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Basic Choices in the Law of Auto Finance: Contract Versus Regulation

*Alvin C. Harrell**

I. INTRODUCTION

It is widely thought that American society is polarized as to fundamental issues regarding the role of government in regulating private transactions.¹ Such a polarization has historical roots,² and it seems to be widening rather than contracting. It has also been noted that this is occurring at a time of unprecedented long-term national prosperity,³ with serious economic recessions seemingly a distant memory. This suggests an obvious question: what will happen to this political divide, and its effect on American society, in the context of the inevitable serious economic crisis? Your author does not know the answer to that question, but the question itself suggests a need for society to maximize its efforts to address, illuminate, and, as possible, rationally reconcile its conflicting views in a timely manner.

At the center of this polarization is the law, and more precisely for our purposes, commercial and consumer law. A primary role of any legal system is to provide a mechanism for the peaceful resolution of private controversies.⁴ This function,

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¹ See, e.g., Tim Rutten, *Fact or Opinion? Yes, It Really Does Matter*, L.A. TIMES (Orange County ed.), Dec. 27, 2003, at E1 (noting that this divide extends to journalism and positing that this may threaten the vital center that draws commercial funding to support our news media infrastructure).

² *Id.* See also JAMES GRANT, *MONEY OF THE MIND: BORROWING AND LENDING IN AMERICA FROM THE CIVIL WAR TO MICHAEL MILKEN* (First Noontday Press 1994) (1992) (analyzing the historical growth of borrowing and lending).

³ See Rutten, *supra* note 1, at E1.

⁴ LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 32 (Harry W. Jones ed., 1977). It is surely ironic that our modern legal system, with its emphasis on such things as due process, fundamental fairness, and consumer protection, arose from a feudal system in England designed primarily to maintain the effects of the Norman conquest while balancing the needs of the king against the baronial courts. The Magna Carta of 1215 is merely the most famous manifestation of this reconciliation; notably this process, designed to provide procedures and some substantive rules for resolving jurisdictional disputes between the barons and the king, led ultimately to the

however, requires some consensus as to how such controversies should be resolved. The consensus must extend to substantive as well as procedural law, and must be articulated by legislatures, courts, and lawyers in the form of widely understood and universally applicable principles and rules.⁵ This is the nature of commercial and consumer law. The consensus must also be broad and it must serve as a legal middle ground that represents a workable means to facilitate common transactions. But how can that be possible in a polarized profession and society? Whatever middle ground that exists seems inherently at risk when legal debates focus on the fringes of a polarized profession.⁶ Thus, a central question for our time is whether the traditional middle ground, as it has existed in western society for hundreds of years, can be preserved as the basis for a broad legal consensus in the twenty-first century. A determinant of this outcome is the basic choice between the common law system, particularly contract common law, and regulation as the primary legal basis for effecting private transactions.⁷

The choice between contract and regulation implicates a number of other legal and policy issues, considerations, and choices. Part II of this Article highlights some of these issues. Part III notes the impact on current issues in vehicle finance and

development of the common law system. See WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 295 (Lawbook Exchange 2000) (1914).

⁵ This is, of course, a narrow concept of law, as a system of rules to govern human relations. There are other broader and more philosophical directions that one can take, but these would change the focus of this article into an inquiry concerning the nature of jurisprudence. Roscoe Pound described law in the first sense as “the legal order [as that term] is used to mean the regime of ordering human activities and adjusting human relations through the systematic application of the force of a politically organized society.” 1 ROSCOE POUND, *JURISPRUDENCE* 13 (Lawbook Exchange 2000) (1959). Your author will accept this as good enough for present purposes, and as consistent with the concept of “consumer law” as generally understood today. See *id.* at 12-14; FREDERICK H. MILLER ET AL., *CONSUMER LAW: CASES, PROBLEMS AND MATERIALS* 4-5 (1998). See also Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1985); Patrick J. Kelley, *A Critical Analysis of Holmes’s Theory of Contract*, 75 *NOTRE DAME L. REV.* 1681 (2000); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 *U. PITT. L. REV.* 1 (1969).

⁶ See Rutten, *supra* note 1, at E1. A focus on fringe issues will inevitably emphasize broad, philosophical differences that realistically cannot be bridged, thereby emphasizing the divisions between the participants. In contrast, a debate that focuses on narrow, more practical questions will tend to reduce the scope of the controversy to matters where there is a greater opportunity for consensus. This is not to suggest that any kind of debate should be limited or discouraged, but only to note that if consensus as to a middle ground is desired, success is more likely in the context of narrow practical issues as opposed to broader philosophical ones. The common law of contracts, as discussed in this article, is a particularly effective mechanism for achieving precisely that success. See also Alvin C. Harrell, *Commentary: Common Law or Regulation – Which is Better?*, 58 *CONSUMER FIN. L.Q. REP.* (forthcoming 2004).

⁷ Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 *CARDOZO L. REV.* 1529, 1547-48 (2002) (book review).

the ways that alternative policy choices relate to those issues. Part IV is a conclusion designed to summarize the basic points derived from this discussion.

It can be conceded from the outset that your author believes that freedom of contract is an important part of civil society. As such, it should only be constrained with caution. Regulation of private transactions, even in the name of consumer protection, is inherently a constraint on that freedom.⁸ That is not to say that regulation is always inappropriate; however, it is to say that regulation is not cost-free. Like all policy decisions, the decision to let public institutions regulate rather than defer to the wishes of the parties to the transaction logically requires a realistic cost-benefit analysis in terms of both social and individual interests. This Article considers some of the factors that may be appropriate for consideration in such analysis.

II. POLICY CHOICES IN A POLARIZED SOCIETY

There are some clear analytical benefits in debating these issues. The current emphasis on the polarization of American political thought may help to present society with a set of more clearly articulated policy alternatives regarding the basic elements, practices, transactions, and remedies of commercial and consumer law. Articulation of these choices may help to resolve or at least narrow policy differences. The following discussion will consider some of these basic policy choices.

A. Contract Versus Regulation

The choice between freedom of contract and regulation is one of the most basic of all policy choices and, to a significant extent, will influence the other choices noted below (and vice versa). The simple fact is that there are only two basic ways of determining the terms of private consumer transactions: 1) persons decide for themselves, or 2) someone else decides for them. The choice is party autonomy effectuated via contract or its opposite. The former is decision by private agreement, *i.e.*, freedom of contract. The latter is the absence of or restrictions on choice, *i.e.*, regulation of the terms or availability of the transaction by an external source.⁹

⁸ Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763-64 (1983).

⁹ See JAMES D. GWARTNEY & RICHARD STROUP, *ECONOMICS: PRIVATE AND PUBLIC CHOICE* 32-33 (3d ed. 1983). Of course, consumer law is full of such restrictions. That is the nature of consumer protection law in the United States today. But that does not change the nature of the choice between party autonomy and regulation, or the cost of the latter in terms of the former. See *generally* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF*

Regulation has an inevitable paternalistic effect since consumers are presumably protected from making bad decisions. Freedom of contract, on the other hand, includes the option to make bad choices. It is unlikely that we could reliably eliminate bad choices without also limiting good ones. Nonetheless, it is apparently human nature for us to believe that we can make better choices for others than they can make for themselves; indeed, education apparently tends to reinforce this belief and higher education even more so. Thus, we may tend to assume that if we are well educated we can make better decisions than those who are not, even as to matters personal to other persons. Who among us would not like to assume the role of benevolent dictator? So, paternalistic regulation is often an easy sale politically. Its purported benefit of protection is easily promised, but its costs are seldom fully understood.¹⁰

The common law, although biased towards freedom of contract, has always recognized a role for paternalistic oversight by public officials and the judiciary in order to protect against fraud, deception, duress, unconscionability, and incapacity.¹¹ Such protections, however, have generally been implemented through the courts on the basis of specific evidence and in limited circumstances rather than being imposed across-the-board by regulation on the basis of broad-scale presumptions that effectively bar whole classes of common transactions.¹²

The hesitancy of the common law to broadly prohibit or prescribe in detail the terms of common transactions apparently stems partly from a recognition that regulation is inherently alien to freedom of contract and therefore carries a very high and commonly misunderstood social price.¹³ A basic truth that cannot be reasoned away is that regulation, no matter how minimally paternalistic it may be, takes away some freedom of

LAW (4th ed. 1992) [hereinafter POSNER, *ECONOMIC ANALYSIS*] (examining the common law and regulatory approaches from an economic perspective).

¹⁰ The costs sometimes include the social and economic costs of litigation run amok. See, e.g., Stuart Taylor Jr. & Evan Thomas, *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 43 (the headline on the cover of this issue reads "Lawsuit Hell: How Fear of Litigation is Paralyzing Our Professions"); Alvin C. Harrell, *Commentary: It's a Mad, Mad, Mad, Mad World*, 57 CONSUMER FIN. L.Q. REP. 86, 95 (2003) [hereinafter Harrell, *Mad World*]; Jim Copland, *Tort Law Represents a Growth Industry*, THE DAILY OKLAHOMAN, Mar. 2, 2004, at 12A. These references are not intended as the definitive answer to the issues raised, only to suggest that the issue has indeed been raised.

¹¹ See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.1 (2d ed. 1998); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 9-1 to 10-5 (3d ed. 1987).

¹² FARNSWORTH, *supra* note 11, § 5.1.

¹³ See CALAMARI & PERILLO, *supra* note 11, § 1-3 ("[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.") (quoting HENRY MAINE, ANCIENT LAW 165 (3d Am. ed. 1873)).

contract.¹⁴ It may be fully appropriate as to certain transactions such as those involving duress, fraud, or incapacity, but those traditional confines should not be extended without caution and careful consideration.

Of course, if one does not believe that contracts can be products of equitable bargaining, it will be easy to lose faith in contract law and the related economic freedoms it protects. Much academic discourse has recently been dedicated to the notion that private consumer contracts, specifically form contracts, are a myth because they are often contracts of adhesion rather than a result of detailed negotiations.¹⁵ But this is something of a “straw man,” setting up unrealistic perfection as the goal and then rejecting anything less than perfect as a failure. No modern society could function without form contracts, and most consumers do not have the legal expertise needed to draft a contract that would comply with today’s consumer protection laws. Form contracts, however, do not prevent consumers from regularly negotiating the important terms of big-ticket items (such as houses, cars, home improvements, employment contracts, and many services), and smaller-ticket items are sold in mass markets, which are not susceptible to individual haggling. Both categories of transactions are commonly subject to advertised sale pricing, comparison-shopping, coupons, Internet deals, special offers, and other competitive practices that create marketing conditions somewhat equivalent to pricing negotiations.

Of course, not everyone gets the same deal as the shrewdest consumer. Each of us has negotiating strengths and weaknesses, greater interest and sophistication in some areas than in others (and hopefully a learning curve in each), as well as inherent variations in our personalities and tastes. Our personalities are

¹⁴ See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1211-12 (2003); Alvin C. Harrell, *Introduction: Predatory Lending, Part Three*, 56 CONSUMER FIN. L.Q. REP. 2, 57 (2002) (discussing the cost to consumers of predatory lending laws). Of course, the general statement in the text applies primarily to substantive restrictions; disclosure requirements do not directly interfere with party autonomy. However, even disclosure requirements are not cost-free, e.g., in terms of compliance costs and litigation risks. Like any cost of doing business, these costs ultimately will be passed to consumers in some form (e.g., higher prices and/or reduced competition and/or reduced transaction availability), thereby pricing some consumers out of the market and interfering with freedom of contract in various ways. See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 460 (2001).

¹⁵ See Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903, 1906-07 (2000). See generally Symposium, *Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 1 (1997); Symposium, *Reconsidering Grant Gilmore’s The Death of Contract*, 90 NW. U. L. REV. 1 (1995).

too diverse for it to be otherwise. Thus, in a given transaction, some will be perceived as getting a better deal, although we will probably find much disagreement as to what constitutes the “best” deal in a given scenario. All of this, however, is evidence of the functioning of free markets, not the contrary.¹⁶

B. The Future of Contract Law

By historical standards, contract law is relatively new. Modern contract law has its roots in the common law of sixteenth century England.¹⁷ Controls on private agreements, including essential terms such as price, have been common historically and have long been vigorously defended.¹⁸ Freedom of contract for consumers is therefore a relatively rare and modern phenomenon. Political dynamics may explain why contract law is so recent in human history,¹⁹ and perhaps more consideration is needed on this subject. Today, those of us who enjoy freedom of contract are likely to take it for granted, and we are also likely to take for granted the benefits of our economic freedom that come with the ability to contract. But then again, perhaps it is natural for us to want to have our cake and eat it too, to want freedom of contract without the risks that it entails.

Obviously, freedom of contract does not come without risks. Freedom of contract inherently includes the freedom to make bad deals and other mistakes. We all do that everyday and we will generally defend our right to try again tomorrow. It is appropriate for the law to make reasonable provisions to protect those who are unable to conduct their own transactions and to protect everyone from clearly abusive practices; however, drawing these lines is inherently difficult.²⁰ Consistent with the common law, it is best to leave that task to the courts or their equivalent (*e.g.*, arbitration in appropriate cases). It should always be remembered that laws and regulations are a blunt and dangerous instrument, governed themselves by the law of

¹⁶ Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 254 (1998). See also GWARTNEY & STROUP, *supra* note 9, at 38-39 (explaining how diverse consumer choices translate into the economic “law” of demand).

¹⁷ S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 279 (1969). See also CALAMARI & PERILLO, *supra* note 11, § 1-3.

¹⁸ See James L. Brown, *An Argument Evaluating Price Controls on Bank Credit Cards in Light of Certain Reemerging Common Law Doctrines*, 9 GA. ST. U. L. REV. 797, 798 (1993).

¹⁹ *Id.* (explaining political dynamics as a popularly-based sentiment favoring price controls). Your author would add a suggestion that the intricacies of contract law, and their relation to economic well-being, are often understood at a level of articulation by relatively few, including few in policy-making positions. Thus, the implications are easily misunderstood.

²⁰ Camerer et al., *supra* note 14, at 1211-12.

unintended consequences.²¹ Freedom from mistake may sound appealing but is unlikely to be achieved, because that protection can only come at some cost to party autonomy – a price that many of us probably would prefer not to pay.²²

Perhaps the most vigorous modern argument against contract law in consumer transactions is that it favors giant, sophisticated corporations instead of unsophisticated consumers:²³ Influenced by advertising schemes that rely on popular emotions, consumers are often lured into merchants' establishments and reportedly induced into unwittingly signing adhesion contracts with onerous terms that cannot be viewed as representing consensual transactions.²⁴ This may seem an appealing characterization (who among us does not resent large corporations?), but more consideration is needed before reaching a conclusion based on this scenario.

Like contract law itself, this argument is not new, and, indeed, probably had even greater force in the sixteenth century than it does today. When contract law was created, consumers were far less sophisticated, both in absolute terms and relative to merchants, than they are today. With near-universal education and literacy (at least in the U.S.), widespread dissemination of product information, and vigorous world-wide competitive forces at work, there have never been more opportunities for consumers to inform themselves and make rational choices than there are today.²⁵ Moreover, the Internet and global competition have enhanced consumers' competitive bargaining position relative to merchants across a spectrum of transactions. The playing field has never been so level. That we as consumers do not make even greater efforts to inform ourselves and seek alternatives is largely a function of choice and how we wish to spend our time,

²¹ See David B. Spence & Lekha Gopalakrishnan, *Bargaining Theory and Regulatory Reform: The Political Logic of Inefficient Regulation*, 53 VAND. L. REV. 599, 608 (2000).

²² See, e.g., Ira Carnahan, *Predatory Lawmaking*, FORBES, Jan. 12, 2004, at 61 (noting the cost of predatory lending initiatives, in terms of credit availability).

²³ This appears self-evident to so many that it is often taken as a given in much of the academic literature. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 104 (Ronald K. L. Collins ed., 2d ed. 1995) ("It seems apparent to the twentieth century mind . . . that a system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful . . ."). Of course, Gilmore's brief statement does not purport to adequately describe modern contract law, and, as noted below, in your author's experience that statement is often not accurate as a general proposition. See generally GWARTNEY & STROUP, *supra* note 9, at 461-65.

²⁴ See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 483 (2002).

²⁵ The rise of the Internet should make this self-evident, but the expansion of federal and state disclosure requirements provides a further example. See Camerer et al., *supra* note 14, at 1232-34.

rather than a lack of opportunity.

Advertising is more sophisticated than ever and seemingly less subtle, but the charismatic salesperson, fast-buck artist, and con man have always been with us. The gap between merchant and consumer, in terms of information and bargaining power, has apparently narrowed rather than widened. The best consumer protection of all has always been the consumer's self-interest, and unsophisticated consumers often get the better of larger and more experienced negotiating partners.²⁶ There can be sharp practices and deception on both sides of a transaction.

Contrary to popular belief, contract law does not necessarily reward large institutions or sophisticated and well-educated parties. Well-educated and other successful professionals are notorious for making foolish investment and consumer decisions. This is evidenced by the list of the rich and famous that will appear in any high-profile investment failure or faddish consumer trend. There is, in fact, often a divide between education and business success. Contract law does reward caution and prudence, and over time most of us learn that. Thus, there is a natural consumer learning curve in which young and unwary consumers are more likely to make mistakes, or at least unwise decisions, in ordering their lives. Hopefully, they learn from those mistakes and ultimately govern themselves more prudently. There also seems to be a generational progress in which children learn from their parents and grandparents.²⁷

²⁶ See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract*, 24 J. LEGAL STUD. 283, 296 (1995). By now it should be apparent to almost everyone that stature, resources, education, and a high income do not equate to wisdom or shrewdness. Large enterprises have a long and well-documented tendency toward error, atrophy, stagnation, and even disaster. Innovation and product sophistication more frequently are the hallmarks of individuals (including consumers) and small enterprises. See Gary Hamel & Lloyd Switzer, *The Old Guard vs. the Vanguard*, WALL ST. J., Feb. 23, 2004, at A17; Gary Hamel, *When Dinosaurs Mate*, WALL ST. J., Jan. 22, 2004, at A12. See generally GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (Quadrangle Books 1967) (1963) (documenting the tendency of large enterprises to lose touch with their markets and suffer a declining market share). The relative inflexibility of large enterprises derives in part from a need to standardize products and services to achieve the economics of scale necessary to justify the size of the enterprise. This may result in a perception that the large enterprise has unfair bargaining power, due to the firm's reduced ability to accommodate nonconformity, and a resulting reliance on standard contract terms. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 9, § 4.7. But, in fact, this lack of flexibility is an inherent and severe competitive disadvantage, which opens the door to more nimble competitors more willing to accommodate emerging trends, the demand for innovative goods and services, and expanding niche markets.

²⁷ See Zamir, *supra* note 16, at 244. Like most everything else, this will vary from person to person, and family to family. See generally ROBERT T. KIYOSAKI, *RICH DAD, POOR DAD: WHAT THE RICH TEACH THEIR KIDS ABOUT MONEY – THAT THE POOR AND MIDDLE CLASS DO NOT!* (2000); THOMAS J. STANLEY & WILLIAM D. DANKO, *THE*

Those who are incompetent may need special protection, and the law provides such protection in a variety of ways.²⁸ But for the rest of us, the freedom to develop and apply our own personal prudential standards, and to ascertain and implement the levels and types of risks that we are willing to accept in a given transaction, is an important part of life. It makes it all worthwhile when we see prudent decisions rewarded. For each of us, these risks and choices will be different. Contract law and freedom of contract make it all possible and nothing in the twenty-first century changes this basic analysis.

The debate over contract law will never end, nor should it. It reminds us of the importance of contract law, the need to define reasonable legal boundaries, and the precarious nature of individual freedom. The role of contract law is important to us all, at both the individual and societal level. Fortunately, American contract law in general remains more viable than ever, and as a middle ground, it seems to be holding.²⁹

Consumer contracts and contract law are alive and well in the twenty-first century. We may not always like the results, or even the process, but that is the nature of freedom. How many of us would knowingly give up that freedom in return for paternalistic control by someone else? As always, that is the essence of the choice between contract and regulation.

C. State versus Federal Law

A related choice is that between state and federal law. The relationship between this choice and that discussed above does not seem to be widely recognized and understood, despite the obvious impact of the relationship on the legal profession.³⁰

MILLIONAIRE NEXT DOOR (1996). It is unfortunate the public schools do not do a better job of supplementing this transfer of generational wisdom, so as to help level the playing field in terms of personal financial literacy. Until an institutional effort is made in this regard, the results likely will continue to be uneven.

On the other hand, America remains a land of opportunity that rewards prudent behavior. Recent information suggests, for example, that immigrants close the economic gap with native-born Americans and join the American middle class within about a ten-year period. *California Here We Come*, WALL ST. J., Feb. 23, 2004, at A16 (citing a University of Southern California study). Some groups do better than others, but overall the effect is widespread, affecting diverse ethnic groups. *Id.* As reported in the media, nearly 90% of U.S. immigrants in the U.S. for twenty years or more make it into the middle class. *Id.* Considering the tremendous challenges faced by any immigrant, this is an extraordinary record of achievement, suggesting a very steep "learning curve" in terms of personal financial expertise.

²⁸ See, e.g., OKLA. STAT. tit. 43A, § 10-104 (2003).

²⁹ Movsesian, *supra* note 7, at 1530. See also Alvin C. Harrell, *Case Note: Judge Understands Indirect Auto Finance, Part Two*, 57 CONSUMER FIN. L.Q. REP. 231, 233 (2003) [hereinafter Harrell, *Judge Understands*].

³⁰ Movsesian, *supra* note 7, at 1542-43. See also Amy Bizar et al., *Introduction to the 2000 Annual Survey of Consumer Financial Services Law*, 55 BUS. LAW. 1255, 1255-56

These are further issues that deserve attention as a policy and jurisprudential matter.

State contract law, both common and statutory, is primarily derived from the common law.³¹ Federal law is largely regulatory, and although there are state regulations, most regulatory law is federal law.³² Most state regulations are enforced in court in accordance with the common law system; federal regulations are more often enforced in administrative actions.³³ There are many exceptions to all of this, such as the Predatory Lending and Truth in Lending examples discussed below, but these merely prove the general rule.

Consequently, the choice to address an issue or problem at the federal level is often a choice of administrative regulation over common law. The exceptions are not unimportant, including, for example, the current wave of state predatory lending laws, which are somewhat regulatory in nature in the sense that they effectively bar whole classes of parties from voluntary transactions and mandate in detail certain contract terms for others.³⁴ These state laws are also typically regulatory in the sense of agency oversight and enforcement, although the role of the courts remains an important factor consistent with the common law tradition.³⁵

Judicial remedies also are important in the federal law arena, as evidenced by the Truth in Lending Act (“TILA”)³⁶ and the Fair Debt Collection Practices Act (“FDCPA”)³⁷ litigation, which surely must rank among the most extensive in history.³⁸ In the case of TILA, Federal Reserve Board (“FRB”) regulation has played a significant role, providing a level of regulatory detail that is unheard of in the context of a common law

(2000); Lynne B. Barr et al., *Introduction to the 2004 Annual Survey of Consumer Financial Services Law: Where Do We Go From Here?*, 59 BUS. LAW. (forthcoming 2004).

³¹ See Fernanda Nicola, Book Review, 44 HARV. INT’L L.J. 597, 599 (2003). See also MILLER ET AL., *supra* note 5, at 7.

³² See LEGAL INSTITUTIONS TODAY, *supra* note 4, at 321.

³³ *Id.* at 328. See also MILLER ET AL., *supra* note 5, at 54-58 (describing Federal Trade Commission enforcement procedures, which are typical of federal agency processes).

³⁴ See generally Donald C. Lampe, *Predatory Lending Initiatives, Legislation and Litigation: Federal Regulation, State Law and Preemption*, 56 CONSUMER FIN. L.Q. REP. 78 (2002). Part of what makes these laws so striking is their departure from traditional norms. Still, they are generally subject to some measure of judicial enforcement, in the common law tradition.

³⁵ *Id.* See generally *Predatory Lending, Part Five*, 57 CONSUMER FIN. L.Q. REP. 131 (2003) (part of a series describing state predatory lending statutes).

³⁶ 15 U.S.C. §§ 1601-1667f (2003).

³⁷ 15 U.S.C. §§ 1692-1692o (2003).

³⁸ See RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶¶ 1.01-1.05 (2000 & Supp. 2002); Laurie A. Lucas & Alvin C. Harrell, *2003 Update on the Federal Fair Debt Collection Practices Act*, 58 BUS. LAW. 1301, 1301 (2003).

structure.³⁹ This differentiates TILA law from the typical state law in a way that illustrates state-federal law distinctions. Interestingly, much of the TILA litigation occurs in state courts where TILA disclosure errors are asserted as a basis for state law remedies.⁴⁰ Although the FDCPA has no implementing regulation equivalent to the FRB's Regulation Z for TILA, the FDCPA itself is very detailed and regulatory in nature, again illustrating the noted distinction between state and federal law.

Thus, when deciding on an approach to resolve social, economic, and legal disputes, the policy choice between state and federal law solutions is to some extent a choice between common law and administrative law mechanisms. It is not surprising that the common law sometimes seems to be losing this competition. Historically, the common law is something of an accidental exception to the natural preference of the governing elite for an administrative structure.⁴¹ The English common law courts were essentially a centralized equivalent of the medieval feudal system, designed to resolve private disputes at the periphery of the King's interest and authority. The judges of the King's Bench quietly grafted the Law Merchant onto the common law in order to accommodate emerging practices and expand the jurisdiction of that court.⁴² Much like today's uniform law

³⁹ See ROHNER & MILLER, *supra* note 38, ¶¶ 1.01-1.05.

⁴⁰ See Eugene J. Kelley, Jr. & John L. Ropiequet, *Assignee Liability Under State Law After Jackson v. South Holland Dodge*, 56 CONSUMER FIN. L.Q. REP. 16, 18 (2002).

⁴¹ As noted briefly, *supra* note 4, the common law itself developed following efforts by the English Crown to centralize justice (and therefore administrative control) following the Norman Conquest. MILSOM, *supra* note 17, at 1. Yet it was the accidental aspects of this process, including the competition for business among the various royal courts, that led to replacement of the old system of feudal land tenures by a daring alternative based on private autonomy. *Id.* at 26-50. The result was that the tendency toward centralization of authority led in this instance to a decentralization of economic decision-making, as feudal tenancies were replaced by the common law of contracts. *See id.* at 271. As with the common law today, the process seems quite haphazard, and perhaps too focused on legal fictions. As Milsom said, "the system was transformed without anything much being changed." *Id.* at 52. But while justice was being centralized, the central courts were adapting to the customs and patterns of local practice. "In England, then, proprietary justice and feudal government were in general harnessed by the royal power rather than opposed to it . . ." *Id.* at 6. Together with competition between the courts, this created an unusual environment that encouraged the development of new theories of law to accommodate the needs of local practice in the context of more uniform (or "common") rules. The common law was born, at a level of transaction (involving primarily private torts, contracts, and property disputes) largely beneath the level of interest of the king and his royal administrative authorities, aside from the common law courts which had a financial incentive to accommodate these common needs and emerging practices. *Id.* at 58-59. For a good discussion of the role of the Law Merchant (the custom of merchants) as an influence in the development of the common law, see James Steven Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law*. Thus, the common law system developed very differently from the more common administrative structures found elsewhere during the same period.

⁴² See, e.g., MILSOM, *supra* note 17, at 271-86. See also JOHN EDWARD MURRAY,

process, these common law courts sought to secure their place by accommodating accepted customs and practices rather than mandating political change. Thus, the common law and its derivatives, like the Uniform Commercial Code (“UCC”), have always been user-friendly.⁴³ Custom and usage, and not the imposition of new norms by the political elite, are their driving forces.

This principle is alien to the notion of administrative law, which is inherently a top-down approach oriented toward imposition or consolidation of regulatory control and enforcement rather than accommodation of custom and usage.⁴⁴ It is not surprising that the governing elite (including the administrative agencies themselves) prefer that approach or that an administrative legal structure has prevailed in most countries throughout most of history.⁴⁵ Today, for example, the administrative model is predominant nearly everywhere in Western Europe, Russia, and at the European Union.⁴⁶ In the United States it is present at the federal agency level. The continuing vitality of the American common law model at the state level, however, is the most striking characteristic of American law: it distinguishes the U.S. from other, predominantly administrative legal systems.

The contract-based state common law model is amenable to the development of new industries, which can often be created and take root before administrative structures are established to regulate them.⁴⁷ The resulting legal flexibility has been essential

JR., MURRAY ON CONTRACTS § 3 (Michie Co. 3d ed. 1990) (1947); Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 446-50 (1979).

⁴³ See MURRAY, *supra* note 42, § 10; Lynne B. Barr et al., *Introduction to the 2002 Annual Survey of Consumer Financial Services Law*, 57 BUS. LAW. 1157, 1157 (2002).

⁴⁴ For example, compare the mandate to liberally construe the Uniform Commercial Code with the typical regulatory goal of strict compliance. U.C.C. § 1-102 (2002).

⁴⁵ See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 1-3, 133 (2d ed. 1985); HANS JULIUS WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 54 (1951).

⁴⁶ Czech Republic President Vaclav Klaus recently opined as follows: “The enemies of free societies today are those who want to burden us down again with layer upon layer of regulations. We had that in communist times. But now if you look at all the new rules and regulations of (European Union) membership, layered bureaucracy is staging a comeback.” *THE OKLAHOMAN*, Jan. 5, 2004, at 10A.

⁴⁷ It should be self-evident that heavily-regulated industries tend to be concentrated among a relatively small number of competitors, and to be somewhat less innovative than unregulated industries. This tendency appears to be inherent in the concept of comprehensive regulation. See GWARTNEY & STROUP, *supra* note 9, at 480-83; GEORGE J. STIGLER, *Can Regulatory Agencies Protect the Consumer?*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 178, 181 (1975); Paul H. Weaver, *Regulation, Social Policy, and Class Conflict*, 50 PUB. INT. 45, 47-50 (1978). In contrast, rapidly growing, innovating, and evolving industries often tend to be those with a relatively low level of regulation.

to economic growth and innovation since the beginning of the industrial revolution, and it is replicated to some extent today everywhere that strong economic growth exists. Industries that are heavily regulated through a central administrative structure, e.g., a federal agency, as opposed to being governed by more decentralized common law principles and institutions, tend to be dominated by large, stable entities with close relationships to the regulatory agency. This distinction is evident to some extent even within various industries. It is no accident, for example, that national banks tend to be fewer and larger than state-chartered banks.⁴⁸ Restaurants are governed largely by state and local law and are even more diverse. This seems to be an inherent consequence of the choice between state and federal law.

There are similar implications for the legal profession. A decentralized state law system will likely foster and support a large number of small, local law firms with relatively low levels of legal fees. A federal law issue is more likely to require the services of one of a small number of national law firms with a close relationship to the federal agency whose interpretations of its own regulations will be dispositive of many matters. The legal fees are likely to be much higher and a centralization of clients, legal authority, and rules will result. A legal and business environment that is more suitable to the operation of large nationwide commercial enterprises is created; smaller, local enterprises are unable to successfully comply with the usual stream of regulatory requirements. A trend that encourages further centralization of commerce, law, and legal practice is reinforced.⁴⁹

Thus, a choice between state and federal law solutions to some extent is also a choice between the common law and administrative law, between contract law and regulation, between small and large enterprises, and between local versus national law firms. While this observation is not without numerous exceptions, and is certainly not dispositive as to which approach is the better one with regard to a particular issue, these

⁴⁸ State-chartered banks comprise well over half of the banks in the United States, including two-thirds of the new charters in recent years, but have just over 40% of total U.S. banking assets. Joseph A. Smith, Jr., *Federal and State Regulation of Financial Services: Competition and the Search for Comity*, 57 CONSUMER FIN. L.Q. REP. 131, 131 (2003).

⁴⁹ As noted, this is often favored by larger enterprises. See, e.g., Joseph B. Treaster, *Insurers Want One Regulator Instead of 50*, N.Y. TIMES, Dec. 26, 2003, at C1. "If you freeze the system [through regulation] you will lose its thrust toward progress. But in many ways, GM's life will be easier. So don't look to big business for unequivocal defenses of capitalism. We guess that's up to the folks at XYZ Bumperlight Lens." Robert L. Bartley, *A Bartley Sampler*, WALL ST. J., Dec. 11, 2003, at A18.

factors deserve attention in the matrix of policy elements being considered.⁵⁰

D. Private Versus Public Remedies: Litigation or Administrative Enforcement?

The choice between private and public remedies is one that many policy advocates will reject as unnecessary – the simple answer is to permit both. Perhaps in most consumer law contexts that is indeed the case. Many, though not all, federal consumer laws specifically provide for both private and public remedies, and most state consumer protection laws also have a mixture of such remedies. Still, there are differences and choices as to these issues that should be noted.

For various reasons, state law remedies, including administrative remedies, seem to be enforced primarily through litigation, while federal law remedies are more heavily enforced through administrative action.⁵¹ Again, this is not universal and there are many exceptions, including state administrative enforcement procedures and the TILA and FDCPA litigation as noted earlier. Even so, TILA's greatest impact today is in state court litigation, where TILA disclosure errors are often asserted as a basis for state law claims.⁵² At the federal level, public enforcement actions in administrative law courts are more prevalent. Private FDCPA cases are necessarily brought in federal court, so this is an example where the absence of an agency authorized to implement and enforce regulations has created a more common law-like approach, with an emphasis on private statutory remedies.⁵³ But many other examples illustrate this basic point: Federal Trade Commission ("FTC") enforcement of rules governing fraud and deception in advertising;⁵⁴ federal banking agency enforcement of regulations such as the Community Reinvestment Act ("CRA")⁵⁵ and Home

⁵⁰ As noted by Professor Lawrence Friedman: "[T]he law of contract concerns and provides liberal support for the residue of economic behavior left unregulated (the free market). . . ." GILMORE, *THE DEATH OF CONTRACT*, *supra* note 23, at 7 (quoting LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-24 (1965)).

⁵¹ For example, many state consumer law administrative remedies are enforced by the state attorney general, who does not maintain a separate judicial system and must pursue litigation in state court to enforce public administrative remedies. In contrast, many federal administrative agencies operate their own systems of administrative law courts.

⁵² A classic example is the assignee litigation. *See* Kelley & Ropiequet, *supra* note 40, at 18.

⁵³ The detailed and yet ambiguous nature of the FDCPA (together with statutory damages for technical errors and prevailing party attorney fees for even harmless errors) has created a fertile field for such litigation.

⁵⁴ *See* MILLER ET AL., *supra* note 5, at 53-64.

⁵⁵ Community Reinvestment Act and Interstate Deposit Production Regulations,

Mortgage Disclosure Act (“HMDA”);⁵⁶ the Department of Justice Fair Lending settlements of the 1990s;⁵⁷ recent FTC privacy law enforcement actions;⁵⁸ and money-laundering enforcement actions.⁵⁹ In each of these areas of federal law, public enforcement has exceeded the volume of private litigation. On the other hand, in traditional areas of state law (such as fraud and deception in the negotiation of consumer transactions, breach of contract, revocation of acceptance, unfair and deceptive acts and practices) the level of public enforcement, while significant, is dwarfed by the volume of private litigation.⁶⁰

This phenomenon is partly explained by plaintiffs lawyers’ preference for state over federal courts.⁶¹ It is also explained by the fact that some federal rules (such as the FTC Act Section 5⁶² and the CRA), unlike most state laws, do not provide a private right of action.⁶³ There are examples where an ambiguous or difficult federal rule has created a compliance nightmare that generates inevitable federal litigation. Such is the case with the FDCPA and the Real Estate Settlement Procedures Act of 1974 (“RESPA”).⁶⁴ But even TILA, the granddaddy of federal consumer laws, probably generates more state than federal litigation.⁶⁵ So the basic point remains valid: state law remedies are enforced primarily through private litigation, while federal

12 C.F.R. §§ 25.11-25.65 (2003). See, e.g., Joseph J. Norton, “Fair Lending” Requirements: The Intervention of a Governmental Social Agenda into Bank Supervision and Regulation, 49 CONSUMER FIN. L.Q. REP. 17 (1995) (discussing the CRA); Paul H. Schieber, Decatur Federal and Its Five (So Far) Progeny: U.S. Department of Justice Fair Lending Settlements, 49 CONSUMER FIN. L.Q. REP. 68 (1995) (discussing the CRA and fair lending).

⁵⁶ 12 U.S.C. §§ 2801-2809 (2001). See, e.g., Jacqueline S. Akins, *Impact of the Regulation C Revisions*, 56 CONSUMER FIN. L.Q. REP. 289 (2002).

⁵⁷ See Norton, *supra* note 55, at 23; Schieber, *supra* note 55, at 68.

⁵⁸ See Anthony Rollo, *The New New Litigation Thing: Consumer Privacy, in CONSUMER FINANCIAL PRIVACY: COMPLYING WITH THE GRAMM-LEACH-BLILEY ACT AND THE FINAL RULES* (2000), reprinted in 1 CONSUMER FIN. SERVICES LITIG. 975, 988-89 (2001). See generally *Symposium on Privacy*, 55 CONSUMER FIN. L.Q. REP. 4 (2001).

⁵⁹ See, e.g., Gary L. Betow & Christopher B. Woods, *Overview of the USA PATRIOT Act*, 56 CONSUMER FIN. L.Q. REP. 332, 334 (2002); Jeffrey P. Taft & Christina A. LaVera, *The Changing Landscape of Federal Money Laundering Laws: An Overview of the USA PATRIOT Act and Related Developments*, 57 CONSUMER FIN. L.Q. REP. 109 (2003).

⁶⁰ See, e.g., Harrell, *Judge Understands*, *supra* note 29, at 231; Robert M. Jaworski, *Subprime Lending Under Siege in the Courts—A Summary of Illustrative Cases*, 55 CONSUMER FIN. L.Q. REP. 70 (2001); David E. Worsley, *Fair Credit Reporting Cases Illustrate Risks for Credit Reporting Agencies, Creditors, and Lawyers*, 56 CONSUMER FIN. L.Q. REP. 68, 69 (2002).

⁶¹ See, e.g., Kelley & Ropiequet, *supra* note 40, at 24.

⁶² The Federal Trade Commission Act, 15 U.S.C. § 45 (1991).

⁶³ MILLER ET AL., *supra* note 5, at 45-46.

⁶⁴ 12 U.S.C. §§ 2601-2617 (2001). See also Marsha L. Williams, *Update on RESPA Issues and Developments*, 56 CONSUMER FIN. L.Q. REP. 4, 4 (2002).

⁶⁵ See, e.g., Kelley & Ropiequet, *supra* note 40, at 20-21 (illustrating a preference of private plaintiffs for state court litigation, even as to enforcement of rights created by a federal statute).

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rules are somewhat more prone to public administrative enforcement.

E. Implications

So it seems clear that a policy choice between state and federal law is often a choice between private and public remedies, as well as a choice between contract law and regulation; and a federal law solution is often a choice of administrative law over common law mechanisms. All of this may create a mixed message for partisans of the industry and the plaintiffs' bar, and make some strange political bedfellows. Large enterprises, national law firms, and consumer groups with a preference for centralized administrative authority over contract law may favor federal law solutions at the expense of local attorneys, small companies, and private remedies. Local law firms and legal services lawyers, as well as smaller commercial enterprises less able to bear the burdens of a complex federal regulatory structure, may favor a state common law approach with an emphasis on private remedies in state court (although the latter parties may be less cognizant of the implications of the choices being made).⁶⁶

Since in many cases the ultimate choice between federal regulation and state common law will be made at the federal level, largely at the behest of those with a preference for federal administrative law, it is not surprising that our recent history is a record of expanding the jurisdiction and remedies provided by federal administrative law at the expense of state courts and the common law.⁶⁷ What is surprising is that private state law litigation, at the local level, nevertheless remains a dominant part of the landscape of consumer protection law.⁶⁸ This is surely a testament to the viability of the common law system and should provide a continuing lesson for policy makers and advocates on both sides of the consumer law policy debates.

III. ISSUES IN AUTO FINANCE

Auto sales finance is a very important part of the consumer credit marketplace. There is no question that both new and used auto sales generate numerous consumer complaints.⁶⁹ This

⁶⁶ See, e.g., Bartley, *supra* note 49, at A18.

⁶⁷ See, e.g., Jathon Sapsford, *Critics Cry Foul Over New Rules on Bank Review*, WALL ST. J., Jan. 8, 2004, at C1. See also Lampe, *supra* note 34, at 78, 81; Smith, *supra* note 48, at 131.

⁶⁸ See, e.g., MILLER ET AL., *supra* note 5, at 7.

⁶⁹ See, e.g., PUBLIC CITIZEN, RIP-OFF NATION: AUTO DEALERS' SWINDLING OF AMERICA (2003), at <http://www.citizen.org/autosafety/dealerscam/>.

discussion will note some of the more common issues and consider alternative solutions pursuant to the policy choices noted in Part II above.

A. Spot Delivery

While not a legal term of art, “spot delivery” generally refers to the sale of a vehicle on credit (a “credit sale”) prior to finalizing the credit terms.⁷⁰ An alternative scenario (not a spot delivery) is where the auto dealer contacts a creditor that purchases retail installment sales contracts (a “RISC”) to investigate the likely prospects of a secondary sale of the vehicle buyer’s RISC before the RISC is executed between the vehicle buyer and the auto dealer.⁷¹ In this latter scenario, the dealer may feel comfortable finalizing the credit terms with the vehicle buyer at the time the vehicle is delivered because the dealer is comfortable that the vehicle buyer’s RISC can be sold to a contract purchaser in a secondary transaction.

In contrast, in a “spot delivery” scenario the auto dealer may not feel comfortable in setting the final credit terms with the vehicle buyer due to uncertainty about the possibility of a secondary sale of the RISC.⁷² Thus, a spot delivery involves delivery of the vehicle on the spot, before the credit terms of the RISC have been established. There are obvious risks on both sides of these transactions.

There are also advantages to both parties in a spot delivery. The vehicle buyer gets immediate delivery of the vehicle, which may be important or at least highly desirable to an eager buyer. The auto dealer gets to effectuate a sale that might otherwise be lost if the potential buyer leaves the lot without the vehicle. Thus, spot delivery allows both parties to enter the sales transaction in a timely manner, even in the absence of final credit arrangements. This may be essential for transactions such as weekend sales when some potential contract purchasers are not open for business.

Spot delivery is clearly not illegal. Should it be? It carries the potential for deceptive (and thus illegal) practices on both

⁷⁰ See generally Adam G. Taub, *Yo-Yo Sales: The Predatory Practice of Unscrupulous Car Dealers*, CONSUMER L. NEWSL. (St. Bar of Mich. Consumer L. Sec.), Lansing, Mich., Aug. 2003, at 3, available at <http://www.michbar.org/consumer/>.

⁷¹ See JOHN O. HONNOLD ET AL., CASES, PROBLEMS AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY 112-22 (2d ed. 1992).

⁷² See, e.g., *Baggett v. Crown Auto. Group, Inc.*, No. 01-A-01-9110-CV00401, 1992 WL 108710, at *3 (Tenn. Ct. App. May 22, 1992). See also Eugene J. Kelley, Jr. et al., *APR Splits: Still Legal After All These Years*, 56 CONSUMER FIN. L.Q. REP. 296, 297-99 (2002) [hereinafter Kelley et al., *APR Splits*] (discussing *Baggett*).

sides. For example, the incomplete nature of a spot delivery transaction means that the vehicle buyer may be susceptible to fraudulent representations by the dealer about credit terms when later finalizing the transaction.⁷³ With the vehicle buyer in possession of the vehicle (and possibly having proudly shown it to friends and relatives) and any trade-in or down payment in the possession of the dealer, the vehicle buyer may feel constrained to accept whatever credit terms the dealer later claims to be necessary. Of course, this could work both ways: the vehicle buyer has a right to revoke acceptance of the vehicle or otherwise to reject or rescind the incomplete sales contract if the credit terms prove to be unsatisfactory.⁷⁴ This allows the vehicle buyer to demand cancellation of the sale and return of any down payment or trade-in while holding the vehicle delivered by the dealer as security for any claims. The consumer has considerable negotiating leverage in these circumstances. So, both parties retain some inherent bargaining power in a spot delivery scenario.

Of course, many consumers may be unaware of their remedies.⁷⁵ This is a seemingly unavoidable condition, at least until all consumers enroll in a consumer law seminar. More consumer awareness and education would be beneficial and is always needed. Nevertheless, consumers presumably know they can contact a lawyer or simply refuse to go forward if they are uncomfortable about a pending transaction. These cases are handled constantly and routinely and at reasonable cost by many, mostly small, law firms and legal services offices all around the country.⁷⁶ The common law, UCC, and customary

⁷³ *Baggett*, 1992 WL 108710, at *7. See also Kathleen E. Keest, *Recent Developments in Automobile Lending: Hot Spots*, 52 CONSUMER FIN. L.Q. REP. 287, 292 (1998) [hereinafter Keest, *Recent Developments*].

⁷⁴ There is some dispute over whether spot delivery constitutes a contract with a condition subsequent or a condition precedent. This may depend on the facts and the contract terms, but either way the consumer should have a right to reject the deal. See, e.g., Peter G. Dillon & Alvin C. Harrell, *Revocation of Acceptance Under UCC Section 2-608 as a Remedy in a Consumer Sales Transaction Involving Conflicting Oral Quality Representations and Standardized Quality Warranty Disclaimer Language*, 53 CONSUMER FIN. L.Q. REP. 330, 330-31, 338 (1999).

⁷⁵ Perhaps surprisingly, given the resources being devoted to consumer protection, issues relating to consumer education and debt counseling remain largely unaddressed in our society. See, e.g., Dale Ellis, *Introduction to the Symposium: Why Consumer Bankruptcies Will Continue Like a Plague - Structural Forces that Institutionalize Bankruptcy as a Way of Life in America*, 47 CONSUMER FIN. L.Q. REP. 391, 391-92 (1993); Karen Gross, *Making Sense of Cents: Concrete Ways to Improve Financial Literacy Skills*, 54 CONSUMER FIN. L.Q. REP. 233, 233 (2000); Karen Gross, *Preliminary Proposal on Debtor Education Program Options*, 51 CONSUMER FIN. L.Q. REP. 23, 23-24 (1997); David A. Lander, *Snapshot of an Industry in Turmoil: The Plight of Consumer Debt Counseling*, 54 CONSUMER FIN. L.Q. REP. 330, 330-31 (2000).

⁷⁶ See, e.g., *Symposium: Consumer Litigation*, 52 CONSUMER FIN. L.Q. REP. 287 (1998) (illustrating the range of remedies available in such cases).

consumer protection remedies seem quite adequate in this context, and are easy for general jurisdiction courts to understand and apply. This is the common law in action, and thus far the basic common law and UCC remedies have proved more effective in providing a practical consumer remedy in these scenarios than the most elegant federal statute or regulation.⁷⁷

Would a more onerous regulatory regime be more effective? Regulatory advocates may prefer detailed rules prescribing (or prohibiting) certain contract terms and practices.⁷⁸ Spot delivery could be flatly prohibited or made effectively so by onerous restrictions like those in the Home Owners Equity Protection Act ("HOEPA")⁷⁹ and some state predatory lending statutes. This, however, would interfere with millions of desirable consumer purchase transactions. It would also prescribe a competitive advantage for very large national dealers and creditors who can create in-house sales and financing affiliates, around-the-clock staffing and operations, or automated processing systems. This would mean fewer independent auto dealers, less competition, and probably higher prices for consumers.

The usual political compromise would be to have spot delivery permitted but tightly regulated. This would nevertheless result in the same outcome as described above: smaller, local dealers and creditors would be less able to devote the resources necessary for regulatory compliance. Competition would be reduced and higher prices would result. The advantages of spot delivery would be lost to many dealers and consumers. Moreover, the sheer volume of these transactions means that effective enforcement would be difficult or even impossible unless we are willing to accept some kind of an expanded economic police mechanism.⁸⁰ The likely result is that honest small dealers and creditors would be driven from the market by the regulatory costs, risks, and compliance burdens, while fly-by-night operators would have little to lose and little fear of effective enforcement to impede their abusive operations. Larger dealers would gain market share and raise prices (or

⁷⁷ See Kelley & Ropiequet, *supra* note 40, at 20-24.

⁷⁸ See Lampe, *supra* note 34, at 82; Sapsford, *supra* note 67, at C1.

⁷⁹ Riegle Community Development and Regulatory Improvement Act, Pub. L. No. 103-325, §§ 151-58, 108 Stat. 2190-2198 (1994) (codified as amended in 15 U.S.C. §§ 1601-1604 and scattered sections of 15 U.S.C.).

⁸⁰ While some might welcome such an expansion, it is not an easy solution. The experience of the FTC is instructive: Despite a large budget, its limited resources mean that only a relatively small number of enforcement actions can be maintained each year, necessarily leaving most remedies to the private sector. See, e.g., Lawrence A. Young, *Identity Theft: Who Are You When Your Identity is Gone, Mrs. Jones?*, 57 CONSUMER FIN. L.Q. REP. 88 (2003); Lawrence A. Young, *The Landscape of Privacy*, 55 CONSUMER FIN. L.Q. REP. 4 (2001).

other fees) to compensate for the compliance risks and costs. Overall the cost to consumers would rise significantly and transaction availability would be reduced. The paucity and cost of HOEPA transactions and enforcement serves to illustrate the point.⁸¹ It is reasonable to question whether the benefits would offset these costs.

It is instructive that after more than thirty years of increasingly active regulation of consumer credit transactions, the simple common law (and UCC) remedies are still the most viable in the vast majority of consumer vehicle sales and finance cases.⁸² Advocates of regulation are still seeking a magic regulatory bullet by claiming that additional and more detailed regulation is needed. But this always comes at a cost: reduced competition results in higher costs to consumers and restricted transaction availability. Through it all, the common law remedies have remained the most effective. Spot delivery merely illustrates this basic point.

B. Fraud and Deception, Unequal Bargaining Power, Adhesion Contracts

Fraud and deception come in endless varieties. In fact, the problems with spot delivery are just one variation. Other varieties include misrepresentation as to the condition of the vehicle,⁸³ selling a used car as new,⁸⁴ insurance packing,⁸⁵ forgery and alteration of contracts,⁸⁶ and misrepresenting to the consumer that the dealer will help the consumer get the best financing available.⁸⁷

Much of the analysis above in Part III, Section A regarding spot delivery also applies to this discussion. It is often alleged that the consumer is essentially helpless in these cases; the

⁸¹ See Alvin C. Harrell, *Commentary: Conflicting Perspectives on "Predatory Lending,"* 56 CONSUMER FIN. L.Q. REP. 134, 230, 240 (2002).

⁸² See Dillon & Harrell, *supra* note 74.

⁸³ See, e.g., *Murray v. D & J Motor Co.*, 958 P.2d 823, 826-27 (Okla. Civ. App. 1998) (holding that revocation of acceptance for false description of vehicle was permissible despite disclaimer of all warranties). See also Dillon & Harrell, *supra* note 74, at 330-31.

⁸⁴ See, e.g., *Rubio v. Bob Crow Chrysler-Plymouth-Dodge, Inc.*, 145 F. Supp. 2d 1248, 1248-49 (D.N.M. 2001).

⁸⁵ See, e.g., Anthony Rollo, *A Primer on Consumer Credit Insurance*, 54 CONSUMER FIN. L.Q. REP. 52, 59-63 (2000). This includes abuses in the "forced-placement" of collateral protection insurance. See, e.g., Mark E. Dapier et al., *Collateral Protection Insurance: Legislatures to the Rescue*, 55 CONSUMER FIN. L.Q. REP. 115, 115-16 (2001).

⁸⁶ See, e.g., *Baggett v. Crown Auto. Group, Inc.*, No. 01-A-01-9110-CV00401, 1992 WL 108710, at *5 (Tenn. Ct. App. May 22, 1992). See also Kelley et al., *APR Splits*, *supra* note 72, at 297.

⁸⁷ See *Fairman v. Schaumburg Toyota, Inc.*, No. 94 C 5745, 1996 WL 392224, at *1 (N.D. Ill. July 10, 1996); *Bramlett v. Adamson Ford, Inc.*, 717 So. 2d 772, 775 (Ala. Civ. App. 1996).

consumer is sometimes said to be totally at the mercy of an unscrupulous auto dealer who has greater knowledge and bargaining power and uses adhesion contracts. Sometimes this is all true, although it is not limited to auto transactions. "Buyer beware" remains valuable advice in a variety of contexts, that most of us learn to respect more and more as we gain knowledge and experience. As always, more consumer awareness and education (and prudence) would be desirable. But consumer disadvantages can be overstated, and the common law provides a surprisingly level playing field and ample remedies in these transactions.

The economic leverage is often with the consumer. The auto dealer frequently needs to make the sale more than the consumer needs to buy the auto. The dealer has spent heavily on advertising to attract the consumer to the dealership and may need the sale desperately in order to meet volume quotas and financial commitments. Most vehicle buyers are not that desperate; most can drive their old cars a little longer if the proposed sale does not suit them. In short, in many cases it is easier for the consumer to walk away than it is for the dealer. There are always plenty of other eager dealers if the present one does not make appropriate concessions. The bargaining power advantage is often with the consumer, not the dealer.

True, the RISC is a standard-form adhesion contract. But this is largely true for the dealer as well as the consumer. RISC forms are essentially mandated by secondary market considerations, federal regulations, and consumer credit law requirements, which require them to meet uniform standards.⁸⁸ These standards are designed to be fair and consistent. The standard forms contain no surprises, and the most important terms (price, annual percentage rate, term to maturity, monthly payment, etc.) are fully negotiable and are widely known to be negotiable.⁸⁹ The dealer's control over these forms is very

⁸⁸ See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 550 (1971); James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 315 (1997).

⁸⁹ See Robert A. Cook, *A Primer on Closed-End Credit Transactions Under the Truth in Lending Act and Regulation Z*, 53 CONSUMER FIN. L.Q. REP. 315, 318-20 (1999) [hereinafter Cook, *Closed-End Credit Transactions*] (summarizing the mandatory disclosures for credit transactions). These disclosures make it difficult for any consumer to be unaware of the basic terms of the transaction. *But see* DAVID E. NORDSTROM, *INSIDE SECRETS OF AUTO DEALERS* 31-41 (1995) (describing the "tricks of the trade"); Keest, *Recent Developments*, *supra* note 73, at 288-90; Ralph J. Rohner, *Whither Truth in Lending?*, 50 CONSUMER FIN. L.Q. REP. 114 (1996) (discussing problems with the current disclosure regime). *See also* Robert A. Cook, *The Truth in Lending Act—A Review in Light of its Original Purpose*, 49 CONSUMER FIN. L.Q. REP. 357 (1995); Kathleen E. Keest, *Whither Now? Truth in Lending in Transition—Again*, 49 CONSUMER FIN. L.Q. REP. 360 (1995) [hereinafter Keest, *Whither Now?*]. Perhaps for some consumers, disclosure will

limited. The problems in consumer credit transactions generally do not arise from the use of common or standardized forms.⁹⁰

Thus, contrary to common allegations, the bargaining advantage is often with the consumer. Adhesion contracts are essential and their terms normally fair (the risk of the contrary is simply too great), and fraud and deception are inherently dangerous (and foolish) for a dealer or creditor because the consumer remedies are so effective. Exceptions will never be eliminated and remain too prevalent, but the numbers appear to be relatively small considering the huge volume of these transactions. The exceptions, although always unfortunate, are subject to effective common law remedies. Again, the common law system seems to be working quite well.

Would a system of detailed regulation work better? It is difficult to see how any regulatory system could entirely prevent fraud and deception in this volume of private transactions. Effective private remedies for exceptional cases, such as those provided by the common law and the UCC, are preferable. They do not interfere with the vast majority of desirable transactions. Onerous penalties and detailed regulations would be more likely to discourage legitimate competition and increase consumer prices than to effectively discourage the inevitable bad actors.

There will always be legitimate disputes over contract terms, product quality, and the like. No one has devised a better way to resolve them other than by private arbitration or litigation as a means to effectuate common law and related UCC remedies. The infinite variety of these disputes suggests that no system of detailed regulation can ever contemplate and prevent them all. Efforts to do so are likely to devolve into such complexity and create so many compliance burdens as to restrict legitimate transaction availability and increase consumer costs without effectively combating fraud. Again, the HOEPA and the predatory lending experience are instructive.⁹¹

Thus, an auto dealer's greater experience and inherent command of the sales process is offset to some extent by the

never be enough. See, e.g., Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 364 (1970) ("There is little evidence that disclosure and informed shopping can be relied upon to put competitive pressure on professionals operating in low income areas."). But this problem has proved resistant to solutions that are compatible with the basic personal freedoms traditionally valued in this country. Your author would quarrel with the notion that low-income consumers are inherently incapable of attending to their own financial affairs. See *supra* note 27 and accompanying text.

⁹⁰ Based on a review of the case law, most serious problems derive from alleged abuses relating to negotiated terms. See *supra* notes 83-87 and accompanying text.

⁹¹ See, e.g., Lampe, *supra* note 34.

vehicle buyer's inherent bargaining power, his or her natural focus on the important terms of the transaction (which are commonly known by all parties to be negotiable), and the general fairness of form contracts. Exceptions are subject to very effective and affordable state law remedies in arbitration or state court, with thousands of lawyers in every state eager to handle the cases. It all works very well to facilitate many millions of satisfactory transactions every year and to adequately handle the abusive exceptions. There is no significant evidence that a detailed regulatory regime could do any better (or even as well).⁹²

C. Assignee Issues

Much of the recent high-profile litigation has centered on efforts to hold RISC assignees (contract purchasers) liable for violations of law by assignor auto dealers.⁹³ This by itself may be sufficient to raise modest suspicions that in some of the class action cases the plaintiffs' lawyers are more interested in pursuing deep pockets for attorney fees than in providing remedies for specific clients.⁹⁴ Of course these goals (attorney fees and client relief) are not mutually exclusive, and any suspicion about motives is not necessarily inconsistent with the recognition that many class actions are worthwhile because they play a valuable role in our legal system.⁹⁵ Class actions are clearly needed in some cases but can be abusive in others.⁹⁶ It is up to the courts to develop standards for distinguishing between the two in a consistent manner (an effort that remains a work in progress).

The efforts to pursue contract purchasers on the basis of auto dealer violations reflect both the problems and the progress in this area of law. The cases have largely rejected assignee liability for dealer actions absent some participation in or knowledge of the dealer's wrongdoing.⁹⁷ Some truly creative theories attacking assignees have yielded large rewards for plaintiffs' lawyers,⁹⁸ which sustain the hopes for a lawyer's

⁹² That does not mean that we cannot make it better, but that is easier said than done. See, e.g., Keest, *Whither Now?*, *supra* note 89, at 360; Rohner, *supra* note 89, at 118.

⁹³ See, e.g., Mark E. Dapier et al., *Assignee Liability Under the TILA: Is the Conduit Theory Really Dead?*, 54 CONSUMER FIN. L.Q. REP. 242, 242 (2000); Kelley & Ropiequet, *supra* note 40.

⁹⁴ See Harrell, *Mad World*, *supra* note 10, at 114.

⁹⁵ See MILLER ET AL., *supra* note 5, at 28-36; Thomas M. Byrne, *Demystifying Class Certification*, 54 CONSUMER FIN. L.Q. REP. 277 (2000).

⁹⁶ See generally Eugene J. Kelley, Jr. et al., *Offers of Judgment in Class Action Cases: Do Defendants Have a Secret Weapon?*, 54 CONSUMER FIN. L.Q. REP. 283 (2000).

⁹⁷ See, e.g., Kelley & Ropiequet, *supra* note 40, at 20.

⁹⁸ See, e.g., Anne P. Fortney & James Chareq, *Auto Finance Litigation Under the*

windfall. Mostly, however, the courts have handled these matters well, and continuing efforts to reverse this trend seem likely to prove futile. Thus, there is something of a divide between lawyers claiming large fees for settling questionable class action mega-suits and the local practitioners who help needy individual consumers resolve ordinary contract disputes. Often the efforts of the former are directed at assignees and those of the latter at dealers, which makes this a potential point of distinction between two very different types of consumer advocacy.

Surely, this cannot be taken to say that all suits against assignees are frivolous. But by now it should be clear that assignees generally are not liable for wrongdoing by the assignor outside certain specified legal boundaries under the common law,⁹⁹ the UCC,¹⁰⁰ and federal consumer laws.¹⁰¹ Plaintiffs' lawyers who bring abusive class actions against deep-pocket defendants on theories without legal merit (perhaps hoping to settle for an attorney fee payment less than the defendant's litigation costs or hoping for a sympathetic judge or a jury that misunderstands the law, and seeking no significant relief for the consumer class members) do not deserve to be viewed chiefly as champions of the poor. Among other things, the litigation costs and risks for defendants in these cases have significantly raised the cost of doing business in this country and have had adverse consequences for all consumers, especially the poor.¹⁰² One need not disfavor class action litigation in order to note these issues.

Through it all, the common law of assignment has remained paramount and is actually reflected quite well in federal

Equal Credit Opportunity Act, 57 CONSUMER FIN. L.Q. REP. 227, 228 (2003).

⁹⁹ See FARNSWORTH, *supra* note 11, § 11.7; RESTATEMENT (SECOND) OF CONTRACTS § 336 (1979).

¹⁰⁰ See U.C.C. §§ 3-302:1, 3-305, 9-330 to 9-332, 9-403 to 9-405 (2003).

¹⁰¹ See, e.g., 15 U.S.C. § 1641(a) (1998); 12 C.F.R. § 202.2(l) (2003) (codifying the Equal Credit Opportunity Act ("ECOA") and Regulation B "multiple creditor rule"); 16 C.F.R. §§ 433.1-433.3 (2003) (codifying the FTC "holder in due course rule"). The same is true under state consumer protection laws. See, e.g., Harrell, *Judge Understands*, *supra* note 29, at 231-32. But see Fortney & Chareq, *supra* note 98 (discussing assignee liability in ECOA litigation).

¹⁰² Poor consumers represent higher default and litigation risks and disproportionately pay more to cover those risks. As these risks increase, so do consumer costs. See also Harrell, *Mad World*, *supra* note 10, at 114, 134 (noting the adverse competitive effects of the U.S. litigation explosion on the cost of doing business); *Is Free Trade Immoral?*, WALL ST. J., Feb. 26, 2004, at A10 ("[T]he primary competitive challenge facing manufacturers was not competition from cheaper foreign workers, but the extra cost of doing business in the U.S. The costs contributing to the loss of jobs were high corporate tax rates, mandated employee benefits, tort litigation, regulatory compliance and energy."). See also Holman W. Jenkins Jr., *Jobs, Jobs, Jobs (Fibs, Fibs, Fibs)*, WALL ST. J., Feb. 25, 2004, A15 (citing the adverse impact on U.S. employment of "tort lawyers" and "a product liability system that has become a random lottery of wealth distribution").

consumer laws and regulations. The courts have done reasonably well in applying these rules, although the lure of deep-pocket defendants and creative advocacy is continually tempting for the plaintiffs' bar, and, thus, costly for society. Despite these costs, the common law of assignment has provided the legal environment and market liquidity needed to fund many millions of auto sales (and in a somewhat different legal context, many millions of home mortgage transactions).

It seems unlikely that any system of regulation can effectively supplant this common law system. The apparent failures of regulation relating to alleged assignee abuses in the real estate industry are indicative of the hurdles that await any such effort.¹⁰³ Efforts to prohibit or micro-regulate common practices such as spot delivery, discounts in assignments of RISCs,¹⁰⁴ and APR splits,¹⁰⁵ are no more likely to be successful than the efforts under RESPA to regulate yield-spread premiums. In the meantime, any serious efforts to substitute a regulatory regime would likely impair the availability of credit to low-income vehicle buyers, thereby imposing a potentially devastating economic cost. Ironically, this impact would fall disproportionately on the purported beneficiaries (the poor and minorities).

IV. CONCLUSION

The current American legal environment for consumer credit continues a late twentieth century policy compromise, evidenced by the enactment of the federal TILA and related laws some thirty-five years ago.¹⁰⁶ It is a compromise that preserves the essential role and principles of the common law (primarily contract and tort law) and the UCC as the foundation for commercial and consumer transactions, while providing for enhanced disclosure of important contract terms under mostly federal law and some related state laws.

Your author was asked recently if he thinks the TILA is a failure.¹⁰⁷ The answer is clearly no; in some ways it has been a

¹⁰³ See, e.g., Robert M. Jaworski, *Culpepper: An Epic Battle Continues*, 55 CONSUMER FIN. L.Q. REP. 119, 119 (2001); Williams, *supra* note 64 (describing the checkered and frustrating history of RESPA regulation and litigation).

¹⁰⁴ See Kelley & Ropiequet, *supra* note 40.

¹⁰⁵ See Kelley et al., *APR Splits*, *supra* note 72. Efforts to do so through litigation are also dubious, since the results (even if successful) would affect only one defendant, merely creating a competitive disadvantage for one among many.

¹⁰⁶ See, e.g., ROHNER & MILLER, *supra* note 38, at 11-15.

¹⁰⁷ Apparently due to this published comment: "The Truth in Lending Act was turned from a tool to achieve more informed use of credit into a weapon to avoid repayment of debt." Lynne B. Barr et al., *Introduction to the 2003 Annual Survey of Consumer Financial Services Law: Of Statutory Aging and Process Failure*, 58 BUS. LAW.

spectacular success. The APR and Finance Charge calculations and disclosures, while not free of controversy, have become near-universal standards that are widely recognized as a uniform statement of the cost of credit, thus allowing effective credit comparison shopping for the first time. In a credit sale, the TILA disclosures also prominently disclose the sales price (and in all credit transactions, the total of payments, among other things).¹⁰⁸ The system is not perfect or trouble-free, but it makes it difficult for any interested consumer to misunderstand the basic terms of his or her transaction. In this way, common law and UCC principles and mechanisms, and party-autonomy, have been significantly enhanced.

Of course, it has not come without cost. The TILA is one of the most litigated statutes in history.¹⁰⁹ Some of this litigation has been frivolous and much of it has been very expensive to the industry and ultimately to consumers.¹¹⁰ It is probably no coincidence that much consumer credit is more expensive (in relative terms) than when the TILA was enacted.¹¹¹ It would be a surprise if it were otherwise. The TILA has been immensely expensive, in terms of both compliance and litigation costs, and such costs are inevitably borne by consumers in one way or another.

Due to significantly increasing compliance costs, burdens, and litigation, the TILA and similar laws and regulations have

1131, 1132 (2003) (explaining historical events that led to TILA reform in the 1980s).

¹⁰⁸ See, e.g., Cook, *Closed-End Credit Transactions*, *supra* note 89, at 316.

¹⁰⁹ *Neff v. Capital Acquisitions & Mgmt. Co.*, 352 F.3d 1118 (7th Cir. 2003); *Baker v. Sunny Chevrolet, Inc.*, 349 F.3d 862 (6th Cir. 2003); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024 (11th Cir. 2003); *Pechinski v. Astoria Fed. Sav. & Loan Ass'n*, 345 F.3d 78 (2d Cir. 2003); *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260 (3d Cir. 2003); ROHNER & MILLER, *supra* note 38, at 10.

¹¹⁰ See, e.g., Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 237-38 (1991).

¹¹¹ Your author remembers the 1950s and 1960s, when common below-prime consumer credit transactions, e.g., to buy or refinance household goods, were often available at interest rates of 10% or less. Today the rate is likely to be twice that, and even higher in some instances, at a time when the overall level of interest rates is far lower. Of course, other consumer law protections have also contributed to this increase, such as the FTC Rule on Credit Practices, which effectively bars traditional refinancing and other nonpurchase money loans secured by household goods. 16 C.F.R. § 444.2(a)(4) (2003). While the latter rule was legitimately aimed at certain abusive practices, it arguably went too far in barring all nonpurchase money loans on household goods, thereby cutting off consumers from needed transactions and leaving them with only higher cost alternatives. It illustrates again the point that regulatory solutions tend to drive up the cost of consumer credit in various ways. *Cf.* U.C.C. § 9-108(e) (2003) (requiring a more specific description of consumer goods collateral in the security agreement). While the U.C.C. approach has not been fully developed (perhaps due to the FTC rule), it is a contracts-based approach that could offer more promise than the total regulatory ban.

also contributed to consolidation in the credit industry.¹¹² Competition from small local lenders, who are disproportionately affected by complex regulatory requirements, has been reduced. A manifestation of this is the virtual demise of locally owned community banks, thrifts, and finance companies in some areas and their replacement by larger out-of-state enterprises.¹¹³ Of course, other regulatory factors, such as federal banking regulation, have also played a role. But clearly the credit industry has been remade in the wake of modern federal regulation in ways that are not all beneficial. The TILA and other federal consumer regulations share some of the blame for these changes.

Could the TILA (and the ECOA, FDCPA, etc.) have been done differently and better? Although TILA simplification in the 1980s shaved off many of the roughest edges, the answer to that question is still “undoubtedly so.” Clearly the remaining need is for more simplification, not more complexity in disclosures or more cumbersome regulations.¹¹⁴ The focus should be on more effective disclosure (rather than on more disclosure, litigation encouragement, penalties for inadvertent and harmless errors, or the addition of layers of essentially meaningless requirements). It is never too late to reduce the risks and burdens of regulation. Continual improvement provides the hope that we can eventually get it right.

Of course, laws and regulations must be a compromise and those who do not favor simplicity in the law or freedom of contract may not be eager to enhance contract law. Some plaintiffs’ lawyers may disfavor legal simplification because it reduces the chances of creditor error, and therefore, litigation prospects. Large creditors may not be eager to give up the competitive advantages over smaller competitors that come with a complex federal regulatory environment.¹¹⁵ And, for obvious reasons, regulatory agencies are likely to favor more regulation (and regulatory authority) rather than less. Since these are the most politically active and influential among the interested parties, regulatory reform is as difficult today as ever.

¹¹² See, e.g., Alvin C. Harrell, *Deposit Insurance Issues and the Implications for the Structure of the American Financial System*, 18 OKLA. CITY U. L. REV. 179 (1993) (focusing on the impact of banking regulation); Alvin C. Harrell, *Penn Square Bank—20 Years Later: Introduction to the Symposium*, 27 OKLA. CITY U. L. REV. 945 (2002) [hereinafter Harrell, *Penn Square Bank*].

¹¹³ See, e.g., Harrell, *Penn Square Bank*, *supra* note 112, at 945.

¹¹⁴ See Joseph M. Kolar, *Analysis of the Proposed RESPA Rule*, 57 CONSUMER FIN. L.Q. REP. 10 (2003).

¹¹⁵ As the late Robert L. Bartley said in a 1979 Wall Street Journal editorial: “The business giants . . . always have the option of doing everything left-handed and backward, if that’s what the government wants” Bartley, *supra* note 49.

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The good news is that the common law system largely works anyway. Absent further genuine reform, the best to be hoped for is a continuing, sometimes expensive, and painstaking evolution of the law in the courts. This is the common law at work, and in the end it appears to be the most effective mechanism for developing and keeping up-to-date a modern system of contract-based consumer law for the twenty-first century. After hundreds of years, because of our common law system, the broad middle ground is still holding and is as viable as ever. Thank you, Lord Mansfield.