining that she cannot afford to pay a loan because of the high interest rate. She claims the lender lied to her about the true cost of the loan, and never disclosed many of the terms. State usury law, however, may permit the high interest rate the lender charged. Moreover, the lender's oral fraud in regard to the true cost would be difficult to prove. The law generally does not require lenders to orally disclose important information as long as it is clearly disclosed in written documents and the consumer has the opportunity to read the documents.⁴⁹ However, if the consumer's attorney can find a TILA violation on the face of the loan documents, the consumer has a cause of action with which to counter the lender's conduct.

Indeed, consumer lawyers found rampant violations of TILA and brought thousands of lawsuits as well as using those violations as counterclaims in what had heretofore been "slam dunk" debt

43. Enactment of TILA "marked the birth of modern consumer legislative activism." ELIZABETH RENUART & KATHLEEN KEEST, *TRUTH IN LENDING* 4 (6th ed. 2007) [hereinafter RENUART & KEEST-TILA]. TILA is one part of umbrella legislation called the Consumer Credit Protection Act (CCPA). Peterson, *supra* note 13, at 880. In addition to TILA, which is Subchapter I, CCPA includes Subchapter II, restrictions on garnishment, Subchapter IIA, Credit Repair Organizations, Subchapter III, Credit Reporting Agencies, Subchapter IV, Equal Credit Opportunity, Subchapter V, debt collection practices, and Subchapter VI, electronic fund transfers.

44. Peterson, *supra* note 13, at 877.

45. RENUART & KEEST-TILA, *supra* note 43, at 1.

46. *Id.*

47. Peterson, *supra* note 13, at 880-81.

48. RENUART & KEEST-TILA, *supra* note 43, at 3-4 (explaining that TILA disclosures may provide information that can be used to bring actions for violation of laws besides TILA).

49. *See, e.g.*, 15 U.S.C. § 1638 (1969) (TILA disclosures for transactions other than under an open end credit plan); *id.* § 1638(b) (requiring TILA disclosures be made before credit is extended).

collection claims,⁵⁰ winning most of these cases.⁵¹ The credit industry complained to Congress, resulting in the 1980 enactment of the Truth in Lending “Simplification” Act that greatly reduced the ability of consumer lawyers to sue for TILA violations.⁵² Nevertheless, consumer lawyers who had brought cases under the original version of TILA gained valuable experience they could use in bringing cases under other statutes. Moreover, even after “simplification” TILA is still an important resource for consumer lawyers. It continues to impose many requirements upon creditors and provides consumers with meaningful remedies such as actual damages, statutory damages, costs, attorney fees, and in certain situations three years to cancel transactions where the creditor takes a security interest in the consumer’s home.⁵³ In addition, by examining the TILA disclosures and the amounts disclosed, the consumer’s lawyer may discover violations of state usury laws or the common law.⁵⁴

C. State Legislation

In 1968, the same year TILA was enacted, the National Conference of Commissioners on Uniform State Laws published the Uniform Consumer Credit Code (UCCC).⁵⁵ The drafters were guided by several basic assumptions which included: usury laws are “historical vestiges of the erroneous supposition that emperors, kings and governments could effectively fix all prices;”⁵⁶ competition should be allowed to determine the pricing of money and credit; and credit

50. Peterson, *supra* note 13, at 886 (citing KATHLEEN E. KEEST & GARY KLEIN, NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING 34 (3d ed. 1995)).

51. *Id.* at 889.

52. Pub. L. No. 96-221, 94 Stat. 168 (1980); Peterson, *supra* note 13, at 888–89. *See generally* Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 201–02 (2008).

53. RENUART & KEEST–TILA, *supra* note 43, at 3.

54. *Id.* at 4.

55. UNIF. CONSUMER CREDIT CODE (1968) (approved by the National Conference of Commissioners on Uniform State Laws at its Annual Conference, July 22–August 1, 1968; approved by the American Bar Association at Its Meeting, August 7, 1968; reprinted from COMMERCE CLEARINGHOUSE, NEW RULES ON CONSUMER CREDIT PROTECTION 263 (1969) [hereinafter UCCC 1968]). *See generally* Robert L. Jordan & William D. Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968).

56. UCCC 1968, *supra* note 55, at 267.

grantors should have relatively easy entry into the market.⁵⁷ In regard to enforcement, creditor rights and remedies should not be restricted too much, and consumer rights and remedies should not be too great. Otherwise those who were “less creditworthy” would be deprived “of lawful sources of credit” and driven into the arms of loan sharks.⁵⁸ Consistent with these assumptions, the UCCC relies primarily on competition to protect consumers from unreasonably high credit costs, although it does contain rate ceilings.⁵⁹

Consumer advocates opposed the UCCC because they believed it did not adequately protect consumers. More significant, however, was the action they took to transform that dissatisfaction into positive action. NCLC and the National Legal Aid and Defender Association (NLADA) co-sponsored a conference the first month NCLC began operations. The conference was attended by 55 consumer experts from around the country.⁶⁰ The consensus of those present was that NCLC should draft a substantial revision of the 1968 version of the UCCC.⁶¹

The NCLC’s revision was called the National Consumer Act and was published in 1970.⁶² Compared to the UCCC, the NCA is far more protective of consumers and broader in scope.⁶³ No state adopted the NCA in its totality, but Wisconsin enacted major portions and other states passed individual provisions.⁶⁴ More importantly, when confronted with the contrast between the NCA and the UCCC, most states refused to enact the UCCC. Only seven states adopted the

57. *Id.*

58. *Id.*

59. See generally Jordan & Warren, *supra* note 55.

60. NAT’L CONSUMER LAW CENTER, NATIONAL CONSUMER ACT, FIRST FINAL DRAFT, at iii (1969), available at http://www.consumerlaw.org/issues/credit_code_archive/content/National%20Consumer%20Act.pdf [hereinafter NCA].

61. *Id.* at iv.

62. ELIZABETH RENUART & KATHLEEN E. KEEST, THE COST OF CREDIT: REGULATION, PREEMPTION, AND INDUSTRY ABUSES 35 (4th ed. 2009) [hereinafter RENUART & KEEST–CREDIT].

63. ROTHSCHILD & CARROLL, *supra* note 1, at 817–29. “[T]he NCA abolished the traditional distinction between loans and credit sales, restricted security interests and credit insurance commissions, and addressed credit bureau abuses and deceptive trade practices.” RENUART & KEEST–CREDIT, *supra* note 62, at 35.

64. ROTHSCHILD & CARROLL, *supra* note 1, at 816; RENUART & KEEST–CREDIT, *supra* note 62, at 35 n.182.

1968 version.⁶⁵ The UCCC was revised to include greater protection in 1974, but only four states adopted portions of it.⁶⁶ The drafters of the 1974 version acknowledged NCLC's two model statutes.⁶⁷ The drafters also admitted that legal services attorneys had made them aware of low income consumers' needs.⁶⁸

Perhaps as important as stopping the UCCC was the process involved in this first effort at national consumer legislative advocacy. As described above, in reaction to the UCCC, NCLC and NLADA sponsored a conference of 55 experts who recommended drafting a model act. In other words, the decision to draft the NCA was not made by a few isolated individuals determining on their own what was best for consumers. In addition, in drafting the NCA, NCLC "relied heavily" on persons from major consumer organizations such as Consumer Federation of America, Consumers Union, and the NAACP Legal Defense Fund.⁶⁹

One of the most significant developments on the state level starting in 1965 was the enactment of laws modeled on the FTC Act that prohibited unfair and deceptive acts and practices.⁷⁰ Unlike the FTC

65. RENUART & KEEST-CREDIT, *supra* note 62, at 35.

66. *Id.* at 35. In 1973, NCLC published a successor to the NCA, the Model Consumer Credit Act. ROTHSCHILD & CARROLL, *supra* note 1, at 816. The 1974 version of the UCCC "included stronger 'consumer oriented' provisions to assuage the concerns of consumer groups, such as the National Consumer Law Center." Peter V. Letsou, *The Political Economy of Consumer Credit Legislation*, 44 EMORY L.J. 587, 636 n.161 (1995).

67. The Prefatory Note to the 1974 version reflects the drafters' hostility to NCLC's NCA and MCCA, claiming they take "extreme consumer positions." UNIF. CONSUMER CREDIT CODE Prefatory Note, at XVIII (1974) (Official 1974 Text with Comments) [hereinafter Prefatory Note].

68. "Information gained from legal services attorneys has thrown new light on the needs of poverty-level consumers, but has also revealed that those needs cannot be met solely by consumer credit legislation of general application." *Id.* at XVIII. The Prefatory Note to the 1974 version of the UCCC reflects the drafters' hostility to NCLC's NCA and MCCA, claiming they take "extreme consumer positions." *Id.* at XVII; see also Letsou, *supra* note 66, at 636 n.161 (stating that the 1974 revision of the UCCC "included stronger 'consumer oriented' provisions to assuage the concerns of consumer groups such as the National Consumer Law Center").

69. NCA, *supra* note 60, at iv. One of the co-drafters of the Wisconsin Consumer Act subsequently became the Deputy Director of NCLC. Richard A. Elbrecht, *The NCCUSL Should Abandon Its Search for Consensus and Address More Difficult and Controversial Issues Applying 'Process' Concepts*, 28 LOY. L.A. L. REV. 147, 174 n.a (1994). See generally Jeffrey Davis, *Legislative Restrictions of Creditor Power and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3 (1973) (comparing the Wisconsin Consumer Act with the UCCC and the NCLC's NCA and MCCA); Thomas Crandell, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334 (1973).

70. GREENFIELD, *supra* note 12, at 160.

Act, however, they authorized a private right of action, permitted consumers to obtain injunctive relief, and provided for recovery of damages.⁷¹ Some of the statutes and some of the case law construing the statutes, however, have restricted these laws by requiring actual damages, a showing the consumer's lawsuit is in the "public interest," and a notice or demand letter prior to commencing suit.⁷²

D. *The Supreme Court Cases*

Whereas TILA was the major victory in the federal legislative realm, several Supreme Court cases established important principles and stopped creditor practices that had been abusive to consumers. The first major case, *Sniadach v. Family Finance Corp.*, was brought by the NAACP Legal Defense Fund and decided in 1969, the same year TILA became effective and NCLC was established.⁷³ As noted above, consumer lawyers started to become active in the milieu of the civil rights movement.⁷⁴ It is therefore fitting that the NAACP Legal Defense Fund, the main litigation arm of the civil rights movement, was intimately connected to the first major consumer case before the Supreme Court.⁷⁵ Its involvement indicates that the NAACP believed there was a close connection between civil rights and consumer rights. An amicus brief was filed by Consumers Union, another organization that has been an important participant in consumer law reform efforts.⁷⁶ In *Sniadach*, the Supreme Court struck down as

71. *Id.* at 161–62.

72. Donna S. Shapiro, *The Georgia Fair Business Practices Act: Business As Usual*, 9 GA. ST. U. L. REV. 453, 456 (1993). See generally CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (7th ed. 2008).

73. *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969). The NAACP Legal Defense Fund also was involved in drafting NCLC's National Consumer Act. See *supra* text accompanying note 69.

74. See *supra* text accompanying notes 26–28.

75. The NAACP Legal Defense Fund brought the landmark case of *Brown v. Board of Education*. Calvin William Sharpe, "Judging Good Faith," *Seeing Justice Marshall's Legacy Through a Labor Case*, 26 ARIZ. ST. L.J. 479, 479–82 (1994) (noting that Thurgood Marshall represented the NAACP Legal Defense Fund in the *Brown* case); see JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM, A THEORY OF LAW REFORM AND SOCIAL CHANGE 27 (1978) (stating that the Legal Services program's law reform effort was modeled on that of the NAACP and the NAACP Legal Defense Fund).

76. Lexis version of the case notes that Consumers Union filed an amicus brief. Consumers Union is the publisher of CONSUMER REPORTS; see www.consumersunion.org.

violating due process Wisconsin's prejudgment garnishment law that permitted a creditor to obtain a court order freezing a consumer's wages absent prior notice and opportunity for a hearing. Prejudgment garnishment deprived the consumer of the chance to assert a defense such as the creditor's fraud⁷⁷ and could result in "tremendous hardship" for a worker with a family.⁷⁸

Sniadach was followed by a series of due process cases. Offices funded by the Legal Services program brought much of this litigation and NCLC filed amicus briefs.⁷⁹ Although the Supreme Court initially used broad language to strike down seizures on due process grounds, it subsequently narrowed its rulings somewhat.⁸⁰ Moreover, self-help seizures survived due process challenges due to a lack of state action.⁸¹ Never again, however, could a creditor obtain a writ of replevin to seize a consumer's car or furniture without prior notice and an opportunity for a hearing at which the creditor must establish the probable validity of the underlying claim against the consumer. *Sniadach* and its progeny continued to be followed as comparable types of statutes were struck down many years later.⁸²

The Supreme Court also decided cases that upheld the Federal Reserve Board's (FRB) authority to issue regulations pursuant to TILA. This has proven to be a two-edged sword for consumers. TILA provides that creditors have to make various disclosures in

77. *Sniadach*, 395 U.S. at 339.

78. *Id.* at 340. The Court found support in the evidence and conclusions of congressional hearings on garnishment. *Id.* at 340-41.

79. See, e.g., *Craft v. Memphis Gas*, 436 U.S. 1, 19 (1978) (recognizing utility service as a "necessity of modern life" and requiring hearing prior to termination of service); *Mitchell v. W.T. Grant*, 416 U.S. 600, 630-36 (1974) (Stewart, J., dissenting) (restricting the holding in *Fuentes*); *Jackson v. Metro. Edison*, 419 U.S. 345, 363-64 (1974) (holding termination of utility service violates due process); *Fuentes v. Shevin*, 407 U.S. 67, 97-98 (1972) (holding prejudgment replevin statutes violate due process); *Swarb v. Lennox*, 405 U.S. 191, 206 (1972), *reh'g denied*, 405 U.S. 1049 (1972) (dismissing on procedural grounds a challenge to confession of judgment). "It is because social-reform groups lack the power to seek their demands through normal political processes or through direct action that they turn to [the courts] for help. Courts have always been used by those who find the balance of political forces against them. The powerless seek to neutralize inequities in bargaining power or at least to extract some concessions from their opponents." HANDLER, *supra* note 75, at 22.

80. See *Mitchell*, 416 U.S. at 617-18.

81. Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975).

82. See, e.g., *Wyatt v. Cole*, 710 F. Supp. 180, 182 (S.D. Miss. 1989) (striking down replevin law and citing *Fuentes*), *rev'd on other grounds*, 504 U.S. 158 (1992).

transactions in which they impose a finance charge.⁸³ Creditors could easily avoid these requirements simply by not stating any finance charge in their documents. The FRB, reasoning that any transaction in which the consumer can defer payment for more than a short period of time must contain a hidden finance charge which is buried in the price of the goods, issued its “four installment rule.” That regulation triggers the TILA disclosure requirements, not only when there is a stated finance charge, but also if the consumer may pay in more than four installments.⁸⁴ In *Mourning v. Family Publications Service, Inc.*,⁸⁵ the Supreme Court upheld the FRB’s power to issue the regulation, holding that when Congress grants an administrative agency general authority to promulgate regulations, as it had in TILA, the regulations should be upheld as long as they are reasonably related to the purposes of the statute.⁸⁶

The case is important because it reflects the FRB’s early determination to close loopholes that may have been lurking through Congress’s failure to use more precise language in this first-of-its-kind federal legislation. The FRB’s aggressive stance is significant because when Congress was considering TILA legislation, the FRB was less than enthusiastic about being the agency delegated the responsibility for issuing regulations pursuant to TILA.⁸⁷

83. 15 U.S.C. § 1631 (1969).

84. 12 C.F.R. § 226.2(k) (1982). The rationale for the rule is explained in *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 366 (1973).

85. *Mourning*, 411 U.S. at 356.

86. *Id.* at 369.

87. *Hearings Before Subcomm. on Financial Institutions, Committee on Banking & Currency*, 90th Cong. 666–67 (1967) (statement of J.L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System) (noting that its familiarity with the trade practices subject to TILA was “very limited,” that considering those practices would leave it with less time to formulate monetary policy, that its experience in setting monetary policy had not prepared it to implement TILA with regulations, that it had no trained staff to determine if there were compliance with its regulations, and that if Congress nevertheless designated the FRB to issue regulations, it hoped that “in time” Congress would reassign that role “to an agency better suited to perform the function”). Forty years after TILA became effective, President Obama proposed to grant the FRB its wish by establishing a Consumer Financial Protection Agency that would have sole rule-making authority under TILA. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 58, available at http://financialstability.gov/docs/regs/FinalReport_web.pdf (last visited Mar. 8, 2010); see *infra* text accompanying notes 328–350. Two years later, after TILA had already been enacted, the FRB voiced similar reservations when asked whether it would be the appropriate agency to draft regulations if Congress restricted the mailing of unsolicited credit cards in TILA. *Hearings Before*

The facts in the *Mourning* case illustrate one of the typical types of largely unregulated transactions that had been plaguing consumers. The consumer, Leila Mourning, was 73 years old.⁸⁸ A door-to-door salesman sold her five year subscriptions to four magazines. The total cost was \$122.44, payable in 30 monthly payments in addition to a down payment. The contract did not state a finance charge and contained none of the TILA disclosures. It provided that if the consumer missed any payment, the entire sum became due. Perhaps realizing she had made a bad bargain, or perhaps because she could not afford the payments, Mourning defaulted and the magazine service sent her dunning letters.

The case was typical in that the consumer was elderly, the marketing was done in the consumer's home where the consumer might well be alone and would feel vulnerable, and the amount of the transaction was small.⁸⁹ Because of the small amount, the transaction costs of challenging the transaction would be prohibitive in terms of time and expense. Most lawyers would not even consider taking a case where so little money was involved.⁹⁰

As a result of the FRB's "four installment rule," magazine services such as the one involved in *Mourning* are required to make various disclosures to consumers. One might question, however, whether

Subcomm. on Financial Institutions, Committee on Banking & Currency, 91st Cong. 28 (1969) (statement of Andrew Brimmer, Board of Governors, Federal Reserve System) (testifying that the FRB should authorize an agency "that is much closer to the consumer protection problem rather than assigning it to the Federal Reserve Board"). The FRB, however, refused to recommend the FTC as an appropriate agency. *Id.* When Congress considered regulating credit bureaus, the Senate bill granted the FRB authority to issue regulations. The FRB's Vice Chairman told the Senate the FRB was "not prepared to assume" that responsibility. *Hearings Before Subcomm. on Financial Institutions, Committee on Banking & Currency, 91st Cong. 26 (1969)* (statement of J.L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System) (testifying that "[t]he functions vested in the Board by the Truth in Lending Act should not be taken as a precedent for assigning to the Board wide-ranging duties in the general area of consumer protection," and furthermore, such duties are "inconsistent" with its monetary policy responsibilities).

88. *Mourning*, 411 U.S. at 358.

89. See *Arizona v. Direct Sellers Ass'n*, 494 P.2d 361, 363 (Ariz. 1972) (quoting from a congressional committee report describing the characteristics of door-to-door selling that make it susceptible to abusive selling); Phuong Cat Le, *Should You Open the Door? Story of Salesman Sparks Fears*, SEATTLE POST INTELLIGENCER, Sept. 15, 2007, at B1, available at 2007 WLNR 18163311 (describing aggressive behavior of door-to-door salespeople); Byron D. Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 UCLA L. REV. 717 (1968).

90. *Muhammad v. County Bank*, 912 A.2d 88, 99 (N.J. 2006).

those disclosures would have made any difference in Mourning's decision to purchase the magazines. The Federal Trade Commission (FTC) investigated door-to-door sales and found rampant abuses.⁹¹ The pervasiveness of the unfair practices was crucial to justifying its regulation of the industry since the amount involved in most cases was small. The FTC apparently thought more was necessary to protect consumers than TILA's disclosures. Its door-to-door sales rule requires such sellers to give consumers three days to cancel their purchases.⁹²

The consumer's legal representation in the *Mourning* case also is noteworthy. One of the law offices representing the consumer was the Legal Services Senior Citizen Center, which received funding from the Legal Services program of OEO.⁹³ Before the Supreme Court, the consumer was represented by lawyers from the NAACP Legal Defense Fund, the same civil rights organization that represented the consumers in *Fuentes*⁹⁴ and that brought the *Sniadach* case.⁹⁵ NCLC submitted an amicus brief.⁹⁶ The magazine service was hardly out-gunned, however. Three law firms represented it, including Cravath, Swaine & Moore.⁹⁷ This illustrates another aspect of the development of consumer law: creditors have been well-

91. J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 356 (1992).

92. 16 C.F.R. § 429.1 (2009).

93. Brief for Petitioner, *Mourning v. Family Publ'ns Serv., Inc.*, No. 71-829 (5th Cir. July 31, 1972), 1972 WL 136302 (listing the Legal Services Senior Citizens Center as representing the petitioner). E-mail from Leonard Helfand, former counsel for the Legal Services Senior Citizens Center, to author (Nov. 4, 2009) (confirming that the Legal Services Senior Citizens Center received funding from the Legal Services program of OEO).

94. The consumer's brief in *Fuentes* lists Jack Greenberg, James M. Nabritt III, and Eric Schnapper. Brief for Petitioner, *supra* note 93. At that time, they were on the staff of the NAACP Legal Defense Fund. *Legends in the Law, A Conversation with James M. Nabritt III*, http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/nabritt.cfm (last visited Sept. 24, 2009) (appeared in THE WASHINGTON LAWYER, July–Aug. 2001); Jack Greenberg's Biography for Columbia Law School, http://www.law.columbia.edu/fac/Jack_Greenberg (last visited Sept. 24, 2009); Eric Schnapper's Biography for University of Washington School of Law, <http://www.law.washington.edu/directory/Profile.aspx?UD=155> (last visited Sept. 24, 2009).

95. See *supra* text accompanying note 73.

96. Brief for Mourning as Amici Curiae Supporting Petitioner, *Mourning v. Family Publ'ns Serv., Inc.*, No. 71-829 (5th Cir. June 16, 1972), 1972 WL 136305. The author was one of NCLC's lawyers on the brief.

97. Brief for the Respondent, *Mourning v. Family Publ'ns Serv., Inc.*, No. 71-829 (5th Cir. Sept. 2, 1972), 1972 WL 136303.

represented. Hiring firms such as Cravath illustrates how important the industry views these issues.

In the past it was highly unlikely that a consumer in Leila Mourning's situation would be able to obtain legal representation at all, much less legal counsel all the way to the Supreme Court. TILA, however, provides that a successful consumer may recover costs and attorney's fees.⁹⁸ The prospect of collecting costs and fees provided an incentive for some lawyers to take cases like Mourning's, especially if they could be brought as class actions. Subsequent developments, however, have substantially reduced the viability of this incentive.⁹⁹

Although the legal rule of deference to administrative agency regulation preserved the protections of TILA in *Mourning*, that rule does not always work in the consumer's favor. For example, in *Ford Motor Credit Co. v. Milhollin* the Court upheld an FRB regulation over consumer objections that TILA required a stronger rule.¹⁰⁰ The Court ruled that agencies like the FRB possess expertise that courts lack and consequently courts should uphold their regulations unless they are "demonstrably irrational."¹⁰¹ In contrast to the "four installment rule," which expanded the scope of the term "finance charge," the FRB subsequently has steadily narrowed the definition of what is included in that term.¹⁰²

98. 15 U.S.C. 1640 (2006).

99. See discussion *infra* text accompanying notes 158–70. Due to mandatory arbitration, legal representation in such cases is now far less likely, although recent developments have possibly made mandatory arbitration less pervasive. See discussion *infra* text accompanying notes 171–75. Moreover, for many years, offices funded by the Legal Services Corporation were not permitted to accept attorney's fees, even when awarded by the court pursuant to a statute expressly permitting them. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 504(a)(7), 504(a)(13), 110 Stat. 1321, 1353–54 (1996). See *infra* note 135.

100. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 570 (1980); see HANDLER, *supra* note 75, at 23 (noting that "[a]gencies are usually hostile to the claims of social-reform groups" and can "thwart the will of the courts"). Nevertheless, agencies are an essential part of any enforcement effort because "[c]ourts become almost impotent when confronted with supervising difficult problems of enforcement," but can effectively enforce the law if the court does not need to "defer to agency discretion" and can merely award damages or issue an injunction. *Id.* at 24–25.

101. *Milhollin*, 444 U.S. at 565.

102. Renuart & Thompson, *supra* note 52, at 202–03.

E. *The Role of Federal Administrative Agencies*

During the formative years of consumer protection law, federal administrative agencies played an important role in many areas in addition to the FRB's role in TILA. The FRB has issued regulations pursuant to the Electronic Fund Transfers Act,¹⁰³ the Equal Credit Opportunity Act,¹⁰⁴ and the Fair Credit Reporting Act.¹⁰⁵ From the standpoint of consumer advocates, the FRB's role has been mixed, as the *Mourning* and *Milhollin* cases illustrate. Sometimes the FRB issues regulations that strengthen consumers' positions, and sometimes its actions do the opposite.

The FTC also has played a crucial role. Long moribund, in 1969, the same year NCLC was established and TILA became effective, the Nixon administration reorganized the FTC in order to make it far more active in combating unfair and deceptive practices.¹⁰⁶ Congress soon granted the FTC broad rulemaking authority¹⁰⁷ which the FTC used to issue several wide-ranging regulations.¹⁰⁸ It also became more aggressive in its efforts to enforce the FTC Act.¹⁰⁹

No matter how greatly the FTC might have wished to enforce the law, however, its resources were limited to whatever amounts Congress appropriated and had to be shared with the FTC's anti-trust responsibilities. Furthermore, the scope of its authority is restricted to enforcement actions in the public interest.¹¹⁰ Consequently, it was crucial to consumer protection that statutes such as TILA include

103. 12 C.F.R. pt. 205 (2009).

104. *Id.* pt. 202.

105. *See, e.g., id.* pt. 232.

106. RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 166–67 (2d ed. 1996); Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 375–76 (1997).

107. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 57a(a)(1) (2006)); *see* HARRIS & MILKIS, *supra* note 106, at 172–73.

108. *E.g.*, Credit Practices Rule, 16 C.F.R. pt. 444 (2009), Funeral Industry Practices Rule, 16 C.F.R. pt. 453.1 (2009); Holder Rule, 16 C.F.R. pt. 433 (2009); Door-to-Door Sales, 16 C.F.R. pt. 429.1 (2009).

109. HARRIS & MILKIS, *supra* note 106, at 181.

110. 15 U.S.C. § 45(b) (2006).

provisions to facilitate individual lawsuits such as a private right of action, actual and statutory damages, and attorney fees.¹¹¹

III. GROWING PAINS: CONSUMER PROTECTION LAW TAKES A HIT

During the Reagan administration and continuing into the Carter administration, the political climate shifted and there were several developments that severely obstructed the expansion of consumer protection law. On the legislative front, the Depository Institutions Deregulation and Monetary Control Act of 1980 deregulated interest rates for an entire segment of the consumer credit market.¹¹² A second law, the Alternative Mortgage Transactions Parity Act imposed further deregulation.¹¹³ A third setback was the extensive revision of TILA. Legal services lawyers and lawyers from the private bar often brought cases under TILA on behalf of their low income clients.¹¹⁴ Although the FRB had found that as a result of TILA consumers were much more aware of the cost of credit, Congress was concerned that there were too many disclosures and it was too difficult for creditors to comply with TILA's complex regulatory scheme.¹¹⁵ Consequently, Congress passed the Truth in Lending Simplification and Reform Act in 1980.¹¹⁶ That law reduced the number of required disclosures and limited the liability of creditors who did not comply with the reduced requirements.¹¹⁷ In order to make compliance less onerous for creditors, TILA was amended again in 1995.¹¹⁸

111. *Id.* § 1640.

112. Peterson, *supra* note 13, at 873; Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of 12 U.S.C.). The Depository Institutions Deregulation and Monetary Control Act of 1980 prohibited the states from imposing interest rate maximums on home and mobile home first mortgages. Peterson, *supra* note 13, at 873; *see* RENUART & KEEST-CREDIT, *supra* note 62, at 123-25.

113. 12 U.S.C. § 3801 (2006); *see* RENUART & KEEST-TILA, *supra* note 43, at 37.

114. RENUART & KEEST-TILA, *supra* note 43, at 5.

115. *Id.* at 5-6.

116. 15 U.S.C. § 1601 (2006); *see also* sources cited *supra* note 52.

117. RENUART & KEEST-TILA, *supra* note 43, at 7.

118. *Id.* at 8-9.

In light of the Obama administration proposal to establish a Consumer Financial Protection Agency,¹¹⁹ it is relevant to note Congress's defeat in 1978 of a bill to create a consumer advocacy agency to be called the Department of Consumers.¹²⁰ The Department would "monitor the activities of other government agencies and intervene in their regulatory decision-making."¹²¹ It would not regulate specific abuses. The bill was defeated despite "nine years of effort by one of the largest and most active consumer coalitions in history."¹²² One reason the bill was not passed was that it served as a catalyst for the first coalition of business interests to oppose a consumer protection bill.¹²³

There also were setbacks in the courts, especially the Supreme Court's treatment of state interest rate regulation. In *Marquette v. First of Omaha Service Corp.* the Supreme Court held that the interest rate cap set by credit card law of a national bank's home state controlled, not the cap set by the law of the consumer's state.¹²⁴ Consequently, a national bank could "export" the home state's caps to the consumer's state. As a result, national banks moved their credit card operations to those states with no caps, and some states repealed their caps in order to entice issuers to move their operations to their states.¹²⁵ In *Smiley v. Citibank*, the Supreme Court upheld a ruling by the Office of the Comptroller of the Currency (OCC) that defined "interest" very broadly.¹²⁶

The major federal agency charged with protecting consumers, the FTC, contributed to the era's consumer protection retrenchment. As noted above,¹²⁷ in the early 1970s the FTC had issued several wide-ranging regulations. Whereas litigation by the FTC targets one company at a time, a regulation can have an impact on an entire

119. *See infra* notes 328–50.

120. HOBBS & GARDNER, *supra* note 1, at 11.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Marquette v. First of Omaha Serv. Corp.*, 439 U.S. 299, 301 (1978).

125. Peterson, *supra* note 13, at 873.

126. *Smiley v. Citibank*, 517 U.S. 735, 735–36 (1996).

127. *See supra* text accompanying notes 107–08.

industry. Therefore, it can be far more efficient and effective. Under the Reagan administration, however, the FTC's budget was cut drastically¹²⁸ and the FTC stopped proposing new regulations.¹²⁹ It also brought fewer cases.¹³⁰ The FTC Act authorizes the FTC to stop "unfair and deceptive acts and practices."¹³¹ The FTC redefined "deceptive" during the Reagan administration; one dissenting FTC Commissioner complained the new definition would undermine consumer protection.¹³² Congress also amended the FTC Act to ban certain types of FTC investigations and provide more Congressional control over FTC activities.¹³³

There also were serious threats to the legal services lawyers who were handling the problems of low income consumers. Funding for legal services was cut drastically, forcing those legal services lawyers still employed to handle only emergency cases, often refusing to take any consumer matters.¹³⁴ Moreover, most legal services offices

128. HARRIS & MILKIS, *supra* note 106, at 189–97.

129. Budnitz, *supra* note 106, at 413.

130. *Id.* at 393–95.

131. The FTC can issue cease and desist orders, 15 U.S.C. § 45(a)(2), (b) (2006), and can request that a court issue a temporary restraining order or a preliminary injunction, 15 U.S.C. § 53(b) (2006).

132. Budnitz, *supra* note 106, at 396–99. The new definition was applied in the FTC's cases. *E.g.*, *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).

133. Mark V. Nadel, *Congress and Consumer Protection*, in *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT*, *supra* note 23, at 126, 128.

134. See generally ALAN W. HOUSEMAN & LINDA E. PERLE, *SECURING EQUAL JUSTICE FOR ALL, A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 29–30 (2007), <http://www.clasp.org/admin/site/publications/files/0158.pdf> (describing how the budget cuts in the early 1980s resulted in closed offices, fired staff, and a substantial reduction in the level of services); William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960s to the 1990s*, 17 ST. LOUIS U. PUB. L. REV. 241, 257, 259 (1998) (reporting that in the 1980s LSC funding was greatly reduced and services were limited); Deborah L. Rhode, *Access to Justice*, TRIAL, Jan. 2006, at 48, 48 (attributing the ineffectiveness of legal assistance to the poor to "long-standing ideological and structural constraints"). Legal services offices have continued to face serious challenges. For example, in 2009, 105 members of the U.S. House voted to eliminate the Legal Services Corporation, the primary funding source for legal services offices throughout the country (eleven did not vote). Press Release, Legal Services Corporation, House Approves \$440 million for LSC (June 18, 2009), http://www.lsc.gov/press/pressrelease_detail_2009_T248_R15.php. Although the effort failed when 323 representatives voted against this proposal, it is significant that almost a quarter of the House was in favor of this drastic measure at a time when the country was in the midst of its worst economic crisis since the Depression. Moreover, the House retained significant restrictions on funding. See *infra* note 135. The current economic recession has increased the number of persons eligible for assistance by legal aid offices by 11 million, but the programs will not have adequate funds to handle more than one-half of those who request assistance. Tony Pugh, *Crush of New Clients Swamp Legal*

received at least some of their funding from the Legal Services Corporation, the successor to OEO, and the statute authorizing that funding was amended to prohibit legal services offices from bringing class actions or accepting an award for attorney fees. The amendment also restricted activities LSC offices could engage in even with non-LSC money.¹³⁵ LSC funding for NCLC was terminated in 1995.¹³⁶

IV. ONE CENTURY ENDS, ANOTHER BEGINS: NO DRAMA FROM THE BUSHES OR CLINTON

There were no dramatic consumer protection developments during the administrations of George H.W. Bush and Bill Clinton.¹³⁷ During George W. Bush's presidency consumers suffered two major setbacks. One was passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.¹³⁸ That statute had the effect of "radically limiting access to (and increasing the cost of obtaining) a bankruptcy discharge."¹³⁹ Second, the Office of Comptroller of the Currency and the Office of Thrift Supervision aggressively asserted

Aid: Recession Means More Poor, Jobless Are Seeking Help, MODESTO BEE (Cal.), July 12, 2009, at A4, available at 2009 WLNR 13345424.

135. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), (13), 110 Stat. 1321, 1353-54 (1996). In 2010, the Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034, amended the Legal Services Corporation Act to remove the restrictions on LSC-funded offices receiving attorney's fees. See Legal Services Corporation Regulations, 75 Fed. Reg. 6816, 6816 (Feb. 11, 2010) (to be codified at 45 C.F.R. pts. 1609, 1610, and 1642).

136. HOBBS & GARDNER, *supra* note 1, at 19.

137. See *id.* at 12 (acknowledging, however, that President George H.W. Bush made "several strong appointments to regulatory agencies" and Clinton lost his Democratic majority in Congress before he developed priorities for consumer protection issues).

138. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11, 12, 15, 18, and 28 U.S.C.).

139. Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1481 (2006); see Peter Alexander, *Another Perspective: The Bankruptcy Code Harms Women and Children*, 15 WIDENER L.J. 599, 605 (2006) (predicting that fewer attorneys will take cases as a result of the bankruptcy amendments); Henry Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 191, 211 (2005) (predicting general practitioners will stop taking cases as a result of the bankruptcy amendments, posing access difficulties for consumers in small towns and rural areas).

their right to preempt state law intended to protect consumers of financial services.¹⁴⁰

V. THE CHALLENGES OF THE 21ST CENTURY: CONTRACTS AND TECHNOLOGY'S TWO EDGED SWORD

The ability of the law to effectively protect consumers is being seriously tested by current developments, most of which began in the last century, and several of which were made possible by advances in technology.¹⁴¹ These include the ways in which contracts are written, the unfair terms they include, and the means by which consumers agree to be bound by them. One of those terms, the mandatory pre-dispute arbitration clause, has been especially significant because it cuts off access to the courts. Once an agreement has been made, thanks to technology, consumers have new types of payment systems and devices with which to pay. Technology also facilitated securitization of mortgages, contributing to the present economic crisis. While these new developments pose opportunities for the exploitation of consumers, technology also has given consumers convenient ways to shop and bank as well as new tools for making sound purchasing decisions.

Despite the many state and federal statutes that have been enacted in the last forty years to regulate consumer transactions, the underlying contract between the company and the consumer remains crucial in determining the rights and liabilities of the parties. One key element is the courts' effective elimination of the concept of agreement. There is no "meeting of the minds"; the consumer never

140. WookBai Kim, *Challenging the Roots of the Subprime Mortgage Crisis: The OCC's Operating Subsidiary Regulations and Watters v. Wachovia Bank*, 21 LOY. CONSUMER L. REV. 278, 285–88 (2009). Not all of the agencies' actions have been to the detriment of consumers, however. 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, 418 (2009) (reporting that OCC has issued a directive having the effect of preventing payday lenders from taking advantage of federal preemption to avoid enforcement of state law).

141. See STAFF OF THE FEDERAL TRADE COMMISSION, PROTECTING CONSUMERS IN THE NEXT TECH-ADE 2 (2008), <http://www.ftc.gov/os/2008/03/P064101tech.pdf> [hereinafter Tech-ade Report] (observing that changes are "taking place at a dizzying pace").

agrees to the contract terms.¹⁴² Rather, contracts are written in language few could ever hope to understand¹⁴³ and the contracts are presented on a take-it-or-leave-it basis.¹⁴⁴ In many situations, courts enforce contracts and changes in contract terms as long as the company notified the consumer and the consumer continued her relationship with the company, such as continuing to use her credit card, or continuing to maintain her account with the bank.¹⁴⁵ Notice has replaced agreement as a crucial element of contract formation.

Developments in technology have been a significant factor in changing the law of contracts, especially with many consumer transactions taking place on the Internet. Contracting on-line has presented many issues. A fundamental one is the basic question of whether a contract has been formed. When consumers buy goods or services on-line they are presented with various scenarios for entering into contracts.¹⁴⁶ In some of these settings, the contract is displayed on an internal page on the seller's site, but the consumer is not required to engage in affirmative conduct to indicate an intention to enter into a contract.¹⁴⁷ The courts have not resolved issues surrounding the validity of these "browsewrap" or "click free" contracts.¹⁴⁸ Other sites use a contracting process called clickwrap in which the consumer is required to click on some part of a web page

142. Amelia Rawls, *Contract Formation in an Internet Age*, 10 COLUM. SCI. & TECH. L. REV. 200, 217–20 (2009) (contending that new technologies make the "meeting of the minds" doctrine "moot"); Jay P. Kason & Rajiv C. Shah, *Setting Software Defaults: Perspectives from Law, Computer Science and Behavioral Economics*, 82 NOTRE DAME L. REV. 583, 607 (2006) (arguing that there is no meeting of the minds in consumer contracts).

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

144. Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Standard Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 396–97 (2003); Francis J. Mootz III, *After the Battle of the Forms: Commercial Contracting in the Electronic Age*, 4 J.L. & POL'Y FOR INFO. SOC'Y 271, 303 n.42 (2008); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" As the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 485–86 (2008).

145. *Tsadilas v. Provident Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004) (holding that consumer is bound by contract term where she continued to use credit card).

146. Mark E. Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?*, 16 GA. ST. U. L. REV. 741, 744–51 (2000).

147. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

148. *Compare ProCd, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), with *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991).

indicating assent, but it is not clear consumers understand the click constitutes a legally binding assent.

Even if a contract has been formed on-line, many questions persist as to what terms are included in the contract and what terms are merely proposals offered by the company. Courts enforce “rolling” or “layered” contracts in which consumers are informed of crucial terms only after they purchase goods or services.¹⁴⁹ Questions arise as to the proper method of binding consumers to later modifications of the terms.¹⁵⁰

Another issue concerns the contents of the terms contained in contracts, whether on-line or off-line. Examples of terms that courts have struck down include arbitration agreements charging excessive fees,¹⁵¹ cross-collateral provisions,¹⁵² and waiver of defense clauses.¹⁵³ While those terms often are clearly disclosed in consumer contracts, others are what Professor Alces calls “guerilla terms” because they are “shrouded.”¹⁵⁴ That is, the seller hides “the true and complete cost of a purchase.”¹⁵⁵ Examples include credit card companies concealing terms in the mathematical figures they disclose,¹⁵⁶ and allocating payments in a manner that the consumer will not understand.¹⁵⁷ As discussed in Part VII, Congress objected to several types of contract terms used by credit card issuers and placed restrictions on them in the Credit Card Act of 2009.

A contract term that has been very controversial is the mandatory pre-dispute arbitration clause.¹⁵⁸ These clauses have become

149. See generally *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *ProCd, Inc.*, 86 F.3d 1447; Clayton P. Gillette, *Rolling Contracts As an Agency Problem*, 2004 WIS. L. REV. 679.

150. John J.A. Burke, *Contract As Commodity: A Notification Approach*, 24 SETON HALL LEGIS. J. 285, 322 (2000).

151. *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958 (W.D. Va. 2000).

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

153. *Unico v. Owen*, 232 A.2d 405 (1967).

154. Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1513 (2007).

155. *Id.*

156. *Id.* at 1552.

157. *Id.* at 1512. Professor Alces gives the example of the allocation of payments when the consumer does not pay the full amount due and has balances both from a previous balance transfer from another account and a current balance.

158. Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 151 (2009). Forcing consumers to litigate their cases in arbitration administered by private companies is an example of the privatization of the law.

pervasive in most consumer transactions.¹⁵⁹ The clauses have been attacked on the bases that: arbitration often is more expensive than litigation;¹⁶⁰ typically the clauses ban class actions making it infeasible for consumers to challenge illegal conduct;¹⁶¹ arbitration services are biased in favor of companies;¹⁶² and arbitration is private, shielding companies from public scrutiny.¹⁶³ While many courts have struck down the clauses or parts of them as being unconscionable,¹⁶⁴ many other courts have upheld the clauses.¹⁶⁵

Arbitration clauses also can be challenged on two more fundamental grounds. First, arbitrators are not required to follow the law.¹⁶⁶ Therefore, all of the laws that have been enacted in the past forty years to protect consumers can be completely ignored by arbitrators and there is nothing the consumer can do about it, since that is not a basis for challenging an arbitrator's decision. In fact, arbitrators are not required to make any written findings of fact or rulings of law.¹⁶⁷ Second, arbitration is an example of the privatization of the law. Consumer protection laws to a significant extent took consumer transactions out of the world of private contract

Another example is the rules that govern much of the electronic payment systems, rules issued by the National Automated Clearinghouse Association. 2009 ACH RULES: A COMPLETE GUIDE TO RULES & REGULATIONS GOVERNING THE ACH NETWORK (2009). *See generally* Stewart Macaulay, *Private Government*, in *LAW AND SOCIAL SCIENCES* 445 (Leon Lipson & Stanton Wheeler eds., 1986); David J. Kenney, *Due Process in a Privatized Welfare System*, 64 *BROOK. L. REV.* 231 (1998); Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rulemaking of Private Legislatures*, 29 *GA. L. REV.* 909 (1995); David V. Snyder, *Private Lawmaking*, 64 *OHIO ST. L.J.* 371 (2003).

159. Alderman, *supra* note 158.

160. Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 *LAW & CONTEMP. PROBS.* 133, 133 (2004).

161. Alderman, *supra* note 158, at 154.

162. *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008); *see infra* text accompanying note 171.

163. Daniel R. Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 *DUKE L.J.* 103, 112 (2008).

164. *E.g.*, *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 169 (5th Cir. 2004) (holding arbitration clause unconscionable because of non-mutuality).

165. *E.g.*, *Stenzell v. Dell, Inc.*, 870 A.2d 133 (Me. 2005) (holding non-mutual arbitration contract not unconscionable under Texas law).

166. Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 *J. DISP. RESOL.* 1.

167. David L. Heinemann, Note, *Arbitrability of Claims Arising Under the Securities Exchange Act of 1934*, 1986 *DUKE L.J.* 548, 553 (1986).

by requiring disclosures and notices, out of which the parties could not contract. These requirements could be enforced by statutes which encouraged enforcement in the public forum of the courts by providing for the award of attorney's fees, costs, and class actions. Arbitration pulls consumer transactions into the nether world of private dispute resolution where the only rules are those the companies and the arbitration services the companies select adopt at their pleasure, without consumer involvement or government oversight.

Use of arbitration clauses represents a clever strategy by companies to gain the upper hand by changing "the rules under which the battle is fought."¹⁶⁸ Before their inclusion in consumer contracts, companies faced lawsuits, often class actions, brought by an increasing number of ever more experienced consumer lawyers. By forcing consumers into arbitration, companies were able to obtain a far more favorable forum.¹⁶⁹ They furthered their escape from significant liability by including a ban on class actions in their arbitration clauses.¹⁷⁰

Dramatic changes occurred in 2009 when the Attorney General of Minnesota sued the National Arbitration Forum (NAF). The Attorney General's Complaint alleged that NAF violated state law when it did not disclose that it had financial ties to law firms that brought debt collection actions against consumers in NAF administered arbitrations.¹⁷¹

NAF promptly reached a settlement with the Attorney General's office in which NAF agreed to stop administering all consumer

168. See generally Stephen Meili, *Consumer Cause Lawyers in the United States: Lawyers for the Movement or a Movement unto Themselves?*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 120, 128 (Austin Sarat & Stuart Scheingold eds., 2006). Meili uses federal preemption as his example of companies changing the rules.

169. See JOHN O'DONNELL, PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

170. Alderman, *supra* note 158, at 154.

171. Evan Tager, *National Arbitration Forum to Cease Administering Consumer Arbitrations: Many Consumer Arbitration Provisions May Need Revision*, MONDAQ, July 31, 2009, available at 2009 WLNR 14806599.

disputes.¹⁷² Shortly thereafter the American Arbitration Association (AAA) announced it would no longer administer consumer debt collection disputes until it addressed several concerns.¹⁷³

NAF's decision to stop handling consumer arbitrations left many questions that will have to be resolved in the future. For example, how will disputes be decided if a contract designates only the NAF as the arbitration service?¹⁷⁴

The larger issue is: what is the future of consumer arbitration? Will the decisions by NAF and AAA result in companies no longer trying to enforce arbitration provisions in their contracts? Will a new arbitration service be established that companies substitute for NAF and AAA? If so, will that service insist on handling arbitration only if the companies' contracts omit provisions consumer advocates and some courts have found most objectionable? Is there any need for federal legislation banning consumer arbitration?¹⁷⁵

The Internet poses many new challenges for consumers. In addition to facing fraud and deceptive practices similar to those in off-line transactions, consumers confront new challenges such as phishing in which consumers unwittingly provide thieves with information that can result in identity theft and unauthorized access to consumer bank accounts.¹⁷⁶ The Internet also enables fraudsters to

172. Lewis Weiner, *NAF Announces It Will No Longer Arbitrate Consumer Disputes, and AAA Comes Tumbling After*, MONDAQ, Aug. 13, 2009, available at 2009 WLNR 15739960.

173. *Id.*; *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts, Hearing Before the H. Subcomm. on Domestic Policy of the H. Comm. on Oversight and Government Reform*, 111th Cong. (2009) (testimony of Richard W. Naimark on behalf of the American Arbitration Association). The AAA identified the following concerns: consumers do not receive adequate notice of proceedings; arbitrators may not be neutral, especially if the same arbitrator hears many cases; claimants often present no proof of their claims; claimants seek interest charges and attorney fees that exceed the amount of the claimed debt; and arbitrators may not adequately consider consumer defenses and counterclaims. *Id.* at 5–7. Shortly thereafter Bank of America stopped requiring consumer arbitration. Samuel Estreicher & Steven C. Bennett, *Class Action Procedures in Arbitration*, 242 N.Y. L.J. 3 (2009). JPMorgan Chase subsequently announced it would no longer include mandatory arbitration provisions in its credit card contracts. *J.P. Morgan Drops Card-Dispute Arbitration Rule*, WALL ST. J., Nov. 21, 2009, at B2.

174. *Ten Stunning Practice Implications of NAF Withdrawal from All Consumer Arbitrations*, NCLC REPORTS (DECEPTIVE PRACTICES & WARRANTIES EDITION), July–Aug. 2009, at 1.

175. See *infra* text accompanying note 342.

176. "Phishing" typically involves consumers receiving an e-mail that appears to be from a legitimate financial institution. If the consumer responds to instructions in the e-mail, he or she is taken to a web site, asked for personal information, and soon becomes a victim to thieves who access bank accounts

gain electronic access to consumers' bank accounts through hacking, resulting in the potential for unauthorized transfers.¹⁷⁷ In addition, the Internet enables lenders to structure transactions in a way that increases consumer expenses.¹⁷⁸ At the same time, the Internet has the potential of enabling consumer organizations to reach consumers in new and effective ways.¹⁷⁹ In addition, consumers can achieve a beneficial level of anonymity by transacting business on the Internet. For example, if the consumer's name is Mary Smith, the Web seller likely will not know the consumer's race or ethnicity, making discrimination on those bases impossible. Some types of businesses, however, may be able to use the Internet's capabilities and data about the consumer to practice discrimination.¹⁸⁰

New types of payment devices also are being developed. The 21st Century has witnessed greatly reduced use of checks and a huge increase in the use of stored value cards such as gift cards, prepaid spending cards, phone cards, and payroll cards.¹⁸¹ These cards provide benefits for consumers. For example, consumers who cannot qualify for a credit card or who do not have a bank account can use a

and steal one's identity. Fed. Deposit Insurance Corp., Phishing Scams, <http://www.fdic.gov/consumers/consumer/alerts/phishing.html> (last visited Mar. 9, 2010).

177. FED. DEPOSIT INSURANCE CORP., PUTTING AN END TO ACCOUNT-HIJACKING IDENTITY THEFT (2004), http://www.fdic.gov/consumers/consumer/idtheftstudy/identity_theft.pdf. According to the FDIC report, in a 12-month period, almost two million U.S. Internet users experienced unauthorized access to their checking accounts. Seventy percent of these consumers did their banking or bill-paying online. In one scheme, the cyber thieves not only made fraudulent transfers from consumer accounts, they also prevented those transfers from appearing on the consumers' bank statements and transferred random amounts that escaped detection by banks' fraud detection systems. Daniel Wolfe & Steve Bills, *Trickier Trojan*, AM. BANKER, Oct. 7, 2009, at 5, available at 2009 WLNR 19703672.

178. E.g., PaycheckToday.com, <http://www.paychecktoday.com>, in which the on-line lender automatically renews the consumer's loan, debiting only the "finance fee" unless the consumer notifies the lender three business days prior to the due date that he/she wants to pay the loan in full or pay down part of the principal (last visited Sept. 3, 2009).

179. *Consumer Movement Faces Challenges, Opportunities*, CFA NEWS, Mar.-Apr. 2006, at 2 (reporting that the Internet provides opportunities for consumer organizations to connect with consumers and for consumers to connect with each other, and share their experiences).

180. See, e.g., Joyce Cutler, *Advocacy Group, Claiming Web Bias, Raises New Claims Against Wells Fargo*, 74 BNA BANKING REP. 1168 (2000) (reporting that the Association of Community Organizations for Reform Now alleged in a lawsuit that Wells Fargo used a search feature on its Web site and information about consumers' current ZIP codes to steer consumers to neighborhoods in a discriminatory manner).

181. Eniola Akindemowo, *Contract, Deposit or E-Value? Reconsidering Stored Value Products for a Modernized Payments Framework*, 7 DEPAUL BUS. & COM. L.J. 275, 275 (2009).

prepaid spending card instead. Stored value cards look like credit and debit cards and may even bear a Visa or MasterCard logo. Consequently, it is reasonable for consumers to assume the federal laws that protect them, such as laws that place limits on their liability for lost and stolen credit and debit cards, apply to stored value cards.¹⁸² Until 2009, however, only payroll cards were subject to federal protection; in 2009 gift cards were subject to limited federal regulation for the first time.¹⁸³

Technology has made it possible to transfer payments electronically. The result is new conveniences such as direct deposit of wages and Social Security as well as automatic withdrawals using preauthorized electronic transfer plans and on-line bill paying. Consumers also have new payment devices, such as cell phones that can be used for bank transactions. These services reduce the need to go to a bank branch which can be a great benefit to the poor, disabled, and consumers who do not have motor vehicles and lack adequate public transportation.

These new services can pose new problems for consumers, however. For example, a consumer taking out an on-line payday loan obtains very fast approval and the loan proceeds are electronically deposited into the consumer's account very quickly. The consumer, however, must authorize the lender to withdraw funds from the consumer's account electronically. Some payday lenders structure the withdrawals so that unless the consumer affirmatively notifies the

182. Mark E. Budnitz, *Consumer Payment Products and Systems: The Need for Uniformity and the Risk of Political Defeat*, 24 ANN. REV. BANKING & FIN. L. 247, 268 (2005). It is reasonable to assume consumers are confused about the differences between stored value cards and other types of cards since consumers are confused about the differences between credit cards and debit cards. Lloyd Constantine, Gordon Schnell, Reiko Cyr & Michelle A. Peters, *Repairing the Failed Debit Card Market: Lessons from an Historically Interventionist Federal Reserve and the Recent Visa Check/MasterMoney Antitrust Litigation*, 2 N.Y.U. J.L. & BUS. 147, 164 (2005); David A. Balto, *Can the Promise of Debit Cards Be Fulfilled?*, 53 BUS. LAW. 1093, 1102 (1998). Stored value cards also are susceptible to fraud by cyber thieves. *International Effort Defeats Major Hacking Ring*, U.S. FED. NEWS, Nov. 14, 2009, available at 2009 WLNR 22895900. (reporting that the FBI arrested members of a sophisticated international computer hacking organization that compromised data encryption used by a major bank to protect payroll cards, enabling the criminals to raise the amount of the cards and produce counterfeit cards, transferring \$9 million to persons in six countries around the world in less than 12 hours).

183. The Credit Card Act of 2009, Pub. L. No. 111-24, § 401(2), 123 Stat. 1734, 1751 (to be codified as 15 U.S.C. § 16931-1).

lender a specified number of days in advance, the lender will withdraw only interest and the high-cost loan will automatically roll over to the next payment period, making the loan very expensive.¹⁸⁴

Payment by cell phone is in its infancy in the United States, but potential problems can be anticipated. For example, a consumer faces the risk of severe consequences if an obligation is in default. The consumer may have used a cell phone to authorize timely payment to the creditor, but the payment may have failed to reach the creditor. The consumer can complain to the consumer's financial institution and under the Electronic Fund Transfers Act (EFTA), the institution must investigate and correct the error if it is responsible.¹⁸⁵ If the institution informs the consumer that its investigation concluded that it was not at fault, however, the EFTA provides no relief. Assuming the consumer's financial institution is correct in its findings, the consumer likely will have no way to determine (short of expensive discovery in a lawsuit) whether the fault lay in the cell phone's hardware, the software in the cell phone, the telecommunications company transmitting the consumer's message, or some other company involved in the process.

Electronic payments processed through the automated clearinghouse system are governed by the rules of a private body, the National Automated Clearinghouse Association (NACHA). Those rules do not grant consumers the right to sue financial institutions or businesses that violated the rules.¹⁸⁶ The government has resorted to

184. *E.g.*, PaycheckToday.com, *supra* note 178. In addition to being subject to the questionable practices of payday lenders, consumers who take out payday loans also have been targeted by persons posing as debt collectors and demanding payment of non-existent bills. They appear legitimate to the consumer because they have a great deal of personal information about the consumer, apparently the fruits of a data breach affecting thousands of consumers. Daniel Wolfe, *Scam Trends*, AM. BANKER, Nov. 9, 2009, at 5, available at 2009 WLNR 17611116.

185. 15 U.S.C. § 1693f(b) (2006). Banking by cell phone also exposes the consumer to cyber fraud. For example, a computer bug targeted consumers using their iPhones to engage in Internet banking. *iPhone Hit with Worm*, WORLD ENT. NEWS NETWORK, Nov. 24, 2009, available at 2009 WLNR 23647995.

186. *See supra* note 158. The NACHA Rules do not provide a right of action for bank customers whose funds are removed from deposit accounts via the ACH system. Financial institutions and others who are parties to contracts NACHA requires for participation in the ACH system, however, are bound by their contractual obligation to comply with the NACHA rules. MARK BUDNITZ, LAUREN K. SAUNDERS & MARGOT SAUNDERS, CONSUMER BANKING & PAYMENTS LAW 146-47 (4th ed. 2009). There is little case law and it is divided. *Sec. First Network Bank v. C.A.P.S., Inc.*, No. 01 C 342, 2002

electronic payments of food stamp benefits.¹⁸⁷ In conjunction with that, states have contracted with private companies to operate the systems used to transfer funds to needy recipients. This sounds like a sound program—delegate to high-tech companies the task that they are especially equipped to do and that state governments are not. Some of these companies, however, have failed to properly provide the benefits.¹⁸⁸

Consumers purchasing mass market digital products such as software face formidable challenges. The terms imposed by sellers and licensees “provide no usable remedies for product quality defects.”¹⁸⁹ While that also is true when buying other products such as a used car sold “as is,” consumers buying software are trapped by factors not ordinarily present when buying other types of goods. If one company obtains dominance when a new product is introduced into the marketplace, consumers buying that product may have to buy other products by the same company in order to avoid interoperability problems when communicating with other persons, and to avoid the high costs of switching to another system.¹⁹⁰

Technology also was a factor in the current mortgage crisis. The industry’s frantic pursuit of borrowers was fueled by the ability to securitize individual mortgages into vast pools.¹⁹¹ Technology made securitization possible.¹⁹²

WL 485352, at *6 (N.D. Ill. Mar. 29, 2002) (holding a bank customer could sue for breach of the NACHA Rules because its agreement with its bank required it to comply with the NACHA Rules). *Contra* Sinclair Oil Corp. v. Sylvan State Bank, 894 F. Supp. 1470, 1478 (D. Kan. 1995).

187. BUDNITZ, SAUNDERS & SAUNDERS, *supra* note 186, at 217–56.

188. Will Higgins, *\$1B Privatization Deal at Risk*, INDIANAPOLIS STAR, July 8, 2009, at A1, available at 2009 WLNR 15648034 (reporting that IBM wrongly denies food stamps to many).

189. Jean Braucher, *New Basics: Twelve Principles for Fair Commerce in Mass-Market Software and Other Digital Products*, in CONSUMER PROTECTION IN THE AGE OF THE “INFORMATION ECONOMY” 177 (Jane K. Winn ed., 2006).

190. *Id.*

191. Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2039–40 (2007).

192. *Id.* at 2045. Securitization is described as “financial technology.” *Id.* See generally Harry Terris, *Gauging Prospects for Securitization Without Subsidy*, AM. BANKER, June 19, 2009, at 1, available at 2009 WLNR 11693534 (discussing possible structure of securitization in the future).

Technology is both good and bad for consumers, depending on how it is used.¹⁹³ Online banking and shopping enable the elderly and disabled instant access to financial services they might otherwise not be able to enjoy, especially if they live in rural areas or urban neighborhoods without adequate public transportation. However, in order to take advantage of this service, consumers must agree to contracts containing onerous terms.¹⁹⁴ In addition, conducting consumer transactions exposes consumers to many threats including hacking into the consumer's computer to insert viruses, malware, and spyware.¹⁹⁵ The industry is developing new techniques to protect consumer privacy and the security of the communications lines over which personal information flows, but they present their own privacy issues.¹⁹⁶ Comparison shopping is much easier if the consumer can go on-line to compare the goods and prices of one store with

193. Professor Jane Winn has noted that "technological change can be a two-edged sword" both promoting and suppressing competition. JANE K. WINN, *Is Consumer Protection an Anachronism in the Information Economy?*, in CONSUMER PROTECTION IN THE AGE OF THE "INFORMATION ECONOMY," *supra* note 189, at 1.

194. Mark E. Budnitz, Donald F. Clifford, Michael Ferry & Margot Saunders, *Home Banking Services Agreements: Don't Bank on Them*, 61 BUS. LAW. 641 (2006).

195. *Future Wars Will Be Fought in Cyberspace*, FIN. EXPRESS, Aug. 24, 2009, available at 2009 WLNR 17647354 (reporting that viruses, spyware, and malware are the major threats to consumers using computers); Gary Dymek, *Taking Steps Against Hackers*, NEWSDAY, Aug. 19, 2009, available at 2009 WLNR 16125063 (reporting that many individuals do not obtain adequate protection to guard against computer viruses, spyware, and malware); *Court Orders Internet Pagejackers to Return Ill-Gotten Gains*, U.S. FED'L NEWS, Aug. 2, 2009 (reporting that a court ordered three persons held in contempt in connection with an FTC case brought against them for illegal spyware installed in consumers' computers). Some problems consumers confront are due simply to computer glitches, rather than affirmative action by wrongdoers. *Internet Glitch Hits Bank of America*, ATLANTA J.-CONST, Dec. 2, 2009 (reporting that because of a computer malfunction, consumers were unable to transfer funds between accounts online).

196. Daniel Wolfe, *Heartland Completes First Test of Encryption System*, AM. BANKER, July 1, 2009, at 13, available at 2009 WLNR 12492218 (reporting that Heartland Payment Systems, whose database of consumer cardholder information was the victim of a major security breach, had improved its system to encrypt consumer information); Cardline Global, *Voiceprints Used to Authenticate Bill-Pay*, AM. BANKER, June 30, 2009, at 12, available at 2009 WLNR 12419235 (using consumers' voiceprints to authenticate identity); Sam Woods, *Academics to Make Science Fiction Fact*, JOURNAL LIVE, May 29, 2008, <http://www.journallive.co.uk/north-east-news/todays-news/2008/05/29/academics-to-make-science-fiction-fact-61634-20988761/> (reporting on the ongoing development of cards that contain an individual's voiceprint and other unique identifiers; the government and other organizations would be barred from obtaining this data to avoid individuals' privacy concerns); Marianne Menna, *From Jamestown to Silicon Valley, Pioneering a Lawless Frontier: The Electronic Signatures in Global and National Commerce Act*, 6 VA. J.L. & TECH. 12, pt. III.D n.114 (2001) (stating that voiceprints is a technology that presents a privacy threat as well as the safeguard of verifying one's identity).

another.¹⁹⁷ Those with low incomes, however, may not be able to afford the cost of access to the Internet.¹⁹⁸

Another feature of the Internet is the presence of sites where consumers describe their experiences with companies and products. These sites serve two beneficial functions. One, they provide information for consumers.¹⁹⁹ Two, they act as “industry watchdogs” and hopefully motivate companies to improve their goods and services in order to garner more favorable reviews.²⁰⁰ The information provided by the reviewers, however, may not be reliable.²⁰¹ Racial and other forms of discrimination may be less

197. Sean O'Reilly, *Nominative Fair Use and Internet Aggregators: Copyright and Trademark Challenges Posed by Bots, Web Crawlers and Screen-Scraping Technologies*, 19 LOY. CONSUMER L. REV. 273, 276–77 (2007); see Edward Rubin, *The Internet, Consumer Protection and Practical Knowledge*, in CONSUMER PROTECTION IN THE AGE OF THE “INFORMATION ECONOMY,” *supra* note 189, at 35, 50 (proposing to take advantage of the Internet’s interactivity potential to make TILA disclosures more useful).

198. Edward Sholinsky, Note, *Blocking Access to the Information Superhighway: Regulating the Internet out of the Reach of Low-Income Americans*, 38 RUTGERS L.J. 321 (2006). Studies also suggest the “digital divide” extends not only to those with low incomes, but also for African Americans and Latinos. Leonard M. Baynes, *Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color*, 39 U. MICH. J.L. REFORM 199 (2006); Leonard Baynes, “*The Mercedes Divide?*” *American Segregation Shapes the Color of Electronic Commerce*, 29 W. NEW ENG. L. REV. 165 (2006).

199. Winn has noted that consumers do not only purchase goods and services on the Internet. They also consume information, and information is fundamentally different from goods and services. Information, unlike goods and services, “can be used by an unlimited number of people, an unlimited number of times.” Jane K. Winn, *Is Consumer Protection an Anachronism in the Information Economy?*, in CONSUMER PROTECTION IN THE AGE OF THE “INFORMATION ECONOMY,” *supra* note 189, at 1, 3. For a discussion of what type of information consumers need, see Rubin, *supra* note 197, at 35, 46–47.

200. Jonathan Schwartz, *Making the Consumer Watchdog’s Bark As Strong As Its Gripe: Complaint Sites and the Changing Dynamic of the Fair Use Defense*, 16 ALB. L.J. SCI. & TECH. 59 (2006); Martha Kelley, *Is Liability Just a Link Away?: Trademark Dilution by Tarnishment Under the Federal Trademark Dilution Act of 1995 and Hyperlinks on the World Wide Web*, 9 J. INTEL. PROP. L. 361 (2002).

201. The information is usually unverifiable and may not be accurate. Unfavorable postings may have been made by competitors. Favorable postings may have been made by persons associated with the business that is the subject of the posting. See Claire Cain Miller, *Company Settles Case of Reviews It Faked*, N.Y. TIMES, July 14, 2009, at B5 (describing Lifestyle Lifts’s settlement with New York Attorney General who accused company of having employees pose as satisfied customers and of efforts to pressure critical consumers and have their posts removed); Brad Reese, *Belkin President Apologizes for Paying Users to Post Positive Reviews of Belkin Products*, NETWORK WORLD, Jan. 20, 2009, <http://www.networkworld.com/community/node/37495>; *Belkin Fake Reviews Case Raises Broad Questions About Peer Ratings*, NETWORK WORLD, Jan. 20, 2009, available at 2009 WLNR 1518574 (describing company employee who offered to pay people to post favorable reviews of company’s products and to rate unfavorable reviews as unhelpful).

prevalent when purchasing on-line because of the relative anonymity which is involved, unlike a face-to-face transaction. Shopping on the Internet, however, also enables sellers to collect a vast amount of information about consumers, resulting in a serious loss of privacy.²⁰² In addition, the anonymity of the Internet works both ways: the consumer may have difficulty judging the trustworthiness of a company which interacts with the consumer only through automatic electronic responses to the consumer's mouse clicks.²⁰³ While technology has brought consumers many benefits, thieves have used technology to steal vast amounts of personal consumer information.²⁰⁴

VI. THE KEYS TO SURVIVAL: LAW REFORM AND INSTITUTIONALIZATION OF A SOCIAL MOVEMENT

This Part considers whether consumer protection law will survive against the far more powerful industry forces that continue to try to undermine that law. It explores this issue by examining the more general phenomenon of consumerism, of which consumer protection law is one feature. The article considers whether the consumerism of the past years can be accurately characterized as a social movement. It concludes that consumerism is a social movement and analyzes the

202. Tal Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity As Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. MIAMI L. REV. 991, 1010 (2004) (explaining that sellers collect and analyze personal information about consumer behavior and can lock them into high prices); Marcy Peek, *Passing Beyond Identity on the Internet: Espionage and Counterespionage in the Internet Age*, 28 VT. L. REV. 91, 92 (2003) (proposing that persons counter discriminatory steering and marketing by adopting false identities); *Behavioral Advertising: Industry Practices and Consumers' Expectations, Testimony Before the H. Comm. on Energy and Commerce, Subcomm. on Commerce, Trade and Consumer Protection, and the Subcomm. on Communications, Technology, and the Internet*, 111th Cong. (2009) (testimony of Jeff Chester, Executive Director, Center for Digital Democracy).

203. Phishing is an egregious example of the dangers of seller anonymity. See David Koenigsberg, *Developments in Banking and Financial Law 2005: Security with Online Banking*, 25 ANN. REV. BANKING & FIN. L. 118, 119 (2006); see *supra* note 176.

204. *Attorney General Long Announces Multi-State Settlement with TJX Companies, over Massive Data Breach*, U.S. FED'L NEWS, June 26, 2009, available at 2009 WLNR 12222083; Nadia Oehlsen, *Extent of Heartland Breach Unknown; Probes Multiply*, AM. BANKER, Feb. 25, 2009, at 10, available at 2009 WLNR 3592626; Rebecca Sausner, *Card Firms Unmoved by Heartland Encryption Push*, AM. BANKER, Mar. 3, 2009, at 7, available at 2009 WLNR 4019653.

interaction of this movement, consumer organizations, and the development of consumer law. This Part finds the key to survival depends on this interaction.

A. *Consumerism As a Social Movement*

Consumerism has been a phenomenon of American society for many years.²⁰⁵ There are consumer organizations, consumer laws, government agencies dedicated to enforce those laws, and many Americans who become involved in consumer protection activities.²⁰⁶ This Part considers whether consumerism has developed into something more substantial. That is, does consumerism contain elements that suggest it is a social movement? If it is, consumerism has a far greater chance at survival and effectiveness.

1. *Social Movements and Social Change*

Professor Coglianesi provides a definition of a social movement and its relationship to law reform.

Social change lies at the heart of the definition of a social movement. A social movement is a broad set of sustained organizational efforts to change the structure of society or the distribution of society's resources. Within social movements, law reformers typically view law as a resource or strategy to achieve desired social change. Since social change is the purpose of a

205. Roger Swagler, *Consumerism, Modern*, in ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, *supra* note 23, at 172, 172–73. Swagler explains that “consumerism” has been defined in various ways including: a concern for “consumer protection laws, the availability of product and price information, fraudulent and deceptive business practices, and product safety.” *Id.* at 172. Another definition defines the term simply to mean “organized groups seeking to protect consumers.” *Id.* at 173; see Robert O. Herrmann, *Consumerism: Its Goals, Organization, and Future*, in CONSUMERISM: THE ETERNAL TRIANGLE 21 (Barbara B. Murray ed., 1973); Richard H. Buskirk & James T. Rothe, *Consumerism—An Interpretation*, in CONSUMERISM: THE ETERNAL TRIANGLE, *supra*, at 31.

206. See HOBBS & GARDNER, *supra* note 1, at 12–14. One indication that consumers become actively involved in consumer issues occurred when the FRB received over 60,000 comments on its proposed credit card rules. Amanda Ruggeri, *Latest Obama Target: Credit Card Companies and Their Lending Rules*, U.S. NEWS & WORLD REP., Apr. 27, 2009, available at 2009 WLNR 8531891.

social movement, law reform generally is taken to providing a means of realizing that goal.²⁰⁷

As discussed above, the desire to pursue a consumerist agenda was the basis of both national and local consumer organizations.²⁰⁸ These organizations sought to change the way companies did business and fought for changes in the law as well. Working to satisfy many of the same goals have been lawyers representing consumers in individual cases and before legislative and administrative agencies. These consumer lawyers began this effort on a sustained organizational level in legal services offices funded by OEO. The legal services program was part of OEO's Anti-Poverty effort. Social change was a fundamental objective of OEO, and law reform was the priority of the legal services program.²⁰⁹ The government funded the National Consumer Law Center in order to assist local legal services programs meet that priority. Thus, the consumer activities that emerged in the 1960s and continue today fit within Professor Coglianese's definition of a social movement: there was a sustained organizational effort to effect social change, consumer lawyers were a resource, and law reform was one of the strategies used.

Perhaps coincidentally, at the same time consumer lawyers began their efforts, Congress enacted the Truth in Lending Act to make the credit markets work more efficiently by providing consumers with information they could use to comparison shop. As discussed above, Congress continued to play a crucial role in enabling the consumer movement to achieve many of its objectives by enacting many more statutes, and administrative agencies also promoted consumerism by issuing regulations that were necessary to effectuate the goals of the

207. Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PENN. L. REV. 85, 85 (2001). See generally Meili, *supra* note 168, at 121–22 (describing three theories of social movements). “[O]ne of the most important lessons of the civil rights movement: a successful litigation strategy must be linked to a social movement.” Davis, *supra* note 27, at 39.

208. HOBBS & GARDNER, *supra* note 1; Meili, *supra* note 168, at 123.

209. See *supra* text accompanying note 29.

legislation.²¹⁰ In that way, the government itself fostered the social change objective of consumer organizations and consumer lawyers.

2. *Organizational Efforts*

According to Professor Coglianese, “[a] social movement is a broad set of sustained organizational efforts.”²¹¹ The consumer movement has had the good fortune of the long-time work of many organizations. Legal organizations such as NCLC and the National Association of Consumer Advocates (NACA) have played a crucial role in developing and sustaining the law component of the consumer movement, as have primarily non-legal organizations such as the Center for Responsible Lending, US PIRG, the National Consumers League, AARP, Consumer Action, Consumers Union, Public Citizen, the Center for Auto Safety, and Consumer Federation of America.

Without the continuing labors of these groups, the movement would cease. For even after consumer aspirations become law as a result of a statutory enactment or case law development, as discussed in Part II, consumer protection law reforms are ethereal. Protections may evaporate when political winds shift, resulting in more business oriented legislators and judges.²¹² But maintaining and ensuring the survival of these institutions is problematic. Institutions need stable and adequate funding. Non-profit public interest groups have a precarious existence. They depend primarily on funding from foundations, government grants, and individual donations, none of

210. See *supra* text accompanying notes 43–54, 103–09. Sometimes administrative agencies have issued regulations that have been viewed as contrary to consumers’ interests. See *supra* text accompanying note 132. Rubin notes that often law “is autonomously generated by the political sphere—the legislature, the courts, and increasingly, the administrative agencies,” rather than by social movements. Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 11 (2001).

211. Coglianese, *supra* note 207, at 85. Rubin, however, distinguishes between organizations and social movements. “The prevailing view is that organizations . . . are not the same as social movements. Rather, social movements are regarded as consisting of more diffuse agglomerations of individuals within society who are linked together by ideology, beliefs, or collective identities. Organizations may catalyze the creation of these agglomerations, or may be generated by them The movement itself exists in the social sphere, however, while the organizations that created it or were created by it bridge the social and political spheres” Rubin, *supra* note 210, at 4–5 (emphasis added).

212. See *supra* text accompanying notes 112–18.

which can be depended upon for permanent support.²¹³ Foundation support depends on whether the mission of individual foundations include promoting consumer protection. And the extent to which even a foundation dedicated to consumer protection can provide support is dependent on economic conditions.

The reliability of individual contributions will always be uncertain. The Internet, however, has opened up new opportunities, providing consumer organizations with a powerful and relatively inexpensive tool for raising funds from individuals, while providing value to them in the form of an easy-to-use platform for becoming actively involved in promoting consumer protection and supplying useful information. For example, the web sites of consumer groups include petitions and sample letters to legislators on specific issues and legislative proposals. In addition, they provide a great deal of information to keep consumers informed and educate consumers so they can better protect themselves. The availability of such free information on the Internet, however, also presents the opportunity for “free riders.”²¹⁴ That is, many consumers may decide not to donate to support a consumer organization because they can obtain what they want from the group’s website without paying anything.

The precarious existence of consumer organizations is illustrated by events in the late 1970s and 1980s. The major organizations pursuing consumer protection law reform from its earliest years had been offices funded by the Legal Services Program. With the drastic budget cutbacks in legal services funding during the Reagan years, legal services offices had to limit their representation to those cases presenting the greatest threat to the well-being of their clients. As a result, the top priorities were cases involving housing, domestic violence, and essential government benefits.²¹⁵ Less attention was given to consumer cases. Although these steps were necessary, more limited involvement in consumer cases was unfortunate because of

213. See generally HOBBS & GARDNER, *supra* note 1; HANDLER, *supra* note 75, at 9, 12–13.

214. HANDLER, *supra* note 75, at 5–6.

215. Meili, *supra* note 168, at 125.

the direct relationship between consumer problems and the cycle of poverty in which many low income persons are caught.²¹⁶

In addition to the cutbacks in legal services, the budgets of enforcement agencies were reduced and accomplishments were negated when the federal government deregulated many industries.²¹⁷ Nevertheless, the legal component of the consumer movement survived the period because consumer organizations were able to continue their work. One example is NCLC. Despite losing legal services funding, NCLC played a pivotal role in ensuring both the continuation of skilled consumer representation and law reform advocacy during this period. It continued the lawyer training in which it had been engaged from its early days. This consisted of organizing training conferences²¹⁸ and producing manuals.²¹⁹ The conferences provided basic education to lawyers new to consumer law and advanced sessions for seasoned veterans. Through these activities, NCLC produced a growing body of lawyers, both in legal services offices and private practice, who had the knowledge needed to represent consumers in a wide variety of matters where they faced lawyers for industry with far greater resources.²²⁰ Another benefit of the conferences was the opportunity to network with other lawyers handling similar cases.

NCLC continues this crucial organizational role today. In addition to its manuals and conferences, it has taken advantage of technology,

216. For example, for a consumer living in a place with inadequate or non-existent public transportation, a motor vehicle is a necessity. Most low income consumers buy used cars on credit. Used car dealers are notorious for their unfair and deceptive practices and often sell lemons "as is" for inflated prices which soon become inoperable without expensive repairs. The consumer now finds herself without a car, making it very difficult or impossible to get to work, get to medical facilities, get her children to child care while she works, and do other essential tasks. Meanwhile, the creditor will continue to demand car payments even though the car is no longer operable. Even assuming the consumer can still get to her job, she cannot afford to buy another car since she still owes money on the lemon. If she loses her job because she no longer has reliable transportation, she will likely need government benefits in order to survive. This person's consumer problem consequently is the direct cause of her downward spiral into poverty.

217. RENUART & KEEST-CREDIT, *supra* note 62, at 42-50.

218. Willard P. Ogburn, *National Consumer Law Center*, in *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT*, *supra* note 23, at 391, 394.

219. HOBBS & GARDNER, *supra* note 1, at 20; Ogburn, *supra* note 218, at 393.

220. Meili, *supra* note 168, at 127 (reporting that the "number of private attorneys practicing consumer law has increased tenfold in the past decade").

establishing e-mail listservs that act as a “virtual law firm” in which consumer lawyers “share substantive legal expertise, information about defendants, and strategy.”²²¹ Its web site provides instant access to many resources.²²²

NCLC also was instrumental in establishing a new organization, the National Association of Consumer Advocates (NACA).²²³ NACA has over 1,500 members including attorneys and consumer advocates.²²⁴ The attorney membership consists of private lawyers as well as legal services attorneys, law professors and law students.²²⁵ NACA serves as “a forum for communication, networking, and information sharing” among its members.²²⁶ Consumers can go to its website and locate an attorney who may be willing to take the consumer’s case. NACA has filed numerous amicus briefs and testified in regard to proposed legislation and regulations.²²⁷ NACA conducts training conferences on current issues.²²⁸

While NCLC and NACA are primarily legal organizations, their efforts are supported and augmented by other consumer advocacy organizations that help ensure the continued vitality of the consumer movement such as Consumers Union,²²⁹ Consumer Federation of America,²³⁰ the National Consumers League,²³¹ US PIRG,²³² Public

221. *Id.*

222. See NCLC, <http://www.consumerlaw.org> (last visited Mar. 9, 2010).

223. Meili, *supra* note 168, at 126.

224. NACA, <http://www.naca.net> (last visited Mar. 9, 2010).

225. Meili characterizes private attorneys litigating consumer cases as “free agent litigators” who are loyal to the consumer movement but have no formal relationship to movement leaders and are accountable to their clients, not the movement. Meili, *supra* note 168, at 127.

226. NACA Mission, <http://www.naca.net/about-consumer-advocates/> (last visited Mar. 9, 2010).

227. *E.g.*, Sival v. Rent-A-Center, Inc., 912 N.E.2d 945 (Mass. 2009). NACA’s website, <http://www.naca.net> (last visited Mar. 9, 2010), describes NACA’s testimony on issues such as predatory lending, credit reports, and lending abuses targeting the military.

228. *E.g.*, NACA’s 2010 Auto Fraud Conference, <http://www.naca.net/News-Events/Event.aspx?item=69755> (last visited Mar. 9, 2010).

229. Consumers Union, <http://www.consumersunion.org> (last visited Mar. 9, 2010). In order to reach younger consumers by communicating with them through the medium they use, Consumers Union purchased the Consumerist blog. *Advocates Must Adapt to Media Changes*, CFA NEWS, Mar.–May 2009, at 2.

230. Consumer Federation of America, <http://www.consumerfed.org> (last visited Mar. 9, 2010).

231. Nat’l Consumer League, <http://www.nclnet.org> (last visited Mar. 9, 2010).

232. U.S. PRIG, Standing Up to Powerful Interests, <http://www.uspirg.org> (last visited Mar. 9, 2010).

Justice,²³³ the Center for Responsible Lending,²³⁴ and AARP.²³⁵ These organizations often file joint amicus briefs and testimony. Each organization arguably increases its individual credibility and is able to participate in more law reform efforts by cooperating with and working in conjunction with other organizations.

Lawyers have been crucial players in the consumer movement. In order for this to continue, however, there must be an organizational structure for ensuring an adequate supply of new lawyers to replace those who retire or for other reasons drop out. In the infancy of consumer law, the legal services program was that organization. Consumer lawyers came overwhelmingly from legal services offices.²³⁶ Law schools did not play a significant role; most offered no courses in consumer protection. The picture today is very different. Many law schools offer traditional as well as clinical courses in consumer law.²³⁷ Many professors have taught consumer law for a considerable length of time.²³⁸ Law professors also have produced a substantial body of consumer law scholarship. In this way, legal education provides another organizational support for the development of future consumer lawyers and consumer law.

The movement needs the active presence of consumer organizations and cannot depend on government agencies. The robustness of enforcement efforts by government agencies such as

233. Public Justice, America's Public Interest Law Firm, <http://www.publicjustice.net/> (last visited Mar. 9, 2010).

234. Center for Responsible Lending, www.responsiblelending.org (last visited Mar. 9, 2010).

235. Ass'n for the Advancement of Retired Persons, <http://www.aarp.org> (last visited Mar. 9, 2010).

236. See *supra* text accompanying notes 38–40, 79.

237. Professors who teach consumer law courses include: Stephen Calkins, <http://www.law.wayne.edu> (last visited Mar. 9, 2010); Alvin Harrell, <http://www.okcu.edu> (last visited Mar. 9, 2010); Michael Greenfield, <http://www.wustl.edu> (last visited Mar. 9, 2010); Christopher Peterson, <http://www.law.utah.edu> (last visited Mar. 9, 2010); Jeff Sovern, <http://www.stjohns.edu> (last visited Mar. 9, 2010); Cathy Lesser Mansfield, <http://www.law.drake.edu> (last visited Mar. 9, 2010); and Patricia McCoy, <http://www.law.uconn.edu> (last visited Mar. 9, 2010). Professors teaching clinical consumer courses include: Stephen Meili, <http://www.law.umn.edu> (last visited Mar. 9, 2010); Kurt Eggert, <http://www.chapman.edu/law/> (last visited Mar. 9, 2010); and Richard McElvaney, <http://www.law.uh.edu> (last visited Mar. 9, 2010). Rubin notes that social movements result in legislation and that leads new courses in law schools. Rubin, *supra* note 210, at 11.

238. According to the 2007–2008 AALS Directory of Law Teachers, 50 full-time law professors have been teaching a consumer law course for over ten years. THE AALS DIRECTORY OF LAW TEACHERS 2007–2008, at 1255–56 (2007–2008).

the FTC, bank agencies and state attorneys general depends upon the political climate in which those agencies operate, the resources they receive, and other priorities needing a share of those resources. In addition, there is always the risk an agency will become the captive of the industry it is established to regulate.²³⁹ Moreover, companies base their conduct largely on what business practices will make the most profit. They “are difficult to regulate in part because they lack the moral sentiments that promote individual-level obedience to law,” and “[l]egal sanctions . . . are usually too small and too slow to affect rational organizational planning.”²⁴⁰ Even if an agency issues strong regulations, they may be difficult to enforce if they are technically complex and require the agency to monitor compliance over long period of time.²⁴¹

As described in Part V, the credit industry will continually develop new products and marketing practices that are detrimental to consumers.²⁴² Well-financed industry trade groups will try to ensure that regulation is kept to a minimum. This is a significant threat to strong consumer protection because statutes generally provide agencies with abundant discretion in drafting regulations.²⁴³ In addition, a company’s response to regulation of its current practices may not be compliance, but rather evasion, such as inserting into contracts consumer waivers, seller disclaimers of liability, and limitations on consumer remedies.²⁴⁴ To ensure that regulatory agencies draft and enforce effective regulations, consumer organizations need to do what industry representatives likely do: gain the support of persons in the agencies, including field level staff.²⁴⁵

239. Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 487 (1997); HANDLER, *supra* note 75, at 16.

240. Edelman & Suchman, *supra* note 239, at 487.

241. HANDLER, *supra* note 75, at 19.

242. *See supra* text accompanying notes 156–157, 184, 194.

243. *See supra* text accompanying notes 156–157, 184, 194.

244. Edelman & Suchman, *supra* note 239, at 488.

245. HANDLER, *supra* note 75, at 20–21.

3. *Law Reform Provides Means to Realize Social Change*

In describing social movements, Professor Coglianese states that “[s]ocial change lies at the heart of the definition of a social movement” and a social movement is “a broad set of sustained organizational efforts to change the structure of society or the distribution of society’s resources.”²⁴⁶ Moreover, law reform is a means of achieving social change.²⁴⁷ Beginning in the 1960s, several legal organizations including the National Consumer Law Center, the NAACP Legal Defense Fund, legal services programs, and later on lawyers on the staffs of Consumers Union, NACA, US PIRG, and AARP have engaged in law reform in order to improve consumers’ position in the marketplace. Contrary to Professor Coglianese’s first formulation, however, they have not sought to do this by changing the structure of society. Instead, they have worked within that structure to improve the legal rights of consumers. Furthermore, they have not tried to change the fundamental structure of the legal system, but rather have sought far more limited goals.²⁴⁸ Consequently, the role played by consumer law organizations does not fit neatly within this component of Professor Coglianese’s model of what constitutes a social movement, for the law reform component has not sought to change the structure of society.

Although consumer law organizations have not tried to change the structure of society or even of the legal system, they have made a significant impact on society that arguably qualifies as social change because they have changed some basic features of the law governing the marketplace. While they worked within the legal system and often with government agencies,²⁴⁹ the legislation they supported resulted in statutes that embody significant national public policy that never existed before. Examples include a consumer’s legal right not to be subjected to discrimination in the extension of credit, insurance,

246. Coglianese, *supra* note 207, at 85 (emphasis added).

247. *Id.*

248. An early example is litigation such as *Sniadach*, which curbed the creditor’s ability to use the state’s powers against consumers without restraint. See *supra* text accompanying notes 73–78.

249. Consumers Union was the consumer representative in FTC Rulemaking proceedings under that agency’s intervenor funding program. HARRIS & MILKIS, *supra* note 106, at 174.

or employment based on the consumer's gender, race, national origin, or religion,²⁵⁰ and a limited right to privacy in regards to credit reports²⁵¹ and information sharing by financial institutions.²⁵² Major requirements have been placed on financial institutions such as the requirement to investigate consumers' credit card billing disputes²⁵³ and disputes over the electronic transfer of funds.²⁵⁴ In these and other ways, companies can no longer conduct business the way they used to.

4. *Effort to Change Society's Distribution of Resources*

Even if one assumes consumer law organizations do not come within Professor Coglianesi's first formulation of a social movement because their law reform efforts, however substantial, are not an attempt change the structure of society, their efforts do satisfy Professor Coglianesi's alternative formulation because their objective is to change the distribution of society's resources. For example, many of the cases they have brought and bills they have supported in Congress and state legislatures have as their objective a change in legal rules that would result in less money going to businesses and more staying in consumers' pockets. An example is the effort to control interest rates and other credit charges imposed by creditors.²⁵⁵

5. *From Social Movement to Institutionalization*

As described above, "consumerism" has developed into a social movement. Its chances of survival, however, were greatly enhanced

250. 15 U.S.C. §§ 1691 *et seq.* (2006).

251. *Id.* §§ 1681 *et seq.*

252. Gramm-Leach-Bliley Fin. Servs. Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338.

253. 12 C.F.R. § 226.13(f) (2009).

254. 15 U.S.C. §§ 1693 *et seq.* (2006).

255. For example, the National Consumer Law Center's National Consumer Act (undated) and its Model Consumer Credit Act 1973. *See supra* text accompanying notes 62–66. "[L]arge forward movements are possible only as the expectations of people increase as a result of numerous small struggles, reforms, and increased understanding." DAVIS, *supra* note 27, at 142 (quoting Edward V. Sparer).

by the movement's institutionalization. Professor Coglianese has examined one social movement in particular: the environmental movement. He has identified several developments that demonstrate the environmental movement has become institutionalized. One development was the passage of several major statutes.²⁵⁶ Enactment of those laws was accompanied by government agencies issuing regulations and enforcing the law.²⁵⁷ Private organizations grew "more professional, increasing both the size and specialization of their staffs."²⁵⁸ They published extensively.²⁵⁹ "Environmentalism had matured from a social movement to an extensive network of interest group organizations with a presence in Washington, D.C like that of any other political lobby."²⁶⁰

The consumer movement has experienced comparable developments, indicating that it too has been institutionalized. Congress has passed several major statutes²⁶¹ that government agencies have enforced and pursuant to which they have issued regulations.²⁶² Movement objectives typically are carried out in Washington by national organizations rather than by local grass roots community groups such as CEPA.²⁶³ The organizations' activity often consists of formal testimony presented by professionals such as

256. Coglianese, *supra* note 207, at 117.

257. *Id.* at 115.

258. *Id.* at 101.

259. *Id.*

260. *Id.* at 102.

261. *See supra* text accompanying notes 43, 250–54.

262. *E.g.*, 12 C.F.R. § 226 (2009) (Reg. Z); 12 C.F.R. § 205 (2009) (Reg. E); 12 C.F.R. § 202 (2009) (Reg. B).

263. *See supra* text accompanying note 23. Some national organizations focus their activities on the local level. *See, e.g.*, Neighborhood Assistance Corporation of America (NACA), <http://www.naca.com> (last visited Mar. 9, 2010). Independent grass roots protests have continued as well. *Anti-Bank Protestors Picket Goldman, Wells*, AM. BANKER, Oct. 27, 2009 (reporting that members of the National People's Action, a community group, and the Service Employees International Union organized a protest on Chicago streets to demonstrate their anger at home foreclosures, predatory lending practices, and excessive bonuses paid to bank executives); Mathew Monks, *Stunts May Be Silly, But They're Serious for Banks*, AM. BANKER, July 2, 2009, at 1, available at 2009 WLNR 12561425 (describing protest at local branch bank by Empowering and Strengthening Ohio's People); Emily Udell, *Hundreds Back Crackdown on Payday Loan Companies*, COURIER-J., Mar. 24, 2009, at 3B. Institutionalization does not necessarily mean the end of grassroots activity, but institutionalization can greatly affect it. Grassroots mobilization, when employed, became integrated into the environmentalists' legislative agenda and was strategically targeted at specific members of Congress. Coglianese, *supra* note 207, at 100.

lawyers before Congressional committees and administrative agencies.²⁶⁴ While some organizations cover a wide variety of consumer issues, others are specialized.²⁶⁵ They publish manuals for lawyers,²⁶⁶ books for consumer advocates,²⁶⁷ and educational guides for the public.²⁶⁸ They also conduct studies.²⁶⁹

It is significant that this institutionalization of the consumer movement affects not only consumer organizations, but also government entities. For example, the consumer movement had a major impact on the FTC and FRB, whose original missions did not include consumer protection. Indeed, the FRB initially resisted taking on that responsibility.²⁷⁰ Once consumerism had become

264. *E.g.*, *Mandatory Binding Arbitration, Testimony of Stuart T. Rossman, Director, Nat'l Consumer Law Ctr., Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. (2009), available at 2009 WLNR 18244651 [hereinafter Rossman Testimony]; Comments of the National Consumer Law Center, National Association of Consumer Advocates, Consumer Federation of America, Consumers Union, and U.S. Public Interest Research Group, In the Matter of Telemarketing Rulemaking, FTC File No. R411001 (Apr. 10, 2002), submitted by Olivia Wein, Carolyn Carter and Margot Saunders, all identified in the Comment as attorneys at NCLC.

265. Compare the topics the Consumer Federation of America lists on its web site, <http://www.consumerfed.org> (last visited Mar. 9, 2010) (listing communications, energy, finance, food and agriculture, health and safety, and housing), and the topics listed on the website of Americans for Financial Reform, <http://www.ourfinancialsecurity.org> (last visited Mar. 9, 2010) (listing the consumer financial protection agency, hedge funds, credit rating agencies, the financial transaction tax, systemic risk, and foreclosure prevention), with the Center for Auto Safety, <http://www.autosafety.org> (last visited Mar. 9, 2010) (listing airbags, oil sludge, and vehicle recalls).

266. NCLC has published an eighteen-volume series of manuals for lawyers. NCLC, Publications for Lawyers, <https://shop.consumerlaw.org/> (last visited Mar. 18, 2010).

267. NCLC's books for advocates include: *Surviving Debt*, *Guide to the Rights of Utility Consumers*, *Stop Predatory Lending*, and *Guide to the Rights of Domestic Violence Survivors*. *Id.*

268. *E.g.*, National Consumers League, <http://www.nclnet.org/personal-finance> (last visited Mar. 9, 2010); Consumer Action, <http://www.consumer-action.org/publications> (last visited Mar. 9, 2010).

269. *E.g.*, ELISA ODABASHIAN, CONSUMERS UNION, GETTING MILKED, BAY AREA SUPERMARKETS CHARGE TOO MUCH FOR MILK (2004), <http://www.consumersunion.org/pdf/milkprt04.pdf>; U.S. PIRG, BAILOUT REPORT CARD: WHAT DID OBAMA'S TEAM LEARN? (2009), available at http://cdn.publicinterestnetwork.org/assets/s9ybLaplPTISBQRaixRqgw/USPIRG_BailoutReportCard_6_22_09.pdf; DIANE E. THOMPSON, NAT'L CONSUMER LAW CENTER, WHY SERVICERS FORECLOSE WHEN THEY SHOULD MODIFY AND OTHER PUZZLES OF SERVICER BEHAVIOR, SERVICERS COMPENSATION & ITS CONSEQUENCES (2009), available at http://www.consumerlaw.org/issues/mortgage_servicing/content/Servicer-Report1009.pdf; Jean Ann Fox & Patrick Woodnall, *Consumers Pay Steep Premium to 'Bank' at Check Cashing Outlets*, CONSUMER FED'N AM., Nov. 2006.

270. *Supra* note 86. HARRIS & MILKIS, *supra* note 106, at 147 (stating that those who created the FTC did not consider consumer protection to be the FTC's responsibility). But as a result of the consumer movement, the FTC became far more aggressive. "The transformation of the FTC was one element of the far-reaching institutional development that took place during the late 1960s and 1970s in the area of consumer protection." *Id.* at 179.

institutionalized, government agencies became part of the network of organizations, some public, others private, with a stake in the success of the movement.²⁷¹ The connection between the private and public sectors became most apparent when the FTC introduced a program of “intervenor funding” which was authorized by the Magnuson-Moss Act.²⁷² Under this program, the FTC funded consumer groups such as Consumers Union²⁷³ in order to ensure that the public’s views would be represented in agency proceedings. The industry opposed the program, “recognizing that imposing such procedural changes represented a fundamental, though incipient, challenge to business’ influence on rulemaking proceedings.”²⁷⁴

After Reagan became president, the FTC eliminated the intervenor funding program²⁷⁵ along with a general restriction on its consumer protection activities.²⁷⁶ This development illustrates that because of the industry’s greater resources and the recurrent emergence of presidents and a Congress hostile to the objectives of the consumer movement, it is not sufficient that a movement becomes institutionalized and that institutionalization includes new law that embodies the movement’s goals.²⁷⁷ In addition, its goals must

271. “[C]ause lawyers . . . are ‘most successful when a confident government is engaged in social change’” Meili, *supra* note 168, at 135 (citing Richard Abel, *Speaking Law to Power, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND SOCIAL RESPONSIBILITIES* 69 (Austin Sarat & Stuart Scheingold eds., 1998)). According to one theorist, “social movements succeed when the government provides tangible benefits to their members that meet the movement’s demands, or when it formally accepts the movement as a valid representative of its members’ interests.” Rubin, *supra* note 197, at 82. Consumer advocates also have been appointed to major roles in government. For example, during the Carter administration, Ralph Nader’s chief lobbyist, Joan Claybrook was the head of the National Highway Traffic Safety Administration and Carol Tucker Forman, who had been Executive Director of the CFA, was an assistant secretary of agriculture for consumer services. HANDLER, *supra* note 75, at 76–77. Rahm Emanuel, President Obama’s Chief of Staff, was a spokesman for Illinois Public Action Council, a “Naderite group.” Ryan Lizza, *The Gatekeeper, Rahm Emanuel on the Job*, NEW YORKER, Mar. 2, 2009, at 24, 27.

272. HARRIS & MILKIS, *supra* note 106, at 173; Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–12).

273. HARRIS & MILKIS, *supra* note 106, at 174.

274. *Id.* at 176.

275. *Id.* at 192.

276. *Id.* at 186–90.

277. See generally Rubin, *supra* note 197, at 83 (stating that recognition of rights “may be won by the activism of social movements, but this victory must be secured by the development of legal concepts . . .”).

become embedded in society's values.²⁷⁸ Otherwise, the movement could be killed or severely debilitated.

There are indications that the consumer movement's goals have been embedded in society's values. Davis and Trebilcock note that many scholars are skeptical about "whether legal institutions play an independent role in promoting social change."²⁷⁹ They acknowledge: "It may be the case that legal systems change only in response to fundamental historical, economic, cultural or political factors and are largely immune to top-down attempts at reform."²⁸⁰ If that is true, then TILA and accompanying federal law was not a top-down effort by Congress to change the legal environment for consumers, but a response to fundamental changes in society's values. Even if a particular Congress tried to impose its will by enacting statutes such as TILA, if those laws were contrary to society's values, given industry's opposition, those laws would not have endured. It is significant that pressure from the credit industry resulted in Congress's cutting back on TILA, but not coming even close to repealing it or any of the other statutes.²⁸¹ To the contrary, Congress has continued to enact more laws and strengthen ones already in effect.²⁸² That development indicates the movement's goals reflect society's values. And those consumer protection laws "incorporate new norms into the ongoing structure of the legal system."²⁸³

The consumer movement has significantly matured. For example, industry representatives frequently claim the abuses alleged by consumer advocates are merely anecdotal and do not reflect market

278. Coglianese, *supra* note 207, at 109, opines: "Legal reform, if it is to have an enduring impact, needs to be accompanied by a genuine change in public values."

279. Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM J. COMP. L. 895, 920 (2008).

280. *Id.*

281. See RENUART & KEEST-TILA, *supra* note 43, at 5-7 (discussing the Truth in Lending Simplification Act).

282. *E.g.*, Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160. NCLC supported passage of this law. Daniel Immergluck, *Private Risk, Public Risk: Public Policy, Market Development, and the Mortgage Crisis*, 36 FORDHAM URB. L.J. 447, 470 (2009); see Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952; Credit Repair Organizations Act, 18 U.S.C. § 1679 (1996).

283. Rubin, *supra* note 197, at 83 (commenting on public officials' formal acceptance of the legal concept of human rights).

failure requiring regulation.²⁸⁴ To counter these assertions, consumer organizations have conducted many sophisticated and comprehensive studies documenting widespread abuses.²⁸⁵ Consumer organizations have the technical expertise needed by agencies considering new or revised regulations.²⁸⁶

Government agencies formerly listened to the views of all sides and used their best judgment when issuing regulations. Agencies now supplement this approach with more sophisticated techniques. For example, to gauge the effectiveness of current and proposed disclosures, the FRB hired a research and consulting firm that tested consumers using focus groups to determine what disclosures consumers would pay attention to, understand, and use.²⁸⁷

A proposed FTC study also illustrates a more sophisticated orientation. The FTC intends to conduct studies on consumer susceptibility to fraudulent and deceptive marketing.²⁸⁸ The FTC admits that “surprisingly little is known about what determines consumers’ susceptibility to fraud.”²⁸⁹ The FTC acknowledges the contributions of social science experiments that have identified

284. *Testimony of Richard Hunt on Behalf of Consumer Bankers Ass’n: Hearing on H.R. 3904, the Overdraft Protection Act, Before the H. Fin. Services Comm.*, 111th Cong. (2009) (urging Congress not to regulate overdraft fees based on anecdotes of consumers who had to pay a \$35 overdraft fee for a \$4 cup of coffee). See generally Paul Krugman, *How Did Old Economists Get It So Wrong?*, N.Y. TIMES, Sept. 2, 2009 (Magazine) (describing traditional economists’ view that markets operate efficiently and do not need to be regulated).

285. E.g., RICH JURGENS & CHI CHI WU, NAT’L CONSUMER LAW CENTER, FEE-HARVESTERS: LOW-CREDIT, HIGH-COST CARDS BLEED CONSUMERS (2007); JEAN ANN FOX & ANNA PETRINI, CONSUMER FEDERATION OF AMERICA, INTERNET PAYDAY LENDING: HOW HIGH-PRICES LENDERS USE THE INTERNET TO MIRE BORROWERS IN DEBT AND EVADE STATE CONSUMER PROTECTIONS (2004). For their part, the industry commissions its own studies, e.g., JONATHAN M. ORSZAG & SUSAN H. MANNING, AN ECONOMIC ASSESSMENT OF REGULATING CREDIT CARD FEES AND INTEREST RATES (2007) (commissioned by the American Bankers Association; see Adam J. Levitin, *A Critique of the American Bankers Association’s Study of Credit Card Regulation*, GEO. U.L. CENTER, Mar. 9, 2008, http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=adam_levitin).

286. *A Note from the Executive Director*, OUTLOOK, NAT’L CONSUMER L. CENTER, Fall 2008/Winter 2009, at 2 (stating that NCLC and other consumer groups analyze for agencies the “fine points” that seem insignificant but can have “an unintended or harmful effect”); *Tell It to the Fed!* OUTLOOK, NAT’L CONSUMER L. CENTER, Fall 2008/Winter 2009, at 3 (describing NCLC’s “detailed legal analyses” submitted to agencies).

287. *Truth in Lending, Final Rule*, 74 Fed. Reg. 5244, 5245–46 (Jan. 29, 2009). The results of the tests were made available on the FRB’s Web site. *Id.* at 5247.

288. *Agency Information Collection Activities; Proposed Collection; Comment Request*, 74 Fed. Reg. 27,794, 27,796 (June 11, 2009).

289. 74 Fed. Reg. 27,794, 27,795 (June 11, 2009).

“several decision-making biases, such as impulsivity, overconfidence, over-optimism, and loss aversion, that can cause inaccurate assessments of the risks, costs and benefits of various choices.”²⁹⁰ One of the FTC’s studies will consist of a laboratory experiment to examine whether these biases are related to susceptibility to deceptive ads.²⁹¹ The FTC hopes the study will help it target enforcement actions, design future surveys, and develop consumer education programs. The second study will consist of a survey of 5,000 consumers conducted on the Internet, seeking information on susceptibility to fraud.²⁹²

The FTC’s planned study illustrates the influence of new developments in economic theory. Classical economic theory has provided powerful academic support for industry anti-regulation and deregulation proposals. The theory is based on the assumption that consumer behavior is rational and the free market, that is, a market free of regulation, is the most efficient and therefore best for both businesses and consumer.²⁹³ In the past several years, however, the field of behavioral economics has gained increasing respectability, supports the need for more regulation, and provides insights for drafting more effective regulation.²⁹⁴

290. *Id.*

291. *Id.*

292. 74 Fed. Reg. 27,796, 27,797 (June 11, 2009).

293. Alan M. White, *Behavior and Contract*, 22 LAW & INEQ. 135, 138 (2009). See generally Krugman, *supra* note 284; Martin Crutsinger, *Greenspan in “Disbelief,”* ATLANTA J.-CONST., Oct. 24, 2008 (reporting that Alan Greenspan, former Chairman of the Federal Reserve, acknowledged that the economic crisis made him realize he was wrong in believing banks would protect their shareholders and institutions’ equity without the need for regulation).

294. On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COL. L. REV. 2098 (2008) (reviewing two books that explore consumer irrationality and its implications for legislators); Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 750 (2008) (“[C]onsumer mistakes and sellers’ strategic response to these mistakes are responsible for a substantial welfare loss”); Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 45 (2006) (“Many consumers systematically underestimate the total price they will end up paying simply because they do not understand how fast interest accrues.”); Arnold S. Rosenberg, *Better Than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 60 CONSUMER FIN. L.Q. REP. 426, 455–56 (2006) (recommending TILA-type “layered” disclosures for debit cards based on studies of consumer behavior); Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1656–57, 1676–79 (2006) (describing how businesses benefit by obscuring contract terms and taking advantage of behavior that prevents consumers from making rational choices, and recommends legislative improvements); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure:*

VII. MISSION ACCOMPLISHED? PROSPECTS AND PERILS

We have seen that consumerism has become an institutionalized social movement and its values are embedded in society. Furthermore, the legal component of the movement has persisted and grown. But can we proclaim “Mission Accomplished?” Of course, the mission will never be fully accomplished because there will always be challenges by the business community. Some in that community will continue to devise new scams, new products, new ways to avoid litigation brought by consumers, and new strategies to defeat proposed statutes and regulations. Nevertheless, consumer advocates can claim “mission accomplished” in the sense that consumer protection is an embedded cultural value and consumer protection law is here to stay.

One lens through which to view where the consumer movement stands today is to examine two significant recent developments: the Credit Card Act of 2009 and the proposed Consumer Financial Protection Agency. While representing major steps forward, they also illustrate the perils that lie ahead.

The Credit Card Act of 2009,²⁹⁵ containing extensive amendments to TILA, provides a useful illustration of the status of new consumer legislation forty years after TILA became effective. The need for the amendments arose because of the industry’s skill in developing new ways to impose costs upon consumers.²⁹⁶ It is significant that Congress was willing to confront the challenges posed by changes in the industry’s practices, especially since the FRB had recently issued regulations that covered some of the same ground.²⁹⁷ But passage came only with clear Democratic majorities in Congress and a

The Problem of Predatory Lending: Price, 65 MD. L. REV. 707, 754–59 (2006) (describing consumer behavior and proposing simplified and standardized disclosures for home loans). *But see* Ronald J. Mann, *Unsafe at Any Price?* 157 U. PA. L. REV. 167 (2009) (stating that behavioral economics is based on little empirical research).

295. Credit Card Act, Pub. L. No. 111-24, 123 Stat. 1734 (2009).

296. Alces, *supra* note 154, at 1512.

297. TILA, Final Rule, 74 Fed. Reg. 5244 (Jan. 29, 2009); Unfair Deceptive Acts or Practices, Final Rule, 74 Fed. Reg. 5498 (Jan. 29, 2009); *see also* Unfair Deceptive Acts or Practices, Clarifications, Proposed Rule, 74 Fed. Reg. 20,804 (May 5, 2009) (clarifying confusion caused by the above rules).

president who was not hostile to consumer protection.²⁹⁸ Consumer organizations had been criticizing these practices for several years and had published studies documenting their use and adverse effects.²⁹⁹ Scholars also became involved, publishing law review articles.³⁰⁰ To some extent, the Act continues the much criticized approach of previous versions of TILA,³⁰¹ merely requiring disclosure.³⁰² But at least some of the disclosures are of a different nature than those in former versions of TILA because they provide consumers with information far more useful to consumers than the required disclosures in previous versions of TILA.³⁰³

Moreover, the Act represents a major step forward because it goes well beyond disclosure by also granting consumers many substantive rights.³⁰⁴ For example, the Act includes prohibitions on increasing the finance charge on any outstanding balance³⁰⁵ and double cycle billing.³⁰⁶ There are rules for increasing and reducing the annual percentage rate,³⁰⁷ subprime fee harvester cards,³⁰⁸ marketing cards to consumers younger than twenty-one,³⁰⁹ and how much time

298. See President's initiative to establish a Consumer Financial Protection Agency, *infra* notes 328–49.

299. JURGENS & WU, *supra* note 285.

300. See, e.g., Alces, *supra* note 154.

301. Laurie A. Burlingame, *Getting to the Truth of the Matter: Revising the TILA Credit Card Disclosure Scheme to Better Protect Consumers*, 61 CONSUMER FIN. L.Q. REP. 308, 326 (2007) (noting that some consumers find TILA credit card disclosures “confusing and misleading”); Summer Krause, *The Truth in Lending Act: A Case For Expanding Assignee Liability*, 49 SANTA CLARA L. REV. 1153, 1164 (2009) (characterizing TILA prior to the Truth in Lending Simplification Act as complicated and difficult to understand); Renuart & Thompson, *supra* note 52, at 210 (describing the difficulty of determining the impact of fees on the annual percentage rate under the TILA disclosure scheme).

302. See, for example, § 101 of the Credit Card Act (advance notice of rate increase), and § 201 (payoff timing disclosures). Pub. L. No. 111-24, §§ 101, 201, 123 Stat. 1734, 1735, 1743 (2009).

303. See, for example, the payoff timing disclosures informing the consumer of how many months it will take the consumer to pay the entire balance if paying only the required minimum. Credit Card Act § 201(a). This type of disclosure is an example of those recommended by Rubin. Rubin, *supra* note 197, at 49–50.

304. Some believe disclosure is preferable to substantive provisions that will allegedly limit the availability of consumer credit. Jeffrey Taft, *Viewpoint: Disclosure Better Than Limiting Credit*, AM. BANKER, May 9, 2008, available at 2008 WLNR 8665939.

305. Credit Card Act § 171.

306. *Id.* § 102.

307. *Id.* §§ 148, 172.

308. *Id.* § 105.

309. *Id.* § 301.

consumers have to make payments.³¹⁰ The Act also increases statutory damages in open end transactions.³¹¹

In some important areas, the Act delegates to administrative agencies the task of issuing regulations. For example, the Act does not regulate the amount of fees creditors may charge. This is arguably a major deficiency in the Act and in marked contrast to the Military Lending Act.³¹² Instead, the Act requires that penalty fees or charges “be reasonable and proportional to [the consumer’s] omission or violation.”³¹³ The FRB is required to issue rules “to establish standards for assessing” whether a fee or charge is reasonable and proportional.³¹⁴ Those rules are crucial for consumers. Depending on how the rules are drafted, they could protect consumers just as well as rate regulation, or they could be so general that they provide no meaningful protection. Under the Act, the FRB must consult with, *inter alia*, the OCC when drafting the rules. In the past, the OCC has issued rules that basically permit national banks to charge whatever fees they want.³¹⁵ If the OCC maintains this approach and the FRB agrees, this provision will provide no benefit to consumers.

Another example of the Act’s delegation of a major area to regulation by the FRB is in regard to gift cards. The Act amends the EFTA by restricting dormancy fees and expiration dates.³¹⁶ However, the Act delegates to the FRB the task of issuing rules relating to the amount of dormancy fees and other charges that are permitted.³¹⁷ Consumers’ problems with gift cards are not confined to dormancy fees and short expiration dates, however.³¹⁸ If the EFTA applied to

310. *Id.* § 106.

311. Credit Card Act § 107.

312. 10 U.S.C. § 987 (Supp. 2009).

313. Credit Card Act § 102(b) (adding § 149(a) to TILA).

314. Credit Card Act § 149(b).

315. 12 C.F.R. § 7.4002 (2009); *see Best v. U.S. Nat’l Bank*, 739 P.2d 554 (Or. 1987); *Perdue v. Crocker Nat’l Bank*, 702 P.2d 503 (Cal. 1985).

316. Credit Card Act § 401 (adding § 915 to EFTA).

317. *Id.*

318. Examples of other types of problems include liability for loss of funds due to defective card readers, damage to cards, and unauthorized use of cards. In addition, there is the lack of a required error resolution procedure, privacy protection, supervision of unregulated and uninsured issuers, and private rights of action. *See* MODEL STORED VALUE CARD PROTECTION ACT (Nat’l Consumer Law Ctr.) for an

gift cards, consumers would have the benefit of substantial protection. Congress gave to the FRB the responsibility to decide which, if any, portions of the EFTA will apply to gift cards.³¹⁹

Legislators believe some creditor practices are acceptable as long as they are disclosed. Some practices, however, are against public policy and should be prohibited. In between are practices that are questionable and that consumers should be able to avoid if they wish without being required to forego the opportunity to obtain credit altogether. In regard to these “in between” practices, there has been a great deal of controversy over whether to require consumers to take affirmative steps to opt out of these practices, or to make it far less likely consumers will be saddled with them by making them inoperative unless the consumer opts in.³²⁰ Significantly, the Credit Card Act provides the consumer-friendly opt-in approach to over-the-limit transactions.³²¹

As discussed above, technology has both benefited and harmed consumers.³²² The Act uses the Internet to assist consumers by requiring creditors to maintain Internet sites on which they must post their written agreements.³²³

The Credit Card Act may, in retrospect, be viewed as the forerunner of a new stage in consumer protection legislation. The Act has many positive features that will benefit consumers—meaningful disclosures, opt-in, and substantive protections. It is responsive to the contention of consumer advocates’ that more than disclosure is needed to adequately protect consumers.³²⁴ There are certain major deficiencies, however. For example, almost forty years after the rate controversy surrounding the UCCC and almost thirty years after

example of legislation dealing with these issues. BUDNITZ, SAUNDERS & SAUNDERS, *supra* note 186, at 621–28.

319. Credit Card Act § 401 (adding § 915 to EFTA).

320. Eric Poggemiller, *The Consumer Response to Privacy Provisions in Gramm-Leach-Bliley: Much Ado About Nothing?*, 6 N.C. BANKING INST. 617, 627–35 (2002); Jeff Sovern, *Opting in, Opting out, or No Option: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1075 (1999).

321. Credit Card Act § 102(k).

322. See *supra* text accompanying notes 193–98.

323. Credit Card Act § 204.

324. Barak Y. Orbach, *The New Regulatory Era—An Introduction*, 51 ARIZ. L. REV. 559, 561 (2009) (stating that the Credit Card Act bans “many practices that were customary until its enactment”).

federal deregulation of interest rates, there is, generally, no federal regulation of the rates, charges and fees that creditors may impose.³²⁵ While the Credit Card Act prohibits specific overreaching practices in which creditors have been engaged, it is likely creditors will develop new practices that are not specifically banned in the Act and fail to clearly disclose the costs and risks of those new practices.³²⁶ Creditors will implement these new practices because their business model depends on collecting late fees from consumers who pay late.³²⁷ Moreover, the Act does nothing to restrict creditors from forcing consumers into creditor-friendly arbitration in which arbitrators are not required to follow any law, much less the new Act. Finally, crucial provisions are delegated to administrative agencies. Based on past experience, there is always the possibility they will issue regulations that provide little relief for consumers.

President Obama's proposed Consumer Financial Protection Agency Act of 2009 (CFPA) appears to be based, in part, on the belief that those agencies cannot be trusted to adequately protect consumers.³²⁸ By transferring all of the consumer financial protection functions of federal agencies to a new agency³²⁹ as well as personnel engaged in consumer protection in those agencies,³³⁰ the CFPA, in

325. RENUART & KEEST—CREDIT, *supra* note 62, at 42–43, 46–47.

326. See James Surowiecki, *Caveat Mortgagor*, NEW YORKER, July 6, 2009, available at http://www.newyorker.com/talk/financial/2009/07/06/090706ta_talk_surowiecki (“[K]eeping customers confused often seems to be a business strategy.”).

327. James Surowiecki, *House of Cards*, NEW YORKER, Mar. 16, 2009, at 45. See generally Eric Dash, *Bank Fees Rise As Lenders Try to Offset Losses*, N.Y. TIMES, July 1, 2009.

328. Proposed Consumer Financial Protection Agency Act (CFPA) of 2009, www.financialstability.gov/docs/CFPA-Act.pdf (last visited Mar. 28, 2010) (proposed by President Obama). A somewhat modified version was submitted in the House. CFPA, H.R. 3126, 111th Cong. (as introduced by House, July 8, 2009). The text discusses the president's proposal because an accompanying Treasury Department Report sheds light on the rationale for some of the proposals in that proposal. Professor Elizabeth Warren provided scholarly support for these proposals before the 2008 elections. Elizabeth Warren, *Making Credit Safer: The Case for Regulation*, HARV. MAG., May–June 2008, at 34. Some claim the FRB had adequate notice of the coming mortgage crisis as early as 2002 and could have taken steps to ameliorate the problem. Jon C. Gamboa & Robert Gnaizda, *Viewpoint: Fed Had Plenty of Warning on Mortgage Issues*, AM. BANKER, Sept. 21, 2007, at 11, available at 2007 WLNR 18470317. In 2008, the FRB issued regulations to crack down on abusive credit card practices, but some claimed it did so only as a result of pressure from Congress, the threat of Congressional legislative action, and the loss of credibility. Steven Sloan, *In Focus: In Fed's Regulatory Curriculum, A Course in Political Calculus*, AM. BANKER, May 12, 2008, available at 2008 WLNR 8773817.

329. CFPA § 1061.

330. *Id.* at 1064.

effect, rejects the suitability of the current structure. The Treasury Department's report accompanying the CFPB bill describes the deficiencies in the current regulatory system.³³¹ The new agency would overcome these deficiencies, for example, by having wide jurisdiction over financial companies, whether or not they are owned by banks. Its sole mission would be protecting consumers. In contrast, agencies such as the OCC and Office of Thrift Supervision (OTS) have a potentially conflicting primary mission of ensuring the safety and soundness of financial institutions. The FRB's primary responsibility is to set monetary policy.

One of the major impediments to consumer protection has been OCC's and OTS's preemption of state law and consequent blocking of state enforcement of that law.³³² A 2009 Supreme Court case is a major victory for consumer protection because the Court held federal agencies cannot preempt state enforcement of substantive state law.³³³ The decision, however, did not provide any guidance on how to resolve a dispute where a federal agency claims a state law conflicts with federal banking law. That is an issue for Congress to decide. Moreover, the legislature is better suited than the courts to

331. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, *supra* note 87, at 56 (pointing out the FTC's jurisdictional limits; the banking agencies' proclivity to "see the world through the lenses of institutions and markets, not consumers"; the opportunities for "regulatory arbitrage" in which firms choose the least aggressive regulator; and state and federal bank supervisory agencies' mandate to ensure "financial institutions act prudently, a mission that . . . often conflicts with their consumer protection responsibilities").

332. Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 HARV. J.L. & PUB. POL'Y 981 (2006); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225 (2004).

333. *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2717 (2009) (holding that the OCC can preempt state law that relates to its visitatorial powers, but not state enforcement of substantive state law). While a victory for consumer protection by permitting state enforcement, the Court's holding that states cannot usurp agencies' visitatorial authority precludes state agency investigations, including subpoena power, and requires states to go to court and engage in discovery. Absent the power to subpoena or otherwise examine bank records, it may not be possible in many cases for states to gather enough evidence of violations to justify filing a lawsuit. Cheyenne Hopkins, *States Win in Supreme Surprise*, AM. BANKER, June 30, 2009, at 1-2, available at 2009 WLNR 12419230 (observing that the *Cuomo* decision limits the powers of state attorneys general). Furthermore, it is not always clear when the state is exercising its enforcement authority and not its visitatorial powers. Cheyenne Hopkins, *A Preemption of Clarity, Court Ruling Raises Enforcement Questions*, AM. BANKER, July 14, 2009, at 1, 9, available at 2009 WLNR 13329429.

make that determination because legislation can provide standards for when preemption is appropriate, and in setting the standards Congress can take into account the entire regulatory infrastructure which is affected by preemption, the proper role of federalism and states' rights, and the effect on financial markets.

The CFPA seeks to do that.³³⁴ The general principle established under the CFPA is that the Act does not alter state law unless it is inconsistent with the CFPA, “and then only to the extent of the inconsistency.”³³⁵ Furthermore, a state law is not inconsistent if it provides greater consumer protection than that provided under the CFPA.³³⁶ The CFPA also clarifies the power of the states to enforce state consumer laws of general application against institutions subject to federal financial regulation. For example, state consumer laws relating to unfair and deceptive practice, fraud, repossessions, foreclosure, and collection law apply to national banks.³³⁷

The CFPA grants the new agency extensive powers to investigate conduct that may violate the CFPA.³³⁸ It can conduct hearings and adjudication proceedings.³³⁹ The agency can bring civil actions, using its own attorneys.³⁴⁰ These powers are essential, given the severe restrictions placed on private enforcement, including forced arbitration.³⁴¹

The CFPA does not prohibit mandatory pre-dispute arbitration, but grants the new agency the power to “prohibit or impose conditions or limitations on the use” of such agreements.³⁴² The standards for doing so are quite vague. The agency can take any of the actions specified if they “are in the public interest and for the protection of

334. CFPA subtit. D. See Cheyenne Hopkins, *Industry Is Underdog in Fight over New Agency*, AM. BANKER, July 1, 2009, at 1, 3, available at 2009 WLNR 12492225 (reporting that the banking industry strongly opposed the preemption provision, but believed the *Cuomo* case made opposition more difficult because the decision upheld states' enforcement actions against banks).

335. CFPA § 1041(a)(1).

336. *Id.* § 1041(a)(2).

337. *Id.* § 1043 (adding 12 U.S.C. § 5136C).

338. *Id.* § 1051.

339. *Id.* § 1053.

340. *Id.* § 1054.

341. See *supra* text accompanying notes 158–70. But see notes 171–75 and accompanying text.

342. CFPA § 1025.

consumers.”³⁴³ The Treasury report provides an explanation for this provision. It first notes that consumers do not know that the form contracts they sign when taking out a loan waives their right to a trial.³⁴⁴ It may be true that many consumers do not fully realize the significance of this waiver, but many lenders disclose the waiver clearly. Far more significant is the fact, not mentioned in the report, that whether or not consumers see or understand the waiver, they have no choice since the waivers are practically universal.³⁴⁵ The report does point out another important feature, however, stating that the dispute is heard by “a private party dependent on large firms [lenders] for their business.”³⁴⁶ The report says the new agency should determine if arbitrations “promote fair adjudication and effective redress” and should ban the clauses if necessary.³⁴⁷ Making that determination may prove challenging since the results of arbitration proceedings are private, except in California where the law requires disclosure of limited information.³⁴⁸ Nevertheless, merely looking at the language of the clauses may provide sufficient information to justify agency action. Requiring that the arbitration take place only in one location in the United States, regardless of where the consumer lives, and banning class actions are examples of clauses that may indicate the arbitration will not be fair and the consumer may not be able to obtain adequate redress.

While this provision should be comforting to critics of consumer arbitration, it does not go nearly as far as current law in regard to military personnel where arbitration is prohibited altogether in regard to pay day loans.³⁴⁹ The CFPB also is not as sweeping as the pending

343. *Id.*

344. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, *supra* note 87, at 62.

345. Alderman, *supra* note 158, at 154.

346. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, *supra* note 87, at 62; *see* Rossman Testimony, *supra* note 264 (testifying that arbitration services make money by convincing businesses to select their services).

347. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, *supra* note 87, at 62.

348. CAL. CIV. PROC. CODE § 1281.9 (2003).

349. 10 U.S.C. § 987(e) (Supp. 2009). The Department of Defense issued regulations limiting the statute to pay day loans, vehicle title loans, and tax refund loans. 32 C.F.R. § 232 (2009).

Arbitration Fairness Act of 2009 that bans all predispute arbitration agreements.³⁵⁰

On a more abstract level, the Treasury Department's report suggests the institutionalization of the consumer movement is far from complete and one goal of the CFPA bill is to further that institutionalization. The report proclaims: "Consumer protection is a critical foundation for our financial system."³⁵¹ In order to ensure that consumer protection is given its due, it must have "an independent seat at the table in our financial regulatory system."³⁵² The public must have "confidence that consumer protection is important to regulators,"³⁵³ and that requires "clear accountability in government" for consumer protection.³⁵⁴ The report recognizes that it is not sufficient merely to grant regulatory authority to agencies. "[W]e need first to instill that culture [of consumer protection] in the federal regulatory structure."³⁵⁵ The ultimate goal is for consumer protection to be part of the culture of the entire society, so that financial institutions not only comply with agency rules, but "the financial system develops and sustains a culture that places a high value on helping responsible consumers thrive and treating all consumers fairly."³⁵⁶ In other words, the institutionalization must occur at all levels: the public, government agencies, and even financial institutions.

CONCLUSION

It is too soon to know if recent progress in extending consumer protection, such as the Military Lending Law, the Credit Card Act, and the proposed Consumer Financial Protection Agency Act will

350. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). The bill also bans predispute arbitration of employment and franchise disputes or disputes arising under statutes to protect civil rights.

351. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, *supra* note 87, at 7.

352. *Id.* at 56.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

result in significant and long-term benefits to consumers. For example, Congress may fail to enact the Consumer Financial Protection Agency Act and once the current financial crisis is over, the federal agencies may return to their lackluster efforts to protect consumers. Credit card issuers may develop new techniques for unfairly imposing credit costs that consumers cannot understand and cannot avoid if all companies impose them. Technology may always be well ahead of regulation as the payments industry develops new payment devices and processing systems. Cyber criminals may pose an ever-increasing threat to the entire financial system.³⁵⁷

Despite the inevitable setbacks for consumers, this article contends that consumer protection law is institutionalized and is part of a social movement. Furthermore, the movement's goals have become embedded in society's values. If that is correct, there will continue to be organizations as well as individual lawyers who will use the legal system to push back those who try to abuse the marketplace, prod regulators to enforce the law more aggressively, persuade judges and juries to find predatory businesses liable, and pull legislators toward more effective consumer protection laws.³⁵⁸

357. *E.g.*, Rhonda Cook, *International Hackers Stole \$9.4 Million in One Day*, ATLANTA J.-CONST., Nov. 11, 2009, at B1.

358. The journey of the proposed federal consumer agency through Congress illustrates the major setbacks that can occur. *E.g.*, Stacy Kaper, *House Deal Bolsters Defense of Preemption*, AM. BANKER, Dec. 11, 2009, available at 2009 WLNR 24944239 (reporting that the House bill was amended to permit the OCC to preempt state consumer protection laws from applying to national banks); *Legislative Update*, AM. BANKER, Dec. 10, 2009, available at 2009 WLNR 24841590 (reporting that several industries had been exempted from coverage under the House bill, including "auto dealers, manufactured home brokers, realty agents, lawyers, accountants, mutual funds, and credit, title and mortgage insurance agents").

